UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

CHRISTINA ZAMORA, INDIVIDUALLY AND NEXT FRIEND OF M.Z., et al.,	§	
Plaintiffs,	§	Case No. 2:23-CV-00017-AM
v.	§	
DANIEL DEFENSE, LLC, et al,	§	
Defendants.	§	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT CITY OF UVALDE'S RULE 12(b)(1) AND (6) MOTION TO DISMISS PLAINTIFFS' ORIGINAL COMPLAINT

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

Christina Zamora, as next friend of M.Z.; Ruben Zamora, as next friend of M.Z.; and Jamie Torres, as next friend of K.T. (collectively "Plaintiffs") file this brief in opposition to the motion to dismiss filed by Defendants City of Uvalde ("Uvalde City" or the "City") and Lieutenant Mariano Pargas ("Pargas") in his official capacity (together, the "City Defendants"). The Court should deny that motion for the reasons set forth below.

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UVALDE CITY 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 Plaintiff M.Z. celebrated receiving several awards at Robb Elementary School. It was supposed to be the day that Plaintiff K.T. shared bubbles with her new fourth-grade classmates, cementing friendships she had recently made due to being new in town. It was supposed to be a day of joy, of pride, of excitement.

Instead, at 11:33 a.m. that day, a man armed with an assault rifle entered Robb classrooms 111 and 112 and began shooting. Over the next 77 minutes, Uvalde City officers, including Lieutenant, Acting Police Chief, and chief policymaker Defendant Mariano Pargas, instituted a policy of treating the shooter as barricaded rather than active. Through this policy, Pargas and the City barricaded the students in the classrooms with the shooter, preventing anyone from attempting to rescue them. As a result, the gunman murdered 19 children and two teachers. Seventeen other children, M.Z. and K.T. included, were wounded. The surviving children suffered extreme and severe psychological trauma.

Fewer than three minutes after the shooting began, officers, including Defendant Pargas, arrived at the scene of the massacre, separated from the shooter only by a classroom door. In accordance with their active shooter training, there was only one reasonable course of action available: to breach the doors to classrooms 111 and 112, immediately engage the active shooter, and neutralize him mere minutes after he began shooting. Pargas and the officers under his command could have saved countless lives that day. Instead, acting on behalf of Uvalde City, Pargas decided to institute a new policy of barricading the children in the classroom with the shooter, which led to the needless suffering and death and prevented desperate parents from attempting to save their children.

The City's policy, as instituted through Pargas's conduct, violated M.Z. and K.T.'s constitutional rights. The policy of barricading M.Z. and K.T. in their classrooms was an unlawful seizure in violation of their rights under the Fourth Amendment. The policy of trapping M.Z. and K.T. in a room with a shooter, while actively preventing anyone else from rescuing them, violated Plaintiffs' substantive due process rights under the Fourteenth Amendment under both the state-

created danger and custodial relationship theories of liability. In the alternative, the City's failure to train its officers to follow the active shooter policy, as evidenced by the fact that no City officer breached the classroom and stopped the killing, violated Plaintiffs' Fourth and Fourteenth Amendment rights.

Through the actions of chief policymaker Pargas, Uvalde City sealed the fates of many children that day. For 77 agonizing minutes, he enabled the shooter to murder and severely wound two classrooms full of children. The Court should deny the City Defendants' motion in its entirety.

FACTUAL BACKGROUND

On May 24, 2022, Plaintiffs M.Z. and K.T. woke up excited for a special day at Robb Elementary School in Uvalde, Texas. Compl. ¶¶ 1-2.[1] It was awards day, a day to celebrate the hard-earned achievements of M.Z., K.T., and their fourth-grade classmates. M.Z.'s and K.T.'s excitement was abruptly cut short. At approximately 11:30 a.m., Salvador Ramos walked into a set of connected classrooms, rooms 111 and 112 of Robb Elementary, armed with an assault rifle, and eventually murdered 19 children and two teachers, wounding at least 17 other children. *Id.* ¶¶ 3-4. He remained in those classrooms for a total of 77 minutes before police entered. *Id.* ¶ 4. M.Z. was shot repeatedly and very nearly died; K.T. was hit by shrapnel and pretended to be dead to survive, laying in a pool of blood, with her eyes open to mirror her dead and dying classmates around her. *Id.* ¶ 5. Both suffered the most extreme psychological trauma that a fourth-grade child could possibly endure.

At 12:10 p.m., K.T. found her teacher's phone, wiped the blood off the screen, called 911, and begged the dispatcher for help. *Id.* ¶ 169. 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., K.T. called 911 again, and told the dispatcher, "'There's a school shooting.'" *Id.* ¶ 179. The students, including M.Z. and K.T., heard the officers outside of the classroom in the hallway. *Id.* ¶¶ 147, 179. K.T. asked the dispatcher, "'Can you tell the police to come

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

to my room?"" *Id.* K.T. bravely suggested to the dispatcher that she could do what should have been the officers' responsibility: she could "open the door to her classroom so that the police gathered outside could enter." *Id.* But because they chose to trap the children inside with the shooter, "[t]he dispatcher told her not to do that." *Id.* K.T. complied with the dispatcher's order and did not open the classroom door. *Id.* Given this show of force and express instructions, K.T. and M.Z. were not free to leave the classroom. *Id.* ¶¶ 155, 161, 179.

The injuries to K.T. and M.Z. were a direct result of the decision by Uvalde City policymaker Pargas to barricade the children in the classrooms with the shooter. At all relevant times, Pargas was a lieutenant and acting chief of the Uvalde Police Department ("UPD") and the chief policymaker of the UPD with final policymaking authority for the City of Uvalde and the UPD. *Id.* ¶ 30. Pargas was among the first law enforcement officers to arrive on scene. *Id.* ¶ 116. Fewer than three minutes after the shooting began, a group of officers entered Robb Elementary and approached classrooms 111 and 112; Pargas was "right behind the initial group." *Id.* ¶ 128. At 11:35 p.m., the initial group of officers, including Pargas, "heard the shots being fired in the classrooms" and, "[a]ccording to training and prior policy," were thus "required to engage [the] active shooter[] immediately." *Id.* Pargas ignored his training and overrode existing active shooter policy and instead "created a new policy," choosing "to barricade children, including M.Z. and K.T., inside a classroom with an active shooter, delaying emergency medical and rescue services and depriving them of the comfort of their family." *Id.* ¶ 129. Once Pargas and the officers with him "realized that Ramos was armed with an AR-15 rifle," they requested additional equipment "instead of doing what was required under the active shooter policy, to breach the classroom immediately and to stop the killing." *Id.* ¶ 131. In so doing, Pargas "violated active shooter protocols and began implementing the new policy of barricading Ramos in the classroom with the students." *Id.*

Pargas acted intentionally and with full knowledge that his conduct would lead to additional suffering and needless deaths of fourth graders. At 12:12 p.m., as Pargas and officers under his

command stood back and allowed the massacre to continue, Pargas received a direct communication from a radio dispatch "that one of the classrooms was 'full of victims.'" *Id.* ¶ 170. At that point, Pargas "stepped out of the school building to contact the dispatcher for more information about [] K.T.'s 911 call" and "was even given her name." *Id.* Still, despite having received official confirmation that children were still alive in the classrooms, Pargas and the officers under his command "did not 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 Ramos as a 'barricaded subject.'" *Id.*

At 12:16 p.m., Pargas called "his UPD dispatchers to get further details about the radio message concerning a classroom 'full of victims' that he received four minutes earlier." *Id.* ¶ 172. He was informed that the call came from a student and "that eight or nine were still alive in the room, but the student couldn't be sure of the exact number because it was hard to tell who was injured versus who was already dead." *Id.* At 12:17 p.m., he re-entered the school briefly, "mentioned victims to a Border Patrol Officer, and walked back out of the school at 12:20." *Id.* Aware that his decision to barricade children with an active shooter had already resulted in suffering and death and risked the additional deaths of "eight or nine" children, Pargas "spent the next 30 minutes outside and never attempted to breach the classroom as the active shooter protocol required." *Id.*

* * *

Just as K.T. followed orders not to open the door to her classroom, Pargas, too, never opened the classroom door. Despite knowing that more kids would be murdered, Pargas and the officers under his command did not breach the classroom or shoot the gunman and, instead, 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 Pargas had arrived on scene. *Id.* ¶ 188.

ARGUMENT

I. THE COURT HAS JURISDICTION OVER PLAINTIFFS' CLAIMS

In a single paragraph, the City Defendants argue that the Court lacks jurisdiction over Plaintiffs' claims. *See* Br. at 7.[2] They provide no support for this argument, and simply state in a single conclusory sentence that "Plaintiffs fail to" establish jurisdiction. *Id.* For the avoidance of doubt, the Court has jurisdiction over Plaintiffs' claims against the City Defendants pursuant to 28 U.S.C. § 1331 and 1343 under the federal question doctrine, as Plaintiffs seek redress for violations of their constitutional rights under Section 1983. *See* Compl. ¶ 16.

II. LEGAL STANDARD

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, 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 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).

[2] Citations to "Br." are to the City Defendants' Rule 12(B)(1) and (6) Motion to Dismiss Plaintiffs' Original Complaint, ECF No. 84.

III. PLAINTIFFS HAVE ALLEGED THAT DEFENDANT PARGAS CREATED OFFICIAL CITY POLICY THROUGH HIS DECISION-MAKING (ALL CLAIMS)

A. Pargas Was an Official Policymaker.

The City Defendants acknowledge that liability under *Monell v. New York City Dept. of Soc. Servs*, 436 U.S. 658 (2018) may be found as to the City for the actions of its official policymakers, but argue that Defendant Pargas was not one such policymaker, because the "City Manager" "directs and supervises the administration of all departments, including the police department in which Pargas served as Acting Police Chief on the day of the incident." Br. at 14. But a government official being a policymaker for *Monell* purposes is not dependent on whether they "direct[] and supervise[]" a government department pursuant to a City Charter. *See Gros v. City of Grand Prairie, Tex.*, 181 F.3d 613, 616 (5th Cir. 1999) ("The sources of state law which should be used to discern which municipal officials possess final policymaking authority are state and local positive law, as well as 'custom or usage' having the force of law."). Rather, as the Supreme Court stated in *Monell*, an official policymaker is one "whose edicts or acts may fairly be said to represent official policy." *Monell*, 436 U.S. at 694.

Policymakers are those that "decide the goals for a particular city function and devise the means of achieving those goals," *Bennett v. City of Slidell*, 728 F.2d 762, 769 (5th Cir. 1984), and police chiefs are traditionally those that "decide the goals" and means of achieving them for police departments. The City Defendants rely upon *Webb v. Town of Saint Joseph*, in support of their argument that Pargas was not an official policymaker, but as that case makes clear, whether someone is a policymaker is a question of state law. 925 F.3d 209, 215 (5th Cir. 2019). And "[a]lthough the Fifth Circuit has not held that Texas police chiefs are final policymakers for their municipalities as a matter of law, it has 'previously found that Texas police chiefs are final policymakers for their municipalities, and it has often not been a disputed issue in the cases.'" *Roundtree v. City of San Antonio, Texas*, No. SA18CV01117JKPESC, 2022 WL 903260, at *5 (W.D. Tex. Mar. 28, 2022) (quoting *Garza v. City of Donna*, 922 F.3d 626, 637 (5th Cir. 2019) and collecting cases). In any event, even if Acting Chief Pargas were not the "final policymaker," the Fifth Circuit has held that "a municipal employee may

also possess final policymaking authority where the final policymaker has delegated that authority, either expressly or impliedly." *Webb*, 925 F.3d at 215.

Plaintiffs have met their burden at the pleading stage to allege that Pargas was the official policymaker representing Uvalde City in alleging both (i) that Pargas was the acting chief of the UPD at the time of the shooting, and (ii) that he exercised that authority in deciding to overrule active shooter protocol in treating the shooter as a barricaded subject. *See Flanagan v. City of Dallas, Tex.*, 48 F. Supp. 3d 941, 951-52 (N.D. Tex. 2014) ("At this juncture, the Court accepts as true Plaintiffs' allegation as to Chief Brown's policymaking authority for purposes of the City's Rule 12 dismissal motion."). The City has delegated decision-making authority over the "goals" of the police department to the police chief in decreeing, through the Uvalde Municipal Code, that "[t]he executive officer of the police department shall be the chief of police." Uvalde Municipal Code § 2.56.010. The Municipal Code also provides that, "[i]n the prevention and suppression of crime and arrest of offenders, the chief shall have, possess and execute like power, authority and jurisdiction as the sheriff." *Id.* § 2.56.030. Uvalde City is liable under *Monell* for Pargas's actions on May 24, 2022. *See Brooks v. George Cnty, Miss.*, 84 F.3d 157, 165 (5th Cir. 1996).[3]

B. Pargas' Decision to Treat the Shooter as a Barricaded Subject Created City Policy

Under *Monell*, "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*, 84 F.3d at 165 (5th Cir. 1996) (same). The City Defendants have argued that the *Monell* claims fail because here there was no traditional "policy or

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

pattern," *see* Br. at 15, but fail to engage with the single decision exception as discussed in *Pembaur*.[4] The City Defendants then argue that "[a] moving force under *Monell* must also result from the [alleged] deliberate indifference resulting in a constitutional violation." *Id.*

At this early stage, Plaintiffs need not allege with factual certainty the deliberate decisions made by Pargas, but rather must plead facts viewed in the light most favorable to Plaintiffs, which "make it *plausible* that [Pargas] 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). That standard is met here, as the Complaint is replete with allegations which make it more than plausible that Pargas made "a deliberate choice to" barricade the children in with the shooter, "a course of action [] made from among various alternatives" available to Pargas that day. *Id.* at 317 (quoting *Pembaur*, 475 U.S. at 483).

The Complaint alleges that, almost immediately upon arriving at the scene of the shooting, Pargas affirmatively acted to create and advance the City's new policy of barricading the children in the classrooms with the shooter. For example, once Pargas and the officers with him "realized that Ramos was armed with an AR-15 rifle," and even though some of the responding officers were armed with AR-15s, they requested additional equipment "instead of doing what was required under the active shooter policy, to breach the classroom immediately and to stop the killing." Compl. ¶ 131. Evidencing his deliberate indifference for the lives of the students in the classroom, Pargas did not change course and breach the classroom, as active shooter protocol required him to do, after receiving a direct communication from a radio dispatch "that one of the classrooms was 'full of victims.'" *Id.* ¶¶ 170-72. Despite learning "that eight or nine were still alive in the room, but the student couldn't be sure of the exact number because it was hard to tell who was injured versus who was already dead," *id.*, Pargas made the conscious choice to "ignore[] this information and continue[] to treat [the shooter]

[4] The City Defendants appear to conflate the single decision exception to the traditional "policy or pattern" rule with the "single incident exception" to the notice requirements of failure to train claims. *See* Section VII, *infra.* The case cited by the City Defendants for the proposition that the single decision exception requires "'highly predictable consequences' resulting in an injury," Br. at 16 (quoting *Valle v. City of Houston*, 613 F.3d 536, 549 (5th Cir. 2010)), is discussing the single incident exception in failure to train claims, not the single decision exception, which does not carry such a requirement.

as a 'barricaded subject.'" *Id.* ¶ 170. He acted affirmatively when he decided not to breach the classroom, but to simply "mention[] victims to a Border Patrol Officer, and walked back out of the school at 12:20." *Id.* ¶ 172

Finally, Pargas made these affirmative decisions despite having "various alternatives" available to him. *Cherry Knoll*, 922 F.3d at 317. Pargas could have breached the classroom immediately, instead of deciding to institute a new policy of barricading everyone inside the classroom. He had numerous opportunities to do so before and after learning that the classrooms were "full of victims" or that "eight or nine [children] were still alive in the room." Compl. ¶ 172. These factual allegations make it more than plausible that Pargas made "a deliberate choice" *Cherry Knoll*, 922 F.3d at 317, to 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 Pargas's affirmative conduct.

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

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).

The Complaint alleges that Plaintiffs reasonably did not believe that they were free to leave the classroom due to Pargas's actions (and the actions of those under his command) and the resultant policy to barricade the students in the classroom. Plaintiff K.T. called 911 multiple times while trapped in the classroom with the shooter, begging for assistance from Pargas or any of his fellow officers. Compl. ¶¶ 169–70, 179. She asked the police to come to her room and volunteered to open the door for them so that she could leave. *Id.* ¶ 179. As detailed above, Pargas spoke to UPD dispatchers and

learned about K.T.'s call, as well as the likelihood that "eight or nine" students were still alive in the classrooms. *Id.* ¶ 172. But because of Pargas's decision to create a policy of barricading children inside the classroom rather than breaching it, the dispatcher ordered K.T. not to open the door to her classroom. *Id.* ¶ 179. And the children, including M.Z. and K.T., heard Pargas and the other officers in the hallway, *id.* ¶¶ 147, 155, 179, 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 K.T. to "have believed that [she] was not free to leave," *Michigan*, 486 U.S. at 573, due to Pargas's (and the other officers under his command) show of authority and barricade policy, and thus that a seizure occurred. A jury could also conclude that had K.T. attempted to leave the classroom, the 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.

The City Defendants primarily argue that Plaintiffs' claim "*should be analyzed under the Fourth Amendment*." *Id.* at 9 (emphasis in original). Plaintiffs do not disagree—their unlawful seizure claim was brought under the Fourth Amendment, and the Complaint references the Fourteenth Amendment in connection with the Fourth Amendment seizure claim only because "the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth." *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).[5]

The City Defendants' only arguments relevant to Plaintiffs' Fourth Amendment claim are that K.T. and M.Z. could not have been seized because they were "unknown" bystanders and that there was no "intentional seizure" on the part of the officers. Br. at 8-9. The City Defendants cite *Blair v. City of Dallas* to argue that bystanders who were unknown to the officers cannot be seized inadvertently. 666 Fed. App'x 337, 341-42 (5th Cir. 2016). But in *Blair*, two officers followed someone to his apartment and then fired their guns at him, unaware that a woman and a young child were inside the apartment. *Id.* at 339. The Fifth Circuit concluded that there was "no evidence that the officers

[5] Plaintiffs address the Fourteenth Amendment cases cited in this section of the City's brief in Section V, *infra*.

knew [the woman and child] were inside the apartment when they fired the shots," which was instrumental to their conclusion that the "officers' use of force was not deliberately applied" to the woman and child. *Id.* at 342. Here, by contrast, Pargas and the officers under his command knew that the classrooms were filled with fourth graders. As to the City Defendants' second argument, the Complaint is replete with allegations of affirmative and intentional conduct by Pargas in instituting and perpetuating the City's policy of barricading the students in the classroom. The City Defendants' argument thus fails, as a jury could infer from that affirmative conduct that Pargas and his officers "intentionally" acted to keep the students in the classroom with the shooter, and thus that an "intentional seizure occurred." Drawing all reasonable inferences in "a light most favorable to the plaintiff," *Schydlower*, 231 F.R.D. at 498, Plaintiffs have stated an unlawful seizure claim.

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

The special relationship between Uvalde City's chief policymaker and Plaintiffs provides a first independent source of liability under the Due Process Clause. 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). 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).

In moving to dismiss this claim, the City Defendants argue 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. The City Defendants rely upon *Doe v. Hillsboro Independent School District*, 113 F.3d 1412 (5th Cir. 1997) and *Meloy v. Alief Independent School District*, No. H-05-2840, 2007 WL 9752122 (S.D. Tex. Feb. 20, 2007), both cases that reject the notion that Texas's compulsory school attendance laws create a custodial relationship. But here, unlike in those cases, K.T. and M.Z. were not free to leave because they were surrounded by a barricade of armed law enforcement officers and were being instructed to remain in the classroom, not because of school attendance requirements. *Hillsboro* and *Meloy* are not analogous.

The City Defendants may well disagree that Pargas'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). 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. As described *supra*, Factual Background and Section III.B., the Complaint alleges that the Pargas, on behalf of Uvalde City, took M.Z. and K.T.'s lives in his hands, placing them in a situation which provided "no realistic means of voluntarily terminating" the barricade outside classrooms 111 and 112 and deprived M.Z. and K.T. "of the ability or opportunity to provide for [their] own care and safety." *Walton*, 44 F.3d. at 1305. The Complaint states a claim under the custodial relationship theory.

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

The state-created danger theory is a second independent source of liability under the Due Process Clause. The City Defendants argue that the state-created danger theory is not recognized in the Fifth Circuit, echoing other defendants' arguments as to qualified immunity. Contrary to the City's arguments, however, the Fifth Circuit has not expressly *rejected* the theory, and rather has laid out the

theory's elements. 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.

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

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 . . . *it played no part in their creation, nor did it do anything to render him any more vulnerable to them.*") (emphasis added).[6] 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 Independent School District*, 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

[6] Ten circuits 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) (same); *Kneipp v. Tedder*, 95 F.3d 1199, 1211 (3d Cir. 1996) ("[T]he state-created danger theory is a viable mechanism for establishing constitutional claim 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) (same); *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) (same).

> 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.

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. 2014) ("[T]his case does not sustain a state-created danger claim, even assuming that theory's validity."). While the City Defendants have argued that the recent decision in *Fisher v. Moore*, __F. 4th __, 2023 WL 4539588 (5th Cir. Jul. 14, 2023) precludes a state-created danger claim here, *Fisher* does

not bar this case. *Fisher* does hold that the state-created danger doctrine was not "clearly established," as of November 2019, but while that is central to a qualified immunity analysis, it is not relevant here, where Plaintiffs sue under *Monell* and thus qualified immunity has no bearing. Moreover, *Fisher* expressly left "for another day" the question of whether to adopt the doctrine.

B. If There Were Ever a Case to Expressly Adopt the State-Created Danger Theory, It Is This One.

Because the Fifth Circuit has laid out the theory's elements, Plaintiffs should be allowed to develop evidence as to a state-created danger claim. *See Kemp v. City of Houston*, No. CIV.A. H-10-3111, 2013 WL 4459049, at *6 (S.D. Tex. Aug. 16, 2013). If ever a set of facts justified the express adoption of this theory of liability, this case would manifestly qualify.

Although the City Defendants have argued that "there is no state action that overcomes the absence of a legal duty to prevent the criminal actions of a private actor," Br. at 11, the facts alleged in the Complaint show that Pargas and the officers under his command created and maintained a barricade that ensured that K.T. and M.Z. would be trapped with an active shooter while also cutting off sources of aid. Prior Fifth Circuit cases have declined to apply the state-created danger theory on particular facts due to lacking a key requirement: 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 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, because Pargas, on behalf of the City and joined by the officers under his command, "knowingly

placed" M.Z. and K.T. in danger. *Johnson*, 38 F.3d at 200. He knew that children were still alive and being shot at, and yet decided to barricade them in the classroom anyways. *See* Compl. ¶¶ 129, 131, 140, 170–72. They knowingly chose to call for additional equipment upon hearing shots being fired in the classroom, rather than immediately engaging the shooter as active shooter policy required, *id.* ¶¶ 131, 140, and to step out of the school building and to merely "mention[] victims" to other officers, rather than attempt to save them, upon learning that "eight or nine" children were still alive in the classrooms, *id.* ¶¶ 170, 172. These were affirmative actions taken by Pargas (and those under his command), even though he full-well knew that children were alive and being shot at in the classrooms. That is deliberate indifference, and the precise scenario envisioned by the state-created danger theory.[7]

The City Defendants also argue that intent to harm is required in Fourteenth Amendment claims, citing *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). Br. at 8. But *Lewis* did not announce so broad a rule. The case involved "a high-speed automobile chase aimed at apprehending a suspected offender," which resulted in a crash that left a passenger in the chased vehicle dead. *Id.* at 836-37. The Supreme Court had granted *certiorari* to resolve a circuit split "over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case," *id.* at 839 and it limited its holding to pursuit cases. *Id.* at 854 (holding that "purpose to cause harm. . . ought to be needed for due process liability **in a pursuit case**" (emphasis added)). In a high-speed pursuit case such as *Lewis* or *Plumhoff v. Rickard*, 572 U.S. 765 (2014) (also relied upon by the City, *see* Br. at 8), it

[7] The City Defendants argue that deliberate indifference is insufficient to establish liability for a substantive due process claim outside the context of custodial relationships. *See* Br. at 12–13. They are wrong as a matter of law. The Fifth Circuit was clear in *Johnson* that for liability to attach under the state-created danger theory, "the defendants must have been at least **deliberately indifferent** to the plight of the plaintiff." *Johnson*, 38 F.3d at 201 (emphasis added). The City Defendants' argument that the Supreme Court has not found deliberate indifference sufficient in non-custodial contexts also fails, because as discussed *supra* Section V, a custodial relationship existed in this case. Even if it did not, though, and the "conscience shocking" standard applied, Pargas's conduct shocks the conscience. This case is not one, as the City Defendants suggest, that required only "split-second judgments." Br. at 13. Rather, Pargas arrived on-scene of the shooting mere minutes after it began, and instituted and perpetuated a policy of barricading the shooter in the classroom *for over an hour* through decisions that did not require "split-second judgments," but rather involved prolonged deliberation with other officers and police dispatchers. *See* Compl. ¶¶ 116, 129, 131, 170–72. These decisions thus do not implicate an intent "to cause harm" standard as the City suggests. *See* Br. at 13. Rather, because Pargas's actions were "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n. 8 (1998).

may make sense to argue, as the City Defendants do, that Plaintiffs "merely second guess" "split-second judgments." Br. at 8, 13. But here, Pargas and others under his command had countless "split-seconds"—74 minutes' worth of split-seconds—during which they willfully disregarded the mandates of active shooter response.[8]

Uvalde City's policy of barricading students in with the shooter prolonged and exacerbated a dangerous and deadly environment, and Pargas knew it was dangerous when he created the policy. Given Pargas's status as chief policymaker, Uvalde City is liable for those decisions.[9]

VII. PLAINTIFFS HAVE STATED FAILURE TO TRAIN CLAIMS (DUE PROCESS AND FOURTH AMENDMENT)[10]

Plaintiffs have also stated a "failure to train" claim under *Monell* as the Complaint 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 Complaint plainly alleges that Uvalde City "failed to ensure that their police officers were adequately trained and failed to develop meaningful plans to address an active shooter incident."

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[8] The City Defendants also cite *Vielma v. Gruler*, 808 Fed. Appx. 872 (2020) to argue that no liability can be imposed in this case. *See* Br. at 9. But *Vielma* is inapposite, as the plaintiffs there did not argue that the state-created danger exception to *DeShaney*'s general rule applied, and thus that decision 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. *Id.* at 879.

[9] Citing *Blackburn v. City of Marshall*, 42 F.3d 925, 936-37 (5th Cir. 1995) and other cases, the City Defendants argue that Plaintiffs were required to "identify a property interest of which they were deprived." Br. at 13. They misrepresent *Blackburn* and the other cases it cites, which make clear that to establish a substantive due process claim, "a plaintiff must first identify a life, liberty, **or** property interest." *Blackburn*, 42 F.3d at 935 (emphasis added). For the avoidance of doubt, Plaintiffs' substantive due process claims are founded on their "life" and "liberty" interests—*i.e.*, to not be barricaded in a classroom with and shot at by an active shooter—not a property interest. The City Defendants' other citations are thus similarly inapposite. *See Thompson v. Bass*, 616 F.2d 1259, 1265 (5th Cir. 1980) (in employment context, analyzing property interest because a "life" interest was not at issue); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (analyzing property interest in the context of procedural, not substantive, due process).

[10] Contrary to the City Defendants' assertion, Br. at 19–20, Plaintiffs do not bring claims for the denial of medical care. Plaintiffs' allegations that they were denied medical care for 77 minutes speak to the City's deliberate indifference in the context of Plaintiffs unlawful seizure, state-created danger, and custodial relationship claims.

Compl. ¶ 287. It alleges that "as of May 24, 2022, approximately half of the Uvalde Police Department Officers had not received active shooter training." *Id.* ¶ 193. Plaintiffs meet the first *Porter* prong.

Second, contrary to the City Defendants' first argument on this claim, the Complaint is replete with allegations that plausibly establish a causal link between the City's failure to conduct active shooter training and the harms Plaintiffs suffered, and thus that the failure to train was a "moving force" in causing Plaintiffs' injuries. *Porter*, 659 F.3d at 446; *see also* Compl. ¶¶ 110, 170, 195-96. Further, the City Defendants cite no case law for its assertion that Plaintiffs need to allege the precise "training the officers received" to meet this prong. Br. at 17. Rather, at the motion to dismiss stage, Plaintiffs need only identify training "procedures that are inadequate." *E.G. by Gonzalez v. Bond*, No. 1:16-CV-0068-BL, 2017 WL 3493124, at *6 (N.D. Tex. June 29, 2017), *report and recommendation adopted*, No. 1:16-CV-068-C, 2017 WL 3491853 (N.D. Tex. Aug. 14, 2017).

To that end, the Complaint details at length the specific national standards for active shooter trainings and how the City's inadequate training failed to meet those standards. It notes that from the Columbine shooting onwards, "[r]esponding 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." Compl. ¶ 110. The Complaint further alleges that the officers—including Pargas and the officers under his command—failed to "make any attempt to 'stop the killing,' the primary tenet of all active shooter training and responses." *Id.* ¶ 170. Because officers were not adequately trained to "immediately distract, isolate, and neutralize the shooter," the Uvalde City officers "did not do what they should have been trained to do: stop the killing." *Id.* ¶ 195. These allegations make plain the causal link between the City's failure to train its officers and the harms Plaintiffs 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 M.Z., K.T., and their classmates lay dying and suffering." *Id.* ¶ 196.

Third, contrary to the City Defendants' next argument on this claim, the 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 obviously likely to result in a constitutional violation." *Goodman v. Harris County*, 571 F.3d 388, 395 (5th Cir. 2009). The Defendants' central argument on this point is that Plaintiffs only cite "a single incident." Br. at 18.[11] Courts in the Fifth Circuit have noted that such an argument is more appropriate for a motion for summary judgment after the benefit of discovery, rather than a motion to dismiss. *See, e.g.*, *Vargas v. City of San Antonio*, No. SA-08-CA-1026-OG, 2009 WL 10700088, at *2 (W.D. Tex. May 15, 2009); *see also Diaz v. City of San Antonio*, No. SA-05-CA-0888-RF, 2006 WL 509061, at *2 (W.D. Tex. Feb. 22, 2006). In any case, even if Plaintiffs had to allege that a "pattern" of school shootings put the City on notice regarding its inadequate training policies, the Complaint alleges facts demonstrating that the City was on notice that failing to train 50% of its officers on active shooter protocols would likely result in these constitutional violations. For example, the Complaint 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." Compl. ¶ 100.[12] The Complaint also 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." *Id.* ¶ 286. Further, national standards promulgated by the ALERRT Center put Uvalde City on notice that innocent civilians could be killed if officers were not trained properly on responding to active shooters. *Id.* ¶ 110. The City Defendants may disagree on

[11] *Saenz v. City of El Paso*, 637 F. App'x 828, 832 (5th Cir. 2016), cited by Defendants, is inapposite. *See* Br. at 18. Plaintiffs here have plead facts similar to the Fifth Circuit's hypothetical in *Speck v. Wiginton*, 606 Fed. App'x 733 (5th Cir. 2015)—sending police officers to an elementary school to confront an active shooter without training officers on active shooter protocol is analogous to capturing fleeing felons in public without having been trained on the use of deadly force.

[12] Those school shootings are more analogous to this case than the 21 deadly force incidents over 19 years relied on by the plaintiff in *Saenz*. The plaintiff did not provide any additional context for 11 of those instances, and the District Court there noted that none of the other ten incidents occurred in pretrial detention (where the incident that gave rise to the lawsuit had occurred). *Saenz v. City of El Paso*, No. EP-14-CV-244-PRM, 2015 WL 12976854, at *4 (W.D. Tex. Apr. 23, 2015), *aff'd*, 637 F. App'x 828 (5th Cir. 2016).

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.

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

Plaintiffs have met the pleading standard necessary to assert viable claims, and the City Defendants' motion should therefore be denied. In the alternative, however, Plaintiffs respectfully request that the Court allow them to amend the Complaint to allege additional facts to the extent the Court finds the allegations therein insufficient on any claim. For example, on May 24, 2023, the Washington Post published an investigation into law enforcement officers' response to the shooting. *See* Joyce Sohyun Lee, et al., *A year after Uvalde, officers who botched response face few consequences*, WASHINGTON POST (May 24, 2023), https://www.washingtonpost.com/nation/2023/05/24/uvalde-school-shooting-police-response/. Similarly, Plaintiffs also recently obtained unabridged audio recordings of K.T.'s 911 calls and can allege additional facts about those calls. Finally, a state judge recently ordered the Texas Department of Public Safety to release records related to the Uvalde shooting response by police officers; those records are expected to be released in the fall. Lexi Churchill and William Melhado, *Judge says DPS must release documents related to Uvalde shooting response*, TEXAS TRIBUNE (June 29, 2023), https://www.texastribune.org/2023/06/29/uvalde-shooting-dps-records/. Generally, courts within the Fifth Circuit allow plaintiffs at least one opportunity to cure any pleading deficiencies before dismissing a case under Rule 12(b)(6). *See Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002).

CONCLUSION

For the foregoing reasons, the Court should deny the City Defendants' motion to dismiss. In the alternative, Plaintiffs respectfully request the opportunity to amend their Complaint.

Dated: July 28, 2023

By: */s/Eric Abrams*

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