UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

SANDRA 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,	§	
Plaintiffs,	§	
v.	§	**CIVIL ACTION NO. 2:22-cv-00059**
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; UVALDE POLICE DEPARTMENT ("UPD") LIEUTENANT AND ACTING CHIEF MARIANO PARGAS; FORMER UPD OFFICER AND UCISD SCHOOL BOARD MEMBER JESUS "J.J." SUAREZ; UPD SERGEANT DANIEL CORONADO; UPD OFFICER JUSTIN MENDOZA; UPD OFFICER MAX DORFLINGER; UVALDE COUNTY SHERIFF RUBEN NOLASCO; 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; and DOES 1-119,	§	**FIRST AMENDED COMPLAINT FOR DAMAGES** (1) Negligence (2) Negligence Per Se (3) Negligent Transfer (4) Negligent Sale (5) 42 U.S.C. § 1983, *et seq.* (6) Punitive/Exemplary Damages Jury Trial Demanded pursuant to Fed. R. Civ. P. 38(b)
Defendants.	§	

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

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MOTION TO DISMISS BY JESUS "J. J." SUAREZ IN RESPONSE TO PLAINTIFFS' FIRST AMENDED COMPLAINT

I. SUMMARY OF THE ARGUMENT

Plaintiffs attempt to state Fourth, and Fourteenth Amendment claims against various Governmental Entities as well as individuals, including police officers. Plaintiffs sue Jesus "J. J." Suarez in his individual capacity under 42 U.S.C. §1983. Plaintiffs also allege a claim against Suarez based on allegations of "state-created danger". Plaintiffs further make claims of Wrongful Death and Survival under Texas law. Suarez is entitled to dismissal of all claims on the basis of qualified immunity because Plaintiffs have failed to plead the violation of a constitutional right. Even if they had done so, they cannot demonstrate that the right was clearly established and that the police officer defendants' actions were objectively unreasonable under the circumstances. Suarez is also entitled to dismissal based on state law immunity from suit and damages.

II. RELEVANT FACTUAL ALLEGATIONS RELATED TO JESUS "J. J." SUAREZ[1]

A. Allegations

Plaintiffs allege that, in May 2022, a shooter began a "rampage with an act of domestic violence in the City of Uvalde." ECF Doc. 26 at ¶¶110-111. They allege that during the event, the shooter entered the west building of Robb Elementary through an unlocked door. ECF Doc 26 at ¶126. Officers from multiple law enforcement agencies arrived at the scene. Plaintiffs assert that the shooter was killed by officers at approximately 12:48 p.m.

B. Plaintiffs' Causes of Action Against Defendant Jesus "J. J." Suarez

Plaintiff's assert that Jesus "J. J." Suarez was a Board Member for the Uvalde Consolidated Independent School District and an officer of the Uvalde Police Department. ECF Doc. 26 at ¶29.

[1] The following summary is based on the factual allegations in Plaintiffs' Original Complaint and ("Complaint," Dkt. 1), as well as the documents attached to or referenced in the Complaint, which, under Federal Rule of Civil Procedure 12(b)(6), are assumed to be true.

Plaintiffs assert claims against Suarez as one of the "Law Enforcement Individual Defendants" under 42 U.S.C. §1983 for alleged violation of Plaintiffs' rights under the Fourth and Fourteenth Amendments. ECF Doc. 26 at ¶¶274-275. More specifically, Plaintiffs allege that the Law Enforcement Individual Defendants used "force and authority to involuntarily confine E.T. and other students and teachers inside classrooms 111 and 112". ECF Doc. 26 at ¶¶276-279. Plaintiffs also vaguely assert allegations regarding Suarez's location during the incident and actions by Suarez related to "people outside" and treatment of parents, but make no direct claims against Suarez regarding these allegations. ECF Doc. 26 at ¶¶148, 151, 177, and 208.

Defendant asserts that Plaintiffs have failed to invoke the jurisdiction of this court, failed to state a claim upon which relief can be granted, and that he is entitled to Qualified Immunity as well as Immunity under Texas State Law.

III. STANDARD OF REVIEW

A. Standard for a Motion to Dismiss.

To survive Rule 12(b)(1), the party asserting jurisdiction bears the burden of proof on the issue. *Ramming v. U.S.,* 281 F.3d 158, 161 (5th Cir. 2001). If the Rule 12 (b)(1) motion is filed with other motions, it should be decided first. *Wolcott v. Sebelius*, 635 F.3d 757, 762 (5th Cir. 2011). The claim should be dismissed if the Court does not have the power to adjudicate the case. *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 668 F.3d 281, 286 (5th Circuit 2012).

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead sufficient factual allegations that, when assumed to be true, state a claim for relief that "is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* When a complaint pleads facts that are "merely consistent with" a defendant's liability, "it 'stops short of the line between possibility and plausibility.'" *Id.* (citation omitted). Although a court must accept well-pleaded facts as true, neither

conclusory allegations nor "legal conclusions masquerading as factual conclusions" are entitled to a presumption of truth. *Beavers v. Metro. Life Ins. Co.*, 566 F.3d 436, 439 (5th Cir. 2009); *see also Iqbal*, 556 U.S. at 678–79, 681. A plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint must provide "factual content" that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

IV. ARGUMENT AND AUTHORITIES

A. Overview of qualified immunity.

Individual defendants may invoke the defense of qualified immunity to section 1983 claims. Public servants are immune from suit unless their conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010). Immunity protects public officials from the disruption and costs associated with litigation. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Plaintiffs may not engage in discovery until they have supported their constitutional claims with sufficient facts that, if true, would overcome the immunity defense. *See Iqbal*, 556 U.S. at 685-86; *Zapata v. Melton*, 750 F.3d 481, 485-86 (5th Cir. 2014); *Winstead v. Box*, 419 F. App'x 468, 469 (5th Cir. 2011) (citing *Wicks v. Miss. State Emp't Servs.*, 41 F.3d 991, 994 (5th Cir. 1995)).

The availability of qualified immunity is a question of law. *Siegert v. Gilley*, 500 U.S. 226, 231-32 (1991). Courts must determine (i) whether the plaintiffs have described a violation of a constitutional right; and (ii) whether the right was "clearly established" at the time of the official's conduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Courts may decide which prong to address first based on the circumstances of the case. *Id.* at 225. Under the first prong a court must decide "whether the plaintiff[s] ha[ve] alleged a violation of a constitutional right." *Charles v. Grief*, 522 F.3d 508, 511 (5th Cir. 2008) (citations omitted). The second prong requires a court to determine whether the right

was clearly established at the time of the incident. *Hare v. City of Corinth, Miss.*, 135 F.3d 320, 326 (5th Cir. 1998). If so, the court must evaluate whether the conduct of the official was objectively unreasonable under clearly established law. *Id.*; *Davis v. McKinney*, 518 F.3d 304, 317 (5th Cir. 2008).

Plaintiffs bear the burden to show the official violated clearly established law. *Brinsdon v. McAllen Indep. Sch. Dist.*, 863 F.3d 338, 347 (5th Cir. 2017); *Kovacic v. Villareal*, 628 F.3d 209, 212 (5th Cir. 2010), *cert. denied*, 564 U.S. 1004 (2011). Plaintiffs must identify the violation of a "particularized" right so that it is apparent to the official that his actions are unlawful in light of pre-existing law. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Plaintiffs may not defeat immunity by describing a "general proposition" of constitutional law, such as a right to equal protection. *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2011). Further, plaintiffs must show that the "contours" of the right were "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Alexander v. Eeds*, 392 F.3d 138, 146-47 (5th Cir. 2004) (citations and internal quotation marks omitted). To defeat immunity, "pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what the defendant is doing violates federal law *in the circumstances*." *Pierce v. Smith*, 117 F.3d 866, 882 (5th Cir. 1997) (emphasis in original) (citations omitted). This means that "existing precedent" must have placed the constitutional question "beyond debate." *Al-Kidd*, 536 U.S. at 741.

In addition, plaintiffs must allege with specificity how the defendant violated the particularized right. *Kovacic*, 628 F.3d at 212; *Babb v. Dorman*, 33 F.3d 472, 479 (5th Cir. 1994). "The defendant's acts are held to be objectively reasonable unless *all* reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the United States Constitution . . . as alleged by the plaintiff." *Thompson v. Upshur Cty., Tex.*, 245 F.3d 447, 457 (5th Cir. 2001) (emphasis in original). If "officers of reasonable competence could disagree on the issue, immunity should be recognized." *Hope v. Pelzer*, 536 U.S. 730, 752 (2002). The reasonableness of an official's actions is

based on the information available to the official at the time of the event. *Morgan v. Swanson*, 755 F.3d 757, 760 (5th Cir. 2014). Qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments, and protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Al-Kidd*, 563 U.S. at 743 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)); *see also Jordan v. Brumfield*, 687 F. App'x 408, 412 (5th Cir. 2017).

Once a defendant asserts qualified immunity, plaintiffs must respond with specificity and "fairly engage" the immunity defense. *Schultea v. Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995). The standard requires more than conclusory assertions. *See Baker v. Putnal*, 75 F.3d 190, 195 (5th Cir. 1996). Plaintiffs must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

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

"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). In order to establish standing, 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 have, in part, alleged individual claims against Suarez under 42 USC ¶1983. Plaintiffs lack individual standing under 1983 because their claims are predicated on allegations that he violated E.T.'s constitutional rights. They do not claim that Suarez violated their own constitutional rights. ECF Document 26,¶¶276, 277, 284, 286, 292, 293 and 295. Parents and siblings cannot bring such

claims based on alleged constitutional violations or deprivations of a child's rights. *Martinez v. Maverick County,* 507 Fed. App'x 446, 448 n.1 (5th Cir. 2013). Based upon the above, Plaintiffs' claims under 1983 should be dismissed with prejudice based on a lack of jurisdiction.

C. The Complaint does not state a violation of Plaintiffs' Fourth or Fourteenth Amendment rights.

Plaintiffs claim that the Officer Defendants, including Suarez, "seized E.T. in violation of her clearly established rights secured to her by the Fourth and Fourteenth Amendments." ECF Doc. 26 at ¶276. Suarez did not seize E.T. Plaintiffs admit that the shooter had barricaded himself in Rooms 111 and 112, effectively holding E.T. and other students hostage. *Id.* at ¶134. Plaintiff was unable to exit the room due to the actions of the shooter, not Suarez.

The Fourth Amendment protects the rights of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. U.S. Const. amend XIV. "A constitutional claim for false arrest … through the vehicle of § 1983, 'requires a showing of no probable cause.'" *Arizmendi v. Gabbert*, 919 F.3d 891, 897 (5th Cir. 2019) (internal citations omitted).

D. Suarez is entitled to qualified immunity.

Even if Plaintiffs could establish that any of the Law Enforcement Individual Defendants violated any of their Fourth of Fourteenth Amendment rights—which they cannot—Plaintiffs cannot show that Suarez's actions were objectively unreasonable in light of clearly established law to overcome his assertions of qualified immunity. Plaintiffs can cite no preexisting law that clearly establishes that an officer violates an individual's Fourth or Fourteenth Amendment rights by responding in the manner in which they did. Even if such rights were clearly established, Plaintiffs cannot show the actions of Suarez were objectively unreasonable. As a result, the Suarez is entitled to qualified immunity from Plaintiffs' Fourth and Fourteenth Amendment claims.

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). Suarez is entitled to qualified immunity if reasonable officers could differ on the lawfulness of his actions. According to the Supreme Court in *District of Columbia v. Wesby,* 138 S. Ct. 577, 590 (2018), the legal principle must clearly prohibit the specific conduct on the official in the particular circumstances that were confronting the official. Plaintiffs have the burden to plead and prove facts to overcome Qualified Immunity. *Elliot v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985).

E. The Fifth Circuit has not recognized the "state-created danger" exception and, even if it did, Plaintiffs' claim does not fall within this theory of recovery.

Even if the "state-created danger" theory were recognized by the Fifth Circuit, Plaintiffs do not plead facts that would state a claim under the "state-created danger" theory. To maintain a claim pursuant to a "state-created danger" theory, a plaintiff must show that (1) the defendant used its authority to create a dangerous environment for the plaintiff, and (2) the defendant acted with deliberate indifference toward the plaintiff. *Covington Cnty. Sch. Dist.*, 675 F.3d at 865 (quoting *Rios*, 444 F.3d at 424) (the "state-created danger theory is inapposite without a known victim"); *see also Breen v. Texas A&M Univ.*, 485 F.3d 325, 335 (5th Cir. 2007). A "state-created danger" claim also requires a known, identifiable victim. *Covington Cnty. Sch. Dist.*, 675 F.3d at 865 (quoting *Rios*, 444 F.3d at 424) (the "state-created danger theory is inapposite without a known victim"); *see also Breen v. Texas A&M Univ.*, 485 F.3d 325, 335 (5th Cir. 2007).

To establish deliberate indifference for purposes of state-created danger, the plaintiff must show that "[t]he environment created by the state actors must be dangerous; they must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur." *Covington Cnty. Sch. Dist.*, 675 F.3d at 865 (quoting *Piotrowski v. City of Houston*, 237 F.3d 567, 585 (5th Cir. 2001) (citation and internal quotation marks omitted)). Further, to act with deliberate indifference, "a state actor must know of and disregard an excessive risk to the victim's health or safety." *McClendon*, 305 F.3d at 326, n.8. Liability under the

"state-created danger" theory "exists only if the state actor is aware of an immediate danger facing a known victim." *Lester v. City of Coll. Station*, 103 Fed. App'x 814, 815-16 (5th Cir. 2004) (citing *Saenz v. Heldenfels Bros., Inc.*, 183 F.3d 389, 392 (5th Cir. 1999)).

Because the "state-created danger" theory is not recognized within the Fifth Circuit, Plaintiffs cannot maintain a Section 1983 claim against Suarez on this basis.

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Courts have routinely dismissed "state-created danger" claims when the plaintiffs' complaint demonstrated that the state actors did not create the danger by some affirmative act. *DeShaney*, 489 U.S. at 203 (although Department received numerous warnings that boy was being abused by his father, Department did not create dangers boy faced); *see also Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198 (5th Cir. 1994) (affirming dismissal of plaintiff's complaint on Rule 12(b)(6) grounds when student was shot and killed on school premises on day where metal detectors were not utilized and no one checked school identification badges of individuals entering premises); *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992) (finding that Sheriff's dismissal of hostage negotiation personnel and other law enforcement officials did not create or make victim more vulnerable to danger that assailant would kill hostage).

As the Fifth Circuit stated in *Johnson v. Dallas Independent School District*, "[t]he key to the state-created danger cases…lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid." *Johnson*, 38 F.3d at 201. The Court in *Johnson* noted:

> There is no pleading that school officials placed [the boy] in a dangerous environment stripped of means to defend himself and cut off from sources of aid. There is no sufficiently culpable affirmative conduct. [The boy] went to school. No state actor placed [the boy] in a unique, confrontational encounter with a violent criminal. No official in the performance of her duties abandoned him in a crack house or released a known criminal in front of his locker. There is no suggestion that the school district or principal fostered or tolerated anarchy at [the high school]. *Id.* at 202.

The state-created danger exception "simply is not implicated by the failure of state actors to protect individuals from [even] known and serious risks of harm." *Moore v. Dallas Indep. Sch. Dist.*, 557 F. Supp. 2d 755, 767 (N.D. Tex. 2008) *aff'd* No. 08-11220, 2010 U.S. App. LEXIS 5432 (5th Cir. Mar. 12, 2010).

Furthermore, a plaintiff cannot maintain a claim based upon the state-created danger theory unless the plaintiff shows the entity's specific knowledge of immediate harm to a known victim. *Rios*, 444 F.3d at 424; *Saenz v. Heldenfels Bros., Inc.*, 183 F.3d 389, 392 (5th Cir. 1999); *de Jesus Benavides v. Santos*, 883 F.2d 385, 387 (5th Cir. 1989).

For example, in *Doe v. Covington County School District,* Jane Doe, a nine-year old student was checked out from school on six separate occasions by Tommy Keyes, who was not related to Jane Doe and was not listed on the "Permission to Check-Out Form" her guardians submitted to the elementary school. *Covington Cnty. Sch. Dist.*, 675 F.3d at 853. On each occasion, Keyes took Jane Doe from school without the knowledge or consent of her parents, sexually molested her, and returned her to school. *Id.* The plaintiffs in *Doe* alleged that Keyes gained access to Jane Doe because the school officials' policy permitted school employees to release Jane Doe to Keyes without verifying his identity or confirming whether he was an individual listed on her "Permission to Check-Out" Form. *Id.* The plaintiffs asserted that this policy created a danger to students and constituted deliberate indifference to the rights and safety of those students, including Jane Doe. The Does further alleged that school officials received complaints and had safety meetings concerning their checkout policies and the ability for unauthorized individuals to have access to students. *Id.* As a result, the Does alleged that the school "had actual knowledge of the dangers created by their policies, customs and regulations" and "failed to take corrective action to reduce or prevent the danger." *Id.* at 855-856. Nonetheless, the Fifth Circuit held that the plaintiffs' allegations did not support a claim under the state-created danger theory, even though the school released Jane Doe to a sexual predator on multiple occasions as a result of a knowingly, flawed student check-out policy. The Court reasoned that the plaintiffs did not allege that the school knew about an immediate danger to *Jane Doe's* safety. *Id.* at 866. Without allegations that the school knew of such immediate danger to Jane Doe, the Fifth Circuit held that even if it did "embrace the state-created danger theory, [the Does'] claim would necessarily fail."

Similarly, in *Estate of C.A. v. Castro*, a senior at a Houston ISD high school drowned in the deep end of the school swimming pool where students were playing after concluding a physics experiment. *Estate of C.A. v. Castro*, 547 Fed. Appx. 621, 622 (5th Cir. Nov. 25, 2013). The parents alleged they had informed the school that C.A. did not know how to swim and claimed they provided the school with instructions that C.A. should not dive or swim in the school pool. *Id.* at 623. The parents filed suit alleging that: (1) HISD was aware of the obvious dangers posed by the unsupervised use of a swimming pool; (2) HISD was informed that C.A. should not be allowed to participate in swimming or diving activities; and (3) HISD's deliberate indifference caused C.A. to stay at the bottom of the pool for several minutes drowning to death. *Id.* at 623. The Fifth Circuit affirmed dismissal of the plaintiffs' claims against HISD because the dangers of the swimming pool were not "unique to C.A." and, thus, the plaintiffs failed to establish that C.A. was a known victim. *Id.* at 623. The Court noted:

> Even assuming that the district's customs and policies created a dangerous environment that would not otherwise existed and to which it was deliberately indifferent, it cannot be said that HISD was deliberately indifferent with respect to "a known victim." As the district court held, "[t]he record shows that the plaintiff cannot show a basis to support the inference that HISD knowingly created a risk that C.A. would drown, as opposed to creating a *general risk* for students who could not swim or could not swim well."

Further, in *Dixon v. Alcorn County School District*, 499 Fed. Appx. 364 (2012) student Ruby Carol was physically attacked at school by a mentally disabled classmate who had a documented history of violent outbursts and had previous disciplinary incidents where he injured his teacher and other students. *Id.* at 623. On two occasions, he made negative statements about Ruby Carol. One day, the student grabbed Ruby Carol, held her against the wall, and rubbed a Clorox wipe in her eye, injuring her eye. Thereafter, the parents sued the school district and alleged the school deprived Ruby Carol of her substantive due process rights by failing to remove the classmate from Ruby Carol's classroom when the school became aware of his violent tendencies.

The plaintiffs in *Dixon* argued that Ruby Carol was a known victim based on the student's two negative statements about her and the teacher's documented fear of injury to her students. *Dixon*, 499 Fed. Appx. at 367.

The Fifth Circuit rejected this argument because there was no evidence that the student's behavior "ever focused upon Ruby Carol such that she would have been the 'known victim' of an unprecedented assault." The Fifth Circuit stated:

> Sad as the facts of this case may be, the record makes clear that Ruby Carol was merely one student among many who faced a generalized risk resulting from the school's attempt to integrate a mentally disabled child into a normal school environment. As our cases illustrate, the state-created danger theory requires a *known victim*, and the fact that a school's policy or procedure presents a risk of harm to students in general in inadequate to satisfy this requirement.

The Court, thus, held that there was no need to determine whether it should adopt the state-created danger theory of liability based on the facts presented in *Dixon*.

The Complaint, ECF Doc. 26, sets forth no facts that Suarez placed E. T. in a situation that stripped her of the ability to defend herself or cut off potential sources of private aid. As previously noted, the student was "placed in such a situation" by the shooter.

Plaintiffs assert that they have sued Suarez in his individual capacity. However, to the extent that they attempt to bring claims against Suarez in his official capacity, such claims should be dismissed, as well. A suit against 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). Any such claims against Suarez should be dismissed as they are redundant.

V. PLAINTIFFS' NEGLIGENCE AND STATE LAW TORT CLAIMS ARE BARRED BY IMMUNITY UNDER THE TEXAS TORT CLAIMS ACT

Plaintiffs attempt to bring Wrongful Death and Survival claims against Suarez. These claims should be dismissed. Any state law tort claim must be brought under the Texas Tort Claims Act. *Hudspeth County v. Ramirez,* 675 S. W. 3d. 103, 110 (Tex.App.—El Paso, 2000, no pet.)(governmental

unit bay be accountable for wrongful death, but such accountability is imposed by the Texas Tort Claims Act, not the Wrongful Death Act".) The same legal standard should apply for the Survival claims. As previously noted, Plaintiffs' clearly allege that Suarez was an employee of the Uvalde PD, as well as a Board Member for the Uvalde Consolidated Independent School District. Under Federal Rule 12(b)(6), Plaintiffs' allegations of fact must be taken as true.

Under Section 101.106(f) of the Texas Tort Claims Act states:

> (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. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

Tex. Civ. Prac. & Rem Code § 101.106 (2003). Interpreted as a whole, the purpose of section 101.106 is clear: lawsuits against individual governmental employees are disfavored and are, for the most part, prohibited when the governmental entity itself is simultaneously sued under the TTCA. Texas law has a strict prohibition against suing both a governmental entity and its employees. *See Mission Consolidated Indep. School v. Garcia*, 253, S.W.2d 653, 657 (Tex. 2008). A plaintiff is forced to decide before filing suit whether to pursue claims against the government or the individual:

> [Texas Civil Practice & Remedies Code] force[s] a plaintiff to decide at the outset whether an employee acted independently and is thus solely liable, or acted within the general scope of his or her employment such that the governmental unit is vicariously liable, thereby reducing the resources that the government and its employees must use in defending redundant litigation and alternative theories of recovery. *Id.*

The TTCA, therefore, provides for immediate dismissal if suit is brought against both the government and the individual. Tex. Civ. Prac. & Rem. Code § 101.106(e). Importantly, Texas courts broadly interpret this provision in favor of dismissal and assume that all tort claims asserted against a governmental entity meet the "filed under this chapter" standard in section 101.106(e): "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]' for purposes of section 101.106. *Garcia*, 253 S.W.3d at 659. Even if the plaintiff does not "invoke or refer" to the Texas Tort Claims Act in the pleadings, Texas courts are required to assume that all tort claims brought against a governmental entity are claims brought "under" the Act. *Tex. Bay Cherry Hill, L.P. v. City of Fort Worth*, 257 S.W.3d 379, 400 (Tex. App. - Fort Worth 2008, no pet.). It is also irrelevant whether the employee is sued in his individual or official capacity; both require dismissal. *Id.* Such a suit is prohibited by Texas law and requires the immediate dismissal of the claim against the employees pursuant to section 101.106(e).

A. Public Policy Supporting Immunity

Sovereign immunity and governmental immunity exist to protect the State and its political subdivisions from lawsuits and liability for money damages. *See Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). Sovereign immunity protects the State, state agencies, and their officers, while governmental immunity protects subdivisions of the State, including municipalities and school districts. *See Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). However, both types of immunity afford the same degree of protection and both levels of government are subject to the Texas Tort Claims Act. *See* Tex. Civ. Prac. & Rem. Code § 101.001(3); *Sykes*, 136 S.W.3d at 638.

The Texas Supreme Court has found that lawsuits against the State and its political subdivisions "hamper governmental functions by requiring tax resources to be used for defending lawsuits and paying judgments rather than using those resources for their intended purposes." *See Reata Constr. Corp.*, 197 S.W.3d at 375 (citing *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002)). Consequently, the Texas Supreme Court has long recognized that "no State can be sued in her own courts without her consent, and then only in the manner indicated by the consent." *See Hosner v. DeYoung*, 1 Tex. 764, 769 (1847). The Texas Supreme Court has also stated that waivers of immunity are narrowly interpreted and has found that the Legislature is better suited to

balance the conflicting policy issues associated with waiving immunity. *See Garcia*, 253 S.W.3d at 655; *see also* Tex. Gov't Code § 311.034.

B. The Texas Tort Claims Act and Section 101.106

The Texas Tort Claims Act provides a limited waiver of immunity for certain suits against governmental entities and caps recoverable damages. *See* Tex. Civ. Prac. & Rem. Code § 101.023. As the *Garcia* Court explained, "[a]fter the Tort Claims Act was enacted, plaintiffs often sought to avoid the Act's damages cap or other strictures by suing governmental employees, since claims against them were not always subject to the Act." *See Garcia*, 253 S.W.3d at 656. Consequently, the Legislature created an election of remedies provision set forth in § 101.106 of the Texas Civil Practice and Remedies Code.

When § 101.106 was initially enacted in 1985, it afforded "some protection" to governmental employees "when claims against the governmental unit were reduced to judgment or settled, but there was nothing to prevent a plaintiff from pursuing alternative theories against both the employee and the governmental unit through trial or other final resolution." *Id.* at 656. As a result, the Legislature amended § 101.106 in 2003. It is this revised § 101.106 that forced the Plaintiff in this case to make an election at the time this lawsuit was filed as to whether the tort claim that was asserted should be asserted only against the Individual Defendants or against Houston ISD -- but not against both.

The Texas Supreme Court in *Garcia* examined the effect of 101.106(e). *Garcia*, 253 S.W.3d at 658. In *Garcia*, three former school district employees filed identical lawsuits against the school district and its superintendent. *Id.* at 654-55. The employees alleged (1) discriminatory wrongful discharge against the school district, (2) intentional infliction of emotional distress against the school district and the superintendent, and (3) defamation, fraud, and negligent misrepresentation against the superintendent. *Id.* The Court determined that if subsection (e) were applied to the case, the superintendent would be entitled to dismissal of the employees' suit against him upon the school

district's filing of a motion. *See id.* at 659. The Court held that "the Act's election scheme governs all suits against a governmental unit, and its application here bars all common law recovery against the superintendent and the school district." *Id.* at 654.

Because the decision regarding whom to sue has irrevocable consequences, a plaintiff must proceed cautiously before filing suit and carefully consider whether to seek relief from the governmental unit or from the employee individually. *See Garcia*, 253 S.W.3d at 657. By virtue of this Motion being filed by Defendants, the tort claim against Individual Defendants Gonzalez and Schrader must "immediately be dismissed." Tex. Civ. Prac. & Rem. Code § 101.106(e).

C. The Plaintiff has Invoked the Texas Tort Claims Act by Virtue of Suing the Governmental Entity on a Tort Theory.

By bringing state law wrongful death and survival claims, and by asserting that Suarez is an employee of Uvalde PD, the Plaintiff clearly invokes the Texas Tort Claims Action in their claim against Suarez.

Consequently, because the Plaintiff filed suit under the TTCA alleging the tort of negligence against the District, she was put to the election described above at the outset of this litigation. In clearly and unequivocally pleading that Suarez was within the course and scope of his employment, they made their election. Thus, Suarez may invoke subsections 101.106(e). In light of clearly established case law interpreting § 101.106(e) of the Texas Civil Practice and Remedies Code, all tort claims against Suarez must "immediately be dismissed."

To the extent that Plaintiffs bring a claim against Suarez for punitive damages, such claim should be dismissed. As previously shown, Plaintiffs cannot establish that Suarez violated Plaintiffs' constitutional rights. Nor can they establish that he acted with reckless or callous indifference, or was motivated by evil intent. *Smith v. Ward,* 461 U.S. 30, 56 (1983); *Heaney v. Roberts,* 846 F.3d 795, 803 (5th Cir. 2017).

Defendant also asserts, as has been asserted by other defendants in this matter, that while a defendant's assertion of immunity is pending, courts cannot allow any discovery to take place based on *Carswell v. Camp,* 54 F 4th 307, 311 (5th Cir. 2022).

VI. CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Defendant Jesus "J. J." Suarez prays that the court grant his motion to dismiss Plaintiffs' claims against him for lack of jurisdiction under Federal Rule 12(b)(1) and for failure to state a claim upon which relief can be granted under Federal Rule 12(b)(6), that the court recognize that Suarez is entitled to qualified immunity from Plaintiffs' claims and that all of Plaintiffs' causes of action against Defendant Suarez be dismissed, with prejudice to the refiling of same. Defendant further prays that Plaintiff 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 other and further relief, general or special, at law or in equity, to which he may show himself to be justly entitled.

Respectfully submitted,

By: /s/ *James E. Byrom*

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ATTORNEYS FOR J. J. SUAREZ

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 via the Court's electronic filing system on this 30th day of May 2023.

/s/ James E. Byrom

JAMES E. BYROM

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

SANDRA 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,	§	
Plaintiffs,	§	
v.	§	**CIVIL ACTION NO. 2:22-cv-00059**
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; UVALDE POLICE DEPARTMENT ("UPD") LIEUTENANT AND ACTING CHIEF MARIANO PARGAS; FORMER UPD OFFICER AND UCISD SCHOOL BOARD MEMBER JESUS "J.J." SUAREZ; UPD SERGEANT DANIEL CORONADO; UPD OFFICER JUSTIN MENDOZA; UPD OFFICER MAX DORFLINGER; UVALDE COUNTY SHERIFF RUBEN NOLASCO; 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; and DOES 1-119,	§	**FIRST AMENDED COMPLAINT FOR DAMAGES** (1) Negligence (2) Negligence Per Se (3) Negligent Transfer (4) Negligent Sale (5) 42 U.S.C. § 1983, *et seq.* (6) Punitive/Exemplary Damages Jury Trial Demanded pursuant to Fed. R. Civ. P. 38(b)
Defendants.	§	

ORDER ON DEFENDANT JESUS "J.J." SUAREZ'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT AND BRIEF IN SUPPORT

After considering Defendant Jesus "J.J." Suarez's Motion to Dismiss Plaintiffs' First Amended Complaint and Brief in Support, the Court hereby GRANTS the Motion to Dismiss and that all of Plaintiffs' causes of action against Defendant Suarez be dismissed, with prejudice to the refiling of same and Defendant recovers all costs of suit.

SIGNED on this _____ day of _____, 2023.

_____
U.S. DISTRICT MAGISTRATE COURT JUDGE