UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

SANDRA C. TORRES, INDIVIDUALLY AND AS MOTHER AND REPRESENTATIVE OF THE ESTATE OF DECEDENT, ELIAHNA TORRES, AND AS NEXT FRIEND OF E.S.T., MINOR CHILD; ELI TORRES, JR.; and JUSTICE TORRES,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**CA No. 2:22-CV-00059-AM-VRG**
	§	
DANIEL DEFENSE, LLC; DANIEL DEFENSE, INC; OASIS OUTBACK, LLC; CITY OF UVALDE; UVALDE CONSOLIDATED INDEPENDENT SCHOOL DISTRICT; UVALDE COUNTY; UVALDE CONSOLIDATED INDEPENDENT SCHOOL DISTRICT POLICE DEPARTMENT ("UCISD-PD") CHIEF PEDRO 'PETE' ARREDONDO; UCISD-PD OFFICER ADRIAN GONZALEZ; UCISD-PD RESERVE OFFICER AND UCISD SCHOOL BOARD MEMBER JESUS "J.J." SUAREZ; UVALDE POLICE DEPARTMENT ("UPD") SERGEANT EDUARDO CANALES; UPD LIEUTENANT AND ACTING CHIEF MARIANO PARGAS; UPD LIEUTENANT JAVIER MARTINEZ; UPD SERGEANT DANIEL CORONADO; UPD OFFICER LOUIS LANDRY; UPD OFFICER DONALD PAGE; UPD OFFICER JUSTIN MENDOZA; UVALDE COUNTY CONSTABLE EMMANUEL ZAMORA; UVALDE COUNTY CONSTABLE JOHNNY FIELD; TEXAS DEPARTMENT OF PUBLIC SAFETY ("TDPS") CAPTAIN JOEL BETANCOURT; TDPS SERGEANT JUAN MALDONADO; TDPS RANGER CHRISTOPHER KINDELL; TDPS TROOPER CRIMSON ELIZONDO; UVALDE FIRE MARSHAL JUAN HERNANDEZ; and DOES 1-123,	§	

DEFENDANT PEDRO "PETE" ARREDONDO'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT AND BRIEF IN SUPPORT

Defendant Pedro "Pete" Arredondo, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), files this Motion to Dismiss the claims brought against him in Plaintiffs' First Amended Complaint. In support thereof, Arredondo respectfully shows as follows: [1]

SUMMARY

Defendant Arredondo is entitled to dismissal of Plaintiffs' federal claims. First, Plaintiffs lack standing individually as parents and siblings to present claims under 42 U.S.C. § 1983. Second, Plaintiffs fail to allege facts that are sufficient to state a claim for relief regarding Arredondo. Specifically, Plaintiffs' claims against Arredondo for a Fourth and Fourteenth Amendment unlawful seizure fail on their face since any seizure was created by the shooter as opposed to any police presence. The Fourteenth Amendment substantive due process claim is based upon legal theories—state-created danger and custodial relationship—that have been soundly rejected by the Fifth Circuit. Consequently, Arredondo is entitled to qualified immunity since rejected legal theories cannot be clearly established law. Finally, Plaintiffs' state-law tort claims under Texas' Wrongful Death Act and Survival Statute should be dismissed because Plaintiffs made an irrevocable election to bring these state-law claims against Defendant Uvalde Consolidated Independent School District, a governmental unit which employed Defendant Arredondo. Consequently, the claims against the employee, Defendant Arredondo, should be

[1] Pursuant to Federal Rule of Civil Procedure 12(a)(4), Chief Arredondo is not required to file an answer until fourteen (14) days after the Court rules on a motion filed pursuant to Rule 12. *See also Robin v. City of Frisco*, No. 4:16-cv-576, 2017 WL 2986315, *1 (E.D. Tex. Jul. 13, 2017). This extension applies regardless of whether the motion relates to some or all of the claims alleged in Plaintiffs' complaint. *See* 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1346 (3d ed. 2006).

dismissed pursuant to section 101.106(f) of the Texas Tort Claims Act. In any event, Plaintiffs' claims for exemplary damages against Defendant Arredondo are without merit and all discovery should be stayed in this matter until the issue of qualified immunity is resolved.

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BACKGROUND

A. Plaintiffs' Allegations.

Plaintiffs allege that "Uvalde CISD adopted an active shooter response policy on April 15, 2020." ECF Doc. 26 at ¶108. Plaintiffs further allege that Arredondo was a "chief policymaker" and had "final policymaking authority." *Id.* at ¶¶27, 131.[2]

Plaintiffs further allege that the shooter "began his rampage with an act of domestic violence" in the City of Uvalde and then opened fired in the City of Uvalde at "[t]wo people from a funeral home across the street from the crash site" where the shooter drove his truck into a ditch. ECF Doc. 26 at ¶¶110-111. "Officers of the Uvalde Police Department, including Defendant Pargas and Coronado, were among the first law enforcement officers to arrive on scene. *Id.* at ¶114. These City of Uvalde Police Officers were "responding to a report of a car crash and shots fired" in the City of Uvalde. *Id.*

The shooter headed into Robb Elementary School, and Principal Mandy Gutierrez "called Uvalde CISD Police Chief Arredondo, who told her to shut the school down." ECF Doc. 26 at ¶115. The Principal then instructed the janitor to "lock all the doors" indicating the exterior doors were unlocked. *Id*. The shooter entered the west building through an unlocked door. ECF Doc. 26 at ¶121.

"Less than three minutes after the shooting began, officers entered the west building…." ECF Doc. 26 at ¶126. Defendant Pargas, the acting chief of the Uvalde PD, was right behind the initial group. *Id.* "At 11:35 a.m., three Uvalde police officers with body armor, two rifles, and three

[2] Arredondo is not the UCISD's policymaker as a matter of law. The Board of Trustees is the policymaker for independent school districts in Texas. *Doe v. Edgewood Indep. Sch. Dist.*, 964 F.3d 351, 365 (5th Cir. 2020); *Jett v. Dallas Indep. Sch. Dist.*, 7 F.3d 1241, 1245 (5th Cir. 1993). In ruling on a Rule 12(b) motion, a court must treat Plaintiffs' factual allegations in the most favorable light, but a court is not bound to accept legal conclusions couched as factual allegations. *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

pistols took up positions near classrooms 111 and 112. *Id.* "At 11:36 a.m., four additional officers arrived inside the building, including the Uvalde SWAT commander, Sgt. Canales, and Defendant Arredondo." *Id.* at ¶130. "At 11:38 a.m., Defendant Coronado [a sergeant of the Uvalde PD] told other officers that the suspect was 'contained' and 'barricaded.'" *Id.* at ¶140.

Subsequent to the Uvalde Police Chief and SWAT Commander arriving on scene at the north end of the west building, Defendant Arredondo called police dispatch and sought additional officers. ECF Doc. 26 at ¶147. Plaintiffs allege that Arredondo called Uvalde police "asking for a radio, rifle, and additional ammunition." *Id.* at ¶149. Plaintiffs further allege that Arredondo gave orders for other officers to stand down and at 12:09 p.m. "instructed officers not to perform a breach of the classroom." *Id.* at ¶¶149, 164. Plaintiffs allege that Arredondo was "also intermittently attempt[ing] to make verbal contact with [the shooter]." *Id.* at ¶154.

Plaintiffs allege that by 12:13 p.m. the BORTAC commander had arrived on scene. ECF Doc. 26 at ¶167. Then, at 12:30 p.m., Defendant Betancourt arrived on scene. *Id.* at ¶173. "[A] BORTAC-led group of officer" prepared to breach at 12:48 p.m., but Defendant Betancourt ordered them to stand by. *Id.* at ¶181. Disregarding that order, around 12:50 p.m., the BORTAC-led group breached the door and killed the shooter. *Id.* at ¶182.

B. Plaintiffs' Causes of Action.

Plaintiffs assert claims against Arredondo in his individual and official capacities under 42 U.S.C. §1983 for alleged violations of E.T.'s rights under the Fourth and Fourteenth Amendments. ECF Doc. 26 at ¶27. First, Plaintiffs assert a claim against Arredondo in his individual capacity under the Fourth and Fourteenth Amendments for unlawful seizure. *Id.* at ¶¶274-279. Second, Plaintiffs purport to assert a claim against Arredondo in his individual and capacities under the Fourteenth Amendments for a "State Created Danger & Custodial Relationship." *Id.* at ¶¶280-287.

Third, Plaintiffs assert a "failure to supervise or train" claim under the Fourth and Fourteenth Amendments regarding "unlawful seizure" against Arredondo in his official capacity. *Id.* at ¶¶288-302. Finally, Plaintiffs assert a "wrong death and survival claim" under state law. *Id.* at ¶312. Plaintiffs seek recovery from Arredondo for compensatory damages; punitive damages; reasonable attorneys' fees and costs; and pre- and post-judgment interest. *Id.* at Prayer, ¶¶(a)-(d).

ARGUMENT AND AUTHORITIES

A. The Standard for a Motion to Dismiss.

1. Federal Rule of Civil Procedure 12(b)(1).

A court must dismiss a claim for which it lacks jurisdiction. FED. R. CIV. P. 12(b)(1). A claim should be dismissed for lack of subject-matter jurisdiction "when the court does not have statutory or constitutional power to adjudicate the case." *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 668 F.3d 281, 286 (5th Cir. 2012) (citation omitted). When a Rule 12(b)(1) motion is filed together with other Rule 12 motions, the Rule 12(b)(1) challenge should be first considered. *Wolcott v. Sebelius*, 635 F.3d 757, 762 (5th Cir. 2011) (citing *Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001)). The party asserting jurisdiction bears the burden of proof for a motion under Rule 12(b)(1). *Ramming*, 281 F.3d at 161.

2. Federal Rule of Civil Procedure 12(b)(6).

To survive a FED. R. CIV. P. 12(b)(6) motion to dismiss, Plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A formulaic recitation of the elements of a cause of action will not suffice. *Id.*; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In deciding a motion under Rule 12(b)(6), the court does not, "presume true a number of categories of statements, including legal conclusions; mere labels; threadbare recitals of the elements of a cause of action; conclusory statements; and naked assertions devoid of further factual enhancement." *Harmon v. City of Arlington*, 16 F.4th 1159,

1162-63 (5th Cir. 2021) (citing *Morgan v. Swanson*, 659 F.3d 359, 370 (5th Cir. 2011) (en banc)).

The Court need only accept as true the "well pleaded" facts in a complaint; to be "well pleaded," a complaint must state specific facts to support the claim, not merely conclusions and unwarranted factual deductions. *Tuchman v. DSC Comms. Corp*., 14 F.3d 1061, 1067 (5th Cir. 1994); *Fee v. Herndon*, 900 F.2d 804, 807 (5th Cir. 1990). A court is not bound to accept legal conclusions couched as factual allegations. *Papasan v. Allain*, 478 U.S. 265, 286 (1986). The Court should "not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *Gentilello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010). A conclusory allegation is one which lacks factual support. *E.g., Inclusive Communities Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890, 911 (5th Cir. 2019). The Court should dismiss a complaint if it lacks an allegation regarding an element of a cause of action. *Keane v. Fox TV Stations, Inc.*, 297 F. Supp. 2d 921, 925 (S.D. Tex. 2004) (citing *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995)).

3. The Plaintiffs' Burden to Defeat Qualified Immunity.

"Although nominally an affirmative defense, the plaintiff has the burden to negate the assertion of qualified immunity once properly raised." *Collier v. Montgomery*, 569 F.3d 214, 217-18 (5th Cir. 2009). Qualified immunity "adds a wrinkle" to §1983 pleadings. *Arnold v. Williams*, 979 F.3d 262, 266-67 (5th Cir. 2020). "'A plaintiff seeking to overcome qualified immunity must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity.'" *Id.* (quoting *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012)). To defeat qualified immunity, a plaintiff must show: (1) that the official violated a statutory or constitutional right; and (2) that the right was clearly established at the time of the challenged conduct, in the specific context of the case. *Scott v. Harris*, 550 U.S. 372, 377 (2007); *Morgan*, 659 F.3d at 371; *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008). Courts have discretion in deciding which prong to

address first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

B. The Court Lacks Jurisdiction Over the Parents' and Siblings' Individual Claims Because They Lack Standing.

"Federal courts are courts of limited jurisdiction, and absent jurisdiction conferred by statute, lack the power to adjudicate claims." *Stockman v. FEC*, 138 F.3d 144, 151 (5th Cir. 1998). The court "must presume that a suit lies outside this limited jurisdiction, and the burden of establishing federal jurisdiction rests on the party seeking the federal forum." *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001). Accordingly, "before a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue." *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990).

To establish standing under Article III, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). "The injury must affect the plaintiff in a personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992).

Plaintiffs Sandra C. Torres, E.S.T., Eli Torres, Jr., and Justice Torres purport to assert claims individually and as next friend to E.T. against Arredondo. ECF Doc. 26 at ¶¶17-20.

Sandra C. Torres, E.S.T., Eli Torres, Jr., and Justice Torres lack individual standing under §1983 because they expressly base their §1983 claims on allegations that the Defendants violated E.T.'s constitutional rights, not their own constitutional rights. ECF Doc. 26 at ¶¶276 ("By using force and authority to involuntarily confine E.T. and other students and teachers…."); 277 ("were deliberately indifferent to the constitutional rights of E.T., and the other victims…."); 284

("Defendants illegally created a dangerous environment for E.T."); 286 ("were deliberately indifferent to the constitutional rights of E.T., and the other victims…."); 292 ("Defendants Arredondo, Pargas, and Nolasco were deliberated indifferent to the … right of E.T., and the other students…."); 293 ("Defendant officers was the driving force behind and actual cause of M.Z.'s and K.T.'s constitutional injuries."); 295 ("were deliberately indifferent to the constitutional rights of E.T., and the other victims…."). Parents and siblings lack standing to bring individual claims under §1983 based upon alleged deprivations of a child's constitutional rights. *Martinez v. Maverick County*, 507 Fed. App'x 446, 448 n.1 (5th Cir. 2013) (family members of the injured plaintiff "failed to establish standing by not putting forth facts implicating a right of recovery separate from the alleged violations of [the injured plaintiff's] personal rights") (citing *Coon v. Ledbetter*, 780 F.2d 1158, 1160 (5th Cir. 1986)).[3]

Consequently, Sandra C. Torres, E.S.T., Eli Torres, Jr., and Justice Torres lack standing to pursue individual claims under §1983. The Court lacks jurisdiction and must dismiss with prejudice the §1983 individual claims of Sandra C. Torres, E.S.T., Eli Torres, Jr., and Justice Torres against Arredondo.[4]

C. Plaintiffs' Claim for Unlawful Seizure Against Arredondo Fails as a Matter of Law.

As an initial matter, there was no seizure by Arredondo and the Law Enforcement Individual Defendants. "The Fourth Amendment protects '[t]he right of the people to be secure in

[3] *See also, e.g., Gregory v. McKennon*, 430 Fed. App'x 306, 310 (5th Cir. 2011) (plaintiff lacked standing to pursue a §1983 claim based on violations of others' rights, citing *Lujan*, 504 U.S. at 560 n.1 for the proposition that a plaintiff lacks Article III standing where the alleged injury does not affect the plaintiff in a personal and individual way); *Barker v. Halliburton Co.*, 645 F.3d 297, 300 (5th Cir. 2011) ("A third party may not assert a civil rights claim based on the civil rights violations of another individual."); *Covarrubias v. Wallace*, 907 F. Supp. 2d 808, 813 (E.D. Tex. 2012) (plaintiff "cannot raise claims regarding alleged violations of other persons' rights).

[4] For the same reasons, the Court lacks jurisdiction over any claims concerning individuals other than E.T., because Sandra C. Torres, E.S.T., Eli Torres, Jr., and Justice Torres lack standing to assert any such claims on behalf of the "other students and teachers inside classrooms 111 and 112…." *See, e.g.* ECF Doc. 26 at ¶276. The Court should, therefore, disregard Plaintiffs' allegations about Arredondo's purported conduct toward other students and teachers.

their persons, houses, papers, and effects, against unreasonable searches and seizures.' [T]he 'seizure' of a 'person,' which can take the form of 'physical force,' or a 'show of authority' that 'in some way restrain[s] the liberty' of the person." *Torres v. Madrid*, 141 S. Ct. 989, 995 (2021) (quoting *Terry* v. *Ohio*, 392 U. S. 1, 19, n. 16 (1968)); *see also California v. Hodari D.*, 499 U.S. 621 (1991). "At the adoption of the Fourth Amendment, a 'seizure' was the 'act of taking by warrant' or 'of laying hold on suddenly.'" *Torres*, 141 S. Ct., at 995 (citation omitted).

"A seizure requires the use of force *with an intent to restrain*. Accidental force will not qualify. Nor will force intentionally applied for some other purpose satisfy the rule." *Id.* at 998 (emphasis in original) (citation omitted). "[T]he appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain…." *Id.* (emphasis in original). "Nor does the seizure depend on the subjective perceptions of the seized person." *Id.* at 999.

In determining whether an officer makes a sufficient show of authority, the court considers whether, in the light of 'all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *United States v. Wright*, 57 F.4th 524, *11 (5th Cir. 2023) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, (1980)). "When a person 'has no desire to leave for reasons **unrelated to the police presence**, the coercive effect of the encounter can be measured better by asking whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter'" *Id.* (quoting *United States v. Flowers*, 6 F.4th 651, 655 (5th Cir. 2021)). Arredondo made no show of authority to the teachers and students in the classrooms. It was the shooter, not the Law Enforcement Individual Defendants, who was restricting their movements. Plaintiffs were not aware of any coercive effect that Arredondo or the Law Enforcement Individual Defendants could have had on them. Additionally, Plaintiffs' allegations and arguments about "Defendants" generally, and not Arredondo

specifically, are insufficient to state a claim against Arredondo under §1983 because individual liability under §1983 requires a showing of individual causation. *E.g.*, *Martinez v. City of N. Richland Hills*, 846 Fed. App'x 238, 243-44 (5th Cir. 2021); *Jones v. Hosemann*, 812 Fed. App'x 235, 239 (5th Cir. 2020) ("It is not enough for a plaintiff to simply allege that something unconstitutional happened to him. The plaintiff must plead that each defendant individually engaged in actions that caused the unconstitutional harm."). Consequently, there was no seizure by Arredondo.

Plaintiffs allege that "the Law Enforcement Individual Defendants illegally seized E.T. in violation of the clearly established rights secured to her by the Fourth and Fourteenth Amendments." ECF Doc. 26 at ¶276. However, Plaintiffs acknowledge that Arredondo (and the other Law Enforcement Individual Defendants) were responding to an aggravated assault with a deadly weapon in a school. *Id*. at ¶¶121-123. Plaintiffs further acknowledge that the shooter was using a high-powered, "military-inspired" assault rifle. *Id.* at ¶¶49-52. Furthermore, the shooter had barricaded himself in Rooms 111 and 112 effectively holding E.T. and the other students hostage. *Id*. at ¶133. When the Individual Law Enforcement Defendants approached to breach the classrooms, the shooter fired, and his rounds breached the walls of the classroom causing officers to be grazed with shrapnel. *Id.* at ¶134. The facts and circumstances Plaintiffs allege justify the Law Enforcement Individual Defendants (including Arredondo) assessing the situation and removing students and teachers from the surrounding classrooms. E.T. was unable to leave the room because of the shooter—not because of any police presence. Consequently, there was no seizure by Arredondo.

Assuming *arguendo* that there was a seizure (there was not), Plaintiffs' complaint that the encounter took too long so as to rise to the level of a constitutional violation is equally without

merit. Qualified immunity is overcome only if, at the time and under the circumstances of the challenged conduct, *all* reasonable officers would have realized the conduct was prohibited by the federal law on which the suit is founded. *Dudley v. Angel*, 209 F.3d 460, 462 (5th Cir. 2000). The question is whether a reasonable officer could have believed that the actions of the defendant officer were lawful in light of clearly established law and the information the officer possessed at the time. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). If reasonable officers could differ on the lawfulness of a defendant's actions, the defendant is entitled to qualified immunity. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The legal principle in question must clearly prohibit the specific conduct of the official in the particular circumstances that were confronting the official. *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018).

It is the plaintiff's burden to plead and prove specific facts overcoming qualified immunity. *Elliot v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985). To do so, a claimant "must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity." *Backe*, 691 F.3d at 648. Under the pleading standard required to overcome qualified immunity, Plaintiffs' conclusory and speculative Fourth Amendment allegations fail to state a claim.

The Supreme Court has held that the legal issue must be defined with sufficient specificity to determine if the conduct is reasonable in the particular circumstances faced by the defendant. *Wesby*, 138 S.Ct. at 590; *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2012). Plaintiffs allege that E.T. was in custody for 77 minutes. ECF Doc. 26 at ¶182. The clearly established law is that officers can detain witnesses during an event for several hours. *Illinois v. McArthur*, 531 U.S. 326, 332 (2001) (finding a two-hour detention while officers obtained a search warrant for a trailer reasonable where the "time period was no longer than reasonably necessary for the police, acting

with due diligence, to obtain the warrant"). Even if the police, rather than the shooter, detained E.T., the law was clearly established that any such alleged brief "detention" was not a constitutional violation. Consequently, Plaintiffs are unable to meet their burden to demonstrate that Arredondo's actions were objectively unreasonable in light of then clearly established law.

D. Plaintiffs' State-Created Danger and Custodial-Relationship Claims are Not Recognized in the Fifth Circuit and, Therefore, are Not Clearly Established Law Defeating Qualified Immunity.

To defeat qualified immunity, a plaintiff must show: (1) that the official violated a statutory or constitutional right; and (2) that the right was clearly established at the time of the challenged conduct, in the specific context of the case. *Scott*, 550 U.S. at 377. Under the second prong, a constitutional right is "clearly established" when the contours of the right are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. "Because the focus is on whether the officer had fair notice that [his] conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam).

The Fifth Circuit has recognized that schoolchildren have a liberty interest in their bodily integrity which is protected by the Due Process Clause. *Doe v. Columbia-Brazoria Indep. Sch. Dist.*, 855 F.3d 681, 688 (5th Cir. 2017) (citing *Doe v. Covington Cty. Sch. Dist.*, 675 F.3d 849, 853 n.2 (5th Cir. 2012) (en banc)); *see DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989). But the "failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause," unless the state has created "a 'special relationship' with a particular citizen, requiring the state to protect him from harm." *Covington*, 675 F.3d at 855-56 (quoting *Deshaney*, 498 U.S. at 199-200). Plaintiffs' allegations and legal theories are insufficient to defeat Arredondo's entitlement to qualified immunity.

Plaintiffs point to the state-created danger and special-relationship theories because this

case involves a criminal act by a private party who was trespassing on school property. Plaintiffs attempt to pierce Arredondo's qualified immunity through these theories. The problem for Plaintiffs is that "the Fifth Circuit has never recognized th[e] 'state-created-danger' exception." *Keller v. Fleming*, 952 F.3d 216, 227 (5th Cir. 2020). In fact, the Fifth Circuit has repeatedly declined to recognize the state-created danger theory of liability. *Joiner v. United States*, 955 F.3d 399, 407 (5th Cir. 2020); *see also, e.g., Shumpert v. City of Tupelo*, 905 F.3d 310, 324 n.60 (5th Cir. 2018) ("[T]he theory of state-created danger is not clearly established law." (listing cases)); *Kovacic v. Villarreal*, 628 F.3d 209, 214 (5th Cir. 2010) ("The Fifth Circuit has not adopted the 'state-created danger' theory of liability."); *Bustos v. Martini Club Inc.*, 599 F.3d 458, 466 (5th Cir. 2010) ("But this circuit has not adopted the state-created danger theory."); *Rios v. City of Del Rio*, 444 F.3d 417, 422 (5th Cir. 2006) ("[N]either the Supreme Court nor this court has ever either adopted the state-created danger theory or sustained a recovery on the basis thereof."). Consequently, Plaintiff have not demonstrated a clearly established substantive due process right on the facts they allege. *See Keller*, 952 F.3d at 227.

With regard to the special-relationship theory, the Fifth Circuit has emphatically and categorically rejected the special-relationship theory in the public-school context. *See Covington*, 675 F.3d at 857 ("We reaffirm, then, decades of binding precedent: a public school does not have a *DeShaney* special relationship with its students requiring the school to ensure the students' safety from private actors."); *see also Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 522, 529 (5th Cir. 1994) (finding no special relationship between a high school and a student fatally wounded by a gunshot fired in the school parking lot after a school dance); *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 199, 202-03 (5th Cir. 1994) (finding no special relationship between a high school and a student shot and killed in the school hallway during the school day by a boy who was not a

student but had gained access to the school); *Doe v. San Antonio Indep. Sch. Dist.*, 197 Fed. Appx. 296, 298-301 (5th Cir. 2006); *Teague v. Tex. City Indep. Sch. Dist.*, 185 Fed. Appx. 355, 357 (5th Cir. 2006). Accordingly, Plaintiffs' claims cannot rest on the special-relationship theory, as it has been categorically rejected and, thus, cannot defeat Arredondo's entitlement to qualified immunity. *See Watts v. Northside Indep. Sch. Dist.*, 37 F.4th 1094, 1096 (5th Cir. 2022).

E. Plaintiffs' Official Capacity Claims Against Arredondo Should be Dismissed as Redundant.

Suing a governmental official in his official capacity is merely another way of pleading an action against the entity of which that officer is an agent. *Kentucky v. Graham*, 473 U.S. 159, 165-166 (1985); *Brandon v. Holt*, 469 U.S. 464, 471 (1985). Courts dismiss redundant claims when they are asserted against both an individual in his or her official capacity and the entity for which the official works. *E.g.*, *Castro Romero v. Becken*, 256 F.3d 349, 355 (5th Cir. 2001) (upholding the dismissal of claims against officers in their official capacity which were duplicative of the claims against the governmental entities); *Eltalawy v. Lubbock Indep. Sch. Dist.*, 816 Fed. App'x 958, 962-63 (5th Cir. 2020) (dismissing official capacity claims against a school employee as redundant to claims against the school district, citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991)).[5]

Plaintiffs purport to assert claims under §1983 against both UCISD and Arredondo in his official capacity. ECF Doc. 26 at ¶¶274-279, 280-287, 288-302. Specifically, Plaintiffs state their unlawful-seizure claim under the Fourth and Fourteenth Amendment and state-created danger claim under the Fourteenth Amendment as against Arredondo in his individual and official capacities. Plaintiffs then repeat the unlawful-seizure claim and add claims for failure to train and

[5] *See also, e.g.*, *Clark v. LaMarque Indep. Sch. Dist*., 54 Fed. App'x 412 (5th Cir. 2002); *Flores v. Cameron County, Tex*., 92 F.3d 258, 261 (5th Cir. 1996) (dismissing claims against county judge in his official capacity as redundant of claims against the county).

creation of policy.[6] *Id.* at ¶¶288-302. The Court should dismiss the official-capacity claims against Arredondo because they are redundant of Plaintiffs' claims against UCISD.

F. Even if the Official Capacity Claims Survive, Arredondo is Entitled to Qualified Immunity on Plaintiffs' Supervisory Failure Claims.

Supervisory officials may not be held vicariously liable for the actions of their subordinates under §1983. *Iqbal*, 556 U.S. at 677 ("[e]ach Government official…is only liable for his or her own misconduct"); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 452 (5th Cir. 1994); *Oliver v. Scott*, 276 F.3d 736, 742 (5th Cir. 2002) (§1983 does not create supervisory or *respondeat superior* liability).

In *Iqbal*, the Supreme Court expressly rejected the argument that a supervisor can be liable under §1983 for knowledge of and acquiescence in their subordinate's conduct. *Iqbal*, 556 U.S. at 677. The Fifth Circuit's prior holdings concerning supervisor liability generally require plaintiffs to show that the supervisor: (1) had knowledge of discriminatory conduct or knowledge of a substantial risk of serious harm; and (2) responded with deliberate indifference. It is difficult to square these elements of supervisor liability with the Supreme Court's rejection of liability under §1983 based on a supervisor's knowledge of and acquiescence in a subordinate's unconstitutional conduct. Indeed, even the dissent in *Iqbal* understood the decision to eliminate supervisor liability entirely. *Iqbal*, 556 U.S. at 692-93.

Although the Fifth Circuit has not decided whether supervisor liability claims survive *Iqbal*,[7] other circuit courts of appeals have expressed uncertainty as to the viability of supervisor liability claims after *Iqbal*. *E.g.*, *Reynolds v. Barrett*, 685 F.3d 193, 205 n.14 (2nd Cir. 2012);

[6] Again, Arredondo is not the UCISD's policymaker as a matter of law. The Board of Trustees is the policymaker for independent school districts in Texas. *Edgewood Indep. Sch. Dist.*, 964 F.3d at 365; *Jett*, 7 F.3d at 1245. Therefore, Arredondo cannot create policy for the UCISD as Plaintiffs allege.

[7] *E.g.*, *Pena v. Givens*, 637 Fed. App'x 775, 785 (5th Cir. 2015) (per curiam) (declining to address the issue because it was unnecessary to disposition of the appeal); *Hernandez v. Horn*, 410 Fed. App'x 819 (5th Cir. 2011) (per curiam) (declining to address the issue because it was raised for the first time on appeal).

Santiago v. Warminster Twp., 629 F.3d 121, 130 n.8 (3rd Cir. 2010); *Dodds v. Richardson*, 614 F.3d 1185, 1194-1202 (10th Cir. 2010). Even assuming, *arguendo*, that, Plaintiffs' claims alleging liability against Arredondo based on his role as a supervisor are not entirely barred by *Iqbal*, those claims do not allege a clearly established constitutional violation. As a result, Arredondo is entitled to qualified immunity from these claims.

Even if supervisor liability claims survive *Iqbal*, Arredondo is entitled to qualified immunity from Plaintiffs' substantive due process claims because Plaintiffs have not sufficiently alleged facts to support the elements of such a claim. Plaintiffs have not, therefore, demonstrated that Arredondo engaged in a constitutional violation which was clearly established.

Based on Fifth Circuit cases which either predated or failed to acknowledge *Iqbal*, the Fifth Circuit has held that a supervisor may be liable for failure to supervise or train if: "(1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference." *Goodman v. Harris County*, 571 F.3d 388, 395 (5th Cir. 2009).[8] Additionally, for liability to arise based on inadequate training or supervision, Plaintiffs must allege with specificity how a particular training program is defective and how the supervision was inadequate. *Goodman*, 571 F.3d at 395.

To act with deliberate indifference, a government official "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Goodman*, 571 F.3d at 395 (citation omitted). To establish deliberate indifference, Plaintiffs "'must demonstrate a pattern of violations and that the inadequacy of the training is obvious and obviously likely to result in a constitutional violation.'" *Id*. (quoting *Cousin*

[8] *Goodman* relied on *Smith v. Brenoettsky*, 158 F.3d 908, 911-12 (5th Cir. 1998) for these elements and did not acknowledge *Iqbal*, which the Supreme Court issued three weeks earlier.

v. Small, 325 F.3d 627, 637 (5th Cir. 2003)). If Plaintiffs fail to establish deliberate indifference, the Court need not address the other prongs of liability for failure to train or to supervise. *Goodman*, 571 F.3d at 395.

First, Plaintiffs do not allege that Arredondo learned of any complaint or concern about the actions of one of his subordinates—the UCISD police officers. Plaintiffs point to the actions of Uvalde PD officers. ECF Doc. 26 at ¶126. Plaintiffs point out that the Uvalde PD acting police chief was on the scene before Arredondo with "three Uvalde police officers with body armor, two rifles, and three pistols took up positions near classrooms 111 and 112." *Id*. Plaintiffs specify that "additional officers arrived" such as the "Uvalde SWAT commander" and Uvalde PD Sgt. Canales. *Id.* at ¶¶130, 140. Plaintiffs do not allege that any particular subordinate of Arredondo committed any specific constitutional violation. Instead, Plaintiffs simply make the conclusory allegation that UCISD "failed to ensure that their police officers were adequately trained and failed to develop meaningful plans to address an active shooter incident." *Id.* at ¶291. Plaintiffs specifically allege that only 50% of the Uvalde Police Department and only 20% of the Uvalde County Sheriff's Office had received active-shooter training. *Id*. But Plaintiffs make no specific allegation regarding how UCISD police officers were inadequately trained.

Plaintiffs also cannot establish the second element of this claim—that Arredondo demonstrated deliberate indifference toward the constitutional rights of E.T. by failing to take action. *Taylor Indep. Sch. Dist.*, 15 F.3d at 454. The "deliberate indifference" standard is a "stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Board of the County Comm'rs v. Brown*, 520 U.S. 397, 410 (1997); *see also Terry v. Le Blanc*, 479 Fed. App'x 644, 646 (5th Cir. 2012) (per curiam) (noting that conclusory allegations of deliberate indifference do not state a claim of a deprivation of

constitutional rights). The relevant inquiry is not the ultimate efficacy of the actions that were taken, nor the number of steps that were taken. *Taylor Indep. Sch. Dist.*, 15 F.3d at 458 (superintendent was not deliberately indifferent even though his actions were ineffective); *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 531-32 (5th Cir. 1994). Instead, all that is required are good faith measures, any measures, designed to avert the anticipated harm. *Hare v. City of Corinth*, 74 F.3d 633, 649 (5th Cir. 1996); *Lefall*, 28 F.3d at 531-32 (the single act of school official's hiring of security guards for dance where student was fatally shot conclusively established that the official did not act with deliberate indifference, even though the official had actual knowledge that violence was likely at dance).

Plaintiffs failed to offer well-pled allegations of deliberate indifference. Plaintiffs' bald assertions that Arredondo or "the Law Enforcement Individual Defendants were deliberately indifferent" are no more than invalid legal conclusions or conclusory allegations which the Court should not accept as true. ECF Doc. 26 at ¶¶277, 286. Instead, Plaintiffs' more specific allegations negate any finding of deliberate indifference. Plaintiffs allege that Arredondo called Uvalde police "asking for a radio, rifle, and additional ammunition." *Id.* at ¶149. Plaintiffs allege that Arredondo called for the building with the shooter to be "surrounded by as many AR-15s as possible." *Id.* at ¶147. Plaintiffs allege that Arredondo was "also intermittently attempt[ing] to make verbal contact with [the shooter]." *Id.* at ¶154. Most importantly, Plaintiffs allege that Arredondo ran toward the shooting, took a position in the hallway, and never left. *Id.* at ¶130.

Again, Plaintiffs' official capacity claims against Arredondo should be dismissed as redundant. However, if they are not dismissed as redundant, the "*Monell* Liability—Failure to Train; Creation of Policy" claims should be dismissed because Arredondo is not a policymaker for UCISD, and Plaintiffs have failed to offer well-pled allegations sufficient to demonstrate a

constitutional violation for failure to train or failure to supervise. Plaintiffs' unlawful seizure claim is without merit for the reasons stated above. *See supra* section C. Arredondo is, therefore, entitled to qualified immunity, and the Court should dismiss these claims.

G. The Court Should Dismiss Plaintiffs' State-Law Tort Claim for Wrongful Death.

Plaintiffs' reliance on Chapter 71 of the Texas Civil Practice and Remedies Code is misplaced. The Wrongful Death Act does not impose liability upon a school district or school district employee for damages arising out of an injury that causes death; liability for wrongful death against a governmental unit or its employee can only be imposed by the Texas Tort Claims Act ("TTCA"). *See Hudspeth County v. Ramirez*, 657 S.W.3d 103, 110 (Tex.App.—El Paso 2022) (citing *County of El Paso v. Dorado*, 33 S.W.3d 44, 46-47 (Tex.App.—El Paso 2000, no pet.)(government unit may be "accountable for wrongful death, but such accountability is imposed by the Texas Tort Claims Act, and not the Wrongful Death Act.")). Therefore, Plaintiffs' wrongful death and survival claims fall under the TTCA. ECF Doc. 26 at ¶312.

Plaintiffs sue both Defendant UCISD and Arredondo under the TTCA. Plaintiffs specify that "[a]t all relevant times, Arredondo was acting in the scope of his employment" with UCISD. ECF Doc. 26 at ¶27. Section 101.106(f) of the TTCA provides in pertinent part:

> (f) If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only.

"Thus, a defendant is entitled to dismissal under section 101.106(f) upon proof that the plaintiff's suit (1) was based on conduct within the scope of the defendant's employment with a governmental unit and (2) could have been brought against the governmental unit under the Tort Claims Act." *Tipps v. McCraw*, 945 F. Supp.2d 761, 766 (W.D. Tex. 2013) (citations omitted). "Because the Tort Claims Act is the only, albeit limited, avenue for common-law recovery against the

government, all tort theories alleged against a governmental unit, whether it is sued alone or together with its employees, are assumed to be 'under [the Tort Claims Act].'" *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 n.2 (Tex. 2008). This includes intentional tort claims. *Id*. at 658-59. Accordingly, Plaintiffs' wrongful death and survival claims against Defendant Arredondo should be dismissed.

H. The Court Should Dismiss Plaintiffs' Claim for Punitive Damages.

To obtain punitive damages in connection with their §1983 claims, Plaintiffs must establish that Arredondo violated the E.T.'s constitutional rights[9] and that Arredondo acted with reckless or callous indifference to E.T.'s federally protected rights or was motivated by evil intent. *Smith v. Wade*, 461 U.S. 30, 56 (1983); *Heaney v. Roberts*, 846 F.3d 795, 803 (5th Cir. 2017). Plaintiffs must demonstrate that Arredondo acted with subjective recklessness or callous indifference. *Kohler v. Johnson*, 396 Fed. App'x 158, 162 (5th Cir. 2010) (citing *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 536 (1999)); *Williams*, 352 F.3d at 1015. This is a difficult standard to meet.[10]

Plaintiffs have not offered well-pled allegations to show that Arredondo violated E.T.'s constitutional rights. Additionally, Arredondo's alleged conduct does not demonstrate evil motive or intent and does not rise to the level of reckless or callous indifference to E.T.'s constitutional rights. Plaintiffs acknowledge that Arredondo (and the other Law Enforcement Individual Defendants) were responding to an aggravated assault with a deadly weapon in a school. ECF Doc. 26 at ¶¶121-123. Plaintiffs further acknowledge that the shooter was using a high-powered, "military-inspired" assault rifle. *Id.* at ¶¶49-52. Furthermore, the shooter had barricaded himself

[9] *See, e.g., Williams v. Kaufman County*, 352 F.3d 994, 1015 (5th Cir. 2003); *La. ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 303 (5th Cir. 2000).

[10] For example, a plaintiff established defendants' subjective recklessness and callous indifference by showing that the defendants knowingly perpetuated an unconstitutional prison policy in violation of a court order. *Sockwell v. Phelps*, 20 F.3d 187, 192 (5th Cir. 1994).

in Rooms 111 and 112 effectively holding M.Z., K.T., and the other students hostage. *Id*. at ¶133. When the Individual Law Enforcement Defendants approached to breach the classrooms, the shooter fired and his rounds breached the walls of the classroom causing officers to be grazed with shrapnel. *Id.* at ¶134. Plaintiffs allege that Arredondo called Uvalde police "asking for a radio, rifle, and additional ammunition." *Id.* at ¶149. Plaintiffs allege that Arredondo called for the building with the shooter to be "surrounded by as many AR-15s as possible." *Id*. at ¶147. Plaintiffs allege that Arredondo was "also intermittently attempt[ing] to make verbal contact with [the shooter]." *Id*. at ¶154. Plaintiffs allege that Arredondo ran toward the shooting, took a position in the hallway, and never left. *Id*. at ¶130. Importantly, Plaintiffs allege that hundreds of officers from multiple agencies arrived at the school and other officers took charge without ever communicating with Arredondo. *Id.* at ¶¶167(BORTAC Commander), 173(Defendant Betancourt). These allegations amount, at most, to nothing more than allegations of negligent conduct. Accordingly, the Court should dismiss Plaintiffs' claim for punitive damages against Arredondo.

I. The Court Must Stay Discovery

While a defendant's assertion of immunity is pending, courts cannot allow **any** discovery to take place. *Carswell v. Camp*, 54 F. 4th 307, 311 (5th Cir. 2022); *Iqbal*, 556 U.S. at 684-686 (recognizing "serious and legitimate reasons" for the basic thrust of qualified immunity—to free government officials from the concerns of litigation, including disruptive discovery, and noting that permitting discovery to proceed as to other defendants would prejudice defendants who have asserted qualified immunity); *Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) for the proposition that discovery should not be allowed until the threshold question of qualified immunity is resolved); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of

discovery.").[11] The Court may not allow any discovery to take place until Arredondo's assertion of immunity is resolved.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Defendant Pedro "Pete" Arredondo prays that the Court the grant this motion to dismiss Plaintiffs' claims against him for lack of jurisdiction, under Federal Rule of Civil Procedure 12(b)(1) and for failure to state claims upon which relief can be granted, under Federal Rule of Civil Procedure 12(b)(6), that the Court recognize that Arredondo is entitled to qualified immunity from Plaintiffs' claims, and that all of Plaintiffs' causes of action against Defendant Arredondo be dismissed, with prejudice to the refiling of same. Defendant further prays that Plaintiffs take nothing by this suit; that all relief requested by Plaintiffs be denied; and that Defendant recover all costs of suit; as well as for such other and further relief, both general and special, at law or in equity, to which Defendant may show himself to be justly entitled.

[11] *See also, e.g., Jackson v. City of Hearne*, 959 F.3d 194, 202 (5th Cir. 2020); *Vander Zee v. Reno*, 73 F.3d 1365, 1368-69 (5th Cir. 1996); *Allen v. Hays*, 812 Fed. App'x 185, 194 (5th Cir. 2020); *Morris v. Cross*, 476 Fed. App'x 783, 785 (5th Cir. 2012) ("Because the defendants raised qualified immunity, [plaintiff] was not entitled to proceed with discovery.")

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of April 2023, I electronically filed the foregoing document with the Clerk of the Court through the ECF system and an email notice of the electronic filing was sent to all attorneys of record.

/s/ *Christopher D. Livingston*
CHRISTOPHER D. LIVINGSTON