IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

CHRISTINA ZAMORA, individually and as next friend of M.Z.; RUBEN ZAMORA, individually and as next friend of M.Z., and JAMIE TORRES, individually and as next friend of K.T., *Plaintiffs*,	§	
v.	§	Case No. 2:23-cv-00017-AM
DANIEL DEFENSE, LLC, et al., *Defendants*.	§	

UVALDE COUNTY'S REPLY IN SUPPORT OF THE MOTION TO DISMISS

TO THE HONORABLE CHIEF DISTRICT COURT JUDGE ALIA MOSES:

Uvalde County and its officials, as sued in their official capacity, file this Reply in Support of their Rule 12(b)(6) Motion to Dismiss:

I. ARGUMENTS & AUTHORITIES

A. Plaintiffs' admitted in their Complaint they were relying on the single decision exception. This Court should ignore their improper attempt to inject a new theory in their response. Regardless, the response fails to articulate a "pattern of misconduct" custom or policy as a matter of law.

1. Plaintiffs may have now realized that they cannot satisfy the "single decision" exception to the general *Monell* framework.[1] This is unsurprising, as the exception is rare and narrow.[2] Instead, Plaintiffs argue that "contrary to Uvalde County's argument" it was not "just a single incident of misconduct" but that instead they plead a "pattern of misconduct."[3] Plaintiffs never alleged this claim before, and their Complaint is utterly devoid of any allegation of a pattern of misconduct sufficient to state a municipal policy born out of a "pattern of unconstitutional conduct" or custom.[4] "New factual allegations in briefs are not appropriately considered on a motion to dismiss" and a plaintiff may not "buttress" their lawsuit with new theories in their Response.[5]

2. Regardless, as a matter of law, "[a] customary policy consists of actions that have occurred ***for so long and with such frequency*** that the course of conduct demonstrates the governing body's knowledge and acceptance of the disputed conduct."[6] Plaintiffs never plead that Uvalde County ever dealt with a school shooting before—and they therefore have failed to plead that Uvalde County ever had a custom or pattern of misconduct to "barricade" children

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[1] Normally, a Plaintiff must identify one of the "two forms" that an official policy may take to impose liability on a municipality for its own policies. A plaintiff may normally either point to an explicit written policy statement or in the alternative, a plaintiff may demonstrate a persistent widespread practice of city officials. *Zarnow v. City of Witchita Falls, Tex.*, 614 F.3d 161, 169 (5th Cir. 2010).
[2] *Valle v. City of Houston*, 613 F.3d 536, 549 (5th Cir. 2010).
[3] Pl. Resp. to Uvalde County Mot. to Dismiss, pg. 13, Dkt. # 90.
[4] *Zarnow*, 614 F.3d at 169.
[5] *Wilhite v. Harvey*, 861 Fed. Appx. 588, 592 (5th Cir. 2021).
[6] *Zarnow*, 614 F.3d at 169 (citing *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984), on reh'g, 739 F.2d 993 (5th Cir. 1984)).

inside buildings with an active shooter.[7] Accordingly, Plaintiffs' new theory fails as a matter of law. As it concerns the County and its *Monell* liability, this is clearly a single decision exception case—and the Plaintiffs' substantial briefing supporting this theory demonstrates that they agree *sub silentio*.

B. In *Fisher*, the Fifth Circuit explicitly shut the door on Plaintiffs argument that a robust consensus could establish the state-created danger doctrine in its courts. It was accordingly not highly predictable for an Uvalde County final policymaker to anticipate a constitutional violation.

3. The single decision exception cannot be applied unless it was highly predictable the municipal policymaker that their single decision would be unlawful. To be "highly predictable" the constitutional harm in question "must've been the plainly obvious" consequence of the policymaker's single decision. This requires "unmistakable culpability and clearly connected causation."[8] Specifically, culpability requires "a complete disregard of the risk that a violation of a particular constitutional right [would] follow the decision."[9] A municipal policymaker logically cannot disregard a constitutional right that does not exist. As the Fifth Circuit wrote earlier this year—"[t]he problem for [plaintiff] is that the Fifth Circuit has never recognized the state-created danger exception"[10]

4. In *Fisher*, the plaintiff argued—as the Plaintiffs in this case do—that the out-of-circuit "robust consensus of persuasive authority" was sufficient to clearly establish the state-created danger theory.[11] True, the *Fisher* Court acknowledged that "a majority of our sister circuits"

[7] Pls.' Orig. Compl. ¶ 143, Dkt. # 1 (this is the closest Plaintiffs get, and it fails to allege a prior school shooting or policy of barricading victims inside a room with their murderer.).
[8] *Liggins v. Duncanville, Tex.*, 52 F.4th 953, 955 (5th Cir. 2022).
[9] *Id*.
[10] *Fisher v. Moore*, 6262 F.4th 912, 917 (5th Cir. 2023).
[11] Pl. Resp. to Uvalde County Mot. to Dismiss, pg. 17, Dkt. # 90 (Plaintiffs arguing that the ten different circuits adopting the theory is "plainly a "robust consensus of persuasive authority");

have adopted "the state-created danger theory of liability in one form or another."[12] But the *Fisher* Court slammed the door shut on this argument when it held, "the mere fact that a large number of courts [have] recognized the existence of a right to be free from state-created danger in some circumstances is insufficient to clearly establish the theory of liability in our circuit. We [have] reasoned that, despite widespread acceptance of the state-created danger doctrine in other circuits, the circuits were not unanimous in the doctrine's contours or its application".

5. Thus, the Fifth Circuit rejected the "argument that out-of-circuit precedent clearly established her substantive due process right to be free from state-created danger."[13] Accordingly, it could never have been "highly predictable" to any Uvalde County final policymaker that any "single decision" to stage around the Robb Elementary school would amount to a complete disregard of a known Constitutional right to be free from a state-created danger—because that right does not exist in the Fifth Circuit.

C. Even if the state-created danger doctrine existed, any single decision by a Uvalde County policymaker was not the moving force of any injury to the children.

6. Plaintiffs own Complaint ***admitted*** that Ramos was inside the classroom and shooting before any law enforcement officer arrived on scene.[14] The murderer fired 100 rounds in those 2.5 minutes and would fire only 17 more after that time—11 at police attempting entry for the first time, and 6 more subsequently.[15] Plaintiffs claim that this argument is specious—but how can it be? No Uvalde County officer shot the children, and no officer placed the children in that classroom. Even under *Johnson*—the only Fifth Circuit case Plaintiffs have managed to cite that

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contra Fisher, 62 F.4th at 917 ("[A]s [plaintiff points out, sometimes a robust consensus of persuasive authority may suffice to clearly establish a constitutional right.").

[12] *Fisher*, 62 F.4th at fn. 17 (collecting cases).

[13] *Id*. at 917.

[14] Pls.' Orig. Compl., pg. 47, Dkt. # 1.

[15] The undersigned recognize that Plaintiffs have not included these exact numbers in their Complaint, and that they instead come from the ALERRT Report.

even remotely supports their theory—recognizes that even a ***hypothetical*** state-created danger doctrine requires the state to have "callous[ly]" made "decisions" to "interpose [the plaintiff] in the midst of a criminally dangerous environment."[16] That is simply not what happened here. The children were in that classroom with Ramos before they got there, and they would have been in that classroom with Ramos even if officers ***never*** got there. No policy of Uvalde County was accordingly the "moving force" behind any of the children's injuries.

D. Plaintiffs have failed as a matter of law to plausibly plead that any single decision by a final policymaker of Uvalde created a custodial relationship between the children and the officers, because no such relationship was "highly predictable" to the County.

7. Again, the single decision exception cannot be applied unless it was highly predictable to the County's policymaker that their single decision would be unlawful. To be "highly predictable" the constitutional harm in question "must've been the plainly obvious" consequence of the policymaker's single decision. This requires "unmistakable culpability and clearly connected causation."[17]

8. As of 2023, the Fifth Circuit identified ***only three scenarios*** where they have previously held that a special relationship is created. Those scenarios are "(1) when the state ***incarcerates a prisoner***, (2) involuntarily commits someone to an institution, or (3) places a child in foster care."[18] The Robb elementary school students fit none of those categories, and Plaintiffs never plead otherwise. Accordingly, it can hardly be highly predictable to any Uvalde County final policymaker that they were entering into a custodial relationship with the Robb elementary student as a result of their single decision to stage around the classrooms.

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[16] *Johnson v. Dallas Indep Sch. Dist.*, 38 F.3d 198, 202 (5th Cir. 1994).
[17] *Liggins v. Duncanville, Tex.*, 52 F.4th 953, 955 (5th Cir. 2022).
[18] *Doe v. Bridge City Indep. Sch. Dist.*, No. 20-40596, 2021 WL 4900296, at *2 (5th Cir. Oct. 20, 2021) (emphasis added) (citing *Doe ex rel. Magee v. Covington Cnty, Sch Dist. ex rel. Keys*, 675 F.3d 849, 856 (5th Cir. 2012)).

9. In fact, Plaintiffs' entire argument to support a custodial "special relationship" between the Uvalde County defendants and the children rests on their claim that this is "no ordinary case."[19] But the crux of their entire argument relies on one sentence from a panel opinion in *Walton* that was ***explicitly overruled*** on rehearing en banc.[20] Despite conceding that the Uvalde defendants are generally correct that there is no custodial relationship for public school children—they argue that the language from the *Walton* panel left the door open for a "special relationship." But, yet again, Plaintiffs are simply wrong on the case law.

10. Sitting en banc, the Fifth Circuit stated in no uncertain terms in *Walton* that "the state creates a special relationship with a person ***only*** when the person is involuntarily taken ***into state custody*** and ***held against his will*** through the ***affirmative*** power of the state; otherwise, the state has no duty arising under the Constitution to protect its citizens against harm by private actors."[21] The en banc Court accordingly repudiated the panel opinion that found a special relationship exploring what other cases had "left open." This Court should similarly repudiate Plaintiffs' identical argument here.

11. Moreover, Plaintiffs' Response makes no attempt to find any case law within the Fifth Circuit where it or the Supreme Court has held that a special relationship can be created under *Walton* via wild allegations that ***the State*** took children ***involuntarily into custody and held them against their will*** when they staged around a school in an effort to ***save*** the children from the private violence of a maniac. Plaintiffs' failure to find such case law was inevitable—because no such holding has ever been rendered by either the Fifth Circuit or the Supreme Court.

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[19] Pl. Resp. to Uvalde County Mot. to Dismiss, pg. 20, Dkt. # 90.
[20] *Walton v. Alexander*, 20 F.3d 1350, 1354 (5th Cir. 1994), on reh'g en banc, 44 F.3d 1297 (5th Cir. 1995) (the overruled panel wrote that the "cases leave open the possibility that the 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.").
[21] *Walton v. Alexander*, 44 F.3d 1297, 1304 (5th Cir. 1995) (emphasis added).

12. At bottom, Plaintiffs are essentially asking this Court to create a fourth category of special relationships and hold that the school children were the "quasi-prisoners" of the State because of the methods the State chose in its attempts to effectuate their rescue "from harm at the hands of a private actor."[22] This is a completely novel argument, and because it is novel, such a theory of Constitutional wrongdoing could have in no way been "highly predictable" to Uvalde County and its policymakers. The County's 12(b)(6) must be granted accordingly, because Plaintiffs' again fail to satisfy the "extremely narrow" "single incident exception."[23]

E. Neither the County nor its final policymakers ever made the single *intentional* decision to seize the Robb Elementary School children within the meaning of the Fourth Amendment.

13. Frequently, single decision exception cases turn on a policymaker giving one single order that is facially constitutional, but which leads to results that a plaintiff contends were unconstitutional, and those results were "highly predictable." For example, in *Liggins* a police chief order his officers to enter the plaintiff's home, which resulted in one of those officers shooting—i.e. "seizing"—the *Liggins* plaintiff. That plaintiff argued that it was highly predictable that this unconstitutional seizure would occur—but the Fifth Circuit disagreed, holding that there was no pattern of similar violations that would have put the Police Chief on notice that this result would have been "highly predictable" sufficient to create *Monell* liability.[24] Likewise in *Valle* the plaintiff claimed that a supervisor officer who ordered agents to enter the home of a mentally ill man—who was subsequently shot and killed—was a highly predictable result of a "single decision." The Fifth Circuit again disagreed, holding that there was a lack of

[22] *Id*. (holding that state does not "have a special relationship with a student that would require the school to protect the student from harm at the hands of a private actor.").
[23] *Valle v. City of Houston*, 613 F.3d 536, 549 (5th Cir. 2010).
[24] *Liggins*, 52 F.4th at 955.

repetition to put the policymaker on sufficient notice that their decision would have a highly predictable unconstitutional result.[25]

14. Just as in *Liggins* and *Valle*—an order to stage police officers around a barricaded shooter is not facially unconstitutional—nor is it an intentional attempt to "seize" anyone ***but the barricaded shooter***. "A seizure requires the use of force *with intent to restrain*. Accidental force will not qualify."[26] The Supreme Court of the United States in *Torres* made it abundantly clear that an officer cannot accidentally seize a citizen under the Fourth Amendment. When no physical force is used, a show of authority may suffice to affect a seizure. However, "a seizure occurs" only "when an officer *objectively* manifests an ***intent*** to restrain the liberty of an individual through either use of physical force or a show of authority.[27]

15. Plaintiffs have artfully pleaded that the "effect"[28] of a policymaker's order for officers to stage around the Robb Elementary school to seize the shooter had the side-effect of also seizing the students in the classroom with Ramos. This is tantamount to pleading that the Uvalde County created a policy of "accidentally" seizing students while attempting to *intentionally* seize Ramos. This is insufficient as a matter of law to amount to a Fourth Amendment seizure—and therefore it could never have been the highly predictable and unconstitutional result of a policymaker's single decision.

16. Furthermore, it would have never been highly predictable to a policymaker that the Robb Elementary School children would have a subjective belief that they were not free to leave due to any single decision by Uvalde County's policymaker. Such a show of authority must have been sufficient that "in the light of all of the circumstances surrounding the incident, a ***reasonable***

[25] *Id*. (citing *Valle*, 613 F.3d at 542).
[26] *Torres v. Madrid*, 141 S.Ct. 989, 998 (2021) (emphasis original).
[27] *United States v. Wright*, 57 F.4th 524, 530 (5th Cir. 2023) (emphasis added).
[28] Pl. Orig. Compl., pg. 51, Dkt. # 1.

person would have believed that [they] were not free to leave."[29] This objective test is designed to ensure that the Fourth Amendment's protections do not vary "with the state of mind of the particular individual claiming a violation."[30]

17. Here, Plaintiffs claim that they have peered into their crystal ball and determined that the presence of the officers "caused Plaintiffs to believe they could not leave the classroom."[31] This argument merely posits something that M.Z. and K.T.—two children—might have subjectively believed, but it does not save this claim from dismissal under the applicable objective test—and it further does not make such a subjective belief "highly predictable" to the County. Plaintiffs' seizure claim against the County must accordingly also be dismissed.

F. There can be no *Monell* liability for failure to train.

18. Plaintiffs' Response in support of their failure-to-train claim fails to grapple with the actual standard articulated recently in *Allen v. Hays*.[32] Again, failure-to-train *Monell* liability is a "notoriously difficult theory on which to base a *Monell* claim, as it requires plaintiffs to prove that the municipality was aware of an impending rights violation but was deliberately indifferent to it."[33] This requires pleading that the ***specific*** duties assigned to the County's deputies created a "need for more or different training [that was] ***so obvious*** and the inadequacy ***so likely*** to result in the violation of constitutional rights, that the policymakers can reasonably be said to have been deliberately indifferent to the need."[34]

19. Here, Plaintiffs do a workman like job reciting how school shootings have entered the public eye since the Columbine shooting, and how national standards have been distributed by

[29] *Wright*, 57 F.4th at 531.
[30] *McLin v. Ard*, 866 F.3d 682, 691 (5th Cir. 2017).
[31] Pl. Resp. to Uvalde County Officers' Mot. to Dismiss, pg. 22, Dkt. # 90.
[32] *Allen v. Hays*, 65 F.4th 736 (5th Cir. 2023).
[33] *Id*.
[34] *Id*. (citing *Littell v. Hous. Indep. Sch. Dist.*, 894 F.3d 616, 624 (5th Cir. 2018)).

the ALERRT Center in response. However, none of those facts actually engage with the facts that *Allen* requires the Plaintiffs to plead. Plaintiffs do not plead that the Uvalde County Sherriff's Office has previously dealt with a school shooting and its prior response made it obvious they needed more training.

20. Nor have Plaintiffs pleaded that the Uvalde deputies are specifically assigned duties that ***regularly*** call on them to: (1) police schools, (2) respond to mass school shootings, or (3) breach school doorways guarded by maniacs with high-powered rifles. Absent such pleadings, Plaintiffs cannot meet their pleading burden to show that Uvalde County made a "conscious" choice to be deliberately indifferent to training that the County ***knew*** that it needed for its deputies to perform their specific regularly assigned duties. Plaintiffs have not pleaded sufficient facts to clear this high bar, and the claims must accordingly be dismissed.

II. PRAYER

21. WHEREFORE PREMISES CONSIDERED, Defendants Uvalde County, and all of the Uvalde individuals sued in their official capacity, respectfully request that this Court grant this Motion to Dismiss all of Plaintiffs' claims, and for all other relief to which they may be justly entitled in law or equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of July, 2023, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service/E-Mail, in accordance with the Federal Rules of Civil Procedure.

/s/ Stephen B. Barron
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