UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

CHRISTINA ZAMORA, INDIVIDUALLY AND NEXT FRIEND OF M.Z., et al.,	§	
Plaintiffs,	§	Case No. 2:23-CV-00017-AM
v.	§	
DANIEL DEFENSE, LLC, et al,	§	
Defendants.	§	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT JESUS "J.J." SUAREZ'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT AND BRIEF IN SUPPORT

To the Honorable Chief U.S. District Court Judge Moses:

Christina Zamora, as next friend of M.Z.; Ruben Zamora, as next friend of M.Z.; and Jamie Torres, as next friend of K.T. (collectively "Plaintiffs") file this brief in opposition to the motion to dismiss filed by Defendant Jesus "J.J." Suarez. The Court should deny that motion for the reasons set forth below.

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DEFENDANT SUAREZ AND OTHER OFFICERS TRAP CHILDREN WITH A KILLER, WHILE PREVENTING ANYONE FROM SAVING THEM

May 24, 2022 was supposed to be the day that fourth-grade student Plaintiff M.Z. celebrated receiving several awards at Robb Elementary School. It was supposed to be the day that Plaintiff K.T. shared her bubbles with her new fourth-grade classmates, cementing friendships she had recently made due to being new in town. It was supposed to be a day of joy, of pride, of excitement.

Instead, at 11:33 a.m. that day, a man armed with an assault rifle entered classrooms 111 and 112 and began shooting. Over the next 77 minutes, while Defendant Suarez joined with many other law enforcement officers in trapping children in the classroom with the shooter, and then prevented parents from saving their children, the gunman murdered 19 children and two teachers. Seventeen other children, M.Z. and K.T. included, were wounded. All suffered the most extreme and severe psychological trauma one can endure.

Much of the violence could have been stopped. By 11:41 a.m., just 8 minutes after the massacre began, Defendant Suarez was in the hallway outside the classrooms. In accordance with his active shooter training—which Suarez taught as a police academy instructor—there was only one course of action available to Suarez and the other officers: to breach the door to the classroom, immediately engage the active shooter, and neutralize the shooter. Instead, Suarez and his codefendants trapped the children in the classroom with the shooter, which led to the needless and preventable deaths of dozens. And Suarez actively thwarted others from rescuing the children by stopping desperate parents from attempting to save their children in the face of shocking police inaction.

Defendant Suarez's conduct violated M.Z. and K.T.'s constitutional rights. His show of authority along with other defendants in barricading M.Z. and K.T. in their classrooms subjected them to an unlawful seizure in violation of their rights under the Fourth Amendment. His decision along with other defendants to trap M.Z. and K.T. in a room with a shooter, while actively preventing anyone else from rescuing them, violated Plaintiffs' substantive due process rights under

the Fourteenth Amendment under both the state-created danger and custodial relationship theories of liability.

Defendant Suarez helped seal the fates of many children that day. For 77 agonizing minutes, he gave the shooter carte blanche to murder and severely wound two classrooms full of children. The Court should deny his motion in its entirety.

FACTUAL BACKGROUND

On May 24, 2022, Plaintiffs M.Z. and K.T. woke up excited for a special day at Robb Elementary School in Uvalde, Texas. Compl. ¶¶ 1-2.[1] It was awards day, a day to celebrate the hard-earned achievements of M.Z., K.T., and their fourth-grade classmates. M.Z. was particularly excited for the awards ceremony, knowing that she was going to win many awards. *Id.* ¶ 1. Her father, Plaintiff Ruben Zamora, treated her to a special breakfast of a Starbucks Frappuccino and breakfast sandwiches. *Id.* Later that morning, both Ruben and M.Z.'s mom, Plaintiff Christina Zamora, proudly watched as their daughter received three awards in Math, the Robotics Program, and for her success in the AB Honor Roll. *Id.* Despite having planned to spend the afternoon with Ruben, M.Z. decided to stay at school and spend as much time with her friends as possible before the summer break. *Id.*

K.T. was also excited for school that day. She was new in town and eager to cement her newfound friendships with other fourth graders, planning to blow bubbles with them outside after class. *Id.* ¶ 2. Worried that her friend would not have bubbles of her own, K.T. and her grandmother (who was staying with the family) stopped at the store on the way to school to buy some extra. *Id.* Even though she was new to her class, K.T. beamed with pride as she won the "Outstanding Citizen award." *Id.*

M.Z.'s and K.T.'s excitement was abruptly cut short. At approximately 11:30 a.m., a shooter walked into a set of connected classrooms, rooms 111 and 112 of Robb Elementary, armed with an

[1] Citations to "Compl." are to Plaintiffs' Complaint for Damages, ECF No. 1.

assault rifle, and murdered 19 children and two teachers, wounding at least 17 other children. *Id.* ¶¶ 3-4. He remained in those classrooms for a total of 77 minutes before the police entered. *Id.* ¶ 4. M.Z. was shot repeatedly and very nearly died, having to undergo over sixty surgeries; K.T. was hit by shrapnel after pretending to be dead to survive, laying in a pool of blood, with her eyes open to mirror her dead and dying classmates around her. *Id.* ¶ 5. Both suffered the most extreme psychological trauma that a fourth-grade child could possibly endure.

Defendant Suarez's actions contributed to this tragedy. Faced with the chance to save the lives of several fourth-grade children, Suarez chose—and forced others—to do the opposite. By 11:41 a.m., just 8 minutes after the massacre began, Defendant Suarez was in the hallway outside the classrooms, along with the other initial responding officers. *Id.* ¶ 152.[2] At that time, the shooter renewed his gunfire, further evidencing that Suarez's (and others') decision to treat the shooter as a "'barricaded subject,' and trapping him inside a classroom with dozens of victims, made the situation much more dangerous than it had been before law enforcement arrived." *Id.* ¶ 155. As one of the policy academy instructors, Suarez knew or should have known that the renewed fire called for breaching the classroom, rather than trapping students inside it. *Id.* At this time, Plaintiffs "could hear the officers in the hallway," including Suarez. *Id.*

At 12:10 p.m., while Suarez (and others) prevented anyone from saving her, K.T. found her teacher's phone, wiped the blood off the screen, called 911, and begged the dispatcher for help. *Id.* ¶ 169. She stayed on the phone for 17 minutes, risking her life if the shooter had realized what she was doing, before hanging up when she feared that the shooter was about to discover her. *Id.* At 12:36 p.m., K.T. called 911 again, and told the dispatcher, "'There's a school shooting.'" *Id.* ¶ 179. The students, including M.Z. and K.T., heard officers outside of the classroom in the hallway. *Id.* ¶¶ 147, 179. K.T. asked the dispatcher, "'Can you tell the police to come to my room?'" *Id.* K.T.

[2] Paragraph 152 of the Complaint contains a typographical error. It reads: "Defendants Field, Zamora, and *Zamora* were instructors at the regional police academy." It should state "Defendants Field, Zamora, and *Suarez* were instructors at the regional police academy."

bravely suggested to the dispatcher that she could do what should have been Suarez's (and his codefendants') responsibility: she could "open the door to her classroom so that the police gathered outside could enter." *Id.* But "[t]he dispatcher told her not to do that." *Id.* K.T. complied with the dispatcher's order and did not open the classroom door. *Id.* Given this show of force and express instructions, K.T. and M.Z. were not free to leave the classroom. *Id.* ¶¶ 155, 161, 179.

Suarez also worked to prevent others from rescuing their children. As the minutes passed without rescue, parents and family members of Plaintiffs and other students gathered outside the school. "Many family members, hearing gunfire and seeing no discernable police response, wanted to go into the classroom themselves." *Id.* ¶ 181. In response to concerned parents trying to enter the school themselves in the face of the officers' inaction, Suarez "began yelling at, shoving, restraining, and tackling people outside." *Id.* ¶ 182. "A fence was destroyed as police threw a man into it. Other parents were tased, handcuffed, and pepper sprayed outside the building," all while Suarez and his codefendants "failed to engage the shooter." *Id.*

* * *

Just as K.T. followed orders not to open the door to her classroom, Defendant Suarez, too, never opened the classroom door. Despite knowing that his actions would likely lead to more kids suffering and dying, Suarez never breached the classroom or shot the gunman and, to the contrary, took active steps to prevent others from rescuing children. It took a U.S. Customs and Border Patrol-led group of officers to open the door and free the children, over an hour after Suarez had arrived on scene. *Id.* ¶ 188.

ARGUMENT

I. LEGAL STANDARD

Plaintiffs need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a). To defeat a Rule 12(b)(6) Motion, the complaint need only include sufficient factual allegations "to raise a right to relief above the speculative level"

and to provide "fair notice" of the plaintiff's claims. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). In considering a Rule 12(b)(6) motion, the Court must "take all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff . . . and ask whether the pleadings contain 'enough facts to state a claim to relief that is plausible on its face.'" *Yumilicious Franchise, L.L.C. v. Barrie*, 819 F.3d 170, 174 (5th Cir. 2016). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[T]he court must accept as true all material allegations in the complaint, as well as any reasonable inferences to be drawn from them . . . and must review those facts in a light most favorable to the plaintiff." *Schydlower v. Pan Am. Life Ins. Co.*, 231 F.R.D. 493, 498 (W.D. Tex. 2005). Plaintiffs have met their low burden at the pleading stage.[3]

II. QUALIFIED IMMUNITY DOES NOT EXIST

Defendant Suarez argues that he is entitled to qualified immunity on each of Plaintiffs' claims. But as Judge Willett of the Fifth Circuit recently noted, recent academic scholarship "paints the qualified-immunity doctrine as flawed—foundationally—from its inception," because "courts have been construing the wrong version of § 1983 for virtually its entire legal life." *Rogers v. Jarrett*, 63 F.4th 971, 979 (5th Cir. 2023) (Willet, J., concurring). The original text of Section 1 of the Civil Rights Act of 1871 (known as § 1983) included a "Notwithstanding Clause" that "explicitly displaces common-law defenses"—including qualified immunity—by stating that "§ 1983 claims are viable notwithstanding 'any such law, statute, ordinance, regulation, custom, or usage of the State to contrary.'" *Id.* at 979-80.[4] But "[f]or reasons lost to history, the critical 'Notwithstanding Clause'

[3] Plaintiffs Christina and Ruben Zamora and Jamie Torres no longer maintain their individual claims. Defendant Suarez does not challenge the Court's jurisdiction over their claims as next friends of Plaintiffs M.Z. and K.T., respectively.

[4] The full text of the original Section 1 of the Civil Rights Act of 1871 reads: "any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary*

was inexplicably omitted from the first compilation of federal law in 1874." *Id.* at 980. Thus, "the Supreme Court's original justification for qualified immunity—that Congress wouldn't have abrogated common-law immunities absent explicit language—is faulty because the 1871 Civil Rights Act *expressly included such language*." *Id.* (emphasis in original).

The Supreme Court has explained that language of the statute as passed (known as a "Statutes at Large") is controlling, even if codified incorrectly or never codified at all. *See U.S. Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993) (holding that a statute inadvertently omitted from the United States Code remained valid law); *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964) ("[T]he Code cannot prevail over the Statutes at Large when the two are inconsistent.") (cleaned up); *Stephan v. United States*, 319 U.S. 423, 426 (1943) (same). And any textual changes stemming from the codification of the federal laws in 1874 were not meant to alter the scope of the 1871 Civil Rights Act. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 203 n.15 (1970) (Brennan, J., concurring in part and dissenting in part); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 510 (1939).

Qualified immunity does not exist, and Defendant Suarez cannot invoke it as a defense. Even if it did exist, it would not be available to Defendant Suarez. *See* Sections III.B., IV., *infra.*

III. PLAINTIFFS HAVE STATED A CLAIM FOR UNLAWFUL SEIZURE (FOURTH AMENDMENT)

A. Defendant Suarez's (and Others') Decision to Barricade Plaintiffs in their Classrooms Constitute a Seizure by "Show of Authority."

A person is seized when an officer, "by means of physical force *or show of authority*, has *in some way* restrained" that person's liberty. *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) (emphasis added). Physical force or "control" is not required for a seizure to occur—without it, only "submission to

notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . ." *Rogers*, 63 F.4th at 979 (Willet, J., concurring) (quoting Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871)) (emphasis in original).

the assertion of authority is necessary." *McLin v. Ard*, 866 F.3d 682, 691 (5th Cir. 2017) (quoting *California v. Hodari D.*, 499 U.S. 621, 626 (1991). When considering whether a seizure occurred, courts must assess, "in view of all of the circumstances surrounding the incident, [whether] a reasonable person would have believed that he was not free to leave." *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988)

Here, Defendant Suarez's decision (along with other officers) to treat the shooter as a "barricaded" subject, which trapped M.Z. and K.T. in a classroom with the shooter, and actively thwart people who would have attempted to save her, constitutes a seizure, as it caused Plaintiffs to believe they could not leave the classroom, despite making efforts to do so. Compl. ¶¶ 155, 181–83. Defendant Suarez includes a single assertion regarding Plaintiffs' Fourth Amendment claim: that "Plaintiff was unable to exit the room due to the actions of the shooter, not Suarez." Br. at 8.[5] Suarez is incorrect. His argument is belied by the allegations in the Complaint that Suarez and his codefendants, time and time again, prevented others from breaching the classrooms, killing the shooter, or allowing Plaintiffs to leave the classrooms. Although he was a police academy instructor who led teaching active shooter trainings, Suarez disregarded his training and (along with other officers) treated the shooter as "barricaded." Compl. ¶ 155. He did so despite hearing "renewed gunfire," *id.*, which meant that he knew that children were being shot at even as he joined in the decision to barricade children with the shooter inside classrooms 111 and 112. Thus, while Suarez is not responsible for the shooter's initial criminal actions, by "treating [the shooter] as a 'barricaded subject,' and trapping him inside a classroom with dozens of victims, [Suarez] made the situation much more dangerous than it had been before law enforcement arrived." *Id.* These actions constitute a "show of authority" that coerced Plaintiffs to stay in the classroom with the shooter, as "no reasonable person would have felt free to leave the classroom." *Id.*

[5] Citations to "Br." are to Defendant Suarez's Motion to Dismiss Plaintiff's First Amended Complaint and Brief in Support, ECF No. 86.

As the Complaint alleges, Plaintiff K.T. called 911 multiple times while trapped in the classroom with the shooter, begging for assistance from officers. *Id.* ¶¶ 169–70, 179. The second time she called 911, she asked the dispatcher if they could "tell the police to come to my room," and because the shooter went back and forth between the two classrooms, there were times when K.T. was able to offer to "open the door to her classroom so that the police gathered outside could enter" and so that she could leave. *Id.* ¶ 179. But the dispatcher ordered her not to do so. *Id.* And the children, including M.Z. and K.T., heard officers (like Defendant Suarez) in the hallway, *id.* ¶¶ 147, 155, 179, and thus believed that the police were intentionally keeping them in the classroom, which they were. Given the dispatcher's instruction and the known presence of officers, a jury could infer that it was reasonable for K.T. to "have believed that [she] was not free to leave," *Michigan*, 486 U.S. at 573, due to the show of authority by Suarez and other officers, and thus that a seizure occurred. Indeed, a jury could easily conclude that had K.T. attempted to leave the classrooms, the masses of law enforcement officers waiting outside the classrooms, including Suarez, would have assumed that the person opening the door was the shooter and therefore would have been likely to shoot her. Therefore, drawing all "reasonable inferences . . . in a light most favorable to the plaintiff," *Schydlower*, 231 F.R.D. at 498, Plaintiffs have stated a claim for unlawful seizure.

B. Defendant Suarez is Not Entitled to Qualified Immunity.

Assuming qualified immunity exists as a defense, it fails when (1) an official violated a constitutional right; and (2) the right was clearly established at the time of the challenged conduct. *Scott v. Harris*, 550 U.S. 372, 377 (2007). As noted, Plaintiffs have stated a claim for unlawful seizure in violation of the Fourth Amendment. In establishing that a right was "clearly established," a plaintiff need not establish that "the [specific] action in question has previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Further, the Supreme Court does not require directly on-point precedent to determine the "clearly established" prong of qualified immunity where, as here, an officer's conduct is so egregious on its face that it "should have provided respondents with

some notice that their alleged conduct violated" Plaintiffs' constitutional rights. *Hope v. Pelzer*, 536 U.S. 730, 745 (2002); *see also Taylor v. Riojas*, 141 S.Ct. 52, 54 (2020) (reversing grant of qualified immunity due to the "particularly egregious facts of this case").

Officers can be put on notice that their conduct is unlawful in egregious, "novel factual circumstances." *Hope*, 536 U.S. at 741. As Justice Scalia summarized, "[w]hen properly applied, [qualified immunity] protects all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (internal quotation marks omitted). Defendant Suarez's misleading attempt to characterize his actions as simply "responding" fails. Br. at 8. Viewing the Complaint's allegation in the light most favorable to Plaintiffs, Defendant Suarez deliberately participated with other officers in trapping children in a classroom with a killer for 77 minutes while preventing others from mounting a rescue. That is not a reasonable mistake, as every minimally competent officer in the country ought to know. Qualified immunity is not intended to protect officials like him whose actions are obviously harmful and unconstitutional.

Since at least 2004, "the Fifth Circuit has also made clear that '[s]tudents have a constitutional right under the Fourth and Fourteenth Amendments to be free from unreasonable search and seizures while on school premises.'" *T.O. v. Fort Bend Indep. Sch. Dist.*, No. Civ. H-19-0331, 2020 WL 1442470, at *3 (S.D. Tex. Jan. 29, 2020), *report and recommendation adopted*, 2020 WL 1445701 (S.D. Tex. Mar. 24, 2020), *aff'd*, 2 F.4th 407 (5th Cir. 2021) (quoting *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 621-22 (5th Cir. 2004)). The egregious facts of this case should have provided Defendant Suarez with notice that trapping children in a classroom with a school shooter violated their constitutional right to be free from unlawful seizure.

IV. PLAINTIFFS HAVE STATED CLAIMS UNDER THE STATE-CREATED DANGER THEORY OF LIABILITY (DUE PROCESS)[6]

The state-created danger theory of liability is clearly established, and the facts of this case state a claim under that theory. Because the Fifth Circuit has not expressly rejected the theory, and rather has laid out the theory's elements, Plaintiffs should be allowed to develop evidence as to a state-created danger claim in discovery and at trial. *See Kemp v. City of Houston*, No. Civ. H-10-3111, 2013 WL 4459049, at *6 (S.D. Tex. Aug. 16, 2013) (allowing state-created danger claim to proceed to trial because "[w]hether the evidence at trial rises to a level sufficient to submit this claim to the jury, particularly since the Fifth Circuit has not yet adopted the theory, remains to be seen.").

Suarez argues that he is entitled to qualified immunity because the theory has not been expressly adopted in this circuit. But a legal theory need not have been expressly adopted by the Fifth Circuit to put a defendant on notice that "every reasonable official would understand that what he is doing violates the law," and thus for the doctrine to be clearly established. *Morgan v. Swanson*, 659 F.3d 359, 371-72 (5th Cir. 2011). The Fifth Circuit has recognized that such notice can be accomplished by pointing to "controlling authority—***or a robust consensus of persuasive***

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[6] Defendant Suarez has not moved to dismiss Plaintiffs' Fourteenth Amendment claim pursuant to the custodial relationship between Plaintiffs and Suarez, which is an independent source of liability under the Due Process Clause. Even if Suarez attempts to raise this issue in reply, "[t]he Fifth Circuit deems arguments raised for the first time in a reply brief to be forfeited." *Murthy v. Abbott Lab'ys*, 847 F. Supp. 2d 958, 978 n.9 (S.D. Tex. 2012) (holding that an argument raised in reply on a 12(b)(6) motion was waived and was therefore not considered by the court). Suarez has had the benefit of numerous other law enforcement defendants in this case raising arguments about Plaintiffs' custodial relationship theory of liability, and thus his decision not to raise similar arguments should be viewed as intentional.

In any event, Plaintiffs have stated a special relationship claim here. A special relationship exists where "the state has effectively taken the plaintiff's liberty under terms that provide no realistic means of voluntarily terminating the state's custody *and* which thus deprives the plaintiff of the ability or opportunity to provide for his own care and safety." *Walton v. Alexander*, 44 F.3d 1297, 1305 (5th Cir. 1995) (emphasis in original). As described above, the Complaint alleges that Defendant Suarez and his codefendants knowingly trapped M.Z. and K.T. in classrooms 111 and 112 with an active shooter, preventing parents and other officers from saving them. Suarez took M.Z. and K.T.'s lives in his hands, placing them in a situation which provided "no realistic means of voluntarily terminating" the barricade he created with others. *Id.* K.T. called 911 multiple times asking for the police to come to her classroom, and even offered to open the door, but she was expressly told not to do so because she was being barricaded in by the police pursuant to Suarez's and his codefendants' orders and shows of authority outside the classroom. Compl. ¶ 179. His decision to trap students inside the classroom thus deprived M.Z. and K.T. "of the ability or opportunity to provide for [their] own care and safety." *Walton*, 44 F.3d. at 1305. The Complaint adequately states a claim under the custodial relationship theory.

authority—that defines the contours of the right in question with a high degree of particularity." *Id.* (cleaned up) (emphasis added). That test is squarely met here.

A. The Fifth Circuit Has Repeatedly "Recognized" the State-Created Danger Theory and Defined It with Particularity.

First, there is plenty of "controlling authority" in the Fifth Circuit that, while not expressly adopting the state-created danger theory, "defines the contours of the right in question with a high degree of particularity." *Morgan*, 659 F.3d at 372.

The state-created danger theory stems from the Supreme Court's decision in *DeShaney v. Winnebago County Department Social Services*, 489 U.S. 189, 201 (1989), in which the court indicated that Section 1983 liability for private-actor conduct arises if the state played any part in creating the danger the victim faced. *Id.* ("While the State may have been aware of the dangers that Joshua faced in the free world, *it played no part in their creation, nor did it do anything to render him any more vulnerable to them.*") (emphasis added). Since at least 1994, the Fifth Circuit has repeatedly recognized and discussed in great detail the "contours" of the theory. In *Leffall v. Dallas Ind. Sch. Dist.*, 28 F.3d 521 (5th Cir. 1994), the parent of a student sued a school district under § 1983 after the student was killed by random gunfire in the school's parking lot. The court discussed the theory in detail, including the level of "culpability" required to state such a claim, and noted in doing so that the court "may assume without deciding that our court would recognize the state-created danger theory." *Id.* at 530. Ultimately, the Court found the particular allegations in that case insufficient to state a claim. *Id.* at 532.

Three months after *Leffall*, the Fifth Circuit again set out the theory in even greater detail in *Johnson v. Dallas Ind. Sch. Dist.*, 38 F.3d 198 (5th Cir. 1994). Its discussion clearly defined the "contours" of the theory:

> When state actors knowingly place a person in danger, the due process clause of the constitution has been held to render them accountable for the foreseeable injuries that result from their conduct, whether or not the victim was in formal state "custody." This principle has been applied in a number of cases from other circuits. . . .

> The key to the state-created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or *cutting off potential sources of private aid*. Thus the environment created by the state actors must be dangerous; they must know it is dangerous; and, to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur. Put otherwise, the defendants must have been at least deliberately indifferent to the plight of the plaintiff.

Id. at 200–01 (cleaned up). Again, the Fifth Circuit acknowledged the theory, concluding only that the pleadings in that case were insufficient to state a claim. *Id.* at 201.

Two years later, the Fifth Circuit again recognized the theory, concluding in *Scanlan v. Texas A&M Univ.* that "the district court should have concluded that the plaintiffs stated a section 1983 claim under the state-created danger theory." 343 F.3d 533, 538 (5th Cir. 2003). In a subsequent case, the Fifth Circuit went on to note that *Scanlan* "clearly implied recognition of state-created danger as a valid legal theory," but later withdrew that portion of the opinion on rehearing. *Breen v. Texas A&M Univ.*, 485 F.3d 325, 336 (5th Cir. 2007); *Breen v. Tex. A&M Univ.*, 494 F.3d 516, 518 (5th Cir. 2007).

The Fifth Circuit has since clarified that *Scanlan* did not officially adopt the theory. *See, e.g.*, *Rios v. City of Del Rio, Tex.*, 444 F.3d 417, 422–23 (5th Cir. 2006). But in subsequent cases, the Fifth Circuit has only held that the pleadings did not adequately satisfy the theory. *See Doe v. Covington Cnty. Sch. Dist.*, 675 F.3d 849, 865–66 (5th Cir. 2012) ("Although we have not recognized the [state-created danger] theory, we have stated the elements that such a cause of action would require. . . . even if we were to embrace the state-created danger theory, the claim would necessarily fail [due to insufficient allegations]."); *Dixon v. Alcorn Cnty. Sch. Dist.*, 499 Fed. App'x 364, 368 (5th Cir. 2012) ("There is therefore no need to determine whether this Court should adopt the state-created danger theory of liability on the present facts."); *Est. Of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 1003 (5th Cir. 2014) ("[T]his case does not sustain a state-created danger claim, even assuming that theory's validity."). And although other defendants in this case have argued that the recent decision in *Fisher v. Moore*, No. 21-20553, __F. 4th __, 2023 WL 4539588 (5th Cir. Jul. 14, 2023) precludes a

state-created danger claim here, *Fisher* does not bar this case. To be sure, *Fisher* does hold that the state-created danger doctrine was not "clearly established," as of November 2019, but it expressly left "for another day" the question of whether to adopt the doctrine. *Id.* at *5. Defendant Suarez was engaged in egregious conduct that placed M.Z., K.T., and other children in grave danger; he was thus "on notice" that he was violating their constitutional rights, despite these "novel factual circumstances." *Hope*, 536 U.S. at 741.

The state-created danger theory of liability was implied by the Supreme Court in 1989; as explained below, it was adopted and defined in no fewer than ten circuits; and it remains unquestioned by the Fifth Circuit.

B. *Ten* Circuits Have Expressly Adopted the State-Created Danger Theory.

Second, *ten* courts of appeals have adopted the state-created danger theory stemming from *DeShaney*. *Irish v. Fowler*, 979 F.3d 65, 67, 74-75, 77 (1st Cir. 2020) (the state-created danger "theory of substantive due process liability is viable" and clearly-established); *Okin v. Vill. of Cornwall-On-Hudson P.D.,* 577 F.3d 415, 434 (2d Cir. 2009) (state-created danger theory a clearly established right); *Kneipp v. Tedder*, 95 F.3d 1199, 1211 (3d Cir. 1996) ("[T]he state-created danger theory is a viable mechanism for establishing a constitutional violation under 42 U.S.C. § 1983."); *Doe v. Rosa*, 795 F.3d 429, 438-39 (4th Cir. 2015) (recognizing state-created danger theory); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066–67 (6th Cir. 1998) (plaintiffs stated viable claims under state-created danger theory); *Jackson v. Indian Prairie Sch. Dist. 204*, 653 F.3d 647, 654 (7th Cir. 2011) (recognizing state-created danger theory); *Glasgow v. State of Nebraska*, 819 F.3d 436, 442 (8th Cir. 2016) (same); *Wood v. Ostrander*, 879 F.2d 583, 589–96 (9th Cir. 1989) (concluding plaintiff stated a valid claim under state-created danger theory); *Matthews v. Bergdorf*, 889 F.3d 1136, 1143 (10th Cir. 2018) (recognizing state-created danger theory); *Butera v. District of Columbia*, 235 F.3d 637, 652 (D.C. Cir. 2001) ("[T]he State also owes a duty of protection when its agents create or increase the danger to an individual.").

Ten different circuits adopting the state-created danger theory—with no circuit rejecting it—is plainly a "robust consensus of persuasive authority." *Morgan*, 659 F.3d at 382. Whether or not the Fifth Circuit had expressly adopted the state-created danger theory, the robust consensus of ten circuits certainly put Defendant Suarez "on notice [his] conduct [was] unlawful." *Hope*, 536 U.S. at 739. He cannot credibly argue that his actions were "reasonable but mistaken judgments about open legal questions," *al-Kidd*, 563 U.S. at 743, when ten circuits have adopted the state-created danger theory. His deliberate decision to trap children in a classroom with a killer for 77 minutes while forcibly preventing others from mounting a rescue is the height of "plainly incompetent" conduct that qualified immunity does not protect. *Id.*

C. If There Were Ever a Case to Expressly Adopt the State-Created Danger Theory, It Is This One.

With respect to the state-created danger theory, the Fifth Circuit has explained: "When state actors knowingly place a person in danger, the due process clause of the constitution has been held to render them accountable for the foreseeable injuries that result from their conduct, whether or not the victim was in formal state 'custody.'" *Johnson*, 38 F.3d at 200. If ever a set of facts justified the express adoption of this theory of liability, this case would manifestly qualify. Plaintiffs should thus be allowed to develop evidence as to a state-created danger claim in discovery and at trial. *See Kemp*, 2013 WL 4459049, at *6 (allowing state-created danger claim to proceed to trial because "[w]hether the evidence at trial rises to a level sufficient to submit this claim to the jury, particularly since the Fifth Circuit has not yet adopted the theory, remains to be seen.").

"The key to the state-created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, *or cutting off potential sources of private aid." Johnson*, 38 F.3d at 201 (cleaned up) (emphasis added). The Fifth Circuit's analyses on the merits of the theory have typically stopped there, as it is understandably rare for a plaintiff to be able to plead facts reflecting that culpable knowledge and conduct. *See, e.g.*, *Covington*, 675 F.3d at 866; *Lance*, 743 F.3d at 1001-02.

The uniquely horrifying set of facts of this case, however, does not suffer from this flaw. After reviewing several cases without explaining their application to the instant one, Defendant Suarez's arguments on the merits of Plaintiffs' state-created danger claim come down to two conclusory assertions: (1) that the Complaint "sets forth no facts that Suarez placed [Plaintiff] in a situation that stripped her of the ability to defend herself or cut off potential sources of private aid"; and (2) that "the student was 'placed in such a situation' by the shooter." Br. at 13. Both are wrong. As the Complaint alleges, Defendant Suarez "knowingly placed[d]" M.Z. and K.T. in danger. *Johnson*, 38 F.3d at 200. First, as a rare example of a state actor "cutting off potential sources of private aid," *Johnson*, 38 F.3d at 201, Suarez *actively prevented* desperate parents from trying to save their children, including by "yelling at, shoving, restraining, and tackling people outside" as parents nearby were thrown into fences, tased, handcuffed, and pepper sprayed. Compl. ¶ 182. Second, though Suarez is not responsible for the shooter's initial criminal actions, his actions (along with other officer's actions) gave the shooter the opportunity to continue his rampage for over an hour after he arrived on-scene. Compl. ¶¶ 152, 155. Doing so "placed" Plaintiffs in a far more dangerous situation than they would have been in had Suarez and his codefendants done their job and breached the classroom. These were all affirmative decisions by Defendant Suarez—decisions he made knowing full-well that children were alive and being shot at in the classrooms. That is deliberate indifference.

Defendant Suarez also cites several cases for the proposition that a state created danger claim requires a defendant's "specific knowledge of immediate harm to a known victim." Br. at 12–14. But these cases only apply when a "general deficienc[y]"is created by a state actor that later harms a random victim. *Covington,* 675 F.3d at 866. As examples, in *Covington*, a school had a generally inadequate check-out policy for students that led to a student being picked up from school by a sexual predator and assaulted, and in *Est. of C.A. v. Castro*, a school held a generally risky pool-based science experiment and a student drowned in the pool. 547 F. App'x 621, 627 (5th Cir. 2013).

Here, by contrast, officers knew that children, including M.Z. and K.T., were in the classroom with the shooter at the time they decided to barricade them in. Suarez arrived at 11:41 a.m., Compl. ¶ 152, two minutes later it was announced that school "should be in session," (and thus children were in the classroom), *id.* ¶ 154, and then one minute later gunfire erupted in the classroom. *Id.* ¶ 155. Thus, unlike the cases where a defendant creates a general danger that goes on to later harm a victim, here, Suarez and the other officers knew that M.Z., K.T. and their classmates were in imminent danger when they made the decision to trap them in the classroom.

In sum, the Complaint appropriately alleges that Defendant Suarez had "culpable knowledge and conduct in affirmatively placing [M.Z. and K.T.] in a position of danger." *Johnson*, 38 F.3d at 201. His unconstitutional decisions—maintaining the barricade of the students inside Classrooms 111 and 112 along with other officers in the hallway outside those classrooms, Compl. ¶ 155, and preventing parents from trying to save their children by "yelling at, shoving, restraining, and tackling" them, *id.* ¶ 182—allowed the shooter to inflict the level of harm he did. As the Fifth Circuit put it in 1994, Defendant Suarez "cut[] off potential sources of private aid" to M.Z. and K.T, *Johnson*, 38 F.3d at 201, going as far as preventing *others* from breaching the classroom. This is exactly the scenario envisioned by the state-created danger theory. Suarez knowingly prolonged and exacerbated a dangerous environment, and for over an hour, he "used [his] authority to create an opportunity that would not otherwise have existed for the third party's crime" to continue, even as Plaintiffs and others suffered. *Id.* at 201. This Court should reject his attempt to escape accountability for his actions.

V. PLAINTIFFS DO NOT BRING NEGLIGENCE OR STATE LAW TORT CLAIMS AGAINST DEFENDANT SUAREZ AND PUNITIVE DAMAGES SHOULD BE AWARDED

Defendant Suarez spends many pages opposing wrongful death and survival claims that were not brought in this action. Br. at 14–18. For the avoidance of doubt, Plaintiffs' claims are brought under Section 1983 and are founded on constitutional violations. Defendant Suarez's arguments

regarding negligence, the Texas Tort Claims Act, and any immunity thereunder are all irrelevant to this case.

In the same section, Defendant Suarez argues that Plaintiffs' claim for punitive damages should be dismissed. Br. at 18. The Court should reject this argument. Whether to award or deny punitive damages is "generally peculiarly within the province of the trier of fact." *Raley v. Fraser*, 747 F.2d 287, 290 (5th Cir. 1984); *See also Martinez v. Donna Indep. Sch. Dist.*, No. CV M-03-377, 2006 WL 8442182, at *6 n.22 (S.D. Tex. Mar. 31, 2006) (denying motion to dismiss on § 1983 claim and reserving punitive damages question for trier of fact). Where, as here, Plaintiffs plead that the "defendant's conduct is motivated by evil intent or demonstrates reckless or callous indifference to a person's constitutional rights" the question of punitive damages should be resolved by the trier of fact at a later stage in the case." *Martinez,* 2006 WL 8442182, at *6 n.22.

The above principle is borne out in Suarez's argument, which ignores the Complaint's allegations of his recklessness, callousness, and indifference. *See* Br. at 19. He ignores his appalling decision (made with other officers) to trap children in a classroom with an active shooter, despite hearing renewed gunfire and thus knowing that children were actively being shot at, Compl. ¶ 155; and to prevent parents from mounting a rescue by "yelling at, shoving, restraining, and tackling" them, *id.* ¶ 182—all of which a jury could reasonably find reckless and callously indifferent to Plaintiffs' constitutional rights. The Court should leave Plaintiffs' claims for punitive damages "to the trier of fact." *Raley*, 747 F.2d at 290.

VI. IN THE ALTERNATIVE, THE COURT SHOULD PERMIT PLAINTIFFS TO AMEND

Plaintiffs have met the pleading standard necessary to assert viable claims, and Defendant Suarez's motion should be denied. In the alternative, however, Plaintiffs respectfully request that the Court allow them to amend the Complaint to allege additional facts to the extent the Court finds the allegations insufficient on any claim. For example, on May 24, 2023, the Washington Post published an investigation into law enforcement officers' response to the shooting. *See* Joyce

Sohyun Lee, et al., *A year after Uvalde, officers who botched response face few consequences*, WASHINGTON POST (May 24, 2023), https://www.washingtonpost.com/nation/2023/05/24/uvalde-school-shooting-police-response/. Similarly, Plaintiffs also recently obtained unabridged audio recordings of K.T.'s 911 calls and can allege additional facts about those calls. Finally, a state judge recently ordered the Texas Department of Public Safety to release records related to the Uvalde shooting response by police officers; those records are expected to be released in the fall. Lexi Churchill and William Melhado, *Judge says DPS must release documents related to Uvalde shooting response*, TEXAS TRIBUNE (June 29, 2023), https://www.texastribune.org/2023/06/29/uvalde-shooting-dps-records/. Generally, courts within the Fifth Circuit allow plaintiffs at least one opportunity to cure any pleading deficiencies before dismissing a case under Rule 12(b)(6). *See Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002).

CONCLUSION

For the foregoing reasons, the Court should deny Defendant Suarez's motion to dismiss. In the alternative, Plaintiffs respectfully request the opportunity to amend their Complaint.

Dated: New York, New York
July 21, 2023

By: */s/ Eric Abrams*

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