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., et al.,	§	
Plaintiffs,	§	Case No. 2:22-CV-00059-AM
v.	§	
DANIEL DEFENSE, LLC, et al,	§	
***Defendants*.**	§	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT UVALDE COUNTY'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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

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 (collectively "Plaintiffs") file this brief in opposition to the motion to dismiss the First Amended Complaint filed by filed by Defendant Uvalde County ("Uvalde County" or the "County"). The Court should deny that motion for the reasons set forth below.

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UVALDE COUNTY CREATES A POLICY TO TRAP CHILDREN WITH A KILLER AND TO PREVENT ANYONE FROM SAVING THEM

May 24, 2022 was supposed to be the day that fourth-grade student E.T. celebrated receiving awards at Robb Elementary School. Her final softball game was supposed to be that day, and she was to learn about whether she made the all-star team. It was supposed to be a day of joy, of pride, of excitement.

Instead, it was the final day that E.T. got to tell her mother that she loved her. She died that day. At 11:33 a.m., a man armed with an assault rifle entered classrooms 111 and 112 and began shooting. Over the next 77 minutes, while Uvalde County officers, including Sheriff and chief policymaker Defendant Ruben Nolasco, prevented desperate parents from saving their children, the gunman murdered 19 children and two teachers. Seventeen other children were wounded. All suffered the most extreme and severe psychological trauma one can endure.

Much of the violence could have been stopped. Fewer than 10 minutes after the shooting began, officers, including County Sheriff's Office employees, arrived at the scene of the massacre, separated from the shooter only by a classroom door. Soon after, Nolasco arrived on the scene of the shooting. Any semblance of common sense—or following clear and uniformly accepted protocols for responding to an active shooter situation—would have led him to the only reasonable course of action: to breach the door to classroom 112, immediately engage the active shooter, and neutralize him mere minutes after he began shooting. Nolasco could have saved countless lives that day. Instead, acting on behalf of Uvalde County, Nolasco decided to institute a new policy of barricading the children in the classroom with the shooter, contributing to the needless and preventable deaths of dozens. And this policy thwarted desperate parents' attempts to save their children: "[m]any family members, hearing gunfire and seeing no discernable police response, wanted to go into the classroom

themselves. Defendant Nolasco kept parents from entering the school, even as parents yelled at him to do something, anything, to rescue their children." Am. Compl. ¶ 176.[1]

Uvalde County's policy, as instituted through Nolasco conduct, violated E.T.'s constitutional rights. The policy of barricading E.T. in her classroom was an unlawful seizure in violation of her rights under the Fourth Amendment. The policy of trapping E.T. in a room with a shooter, along with dozens of her classmates, while actively preventing anyone else from rescuing them, violated her substantive due process rights under the Fourteenth Amendment under both the state-created danger and custodial relationship theories of liability.

Uvalde County sealed the fates of many children that day. For over 60 agonizing minutes after arriving on the scene, Nolasco enabled the shooter to murder and severely wound two classrooms full of children. The Court should deny Uvalde County's motion in its entirety.

FACTUAL BACKGROUND

On May 24, 2022, E.T. woke up nervous about whether she would make the all-star team in softball; her final game of the season was that night. Am. Compl. ¶ 1. E.T. called her mother that morning, who had left early for work, to tell her that she loved her. *Id.* It was awards day at Robb Elementary School in Uvalde, Texas, a day to celebrate the hard-earned achievements of E.T. and her fourth-grade classmates. *Id.* E.T. posed for a photo with some of her best friends at the ceremony. *Id.*

E.T. did not make it to softball. E.T.'s day—and life—was abruptly and tragically cut short. At approximately 11:30 a.m., a shooter walked into a set of connected classrooms, rooms 111 and 112 of Robb Elementary, armed with an assault rifle, and murdered 19 children and two teachers, wounding at least 17 other children. *Id.* ¶¶ 2-3. He remained in those classrooms for a total of 77 minutes before police entered. *Id.* ¶ 3. E.T. was killed, and her family's life was destroyed. *Id.* ¶ 4. For hours her mother, Sandra Torres, searched for her, desperately hoping she was alive. *Id.* ¶¶ 194-98.

[1] Citations to "Am. Compl." are to Plaintiffs' Amended Complaint for Damages, ECF No. 26.

During the course of the shooting, at 12:10 p.m., while Nolasco (and other Uvalde County employees) prevented anyone from breaching the classroom, a student found her teacher's phone, wiped the blood off the screen, called 911, and begged the dispatcher for help. *Id.* ¶ 165. She stayed on the phone for 17 minutes, risking her life if the shooter had realized what she was doing, before hanging up when she feared that the shooter was about to discover her. *Id.* At 12:36 p.m., the student called 911 again, and told the dispatcher, "'There's a school shooting.'" *Id.* ¶ 175. The student heard Nolasco and the other officers outside of the classroom in the hallway and asked the dispatcher, "'Can you tell the police to come to my room?'" *Id.* The student suggested to the dispatcher that she could do what Nolasco should have done: she could "open the door to her classroom so that the police gathered outside could enter." *Id.* But because Nolasco chose to trap the children inside with the shooter, "[t]he dispatcher told her not to do that." *Id.* The student complied with the dispatcher's order and did not open the classroom door. *Id.* Given this show of force and express instructions, no student was free to leave the classroom. *Id.* ¶¶ 151, 157, 175.

A significant portion of this ordeal was the direct result of the decision by Uvalde County policymaker Defendant Sheriff Ruben Nolasco to barricade the children in the classrooms with the shooter. By 11:49 a.m., Nolasco arrived at Robb Elementary. *Id.* ¶ 160. Though he knew the shooter was not "barricaded," Nolasco made the affirmative decision to treat him as a barricaded subject, and in so doing, trapped E.T. in the classroom with the shooter. *Id.* For example, Nolasco instructed Defendant Betancourt, including in sending text messages, to consider the shooter as a "barricaded" subject. *Id.* Nolasco also told his deputies that "we need to get this contained," though he knew "'containment' was an inappropriate response to an active shooter." *Id.* ¶ 161. Despite being the County Sheriff, Nolasco had never completed a state active shooter training, and his office did not have an active shooter policy as of the shooting. *Id.* ¶ 162.

At approximately 12:12 p.m., Nolasco learned that one of the classrooms was "full of victims." *Id.* ¶ 166. As the events of May 24 unfolded, "[m]any family members, hearing gunfire and seeing no

discernable police response, wanted to go into the classroom themselves." *Id.* ¶ 176. But "Defendant Nolasco kept parents from entering the school, even as parents yelled at him to do something, anything, to rescue their children." *Id.* As a result of Nolasco's affirmative decision—in his capacity as County Sheriff—to prevent parents from entering the school, officers "began yelling at, shoving, restraining, and tackling people outside." *Id.* ¶ 177. Some parents were even "tased, handcuffed, and pepper sprayed outside the building, all while the police failed to engage the shooter" as a result of Nolasco's orders. *Id.*

Faced with the chance to save the lives of several fourth-grade children, chief policymaker Nolasco, and therefore Uvalde County, did the opposite.

* * *

Despite knowing that more kids would be murdered, Nolasco never breached the classroom or shot the gunman and, to the contrary, took active steps to prevent others from doing so. It took a U.S. Customs and Border Patrol-led group of officers to open the door and free the children, over an hour after Nolasco had arrived on scene. *Id.* ¶ 182. E.T.'s death certificate lists her time of death as 3:10 p.m. *Id.* ¶¶ 13, 183.

ARGUMENT

I. LEGAL STANDARD: THE COUNTY IS LIABLE FOR NOLASCO'S ACTIONS UNDER *MONELL*, BECAUSE HE IS A POLICYMAKER

Plaintiffs need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a). To defeat a Rule 12(b)(6) Motion,[2] the complaint need only include sufficient factual allegations "to raise a right to relief above the speculative level" and to provide "fair notice" of the plaintiff's claims. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). In considering a Rule 12(b)(6) motion, the Court must "take all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff . . . and ask whether the pleadings contain 'enough

[2] The County does not challenge Plaintiffs' standing.

facts to state a claim to relief that is plausible on its face.'" *Yumilicious Franchise, L.L.C. v. Barrie*, 819 F.3d 170, 174 (5th Cir. 2016). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[T]he court must accept as true all material allegations in the complaint, as well as any reasonable inferences to be drawn from them . . . and must review those facts in a light most favorable to the plaintiff." *Schydlower v. Pan Am. Life Ins. Co.*, 231 F.R.D. 493, 498 (W.D. Tex. 2005).

Under *Monell v. New York City Dept. of Soc. Servs*, 436 U.S. 658 (2018), "it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. If the decision to adopt a particular course of action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 470 (1986); *see also Brooks v. George Cnty, Miss.*, 84 F.3d 157, 165 (5th Cir. 1996) ("[E]ven a single decision may create municipal liability if that decision were made by a final policymaker responsible for that activity.") (cleaned up).

Defendant Nolasco was the Sheriff and a final policymaker for the Uvalde County, as the County apparently concedes. Uvalde County is liable under *Monell* for Nolasco's actions on May 24, 2022. *See Brooks*, 85 F. 3d at 165. Plaintiffs have met their low burden at the pleading stage to plead facts giving rise to liability under *Monell*.[3]

II. PLAINTIFFS HAVE ALLEGED NUMEROUS AFFIRMATIVE ACTIONS BY UVALDE COUNTY POLICYMAKER DEFENDANT NOLASCO (ALL CLAIMS)

Though Uvalde County does not contest that Nolasco is a final policymaker for the County, it claims the Amended Complaint "merely insinuate[s] that Sherriff Nolasco affirmatively made" the decision to barricade the children inside the classrooms with the shooter. Br. at 5.[4] But the Amended

[3] Plaintiffs do not contest Uvalde County's treatment of Plaintiffs' claim against Nolasco in his official capacity as a claim under *Monell* against the County itself.

[4] Citations to "Br." are to Uvalde County's Motion to Dismiss for Failure to State a Claim, ECF No. 58.

Complaint plainly alleges several decisions Nolasco "affirmatively made." Further, at the pleading stage, Plaintiffs need not allege with factual certainty the deliberate decisions made by Nolasco, but rather must plead facts which "make it *plausible* that [Nolasco] made the deliberate decision" to barricade the students in with the shooter. *Cherry Knoll, L.L.C. v. Jones*, 922 F.3d 309, 317 (5th Cir. 2019) (emphasis added). And those factual allegations must be viewed "in the light most favorable to" Plaintiffs. *Dickerson v. City of Gretna*, No. CV 05-6667, 2006 WL 8456461, at *3 (E.D. La. May 19, 2006).

The Amended Complaint is replete with allegations which, viewed in the light most favorable to Plaintiffs, make it more than plausible that Nolasco made "a deliberate choice to" barricade the children in with the shooter, "a course of action [] made from among various alternatives" available to Nolasco that day. *Cherry Knoll*, 922 F.3d at 317 (quoting *Pembaur*, 475 U.S. at 483). Almost immediately upon arriving at the scene of the shooting, Nolasco affirmatively acted, by sending a text message, to instruct Defendant Betancourt that he was to treat the shooter as a "barricaded" subject, thereby trapping E.T. in the room with him. Am. Compl. ¶ 160. He also affirmatively spoke to his deputies, instructing them that "we need to get this contained," despite its being apparent to him that "'containment' was an inappropriate response to an active shooter." *Id.* ¶ 161. In these affirmative actions, he instituted the policy of treating the shooter and the children as "barricaded" or "contained." He did so knowingly, as he was informed that the classrooms were "full of victims." *Id.* ¶ 166.

But those are not the only unlawful decisions Nolasco made that day. "Many family members, hearing gunfire and seeing no discernable police response, wanted to go into the classroom themselves." *Id.* ¶ 176. But Nolasco (and therefore Uvalde County) affirmatively decided not to allow parents to attempt to save their children. He prevented "parents from entering the school, even as parents yelled at him to do something, anything, to rescue their children." *Id.* In compliance with Nolasco's decision and resulting policy of preventing parents from entering the school, officers "began yelling at, shoving, restraining, and tackling people outside." *Id.* ¶ 177. Some parents were even "tased,

handcuffed, and pepper sprayed outside the building, all while the police failed to engage the shooter" because of Nolasco's orders. *Id.*

In sum, contrary to Uvalde County's argument, it was not just a "single incident" of misconduct that created Uvalde County's policy, but rather a "pattern of misconduct," Br. at 8, starting with Nolasco's instructions to his subordinates to barricade the students in with the shooter, and continuing when he prevented distraught parents from trying to save their dying children. And, in any case, a "single decision may create municipal liability if that decision were made by a final policymaker." *Brooks*, 86 F. 3d at 165.

Nolasco made these affirmative decisions despite having "various alternatives" available to him. *Cherry Knoll*, 922 F.3d at 317. Nolasco could have breached the classroom immediately, instead of deciding to institute a new policy of barricading everyone inside the classroom. He could have allowed others to try and save the students, but instead prevented parents from doing so. These factual allegations make it more than plausible that Nolasco made "a deliberate choice to," *id.*, barricade the children in with the shooter and to prevent anyone from trying to save them. Plaintiffs have plausibly alleged more than sufficient allegations as to Nolasco's affirmative conduct.

III. PLAINTIFFS HAVE STATED *MONELL* CLAIMS FOUNDED ON THE STATE-CREATED DANGER THEORY OF LIABILITY (DUE PROCESS)

A. There Was a "High Predictability" that Uvalde County's Policy Would Violate Plaintiffs' Constitutional Rights Under the State-Created Danger Theory.

Uvalde County first argues that there was no "high predictability" regarding Plaintiffs' claim under the state-created danger theory. Br. at 7–8. The crux of their primary argument is that the theory is not recognized in the Fifth Circuit, echoing other defendants' arguments as to qualified immunity. But a legal theory need not have been expressly adopted by the Fifth Circuit in order to put a defendant on notice that "every reasonable official would understand that what he is doing violates the law," and thus for the doctrine to be clearly established. *Morgan v. Swanson*, 659 F.3d 359, 371–72 (5th Cir. 2011). The Fifth Circuit has recognized that such notice can be accomplished by

pointing to "controlling authority—***or a robust consensus of persuasive authority***—that defines the contours of the right in question with a high degree of particularity." *Id.* (cleaned up) (emphasis added). That test is squarely met here, and there was thus a "high predictability" that the policy of barricading students in a classroom with an active shooter would violate E.T.'s constitutional rights.

Further, because the Fifth Circuit has not expressly *rejected* the theory, and rather has laid out the theory's elements, Plaintiffs should be allowed to develop evidence as to a state-created danger claim in discovery and at trial. *See Kemp v. City of Houston*, No. CIV.A. H-10-3111, 2013 WL 4459049, at *6 (S.D. Tex. Aug. 16, 2013) (allowing state-created danger claim to proceed to trial because "[w]hether the evidence at trial rises to a level sufficient to submit this claim to the jury, particularly since the Fifth Circuit has not yet adopted the theory, remains to be seen."). And if there were ever a set of facts to justify the express adoption of this theory of liability, the facts of this case would manifestly qualify.

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

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

The state-created danger theory stems from the Supreme Court's decision in *DeShaney v. Winnebago County Department Social Services*, 489 U.S. 189, 201 (1989), in which the court indicated that Section 1983 liability for private-actor conduct arises if the state played any part in creating the danger the victim faced. *Id.* at 201 ("While the State may have been aware of the dangers that Joshua faced in the free world, *it played no part in their creation, nor did it do anything to render him any more vulnerable to them.*") (emphasis added). Since at least 1994, the Fifth Circuit has repeatedly recognized and discussed in great detail the "contours" of the theory. In *Leffall v. Dallas Independent School District*, 28 F.3d 521 (5th Cir. 1994), the parent of a student sued a school district under § 1983 after the student was killed by random gunfire in the school's parking lot. The court discussed the theory in detail, including the

level of "culpability" required to state such a claim, and noted in doing so that the court "may assume without deciding that our court would recognize the state-created danger theory." *Id.* at 530. Ultimately, the Court found the particular allegations in that case insufficient to state a claim. *Id.* at 532.

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

> When state actors knowingly place a person in danger, the due process clause of the constitution has been held to render them accountable for the foreseeable injuries that result from their conduct, whether or not the victim was in formal state "custody." This principle has been applied in a number of cases from other circuits.
> . . .
> The key to the state-created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or *cutting off potential sources of private aid*. Thus the environment created by the state actors must be dangerous; they must know it is dangerous; and, to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur. Put otherwise, the defendants must have been at least deliberately indifferent to the plight of the plaintiff.

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

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

The Fifth Circuit has since clarified that *Scanlan* did not officially adopt the theory. *See, e.g.*, *Rios v. City of Del Rio, Tex.*, 444 F.3d 417, 422–23 (5th Cir. 2006). But in subsequent cases, the Fifth Circuit has only held that the pleadings did not adequately satisfy the theory. *See Doe v. Covington County*

Sch. Dist., 675 F.3d 849, 865–66 (5th Cir. 2012) ("Although we have not recognized the [state-created danger] theory, we have stated the elements that such a cause of action would require. . . . even if we were to embrace the state-created danger theory, the claim would necessarily fail [due to insufficient allegations]."); *Dixon v. Alcorn County Sch. Dist.*, 499 Fed. App'x 364, 368 (5th Cir. 2012) ("There is therefore no need to determine whether this Court should adopt the state-created danger theory of liability on the present facts."); *Est. Of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 1003 (5th Cir. 2017) ("[T]his case does not sustain a state-created danger claim, even assuming that theory's validity.").

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

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

Ten different circuits adopting the state-created danger theory—with no circuit rejecting it—is plainly a "robust consensus of persuasive authority." *Morgan*, 659 F.3d at 382. Whether or not the

Fifth Circuit had expressly adopted the state-created danger theory, the robust consensus of ten circuits certainly put Nolasco "on notice [his] conduct [was] unlawful." *Hope v. Pelzer*, 536 U.S. at 739. He cannot credibly argue that his actions were "reasonable but mistaken judgments about open legal questions," *Ashcroft v. al-Kidd*, 563 U.S. at 743, when ten circuits have adopted the state-created danger theory. His deliberate decision to institute a policy of trapping children in a classroom with a killer for 77 minutes while preventing others from mounting a rescue is the height of "plainly incompetent" conduct that qualified immunity does not protect. *Id.*

In sum, the state-created danger theory of liability was implied by the Supreme Court in 1989; as explained below, it was adopted and defined in no fewer than ten circuits; and it remains unquestioned (though never expressly adopted) by the Fifth Circuit. It is clearly established, and there was thus a "high predictability" that Uvalde County's newly instituted policy would lead to a constitutional violation under the state-created danger theory.[5]

B. Plaintiffs Have Alleged the "Requisite Degree of Culpability" to State a *Monell* Claim, and Uvalde County's Policy was the "Moving Force" Behind the Harms Plaintiffs Suffered.

Uvalde County argues that even if the theory were recognized, Plaintiffs failed to plead facts establishing a "requisite degree of culpability"—*i.e.*, deliberate indifference to Plaintiffs' constitutional rights. Br. at 8–11. But here, Plaintiffs have pled that the state actor actually knew or had reason to know that the private bad actor was likely to commit misconduct as a result of the state actor's conduct, evidenced by the state actor impeding *others* from preventing the bad actor's misconduct. "The key to the state-created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability

[5] Uvalde County relies on the *Vielma* decision to argue that no liability can be imposed in this case. *See* Br. at 10 (citing *Vielma v. Gruler*, 347 F. Supp. 3d 1122 (M.D. Fla. 2018), *aff'd*, 808 F. App'x 872 (11th Cir. 2020)). But the *Vielma* decisions are inapposite, as the plaintiffs there did not argue that the state-created danger exception to *DeShaney*'s general rule applied, and thus those decisions did not discuss the theory's potential applicability in the context of shootings. Further, *Vielma* only dealt with a delay in officers engaging that shooter. It did not involve allegations (as Plaintiffs in this case allege) that the officers took *affirmative* steps to prevent *others* from saving the shooting victims while knowing that those affirmative steps would lead to more deaths. *Vielma* "begins and ends with a private actor," *Vielma*, 347 F. Supp. at 1132, and is thus distinguishable.

to defend herself, *or cutting off potential sources of private aid." Johnson*, 38 F.3d at 201 (cleaned up) (emphasis added). The Fifth Circuit's analyses on the merits of the theory have typically stopped there, as it is understandably rare for a plaintiff to be able to plead facts reflecting that culpable knowledge and conduct. *See, e.g.*, *Covington*, 675 F.3d at 866; *Lance*, 743 F.3d at 1001–02.

The uniquely horrifying set of facts of this case, however, does not suffer from this flaw, and Uvalde County's argument is belied by the numerous allegations in the Amended Complaint that Nolasco, on behalf of the County, "knowingly placed" E.T. in danger. *Johnson*, 38 F.3d at 200. Nolasco knew that children were still alive and being shot at, and yet decided to barricade them in the classroom anyways. *See* Am. Compl. ¶¶ 160–61, 166, 176–77. And as a rare example of a state actor "cutting off potential sources of private aid," *Johnson*, 38 F.3d at 201, Nolasco *actively prevented* "parents from entering the school, even as parents yelled at him to do something, anything, to rescue their children." *Id.* ¶ 176. These were affirmative decisions by Nolasco—decisions he made knowing full-well that children were alive and being shot at in the classrooms. That is deliberate indifference. Given Nolasco's status as chief policymaker, Uvalde County is liable for those decisions.

In a similar vein, Uvalde County argues that their policy was not the "moving force" of an alleged violation under the state-created danger theory. *See* Br. at 10–11. They argue that it was the shooter alone who caused E.T. harm and attempt to wave away the impact of their policy as merely reflecting "'poor decisions and bureaucratic dysfunction' in regard to the Municipal defendants' tactics to rescue them and others from [the shooter]." *Id.* at 11. The notion that Nolasco's conduct, and the resulting policy, reflected *any* attempt to "rescue" or "save" E.T. is specious, and belied by allegations that Nolasco barricaded E.T. and other children in with the shooter instead of trying to do anything to "rescue" them, despite knowing that his decisions would lead to further deaths. *See* Am. Compl. ¶¶ 160–61, 166. And though Nolasco is not responsible for the shooter's initial criminal actions, the Amended Complaint alleges that the policy of barricading the students in with him "made the situation much more dangerous than it had been before law enforcement arrived." *Id.* ¶ 151. The barricade

policy was the "moving force" that gave the shooter the opportunity to continue his rampage for 77 minutes.

The Amended Complaint more than adequately alleges that in creating a new policy on behalf of Uvalde County, Nolasco had "culpable knowledge and conduct in affirmatively placing [E.T.] in a position of danger." *Johnson*, 38 F.3d at 201. His unconstitutional decisions on behalf of the County—to barricade the students inside Classrooms 111 and 112, to prevent other officers from breaching the classroom, and to keep "parents from entering the school, even as parents yelled at [Nolasco] to do something, anything, to rescue their children," Am. Compl. ¶ 176—collectively were a "moving force" that allowed the shooter to inflict the level and extent of harm he did. As the Fifth Circuit put it in 1994, the Nolasco "cut[] off potential sources of private aid" to E.T., *Johnson*, 38 F.3d at 201, going as far as preventing *others* from breaching the classroom. This is exactly the scenario envisioned by the state-created danger theory. Uvalde County's policy of barricading students in with the shooter prolonged and exacerbated a dangerous environment; Nolasco knew it was dangerous when he created the policy; and for over 60 minutes, he "used [his] authority to create an opportunity that would not otherwise have existed for the third party's crime" to continue, even as Plaintiffs and others suffered. *Id.* at 201. This Court should reject Uvalde County's attempt to escape accountability for their chief policymaker's actions.

IV. PLAINTIFFS HAVE STATED *MONELL* CLAIMS FOUNDED ON THE CUSTODIAL RELATIONSHIP THEORY OF LIABILITY (DUE PROCESS)

The special relationship between Uvalde County's chief policymaker and E.T. provides a second, independent source of liability under the Due Process Clause. On this claim, Uvalde County recycles its argument described above regarding the shooter, rather than its chief policymaker, being the "moving force" behind any harm to Plaintiffs. Br. at 15-16. For the reasons discussed *supra*, this argument fails. Otherwise, Uvalde County hinges its argument on the notion that ordinarily, liability under the custodial relationship theory is unavailable in the public-school context, as there is typically

no "special relationship" between students and state actors in that context, and thus that there was no underlying constitutional violation on which to find a *Monell* claim. Br. at 15–16.

But this is no ordinary case. The Fifth Circuit has found a special relationship between a person and the state "when this person is involuntarily confined against his will through the affirmative exercise of state power." *Walton v. Alexander*, 44 F.3d 1297,1306 (5th Cir. 1995). "[T]he duty owed by a state to prisoners and the institutionalized might also be owed to other categories of persons in custody by means of 'similar restraints of personal liberty.'" *Walton v. Alexander*, 20 F.3d 1350, 1354 (5th Cir. 1994), *on reh'g en banc*, 44 F.3d 1297 (5th Cir. 1995) (cleaned up). Distinguishing cases where no such relationship arose, such as those discussed by Uvalde County (*see* Br. at 15–16), the Fifth Circuit has noted that a special relationship exists where "the state has effectively taken the plaintiff's liberty under terms that provide no realistic means of voluntarily terminating the state's custody *and* which thus deprives the plaintiff of the ability or opportunity to provide for his own care and safety." *Walton*, 44 F.3d. at 1305 (emphasis in original).

Uvalde County may well disagree that Nolasco's actions and the resulting policy rose to the requisite level of culpability under *Walton*, but such a determination "is necessarily a fact intensive inquiry which must be resolved during discovery or at the Rule 56 stage." *Bae Sys. Resol. Inc. v. Mission Transp.*, LLC, No. CV SA-19-CA-0974-FB, 2020 WL 7482036, at *2 (W.D. Tex. Aug. 19, 2020). "Rule 12(b)(6) does not provide a 'procedure for resolving a contest between the parties about the facts or the substantive merits of the plaintiff's case,'" *id.* (cleaned up), and therefore, "a motion to dismiss is not appropriate at this stage in the litigation," *Dixon v. Loc. Express, Inc.*, No. 4:16-CV-2081, 2017 WL 2778245, at *2 (S.D. Tex. June 26, 2017); *see also Glenntex, Inc. v. Drennan Day Custom Homes, Inc.*, No. 1:18-CV-973-LY, 2019 WL 6251455, at *3 n. 3 (W.D. Tex. Nov. 21, 2019), *report and recommendation adopted*, No. 1:18-CV-973-LY, 2019 WL 13150084 (W.D. Tex. Dec. 11, 2019) ("[T]his issue involves factual questions inappropriate for resolution at the motion-to-dismiss stage.") (cleaned up). The

Court should not deny Plaintiffs that opportunity by dismissing this claim at such an early stage, particularly in light of this exceptional set of facts.

Instead, "the court must accept as true all material allegations in the complaint, as well as any reasonable inferences to be drawn from them . . . and must review those facts in a light most favorable to the plaintiff." *Schydlower*, 231 F.R.D. at 498. In that light, the exceptional circumstances of this case as alleged in the Amended Complaint present precisely the type of limitations on a person's liberty envisioned by *Walton*. As described *supra*, Section II, the Amended Complaint alleges that the Nolasco, on behalf of Uvalde County, knowingly trapped E.T. in classrooms 111 and 112 with an active shooter, preventing parents and other officers from saving her. Nolasco took E.T.'s life in his hands, placing her in a situation which provided "no realistic means of voluntarily terminating" the barricade he and other law enforcement officials created. *Walton*, 44 F.3d. at 1305. As explained above, a student called 911 multiple times asking for the police to come to her classroom, and even offered to open the door, but she was ordered not to do so because the police barricaded her in. Am. Compl. ¶¶ 165, 175. The policy of trapping students inside the classroom deprived E.T. "of the ability or opportunity to provide for [their] own care and safety." *Walton*, 44 F.3d. at 1305. The Amended Complaint adequately states a claim under the custodial relationship theory.

V. PLAINTIFFS HAVE STATED A *MONELL* CLAIM FOUNDED ON UNLAWFUL SEIZURE (FOURTH AMENDMENT)

Regarding Plaintiffs' unlawful seizure claim, Uvalde County again recycles the same argument described above that the policy to barricade E.T. in with the shooter was not a "moving force" of any constitutional violation. Br. at 17. For the same reasons discussed *supra*, this argument fails. Otherwise, Uvalde County argues that no *Monell* claim can be founded on an unlawful seizure violation because, they argue, no seizure occurred, and thus there was no underlying constitutional violation or "high predictability" that the barricade policy would lead to an unlawful seizure. Br. at 13–17. This argument also fails.

A person is seized when an officer, "by means of physical force *or show of authority*, has *in some way* restrained" that person's liberty. *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) (emphasis added). Physical force is not required for a seizure to occur—without it, only "submission to the assertion of authority is necessary." *McLin v. Ard*, 866 F.3d 682, 691 (5th Cir. 2017) (quoting *California v. Hodari D.*, 499 U.S. 621, 626 (1991)). When considering whether a seizure occurred, courts must assess, "in view of all of the circumstances surrounding the incident, [whether] a reasonable person would have believed that he was not free to leave." *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988).

Here, Uvalde County's policy to barricade E.T. in a classroom, forbidding anyone from opening the door and attempting to save them, constitutes a seizure, as it caused E.T. to believe they could not leave the classroom, despite making efforts to do so. Uvalde County's central claim is that Plaintiffs failed to allege facts that "would allow this Court to intuit as a matter of law that the law enforcement officers present at Robb Elementary were using their physical force and authority to prevent E.T. from leaving Robb Elementary—should they have somehow made good their escape from the murderous [the shooter]." Br. at 14. But this argument is contradicted by the allegations in the Amended Complaint that Nolasco and his co-defendants repeatedly prevented others from breaching the classrooms, killing the shooter, or allowing Plaintiffs to leave the classrooms. They decided to treat the shooter as "barricaded," thereby barricading children inside a classroom with the shooter. Am. Compl. ¶ 160. By "treating [the shooter] as a 'barricaded subject,' and trapping him inside a classroom with dozens of victims, [the officers] made the situation much more dangerous than it had been before law enforcement arrived." *Id.* ¶ 151. These actions constitute a "show of authority" that coerced Plaintiffs to stay in the classroom with the shooter, as "no reasonable person would have felt free to leave the classroom." *Id.*

Uvalde County is similarly incorrect in arguing that Plaintiffs "do not plead any facts establishing that E.T. reasonably could have believed that she was 'not free to leave' as a result of law enforcement's authority—as opposed to the shooter's using force and senseless violence to keep the

children hostage." Br. at 14. As the Amended Complaint alleges, students in both classrooms called 911 multiple times while trapped in the classrooms with the shooter, begging for assistance from the Uvalde County Defendants or any of their fellow officers. Am. Compl. ¶¶ 165–66, 168, 175. During the 12:36 p.m. 911 call, the student asked the dispatcher if they could "tell the police to come to my room," and asked if was permitted to "open the door to her classroom so that the police gathered outside could enter" and so that she could leave. *Id.* ¶ 175. But because of Nolasco's decision to create a policy of barricading children inside the classroom rather than breaching it, the dispatcher ordered the student not to do so. *Id.* And the children heard officers in the hallway, *id.* ¶¶ 151, 175, and thus believed that the police were intentionally keeping them in the classroom, which they were. Given the dispatcher's instruction and the known presence of officers, a jury could infer that it was reasonable for E.T. to "have believed that [she] was not free to leave," *Michigan*, 486 U.S. at 573, due to Nolasco's show of authority and barricade policy, and thus that a seizure occurred.[6]

A jury could plainly infer as well that Nolasco would have thought it "highly predictable" that the students would not try to escape specifically because they were being prevented from doing so by law enforcement. A jury could plainly conclude that had E.T. attempted to leave the classroom, the masses of law enforcement officers waiting outside the classroom would have assumed that the person opening the door was the shooter and would have been likely to shoot her. Drawing all "reasonable inferences . . . in a light most favorable to the plaintiff," *Schydlower*, 231 F.R.D. at 498, Plaintiffs have stated a claim for unlawful seizure.

VI. PLAINTIFFS HAVE STATED FAILURE TO TRAIN CLAIMS (DUE PROCESS AND FOURTH AMENDMENT)

[6] The Uvalde County Defendants rely upon *L.S. ex rel. Hernandez v. Peterson*, an 11th Circuit case arising out of the Parkland school shooting. 982 F.3d 1323 (11th Cir. 2020). Br. at 12–14. But in that case, the students argued that a custodial relationship had arisen from the presence of armed school-safety officers. *Id*. at 1330. That is a far cry from the hundreds of armed officers present at Robb Elementary School on May 24, 2022, who barricaded students inside the school and used force (including tasers and handcuffs) to prevent parents from entering. Am. Compl. ¶¶ 147, 155, 176–77.

Plaintiffs have also stated a "failure to train" claim under *Monell* as the Amended Complaint plausibly alleges that "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." *Porter v. Epps*, 659 F.3d 440, 446 (5th Cir. 2011).

First, the Amended Complaint plainly alleges that Uvalde County "failed to ensure that their police officers were adequately trained and failed to develop meaningful plans to address an active shooter incident." Am. Compl. ¶ 291. It alleges that "only 20% of Uvalde County Sheriff's Office employees had received active shooter training as of May 24, 2022." *Id.* Even the County's chief policymaker "Defendant Nolasco had not completed a state active shooter training, and his office did not have an active shooter policy in place on May 24, 2022." *Id.* ¶ 162. Plaintiffs meet the first *Porter* prong.

Second, the Amended Complaint is replete with allegations that plausibly establish a causal link between the County's failure to conduct active shooter training and the harms E.T. suffered. *Porter*, 659 F.3d at 446. The Amended Complaint details at length the national standards for active shooter trainings, and notes that from the Columbine shooting onwards, "[p]riority number one is to 'stop the killing.' Responding officers must have the tools and training to immediately make entry and stop an active shooter. And if they lack one or both, officers were still expected to stop the shooter." Am. Compl. ¶ 108. The Amended Complaint further alleges that the officers—including all Uvalde County officers—failed to "make any attempt to 'stop the killing,' the primary tenet of all active shooter training and responses. Instead, they ignored this information and continued to treat the shooter as a 'barricaded subject.'" *Id.* ¶ 166. Because officers were not adequately trained to "immediately distract, isolate, and neutralize the shooter," the Uvalde County officers "did not do what they should have been trained to do: stop the killing." *Id.* ¶ 188. These allegations make plain the causal link between the County's failure to train its officers and the harms E.T. suffered, which resulted "in a law

enforcement response to the shooting at Robb Elementary that worsened the danger and resulted in children being trapped in two classrooms with their murderer for 77 minutes as he continued killing and as E.T. and her classmates lay dying and suffering." *Id.* ¶ 189.

Third, the Amended Complaint adequately alleges deliberate indifference. *Porter*, 659 F.3d at 446. Plaintiffs may establish deliberate indifference by alleging facts showing "that the inadequacy of the training is obvious and likely to result in a constitutional violation." *Goodman v. Harris County*, 571 F.3d 388, 395 (5th Cir. 2009). The County's central, factual, and false claim on this point is that Plaintiffs have failed to allege facts giving rise to any "reason [for the County] to believe that a lack of training would lead to an impending rights violation." Br. at 19. But Plaintiffs allege several facts demonstrating that the County was on notice that failing to train 80% of its officers on active shooter protocols, and not having *any* official active shooter policy, would likely result in these constitutional violations. For example, the Amended Complaint details the many steps law enforcement offices nationwide have taken to "change[] tactics on active shooter situations" in the wake of the Columbine school shooting in 1999, "23 years before the events at Robb Elementary School." Am. Compl. ¶¶ 108, 290. National standards promulgated by the ALERRT Center put Uvalde County on notice that innocent civilians could be killed if officers were not trained properly on responding to active shooters. *Id.* ¶ 108. The Amended Complaint further alleges that "[m]ass shootings occur in schools across Texas and the United States with alarming frequency" and that "[c]hildren in schools routinely undergo active shooter trainings." *Id.* ¶ 98.

In short, the Amended Complaint contains numerous factual allegations from which a jury could reasonably conclude that it was "obvious" to Uvalde County that a lack of active shooter training would result in needless deaths, and thus "likely to result in a constitutional violation." *Goodman*, 571 F.3d at 395. The County may disagree on the merits at trial, but this "is necessarily a fact intensive inquiry which must be resolved during discovery or at the Rule 56 stage," *Bae Sys. Resol. Inc.*, 2020 WL

7482036, at *2, and therefore, "a motion to dismiss is not appropriate at this stage in the litigation," *Dixon*, 2017 WL 2778245, at *2.[7]

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

"[D]ismissal under Rule 12(b)(6) generally is not immediately final or on the merits because the district court normally will give the plaintiff leave to file an amended complaint to see if the shortcomings of the original document can be corrected." 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (3d ed. 2002). This is so, "even when the district judge doubts that the plaintiff will be able to overcome the shortcomings in the initial pleading." Wright & Miller, supra, § 1357.

Plaintiffs have met the pleading standard necessary to assert viable claims, and Uvalde County's motion should therefore be denied. In the alternative, however, Plaintiffs respectfully request that the Court allow them to amend the Amended Complaint to allege additional facts to the extent the Court finds the allegations therein insufficient on any claim. For example, Plaintiffs recently obtained unabridged audio recordings of a student's 911 calls and can allege additional facts about those calls. Further, Plaintiffs expect to receive shortly additional, non-public footage of the shooting, including unreleased body camera footage, which may reveal additional facts underpinning Uvalde County's unconstitutional policy.

CONCLUSION

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

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[7] Uvalde County argues that the cases arising out of the Columbine shooting are instructive as to the failure to train. However, the County only cites cases favorable to it and conveniently omits a Columbine case where the court found that a "custodial" or "special" relationship existed. In *Sanders v. Board of County Commissioners of Jefferson*, the court found that certain officers "acted affirmatively to restrain the freedom of [shooting victims including the plaintiff], to act on their own behalf" and thus that the plaintiff properly stated a substantive due process claim "under the special relationship doctrine." 192 F. Supp. 2d 1094, 1119 (D. Colo. 2001). That is precisely the argument Plaintiffs make here. What is more, the court in Sanders concluded that the plaintiff could overcome qualified immunity because "[u]nder the unique circumstances of the case, the alleged unlawfulness was apparent in light of existing law." *Id.* at 1124.

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Respectfully Submitted,

/s/ Molly Thomas-Jensen

EVERYTOWN LAW
Eric Tirschwell (*pro hac vice*)
Molly Thomas-Jensen (*pro hac vice*)
Ryan Gerber (*pro hac vice*)
Laura Keeley (*pro hac vice*)
450 Lexington Avenue, P.O. Box #4184
New York, NY 10017
646-324-8226
etirschwell@everytown.org
mthomasjensen@everytown.org
rgerber@everytown.org
lkeeley@everytown.org

LAW OFFICES OF BLAS DELGADO, P.C.
Blas H. Delgado
2806 Fredericksburg Rd., Ste. 116
San Antonio, TX 78201
210-227-4186
delgadoblas@yahoo.com

LM LAW GROUP, PLLC
David Lopez (*pro hac vice*)
2806 Fredericksburg Rd., Ste. 118
San Antonio, TX 78201
210-396-2045
Moreno.LMLawGroup@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of May 2023, I served the following counsel through electronic service (ECF) as authorized by Fed. R. Civ. Pro. 5:

David M. Prichard
David R. Montpas
Prichard Young, LLP
Union Square, Suite 600
10101 Reunion Place
San Antonio, Texas 78216

Stephen B. Barron
Blair J. Leake
Wright and Greenhill PC
4700 Mueller Blvd.
Suite 200
Austin, TX 78723

Thomas Phillip Brandt
Charles D. Livingston
Laura Dahl O'Leary
Fanning Harper Martinson Brandt & Kutchin, P.C.
One Glen Lakes
8140 Walnut Hill Lane
Ste 200
Dallas, TX 75231

D. Craig Wood
Katie E. Payne
Walsh Gallegos Trevino Kyle & Robinson P.C.
1020 N.E. Loop 410, Suite 450
San Antonio, Texas 78209

Andre M. Landry , III
Gray Reed
1300 Post Oak Blvd., Suite 2000
Houston, TX 77056

Clarissa M. Rodriguez
Patrick Charles Bernal
Denton, Navarro, Rocha & Bernal PC
2517 North Main Avenue
San Antonio, TX 78212

Charles Straight Frigerio
Hector Xavier Saenz
Law Offices of Charles S Frigerio
Riverview Towers
111 Soledad, Suite 465
San Antonio, TX 78205

William Scott Helfand
Norman Ray Giles
Randy Edward Lopez
Lewis Brisbois Bisgaard & Smith LLP
24 Greenway Plaza, Suite 1400
Houston, TX 77046

Briana Webb
Office of the Attorney General
Law Enforcement Defense Division
300 W 15th St.
Austin, TX 78701

/s/ Molly Thomas-Jensen
Molly Thomas-Jensen