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, E.T., AND AS NEXT FRIEND OF E.S.T., MINOR CHILD; ELI TORRES, JR.; and JUSTICE TORRES,	§	**CIVIL ACTION**
	§	**NO. 2:22-CV-00059-AM-VRG**
Plaintiffs,	§	
	§	
v.	§	
	§	
DANIEL DEFENSE, LLC; *et.al*.	§	
	§	
***Defendants*.**	§	

DEFENDANT CITY OF UVALDE'S RULE 12(b)(1) AND (6) MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Defendant CITY OF UVALDE ("City") and UPD LIEUTENANT AND ACTING POLICE CHIEF MARIANO PARGAS, in his official capacity only ("Pargas"), collectively referred to as "Uvalde City Defendants," and file this Motion to Dismiss Plaintiffs' First Amended Original Complaint [Dkt. 26] for Lack of Jurisdiction and Failure to State a Claim pursuant to the Federal Rules of Civil Procedure 12(b)(1) and (6).

I. INTRODUCTION/PROCEDURAL HISTORY

1. Plaintiffs are Sandra C. Torres, Individually and As Mother and Representative of the Estate of the Decedent, E.T.; and As Next Friend of E.S.T., Minor Child; Eli Torres, Jr.; and Justice Torres ("Plaintiffs"); Defendants, for the purposes of this Motion, are the CITY OF

UVALDE ("Defendant" or "City") and Lt. Pargas ("Pargas"), sued in his official capacity, collectively "Uvalde City Defendants."

2. Plaintiffs filed their First Amended Original Complaint on February 23, 2023[1] ("Complaint"). The City was served on or about March 6, 2023. Defendant's deadline to file its responsive pleadings was March 27, 2023 [Dkt. 41]. The City filed an agreed Motion for Leave for Extension of Time to File Responsive Pleadings to Plaintiffs' First Amended Complaint on or about March 28, 2023, proposing a new deadline of May 26, 2023.[2]

II. SUMMAARY OF THE ARGUMENT

3. The Uvalde City Defendants generally agree with the factual assertions set forth in paragraphs 84-90 through 90 of Plaintiffs' Complaint; particularly relevant to Plaintiffs' factual assertions is the fact that the gunman engaged in criminal acts, including the murder of innocent children and their teachers in addition to wounding numerous individuals and causing emotional and psychological damages as a result of his own criminal acts. The Uvalde City Defendants do not agree with conclusory facts and allegations against the Uvalde City Defendants made by Plaintiffs throughout their Complaint.

4. Plaintiffs' allegations against the Uvalde City Defendants are based on the tragic incident at Robb Elementary School ("Robb incident" or "incident") on May 24, 2022 where a gunman's senseless acts of violence and the resulting response by law enforcement entities supports their belief that law enforcement officers violated E.T.'s and other students' constitutional rights because of the decisions to "disregard the safety and well-being of the children and adults in the school" and alleged delayed decision making did not save them from the gunman's senseless violence. While the incident on May 24, 2022 at Robb Elementary School was undoubtedly one

[1] Dkt. 26
[2] There is no Order on this Motion; however, Uvalde Defendants are complying with the proposed date in filing this Motion on May 26, 2023. Dkt. 54.

of the worst tragedies in our country's history, Plaintiffs' allegations are conclusory and insufficient to establish viable claims or legal remedies against the Uvalde City Defendants. Plaintiffs attempt to assert claims that are not recognized in this circuit related to "state created danger" and furthermore, fail to assert facts or claims, as a matter of law, that would purport to establish liability against the Uvalde City Defendants under Fifth Circuit and Supreme Court precedent for Fourth and Fourteenth Amendment constitutional claims under *Monell*, *Lewis, DeShaney*, and their progeny, including most recently *Fisher v. Moore*.[3] Plaintiffs further fail to establish that they are entitled to relief under the Texas Wrongful Death and Survival Statutes as asserted in the Complaint. Therefore, all of Plaintiffs' claims as to the Uvalde City Defendants' liability should be dismissed because they do not assert constitutional violations and do not state claims for relief under the binding precedent of our courts.

IV. ARGUMENTS AND AUTHORITIES

A. Allegations Against Uvalde City Defendants.

5. This Motion to Dismiss presents several independent grounds as they pertain to Plaintiffs' First Amended Complaint. First, Plaintiffs fail to allege facts to sufficiently allege facts for an unlawful seizure, i.e., intentional use of force, which is fatal to the Fourth Amendment claims. Next, Plaintiffs' conclusory allegations of facts to support due process claims are insufficient to meet the legal standards under the Fourteenth Amendment as to failure to train, creation of a policy, state created danger and custodial relationships of the students at Robb Elementary by the Uvalde City Defendants. The third defense relates to the *Monell* standard applicable to the Uvalde City Defendants. Plaintiffs fail to identify an official policy,

[3] *Monell v. Dept. of Social Servs*. Of City of New York, 436 U.S. 658 (1978); *County of Sacramento v. Lewis*, 523 U.S. 833 (1998); *DeShaney v. Winnebago Cty Dept. of Social Servs*., 489 U.S 189 (1989); *Fisher v. Moore*, 62 F.4th 912 (5th Cir. 2023).

practice or custom that caused the alleged harm.[4] Although there is an allegation of the "creation of a policy" by the Uvalde City Defendants concerning this incident, Plaintiffs identify no policy or pattern of unconstitutional acts to support a viable claim under *Monell*. Finally, there is no jurisdiction for Plaintiffs' Texas state law claims under the Wrongful Death & Survival Act because Plaintiffs cannot establish they have standing to assert such claims.

B. Applicable Legal Standards for 12(b)(1) and 12(b)(6) Motions to Dismiss.

6. To survive a Rule 12 (b)(6) motion, the complaint must plead "enough facts to state a claim for relief that is plausible on its face."[5] A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[6] The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully."[7] Rather, the court must be sure that the complaint alleges sufficient facts to move the claim "across the line from conceivable to plausible."[8] The plaintiff must plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.[9] While a complaint need not contain detailed factual allegations to survive a 12(b)(6) motion, a plaintiff's "obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[10] "[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to overcome

[4] *See, Monell v. Dep't of Soc. Servs*., 436 U.S. 658, 671 (1978).
[5] *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009).
[6] *Id. quoting Bell Atl. Corp. v Twombly*, 550 U.S.544, 556 (2007).
[7] *Id*.
[8] *Twombly*, 550 U.S. at 570.
[9] *Culbertson v. Lykos*, 790 F.3d 608, 616 (5th Cir. 2015).
[10] *Twombly*, 550 U.S. at 555.

a motion to dismiss."[11] Plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face" and "raise a right to relief above the speculative level."[12]

7. Section 1983 provides a federal cause of action for the deprivation, under color of law, of a citizen's rights, privileges or immunities secured by the Constitution and laws of the United States.[13] A local governmental entity, such as the City, may not be sued under Section 1983 for an injury inflicted solely by its employees or agents as alleged by Plaintiffs.[14] A municipality cannot be vicariously liable for the actions of its employees.[15] Instead, it is when execution of a government's policy or custom whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy and, flex the injury that the government as an entity is responsible under §1983.[16]

8. Municipal liability under section 1983 requires proof of: (1) a policymaker; (2) unofficial policy; and (3) violation of constitutional rights (4) who is moving force is the policy or custom.[17] An official policy, for purposes of §1983 liability is "[a] policy statement, ordinance, regulation or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to *whom the lawmakers have delegated* policymaking authority."[18] Alternatively, official policy is "[a] persistent, widespread practice of city officials or employees, which although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy."[19]

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[11] *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993).
[12] *Twombly*, 550 U.S. at 555.
[13] *Lavidas v. Bradshaw*, 512 US 107, 132 (1994).
[14] Dkt. 26 at ¶ 23 alleging the City is legally responsible for the acts and omissions of Uvalde Police Department.
[15] *City of Canton v. Harris*, 489 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).
[16] *Monell*, 436 U.S. at 694.
[17] *Piotrowski*, 237 F.3d at 578.
[18] *Evans v. City of Houston*, 246 F.3d 344, (5th Cir. 2001)(emphasis added) (*quoting, Brown v. Bryan County*, 219 F.3d 450, 457 (5th Cir. 2000)).
[19] *Id*.

9. *Monell* essentially eliminates lawsuits filed against municipal employees in their official capacities because local government officials are "persons" under Section 1983.[20] Suits against local government officials are thus equivalent as claims against the local government, which is the real party in interest.[21] In the event there is a viable official capacity suit against an individual, the facts and allegations must also satisfy the *Monell* "policy and custom" standards as it were the local governmental entity.[22]

10. A successfully pled claim for failure to train pleads facts plausibly establishing: (1) that the municipality's training procedures were inadequate to address an unconstitutional policy; (2) that the municipality was deliberately indifferent in adopting its training policy; and (3) that the inadequate training policy directly caused the violations in question.[23] In the failure to train context, deliberate indifference may be established by pleading either (1) that a municipality had "notice of a pattern of similar violations at the time the plaintiff's own rights were violated, or (2) that the specific injury suffered is a highly predictable consequence of a failure to train."[24]

11. A plaintiff must "allege with specificity how a particular training program is defective."[25] Deliberate indifference is alleged with facts that show the "municipal actor disregarded a known or obvious consequence of his action."[26] "To demonstrate deliberate indifference, a plaintiff must show that "in light of the duties assigned to specific officers or employees, need for more or different training is obvious, and the inadequacy so likely to result in violations of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately

[20] *Kentucky v. Graham*, 473 473 U.S. 159, 167 n.14 (1985).
[21] *Id.* The claims in the Plaintiffs' Complaint are asserted against Pargas in his official capacity and are briefed as claims against the City here in this Motion. Dkt. 26 at ¶¶ 274-302.
[22] *Graham*, 473 U.S. at 476.
[23] *Ratliff v. Aransas Co.*, 948 F.3d 281, 285 (5th Cir. 2020).
[24] *Robles v Ciarletta*, 797 F. Appx 821, 833–34 (5th Cir. 2019).
[25] *Robertson v. City of Shreveport*, 397 F.3d 287, 293 (5th Cir. 2005).
[26] *Bd. of Cty Comm'rs of Bryan Cty, Okl. v. Brown*, 520 U.S. 397, 410 (1997).

indifferent to the need."[27] A single incident is usually insufficient to show deliberate indifference.[28]

12. Courts must exercise utmost care when considering claims about substantive due process.[29] Substantive due process is a legal concept "untethered from the text of the Constitution," so the Supreme Court has been reluctant to expand its scope.[30] The Supreme Court has said repeatedly that the Fourteenth Amendment is not a "font of tort law" that can support novel federal causes of action.[31] Fourteenth Amendment claims involve behavior so extreme it does not justify any government interest and usually involves deliberate acts.[32] In *Lewis*, the Supreme Court concludes that *without intent to harm*, there is no liability even under the Fourteenth Amendment under §1983.[33] The high standard required for a "shocks the conscience" due process violation goes far beyond negligence, and the cases that have found a viable claim are not comparable to the facts alleged in this case.[34]

13. The lack of subject-matter jurisdiction is a ground for dismissal under FED. R. CIV. P. 12(b)(1). "The objection that a federal court lacks subject-matter jurisdiction…may be raised by a party, or by a court on its own initiative, at any stage in litigation, even after trial and the entry of judgment."[35] "Subject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt."[36] "The party asserting jurisdiction bears the burden of proof

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[27] *Worldwide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 756 (5th Cir. 2009), quoting, *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989).
[28] *Estate of Davis ex re. McCully v. City of North Richland Hills*, 406 F.3d 375, 383 (5th Cir. 2005).
[29] *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).
[30] *Echols v. Lawton*, 913 F.3d 1313, 1326 (11th Cir. 2019).
[31] *County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998).
[32] *Id*. at 849.
[33] *Id*. at 854. (Emphasis added).
[34] *Id.* at 849 ("It is, on the contrary, behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.").
[35] *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006); *Arena v. Graybar Elec. Co.*, 669 F. 3d 214, 223 (5th Cir. 2012).
[36] *Ashcroft*, 556 U.S. at 678 (2009).

for a 12(b)(1) motion to dismiss."[37] Plaintiffs fail to do so, and therefore dismissal of the claims is appropriate.

C. Plaintiffs cannot succeed on Fourth Amendment claims for an unlawful seizure.

14. The *Lewis* case is instructive in that it distinguishes whether a claim is a Fourth Amendment seizure and when the seizure occurs, or a Fourteenth Amendment due process claim as Plaintiffs attempt to assert. They assert both against the Uvalde City Defendants.[38] The instant facts in this case, are somewhat similar to *Lewis* where the suspect's actions were criminal and unlawful, were instantaneous, and involved officers that acted without willful intent or motive to harm anyone.[39] Fourteenth Amendment claims involve behavior so extreme it does not justify any government interest and usually involves deliberate acts.[40]

15. In *Lewis*, the Supreme Court concludes that *without intent to harm*, there is no liability even under the Fourteenth Amendment under §1983.[41] There was no *deliberate act* by the Uvalde City Defendants to intentionally harm any child or adult plaintiff in response to the incident and there are no allegations in Plaintiffs' Amended Complaint to support such claims for post-deprivation rights.

16. For these very reasons, the Plaintiffs' allegations about how the officers "should have" treated this incident as an "active shooter" as opposed to a "barricaded subject" or to "stop the killing" are not actionable under the due process clause.[42]

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[37] *Wolcott v. Sebelius*, 635 F.3d 757, 762 (5th Cir. 2011) (citing *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).
[38] Dkt. 26 at ¶¶ 274-279; 288-302.
[39] *Id.* at 855.
[40] *Id*. at 849.
[41] *Id*. at 854.
[42] *See Plumhoff v. Rickard*, 572 U.S. 765, 780 n. 4 (2014)(*citing*, *Lewis* noting in that case, the Supreme Court found the substantive due process is only applicable where there is a "purpose to cause harm unrelated to the legitimate object of arrest.")); *see also, Daniels v. Williams*, 474 U.S. 327, 331 (1986) ("Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property" (emphasis in original)).

17. The facts alleged by Plaintiffs in this case do not amount to an intentional seizure or a violation of substantive due process. They are clearly inferences that the Uvalde City Defendants "should have known" or "should not have waited" scenarios that merely second guess the actions of officers caused by the deliberate actions of a depraved criminal.[43] In fact, it was a school day and likely that there were students and teachers in the classrooms during the day. The cases applying that standard included recklessness as to unknown, visible innocent parties.[44]

18. The *Garner* Court refused to analyze the plaintiff's claims under the Fourteenth Amendment, and the Supreme Court later made "explicit what was implicit in *Garner*'s analysis" and clarified that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, *or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment*...rather than under a 'substantive due process' approach."[45] "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims."[46] In a similar mass shooting occurrence in 2016 at the Pulse Night Club in Orlando, Florida, an active shooter was pursued by police into an enclosed room with other potential victims.[47] Plaintiffs alleged that their substantive due process rights were violated by the officers for failing "to enter the club immediately after the shooting began to neutralize [the] Shooter," when officers knew the victims faced a serious risk of harm.[48] The 11th Circuit Court

[43] *Thompson v. Mercer*, 762 F.3d 433, 440 (5th Cir. 2014) ("there is little merit in the Thompsons' assertion that law enforcement was constitutionally required to continue lesser efforts to disable the vehicle."). Dkt. 26, ¶¶ 12, 179-182, 185-191.
[44] *See e.g., Blair v. City of Dallas*, 666 F. App'x. 337, 341–42 (5th Cir. 2016) (citations omitted) (applied in qualified immunity context).
[45] *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L.Ed.2d 1 (1985).
[46] *Graham, 490 U.S. at 395*.
[47] *Vielma v. Gruler*, 808 Fed. Appx. 872 (2020).
[48] *Id.* at 879.

of Appeals dismissed the claim pursuant to *Deshaney* and pointed out that plaintiffs could not point to caselaw mandating a duty imposed on officers addressing active shooter threats. Case law in the Supreme Court and in this circuit makes it clear that these unintended outcomes are not actionable.[49] Therefore, Plaintiffs' 14th Amendment claims must be dismissed for failure to state a viable claim.

D. Plaintiffs fail to assert a viable Substantive Due Process claim.

a. The Students and their Teachers were not in a Custodial Relationship with the Uvalde City Defendants.[50]

19. Plaintiffs aver there was a "custodial relationship" and E.T. was in the custody of Uvalde City Defendants because they "took steps to 'establish a perimeter'" and used force to "barricade E.T. and other students and teachers inside classrooms 111 and 112 with Ramos."[51] But these allegations do not meet the custodial relationship standard to state a claim against the Uvalde City Defendants. "It is well-established that school children are not in a custodial relationship with the state that gives rise to constitutional duty to protect students from private actors such as in this case.[52] Ordinarily, there is no custodial relationship in the public school system, even if officials are aware of potential dangers or have expressed an intent to protect from dangers.[53] Similarly to *Meloy,* Plaintiffs attempt to establish a custodial relationship of Uvalde City Defendants because they allege E.T. was forcefully barricaded and a "perimeter was established," and "involuntarily barricading her within classrooms 111 and 112."[54] But, the Fifth

[49] *Gorman v. Sharp,* 892 F.3d 173 (5th Cir. 2018).
[50] Sixth and Seventh Causes of against Uvalde City Defendants.
[51] Dkt. 26 at ¶¶ 284-285.
[52] *Doe v. Hillsboro Indep. Sch. Dist*., 113 F3d 1412, 1415 (5th Cir. 1997).
[53] *See Meloy v. Alief Indep. Sch. Dist.,* No. H-05-2840, 2007 WL 9752122 (S.D. Tex.—Houston 2007) (finding no custodial relationship and discussing Fifth Circuit precedent where claims of the school limiting freedom based on a 'zero tolerance' policy to protect from dangers, exercising control over a school environment and restraining students' liberties to defend themselves via involuntary confinement).
[54] Dkt. 26 at ¶¶ 140; 166; 187; 284; 285.

Circuit precedent does not support claims for the claims of involuntary confinement, and in particular where private parties are involved as in this case, as asserted by Plaintiffs.

b. Plaintiffs' assertions of a "state created danger" cannot succeed under Fifth Circuit precedent.[55]

20. Plaintiffs allege a state created danger theory of liability against the city for the incident.[56] This theory of liability has not been adopted by the US Supreme Court and has been consistently rejected by the Fifth Circuit Court of Appeals.[57] The state created danger theory is inapposite to this incident for several reasons. First, there is no state action that overcomes the absence of a legal duty to prevent the criminal actions of a private actor.[58] In general, local governments are under no duty to provide protective services: "[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even wear such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual… [Thus,] a State's failure to protect an individual against private violence simply does not constitute a violation of the due process clause."[59] The constitution imposes a duty on the state to protect particular individuals only in "certain limited circumstances."[60] Courts have recognized at most - such limited circumstances – when the state has a special relationship with a person due to confinement by a state actor or then the state exposes a person to a danger of its own creation.[61] But that does not exist in the facts as asserted by Plaintiffs in their Complaint because "establishing a perimeter" and "involuntarily barricading" or "using force to barricade E.T." do not meet the elements of the state created danger for Uvalde City Defendants to

[55] Sixth and Eighth causes of action against Uvalde City Defendants. Dkt. 26, ¶¶ 280-287; 303-311.
[56] Sixth and Eighth causes of action against Uvalde City Defendants. Dkt. 26, ¶¶ 280-287; 303-311.
[57] *See, Fisher v. Moore,* 62 F.4th 912 (5th Cir. 2023); *see also, Cancino v. Cameron County, Texas*, 794 F. Appx. 414, 416 (5th Cir. 2019).
[58] *DeShaney*, 489 U.S. at 198.
[59] *Piotrowski*, 237 F.3d at 584 (citing *DeShaney*, 489 U.S. at 196–97.
[60] *DeShaney*, 489 U.S. at 198.
[61] *Walton v. Alexander*, 44 F.3d 1297, 1306 (5th Cir. 1995) (involuntarily taking person into custody against his will).

knowingly placing a citizen in danger or that the private actor's actions resulted in foreseeable injuries to Plaintiffs.[62] Furthermore, Plaintiffs acknowledge that the gunman was barricaded in the classrooms.[63]

21. Second, the elements of a state created danger discussed by the Fifth Circuit in *Fisher*[64], *Piotrowski*[65] and *McClendon v. City of Columbia*[66] are not met. In *McClendon*, the City police department supplied an informant with a weapon to meet with a suspect, resulting in the suspect's murder. *Id.* The Fifth Circuit briefly recognized state created danger elements but quickly withdrew the opinion. Since that time, the Fifth Circuit has repeatedly refused to recognize state created danger as a viable theory of liability.

c. There is No Arbitrary or Conscience Shocking Conduct.

22. Where no custodial relationship exists, conduct by a government actor will rise to the level of a substantive due process violation only if the act can be characterized as arbitrary or conscience shocking in a constitutional sense.[67] Only the most egregious official conduct qualifies under the standard, so even intentional wrongs seldom violate the due process clause.[68] The plaintiffs allege the students were seized and suffered harm by being shot or by being in close proximity to the shooting.

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[62] *See Fisher*, 62 F.4th at 91; Dkt. 26 at ¶ 285.
[63] Dkt. 26 at ¶ 133.
[64] *Id.* at 916-917.
[65] "First, a plaintiff must show that the state actors increased the danger to her. Second, a plaintiff must show that the state actors acted with deliberate indifference." 51 F.3d at 515. Additionally, it is not enough for the plaintiffs to allege that the defendant knew of a risk to a class of people that included the plaintiffs, namely people whose "geographical proximity put them in a zone of danger." Rather, to fall within the scope of the state created danger theory, the plaintiff must allege that the defendant was aware of the danger to the plaintiffs themselves. *Cancino, supra.* at 417.
[66] 258 F.3d 432, 436 (5th Cir.2001), *vacated and reh'g en banc granted,* 285 F.3d 1078 (5th Cir.2002), *rev'd*, 305 F.3d 314 (5th Cir. 2002)([T]he 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) (*citing Johnson v. Dallas Indep. Sch. Dist.,* 38 F.3d 198 (5th Cir. 1994).
[67] *Collins*, 503 U.S. at 128.
[68] *Waddell*, 329 F.3d at 1305.

23. No case in the Supreme Court has held that deliberate indifference is a sufficient level of culpability to state a claim for a violation of substantive due process rights in a non-custodial context.[69] During an incident, such as the one at bar, a shooting is an occasion calling for fast action where officials must make split second judgment in circumstances that are tense, uncertain, and rapidly evolving.[70] When split-second judgments are required, an official's conduct will shock the conscience only when it stems from a "purpose to cause harm."[71] *Lewis* makes clear that rapid judgments in dangerous and unpredictable circumstances, absent intentional wrongdoing, is not reviewable under the due process clause. In *Lewis*, the Supreme Court distinguished, for example, between the day-to-day operations of a prison, where actual deliberation is practical, and a prison riot, where it is not.[72] In a school shooting, as with a prison riot, officials might be able to prepare in the abstract. But, when a violent and chaotic circumstance comes to pass, officials must make decisions in haste, under pressure and frequently without the luxury of a second chance.[73] Plaintiffs, therefore, fail to state a proper due process violation.

d. No Property Interest.

24. If Plaintiffs intend to establish an independent Fourteenth Amendment due process claim, they must identify a property interest of which they were deprived, how that interest was constitutionally protected, or how any process used by Uvalde City Defendants lacked fundamental fairness.[74] But the Complaint is completely devoid of any property interest held by

[69] *Waldron v. Spicher*, 954 F.3d 1297, 1310 (11th Cir. 2020).
[70] *Id.* at 1307.
[71] *Lewis*, 523 US at 854.
[72] *Id.* at 851–53.
[73] *Id.*
[74] *See, Blackburn v. City of Marshall*, 42 F.3d 925, 936-37 (5th Cir. 1995); *Thompson v. Bass*, 616 F.2d 1259, 1265 (5th Cir. 1980), *cert. denied*, 449 U.S. 983 (1980); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

the Plaintiffs in this case and the facts of this incident do not meet that standard. Therefore, Plaintiffs Fourth and 14th Amendment claims fail as a matter of law and should be dismissed.

E. Plaintiffs' claims as to a policy or practice and for failure to train, failure to supervise and failure to discipline all fail as a matter of law under *Monell.*

a. Plaintiffs fail to adequately plead Pargas acted as an official policymaker for the City.

25. As discussed above, *Monell* establishes local governments cannot be sued for constitutional violations caused by employees unless the injury results from an official "policy or custom."[75] Here, Plaintiffs cannot meet policymaker element under *Monell* as plead in the Complaint. The City of Uvalde is a Home Rule City, governed by its City Charter which functions as a council-manager form of government. With this form of government, the policymaking authority resides with the City Manager who directs and supervises the administration of all departments, including the police department in which Pargas was serving as Acting Police Chief on the day of the incident.[76] Plaintiffs allege Pargas is a final policymaker with final policymaking authority for tactics, arrests, and training of police officers.[77] However, under the allegations and facts in the Complaint, Plaintiffs fail to plead Pargas is an official policymaker or how the City Manager delegated his authority that day. Not "all delegations of authority ... are delegations of *policymaking* authority"—some may be only the "discretion to exercise a particular function."[78] "[A] municipality can be held liable only when it delegates policymaking authority, not when it delegates *decision making* authority."[79] But the allegations about Pargas acting as a final policymaker for the City barricading children with an active

[75] *Monell.*, 436 U.S. at 694.
[76] https://library.municode.com/tx/uvalde/codes/code_of_ordinances?nodeId=CICHUVTE_ARTIIMACOOTOFGE_S5MECOAC (last accessed May 26, 2023).
[77] Dkt. at ¶¶ 127; 190; 299.
[78] *Webb v. Town of Saint Joseph*, 925 F.3d 209, 215 (5th Cir. 2019); *Zinter v. Salvaggio*, 610 F. Supp. 3d 919, 959 (W.D. Tex. 2022), appeal dismissed, No. 22-50700, 2022 WL 18587913 (5th Cir. Nov. 17, 2022).
[79] *Id. (citing M.L. v. San Benito Indep. Consolid. Sch . Dist.*, 942 F.3d 258, 271 (5th Cir. 2019)).

shooter does not establish Pargas was the official policymaker for the City or that policymaking authority was delegated to Pargas by the City Manager on the day of the incident.

b. Plaintiffs cannot establish an official policy under Monell.

26. Furthermore, Plaintiffs' allegations that Pargas in his official capacity or the City created a new policy "barricading" and "seizing" E.T. and ignoring the active shooter policy is not sufficient to establish a viable claim.[80] Even assuming the actions of the Uvalde City Defendants "created a policy" which may result in misconduct, this is insufficient and not the test under *Monell* and its progeny.[81] "There must at least be an affirmative link between the training inadequacies alleged, and the particular constitutional violation at issue."[82]

27. Furthermore, the claims against Uvalde City Defendants fail because there is no alleged policy or pattern in the Complaint. Uvalde City Defendants may not be held liable under § 1983 unless the wrongful conduct of an employee is pursuant to policy, practice or custom of Uvalde City Defendants.[83] An official municipal policy is "[a] policy statement, ordinance, regulation or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority."[84] However, allegations Uvalde City Defendants "created a new policy" and "made a new policy" by not following the active shooter policy fails because these do not sufficiently plead the City, or anyone who had authority delegated to him/her, officially adopted "choosing not to follow the active shooter policy" or "barricade children." To create a triable fact issue on a custom or

[80] Dk.t 26 at ¶ 301.
[81] *Lock v. Torres*, 694 F. App'x 960, 965 (5th Cir. 2017)
[82] *Id.* (citing *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 824 n.8, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985). *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986).
[83] *Monell*, 436 U.S. at 691.
[84] *Evans*, 246 F.3d at 358.

pattern, it is not even enough to show a series of isolated incidents.[85] Plaintiffs' Compliant does not contain factual allegations demonstrating a pattern of actual wrongs, and showing that the City *deliberately* failed to act in response.

28. Before a municipality can be liable under Section 1983, it must be shown that it had policies that were the "moving force" that led to constitutional violations.[86] But there is only one single incident in Plaintiffs' Complaint and that is relating to "create[ed] a new policy." The single incident exception is difficult to prove and requires "*highly predictable consequences*" resulting in an injury.[87] (Emphasis added). A moving force under *Monell* must also result from the allegations deliberate indifference resulting in a constitutional violation.[88]

29. Plaintiffs allege failure train, failure to discipline, and failure to supervise the employees resulting in the damages to E.T. and Plaintiffs in failing to follow, identify, and respond to active shooter scenarios.[89] Plaintiffs do not cite to an official policy of the City, therefore this must be a custom or practice. However, Plaintiffs fail to plead factual allegations sufficient to show that such a policy exists.[90] There is no allegation in the Complaint that the training is inadequate.[91]

i. Plaintiffs' failure to train, failure to supervise, failure to discipline allegations fail.

30. The standard applicable to a failure-to-train claim is the same as the standard for municipal liability.[92] "The failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually

[85] *See Burge v. St. Tammy Parish*, 336 F.3d 363, 370 (2003)("[P]roof of a custom or practice requires more than a showing of isolated acts..."); *see also Piotrowski v. City of Houston*, 237 F.3d 567, 581 (5th Cir. 2001)(Isolated violations are not the persistent, often repeated, constant violations, that constitute custom and policy as required for municipal Section 1983 liability")
[86] *City of Canton v. Harris*, 489 U.S. 378, 388–89 (1989).
[87] *Valle v. City of Houston*, 613 F.3d 536, 549 (5th Cir. 2010).
[88] *Id.*
[89] Dkt. 26 at ¶¶ 189; 294; 306.
[90] *See Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 850–51 (5th Cir. 2009).
[91] *See Benavides v. County of Wilson*, 955 F.2d 968, 973 (5th Cir.1992).
[92] *Roberts v. City of Shreveport*, 397 F.3d 287, 293 (5th Cir. 2005).

causes injury."[93] "In resolving the issue of a city's liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform." *City of Canton*, 489 U.S. at 390, 109 S.Ct. 1197. A plaintiff must show that (1) the municipality's training policy or procedure was inadequate; (2) the inadequate training policy was a "moving force" in causing violation of the plaintiff's rights; and (3) the municipality was deliberately indifferent in adopting its training policy.[94]

31. A city's decision not to train certain employees about their legal duty to avoid violating the rights of citizens "may rise to the level of official policy for purposes of §1983."[95] However, "[a] municipality's culpability for a deprivation of right is at its most tenuous where the claim turns upon a failure to train." *Id.* This legal principle applies with equal force to each of the allegations stated in this portion of the Complaint.

32. Plaintiffs fail to plead sufficient facts to show that the City's existing training policy is inadequate. Plaintiffs fail to plead sufficient facts to determine what training these particular officers received as to active shooter or barricaded subjects. Without a showing of what training the officers received, Plaintiffs have not and cannot show how the Uvalde City Defendants and Pargas' training was the moving force in causing the alleged violation of Plaintiffs' rights. Plaintiffs have pled no factual allegations to show Uvalde City Defendants City was deliberately indifferent about adopting its training policy. Despite alleging a lack of training, failure to follow active shooter training, and "egregious delay" in response to the Robb incident resulted in

[93] *Bryan County*, 219 F.3d at 457 (quoting *City of Canton v. Harris*, 489 U.S. 378, 390, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989)).
[94] *See, e.g., Sanders–Burns v. City of Plano*, 594 F.3d 366, 381 (5th Cir.2010); *Pineda*, 291 F.3d at 332; *Valle*, 613 F.3d at 544.
[95] *Connick v. Thompson*, 563 U.S. 51, 61, 131 S.Ct. 1350, 179 L.Ed.2d 417 (2011).

deliberate indifference and vague allegations that Uvalde City Defendants acted with "deliberate indifference,"[96] these fail to meet that standard.

33. Plaintiffs' failure to plead sufficient facts is similar to another recent case, *Saenz v. City of El Paso.*[97] In that case, the court held the plaintiff must allege facts to plausibly suggest the municipality's deliberate indifference to the need for proper training.[98] "Ordinarily, to meet this burden, a plaintiff may allege that the municipality had "[n]otice of a pattern of similar violations," which were "fairly similar to what ultimately transpired."[99] "The number of incidents and other allegations necessary to establish a pattern representing a custom, on a motion to dismiss, varies...."[100]

34. Again, in this case, there is only one single incident cited by the Plaintiffs- Uvalde City Defendants' decisions about the response to the Robb incident- the creation of a new policy to barricade children inside a classroom with an active shooter.[101] There are no allegations, nor can Plaintiffs establish, there were any more than this one horrible incident related to this one instance of the "creation" of a policy by "disregarding the active shooter policy." Plaintiffs attempt to policy violations in the alternative by alleging the Uvalde City Defendants "instituted a policy to barricade"…[102] In fact, these types of shooting incidents are rare, not only in rural communities, but across the country. The single allegation does not allow the court to draw a reasonable inference that this one incident was something other than one isolated incident. And without more, the allegation of this one single shooting incident at Robb Elementary is anything more than one isolated incident. This does not plausibly suggest a pattern of creating policies,

[96] Dkt. 26 at ¶¶ 28; 40; 227; 292; 295; 307.
[97] 637 F. App'x 828, 832 (5th Cir. 2016)
[98] *Id.*
[99] *Id.* at 381.
[100] *Moreno v. City of Dallas*, No. 3:13–CV–4106–B, 2015 WL 3890467, at *8 (N.D.Tex. June 18, 2015).
[101] Dkt. 26 at ¶ 127.
[102] Dkt. 26 at ¶¶ 301; 310.

barricading children, or ignoring policies as Plaintiffs allege. Nor do these allegations and facts plausibly suggest a pattern of abuse to which the Uvalde City Defendants were deliberately indifferent. Although Plaintiffs are not required to provide detailed factual allegations, the complaint must "raise a right to relief above the speculative level."[103] Without some further factual enhancement, which Plaintiffs cannot accomplish, the Complaint "stops short of the line between possibility and plausibility."[104]

35. Here, Plaintiffs merely recite the elements of "deliberate indifference" across 82 pages of the Complaint and assert legal conclusions without making any factual allegations to support them. This is inadequate to impose liability on the City. "[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss."[105] The Court should dismiss Plaintiffs' failure to train, failure to supervise, failure to discipline allegations.

c. Plaintiffs fail to state a viable claim for denial of medical care.

36. Plaintiffs' allegations of denial of medical care are vaguely asserted under the 4th and 14th Amendments.[106] Plaintiffs allege that the students were denied medical care for 77 minutes before officers breached the classroom where the shooter remained as well as after, delaying emergency medical care and rescue services.[107]

37. Plaintiffs fail to allege a policy that is the moving force for the denial of medical care claim. Instead, Plaintiffs merely rely on respondeat superior liability for this claim. Indeed, Plaintiffs allege the failure of defendants "to follow active shooter training and policies ... was

[103] *In re La. Crawfish Producers*, 772 F.3d 1026, 1029 (5th Cir.2014) (quoting *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955).
[104] *Twombly*, 550 U.S. at 546.
[105] *Taylor v. Books A Million*, 296 F.3d 376, 378 (5th Cir. 2002)(quoting *Fernandez–Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir.1993)).
[106] Dkt. 26 at ¶¶ 301, 306
[107] Dkt. 226 at ¶ 144.

the driving force behind and actual cause of E.T.'s constitutional injuries."[108] This claim therefore fails to assert a proper *Monell* liability claim against the Uvalde City Defendants.[109]

F. Plaintiffs' Wrongful Death and Survival Claims must be dismissed.

38. Plaintiffs seek recovery under the Texas Wrongful Death Statute, Texas Civil Practice and Remedies Code, § 71.001, et seq..[110] Plaintiff Sandra C. Torres as Representative of the Estate of Decedent, E.T. does not have standing claims under the Texas Wrongful Death Act because they do not attach to the decedent's estate.[111] Plaintiff Sandra C. Torres as Next Friend of E.S.T., Eli Torres, and Justice Torres do not have standing to sue under the Wrongful Death Statute for the same reasons and it does not apply to those individuals as siblings of E.T.

39. Plaintiff Sandra C. Torres as Representative of the Estate of Decedent E.T. does not have standing under the Texas Survival Statute because there are no facts to support the estate of E.T. has been established nor have any heirs been established to assert a viable claim. Plaintiffs Sandra C. Torres as Next Friend of E.S.T., Eli Torres, and Justice Torres do not have standing to sue under this statute because there are no facts or allegations that they stand as the legal representatives, heirs, or estate of E.T.[112]

40. Further, the City maintains its sovereign immunity from these claims; this deprives the court of jurisdiction.[113] The Court should dismiss the Wrongful Death and Survival claims for lack of jurisdiction and standing under 12(b)(1).

V. CONCLUSION

[108] Dkt. 26 at ¶293.
[109] *Monell*, 436 U.S. at 690-691.
[110] Dkt. 26 at ¶ 312.
[111] *Pluet v. Frasier*, 355 F.3d 381, 384 (5th Cir. 2004).

[112] See Tex. Civ. Prac. Rem. Code § 71.021.
[113] *Escobar v. Harris County*, 442 S.W. 3d 621, 627 (Tex. App.—Houston [1st Dist.], July 31, 2014) (asserting wrongful death claim where there were failure to train and supervise; intentional acts alleged and no waiver of immunity)

41. Plaintiffs' First Amended Original Complaint cannot show that Plaintiffs stated any claim upon where relief can be granted as to any of their alleged constitutional violation claims against Uvalde City Defendants. Plaintiffs fail to establish claims against Pargas in his official capacity. Further, Plaintiffs fail to demonstrate the claims against the City of Uvalde were caused by or pursuant to a policy, practice, or custom, a because Plaintiffs do not allege more than conclusory allegations violating constitutional or statutory rights. Plaintiffs' Complaint attempts to demonstrate a pattern by showing only the tragic outcome of actions involving Uvalde City Defendants and concluding that the City's training must be deficient. Plaintiff's Complaint contains no factual allegations regarding the City's existing training policies or the training provided to Pargas, no facts regarding deliberate indifference in adopting its policies, and no facts that show that any such training directly caused the alleged constitutional violation. It likewise fails to identify any improper supervision or failure to supervise the incident. Plaintiffs' allegations that Pargas was not acting in conformance with an official department policy by "creating" a new policy fails to plead facts sufficient to demonstrate municipal liability under *Monell*. Finally, Plaintiffs also fail to establish jurisdiction and standing for the Wrongful Death and Survival Statutes under Texas law. As a matter of law, all of Plaintiffs' claims against Uvalde City Defendants should be dismissed with prejudice.

VI. PRAYER

WHEREFORE, PREMISES CONSIDERED, Uvalde City Defendants request that the Court grant this Motion to Dismiss Plaintiffs' First Amended Original Complaint and dismiss Plaintiffs' claims identified above pursuant to FRCP 12(b)(1) and 12(b)(6) and further requests such other and further relief to which they may show themselves to be justly entitled, at law and in equity.

SIGNED this 26th day of May, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been served in accordance with the Federal Rules of Civil Procedure on this 26th day of May, 2023, upon all counsel of record via E-File/E-Service/E-Mail.

/s/ Clarissa M. Rodriguez
CLARISSA M. RODRIGUEZ

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, E.T., AND AS NEXT FRIEND OF E.S.T., MINOR CHILD; ELI TORRES, JR.; and JUSTICE TORRES,	§	**CIVIL ACTION**
	§	**NO. 2:22-CV-00059-AM-VRG**
Plaintiffs,	§	
	§	
v.	§	
	§	
DANIEL DEFENSE, LLC; *et.al*.	§	
	§	
***Defendants*.**	§	

ORDER ON DEFENDANTS' MOTION TO DISMISS

On this day the Court considered Defendant CITY OF UVALDE ("City") and UPD LIEUTENANT AND ACTING POLICE CHIEF MARIANO PARGAS, in his official capacity only ("Pargas"), collectively referred to as "Uvalde City Defendants," Motion To Dismiss Plaintiffs' First Amended Complaint under Rule 12(b)(1) and 12(b)(6). The Court, having considered the pleadings, finds that Defendants' Motion should be granted.

IT IS THEREFORE ORDERED that Defendants' Motion To Dismiss Plaintiff's First Amended Complaint under Rule 12(b)(1) and 12(b)(6) is GRANTED. Plaintiff's claims are dismissed with prejudice.

SIGNED this _____day of _____, 2023.

_____
U.S. DISTRICT JUDGE