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 CONSOLIDATED INDEPENDENT SCHOOL DISTRICT'S 12(b)(1) MOTION TO DISMISS AND 12(b)(6) MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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 filed by Defendant Uvalde Consolidated Independent School District ("UCISD"). The Court should deny that motion for the reasons set forth below.

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STATEMENT OF RELEVANT FACTS

May 24, 2022 was supposed to be the day that fourth-grade student E.T. celebrated the end of the school year with an awards ceremony at Robb Elementary School. 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, UCISD officers, including Police Chief and chief policymaker Defendant Pedro Arredondo, instituted a policy of treating the shooter as a barricaded subject rather than an active shooter. Through this policy, Arredondo and UCISD 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 were wounded.

Fewer than three minutes after the shooting began, officers, including Arredondo, arrived at the scene of the massacre, separated from the shooter only by a classroom door. As required by his training and UCISD policy, Arredondo should have immediately engaged the active shooter. As Police Chief, Arredondo was required to instruct the officers under his command to act in accordance with their training and breach the door of the classroom. Arredondo was required to neutralize the shooter mere minutes after he began shooting. Instead, acting on behalf of UCISD, Arredondo ignored UCISD's active shooter policy, overrode his training, and proceeded to reinforce his newly instituted barricade policy, leading to the needless death of dozens. When other officers tried to do the right thing and breach the classroom, Arredondo stood firm on USISD's new policy, ordering them to "f*****g wait." And he did so despite knowing "we probably have kids in there [classrooms 111 and 112]." Faced with trying to stop an ongoing massacre of children versus intentionally trapping those children in a room with an active shooter, Arredondo chose the latter.

UCISD's policy, as instituted by Arredondo, 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, while actively preventing anyone else from rescuing her, violated her substantive due process rights under the Fourteenth Amendment

under both the state-created danger and custodial relationship theories of liability. In the alternative, UCISD's failure to train its officers to follow the active shooter policy, as evidenced by the fact that no UCISD officer breached the classroom, violated Plaintiffs' Fourth and Fourteenth Amendment rights. Through the actions of its chief policymaker Arredondo, UCISD sealed the fates of many children that day. For 77 agonizing minutes, its policy enabled the shooter to murder and severely wound two classrooms full of children. The Court should deny UCISD's motion.

FACTUAL BACKGROUND

On May 24, 2022, E.T. woke up nervous about whether she would make the all-star team in softball. Am. Compl. ¶ 1.[1] Though her mother had already left for work when E.T. woke up, they spoke on the phone before E.T. went to school. *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.'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 E.T. and 18 other children and two teachers, wounding at least 17 other children. *Id.* ¶ 2. He remained in those classrooms for a total of 77 minutes before police entered. *Id.* ¶ 3.

Approximately three minutes after the shooting began, Arredondo entered the school from the south side of the building. *Id.* ¶ 126. He was one of the first officers to arrive to classrooms 111 and 112. *Id.* Arredondo publicly stated the day after the shooting that he immediately heard "'plenty' of gunshots" and even saw gunshots coming out through the walls of the classroom. *Id.* As one of the first to arrive on-scene, Arredondo was required by UCISD policy to engage the active shooter and put an end to the bloodshed occurring in classrooms 111 and 112, just minutes after it began. *Id.* Arredondo chose not to do so. *Id.* One minute after Arredondo's arrival, Ramos resumed shooting inside the classrooms. *Id.* ¶ 130.

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

Faced with the chance to save the lives of several fourth-grade children, Arredondo chose—and instructed others—to institute a new UCISD policy to do the opposite. As UCISD Police Chief, Arredondo overrode established active shooter policy (a policy he had co-authored) and instead "barricade[d] children, including E.T., inside a classroom with an active shooter, delaying rescue and emergency medical services and depriving them of the comfort of their family." *Id.* ¶¶ 130-31. "He intentionally trapped children in the room with the shooter." *Id.* ¶ 131.

Over the next 77 minutes, Arredondo acted to implement UCISD's newly instituted policy. At 11:43 a.m., he "gave orders to officers to stand down while the shooter was actively shooting teachers and students trapped in classrooms 111 and 112." *Id.* ¶ 149. Again at 12:09 p.m., Arredondo instructed other officers "not to perform a breach of the classroom," all while children "were dying in the classrooms that officers had surrounded." *Id.* ¶ 164. At 12:20 p.m., as a group of officers prepared to breach the classroom in defiance of Arredondo's instructions, Arredondo said, "'tell them to f*****g wait.'" *Id.* ¶ 170. Due to Arredondo's decision and orders for other officers to stand down while children were murdered, "[m]any family members, hearing gunfire and seeing no discernable police response, wanted to go into the classroom themselves." *Id.* ¶ 176. Arredondo never made any attempt to enter the classroom, even though he later admitted that he was "'certain' he heard the shooter reload one time—which should have signaled to him that 1) the threat was not over and 2) he had an opportunity to breach and engage." *Id.* ¶ 190. As he later explained in an interview, the only other idea he had was "'to start shooting through that wall.'" *Id.* ¶ 170.

Arredondo did all of this knowingly and intentionally. During the shooting, he told other officers he knew that "we probably have kids in there [Classrooms 111 and 112]." *Id.* ¶ 164. In an interview shortly after the shooting, he admitted he "had him [Ramos] contained" and "kn[e]w there's probably victims in there," referring to classrooms 111 and 112. *Id.* ¶ 131.

At 12:10 p.m., a student found her teacher's phone, wiped the blood off the screen, and called 911. *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. *Id.* ¶ 175. The student heard the 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 should have been the officers' responsibility: she could "open the door to her classroom so that the police gathered outside could enter." *Id.* But "[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.

Despite knowing that his actions would likely lead to more kids being murdered, Arredondo created and implemented a new UCISD policy to barricade children in a classroom with the active shooter. He never breached the classroom or shot the gunman and took active steps to prevent others from doing so—it took a U.S. Customs and Border Patrol led group of officers to do so, 77 minutes after Arredondo arrived on scene. *Id.* ¶ 182.

ARGUMENT

I. 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). On a Rule 12(b)(1) motion, although the burden is on the party asserting subject matter jurisdiction (here, Plaintiffs), "a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

II. PLAINTIFFS HAVE ALLEGED THAT DEFENDANT ARREDONDO CREATED OFFICIAL UCISD POLICY THROUGH HIS DECISION-MAKING (ALL CLAIMS)

A. Arredondo Was an Official Policymaker

UCISD acknowledges that liability under *Monell v. New York City Dept. of Soc. Servs*, 436 U.S. 658 (1978) may be found as to the school district for the actions of its official policymakers, but argues that Arredondo was not a policymaker. 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 their departments. Accordingly, "[a]lthough the Fifth Circuit has not held that Texas police chiefs are final policymakers for their municipalities as 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). What's more, the Fifth Circuit has made it clear that "the specific identity of the policymaker is a legal question that need not be pled." *Groden v. City of Dallas*, 826 F.3d 280, 284 (5th Cir. 2016). "[P]laintiffs can state a claim for municipal liability as long as they plead sufficient facts to allow the court to reasonably infer that the Board either adopted a policy that caused [the plaintiff's] injury or delegated to a subordinate officer the authority to adopt such a policy." *Longoria Next Friend*

of M.L. v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 271 (5th Cir. 2019) (citing *Groden*, 826 F.3d at 284, 286). Arredondo, as Police Chief of UCISD, had policymaking authority.[2] Am. Compl. ¶ 27.

UCISD's arguments to the contrary are unpersuasive. It first argues that Arredondo is not an official policymaker because "in Texas, only the board of trustees has final policy-making authority in an independent school district." Br. at 13.[3] While the board of trustees may be the governing body with ultimate authority and responsibility over UCISD, it may still "delegate policymaking power by an express statement, by a job description or by other formal action." *Bennett*, 728 F.2d at 769. Additionally, "[a]n official may be a policymaker even if a separate governing body retains some powers." *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 168 (5th Cir. 2010) (holding police chief was a policymaker despite being appointed by the City Manager). For this reason, to determine whether a person is a final policymaker, the focus is not on whether the official is a policymaker in general, but rather if the official is the "final policymaker with respect to the specific action at issue." *Brady v. Fort Bend County*, 145 F.3d 691, 699 (5th Cir. 1998) (citing *McMillian v. Monroe County*, 520 U.S. 781, 785-86 (1997)); *see also Gros v. City of Grand Prairie*, 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."). UCISD cites other provisions of the Texas Education Code, but they are all consistent with the board of trustees delegating official policymaking authority to Defendant Arredondo in his capacity as Police Chief. *See, e.g.*, Br. at 13-14 (quoting Tex. Educ. Code §§ 11.151, 37.081(d)–(f). It is also irrelevant that "the 'chief of police of the school district police department shall be accountable to the superintendent and shall report to the superintendent,'" Br. at 14 (quoting Tex. Educ. Code § 37.081(f)), as governing bodies

[2] Plaintiffs no longer maintain their claim for punitive damages against UCISD. Similarly, Plaintiffs no longer maintain their claim against Defendant Arredondo in his official capacity.

[3] Citations to "Br." are to UCISD's 12(b)(1) Motion to Dismiss and 12(b)(6) Motion to Dismiss Plaintiffs' First Amended Complaint, ECF No. 105.

may delegate policymaking authority while "retain[ing] the prerogative of the purse and final legal control by which it may limit or revoke the authority of the official." *Bennett*, 728 F.2d at 769.

UCISD's blanket statement that "school staff, including chiefs of police, do not have final policy-making authority in a school district," Br. at 13, is thus incorrect. None of the cases UCISD cites for this proposition supports such a broad statement of the law. *See Jett v. Dallas Indep. School Dist.*, 7 F.3d 1241, 1245 (5th Cir. 1993) (regarding whether a superintendent specifically had policymaking authority over teacher transfers, not police officers); *Teague v. Texas City Indep. Sch. Dist.,* 386 F.Supp.2d 893, 896 (S.D. Tex. 2005), *aff'd* 185 Fed. Appx. 355 (5th Cir. 2006) (regarding teachers, the principal, and other staff members, not police officers); *Ali v. La Marque ISD Educ. Found., Inc.,* No. CIV.A. G-05-276, 2005 WL 1668146, at *3 (S.D. Tex. July 14, 2005) (regarding the authority over "off duty law enforcement activities of school district policemen," not on-duty police officers). *Jett* is instructive as it distinguishes between delegations of decision-making and policy-making authority. 7 F.3d at 1246-48. In *Jett*, the Fifth Circuit relied upon language in *City of St. Louis v. Prapotnik*, a Supreme Court case that held that "[w]hen an official's *discretionary* decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." 485 U.S. 112, 127 (1988) (emphasis added).[4] Here, Arredondo was the co-author of the school's active shooter policy, which had been ratified by the school board, and he had no discretion under the active shooter policy to not breach the classrooms; his departure from that policy was not discretionary decision-making, per *Jett*, but rather the exercise of policy-making authority. *See also Doe v. City of Springtown*, No. 4:19-CV-00166-P-BP, 2019 WL 5685369, at *5 (N.D. Tex. Aug. 26, 2019) (reading *Jett* to allow school board to delegate policymaking authority), *report and recommendation adopted*, No. 4:19-CV-00166-P, 2019 WL 5684492 (N.D. Tex. Nov. 1, 2019); Am. Compl. ¶¶ 108-09, 130. Plaintiffs have met their burden at the pleading stage to allege that Arredondo was an official

[4] *Praprotnik* further notes that "if a particular decision by a subordinate was cast in the form of a policy statement and expressly approved by the supervising policymaker," that is an indicator of policymaking authority. 485 U.S. at 130.

policymaker representing UCSID and that he exercised that authority in deciding to overrule active shooter protocol in favor of a new policy of treating the shooter as a barricaded subject.

B. Arredondo's Actions Were the "Moving Force" of Plaintiffs' Constitutional Violations

UCISD argues that Plaintiffs' *Monell* claims fail because of a lack of causation—*i.e.*, that the policy in question was not the "moving force" behind Plaintiffs' constitutional violations. *See* Br. at 14. UCISD is incorrect. In considering this question, courts evaluate if the constitutional violation stemmed from whether "a deliberate choice to follow a course of action is made from among various alternatives." *Cherry Knoll, L.L.C. v. Jones*, 922 F.3d 309, 317 (5th Cir. 2019). At this early stage, Plaintiffs need not allege with factual certainty the deliberate decisions made by Arredondo, but rather must plead facts which "make it *plausible* that [Arredondo] made the deliberate decision" to barricade the students in with the shooter, causing constitutional violations. *Id.* at 317 (emphasis added). The Amended Complaint is replete with allegations which, viewed in the light most favorable to Plaintiffs, make it more than plausible that Arredondo made "a deliberate choice to" barricade the children in with the shooter, "a course of action [] made from among various alternatives" available to Arredondo, which resulted in Plaintiffs' constitutional violations. *Id.* at 317 (quoting *Pembaur*, 475 U.S. at 483).

The Amended Complaint alleges that, upon arriving at Robb Elementary approximately three minutes after the shooting began, Arredondo immediately heard "'plenty' of gunshots" and saw gunshots coming out through the walls of the classroom but chose not to breach the classroom in favor of a new policy of barricading the children in with the shooter. Am. Compl. ¶ 126. It alleges that "he intentionally trapped children in the room with the shooter." *Id.* ¶ 131. Instead of breaching the classroom, Arredondo affirmatively prevented others from attempting to breach the classroom on multiple occasions, including by giving "orders to officers to stand down while the shooter was actively shooting teachers and students trapped in classrooms 111 and 112," *id.* ¶¶ 149, 164, 170; and as Arredondo later admitted, he chose not to breach the classroom when he heard the gunman reload, a clear opportunity to neutralize the shooter, *id.* ¶ 190.

The Amended Complaint also makes it plausible that Arredondo did this despite having "various alternatives" available to him. *Cherry Knoll*, 922 F.3d at 317. Arredondo admitted to other officers during the shooting that he knew there were children in classrooms 11 and 112, Am. Compl. ¶ 164, and admitted that he immediately heard gunshots and saw bullets coming out through the walls of the classroom, *id.* ¶ 126. These factual allegations make it more than plausible that Arredondo made "a deliberate choice" *Cherry Knoll*, 922 F.3d at 317, to override existing policy requiring him to breach the classroom in favor of a new policy of barricading the children in with the shooter and preventing anyone from trying to save them. As such, Plaintiffs have adequately alleged that UCISD's policy was the "moving force" behind their constitutional violations.

C. Liability is Attributable to UCISD Under the Single Decision Exception

Finally, UCISD argues that the *Monell* claims fail because here there was no traditional "widespread custom or practice." Br. at 14-15. UCISD ignores that 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 v. George Cnty., Miss.*, 84 F.3d 157, 165 (5th Cir. 1996) (same). UCISD's arguments on this point are thus irrelevant, as Plaintiffs' *Monell* claim is founded on Arredondo's decisions, rather than a "widespread custom or practice." Br. at 14.

III. 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).

UCISD's central, factual, and false argument is that "there are no allegations that any of the students or teachers were arrested, subjected to any physical force, or ordered or told not to leave the classrooms or otherwise impeded from doing so." Br. at 12. UCISD is correct that there are no allegations as to any arrests or use of physical force, theories of liability that Plaintiffs do not rely on. But the Amended Complaint plainly alleges that Arredondo, acting for UCISD, took several affirmative steps to create and perpetuate a new policy of barricading the students in with shooter. *See* Section II.B *supra*. 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." Am. Compl. ¶ 151. The Amended Complaint alleges that a student called 911 multiple times while trapped in the classroom with the shooter, begging for assistance from the officers outside her door. *Id.* ¶¶ 165, 175. Because the shooter went back and forth between the two classrooms, there were times when the student was able to offer to "open the door to her classroom so that the police gathered outside could enter." *Id.* ¶ 175. But the dispatcher instructed her not to do so. *Id.* And the children who lived through the horrific day reported that they heard the officers in the hallway, *id.*, and thus believed that the police were intentionally keeping them in the classroom, which they were. Given these facts, 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 Arredondo'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 any student 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. As such, Plaintiffs have adequately alleged that they were "impeded from" leaving the classroom due to Arredondo's barricade policy. Plaintiffs have stated an unlawful seizure claim.

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

The special relationship between UCISD's chief policymaker and E.T. 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, UCISD emphasizes 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 10-11. UCISD relies upon *Doe ex rel. Magee v. Covington County Sch. Dist. ex rel. Keys*, 675 F.3d 849 (5th Cir. 2012), which held that compulsory school attendance laws do not create a custodial relationship. But here, unlike in *Magee*, E.T. was not free to leave because she was surrounded by a barricade of armed law enforcement officers, not because of school attendance requirements. *Magee* is thus not analogous.

UCISD also cites *Vielma v. Gruler*, 808 Fed. Appx. 872 (11th Cir. 2020), to argue that no liability can be imposed in this case. *See* Br. at 10. But *Vielma* is inapposite, as the plaintiffs there had argued "that because Florida law prohibited them from carrying a weapon in a nightclub, the State had effectively placed them in custody." 808 F. App'x at 878 n.4. Prohibiting a person from carrying a firearm on certain premises is not, in any meaningful way, equivalent to involuntarily confining

someone. Further, *Vielma* 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. UCISD also relies upon *L.S. ex rel. Hernandez v. Peterson*, 982 F.3d 1323 (11th Cir. 2020), a case that arose out of the shooting at Marjory Stoneman Douglas High School in Florida. Br. at 10. But that case, while tragic, only alleged that school resource officers and the state compulsory attendance law gave rise to a custodial relationship. *Id.* at 1330. Unsurprisingly, there was no allegation, as here, that children were barricaded inside a classroom with a school shooter, because the failure of Arredondo and those under his command is unparalleled in U.S. history. Am. Compl. ¶ 12.

UCISD argues that "[a]ccepting this argument would also require agreeing with the absurd result of its logical conclusion—that if the children and teachers were incarcerated, if one of them had attempted to escape, the first responders would have taken steps to force them to return to the classroom." Br. at 11. But it is a reasonable inference from the facts alleged in the Amended Complaint that, had any student attempted to leave the classroom, the law enforcement officers waiting outside the classroom would have opened fire, assuming that the person opening the door was the shooter.[5] UCISD may well disagree that Arredondo'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

[5] As alleged in the Amended Complaint, E.T.'s time of death was listed at 3:10 p.m. on her death certificate, Am. Compl. ¶ 13, a full two hours and twenty minutes after the BORTAC team killed the shooter. *Id.* ¶ 182. The clear inference from E.T.'s death certificate is that she was seized as a result of Defendant Arredondo's decision making and unconstitutional actions, which deprived her of any chance to survive.

facts in a light most favorable to the plaintiff." *Schydlower*, 231 F.R.D. at 498. As described *supra*, Sections II-III, the Amended Complaint alleges that the Arredondo, on behalf of UCISD, took E.T.'s life in his hands, placing her in a situation which provided "no realistic means of voluntarily terminating" the barricade outside classrooms 111 and 112 and deprived E.T. "of the ability or opportunity to provide for [her] own care and safety." *Walton*, 44 F.3d. at 1305. The Amended Complaint states a claim under the custodial relationship theory.

V. 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. UCISD argues that the state-created danger theory is not recognized in the Fifth Circuit, echoing other defendants' arguments as to qualified immunity. Br. at 11. Contrary to the UCISD's arguments, however, 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 express adoption of this theory of liability, 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 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 Independent School District*, 38 F.3d 198 (5th Cir. 1994). Its discussion clearly defined the "contours" of the theory:

> 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*, 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 Magee*, 675 F.3d at 865–66

("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 UCISD argues that the recent decision in *Fisher v. Moore*, 73 F. 4th 367 (5th Cir. 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. 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.*, *Magee*, 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 Arredondo, on behalf of UCISD and officers under his command, "knowingly place[d]" E.T. in danger and cut off "potential sources of private aid." *Johnson*, 38 F.3d at 200-01; *see* Am. Compl. ¶¶ 126, 129-31, 149, 154, 164, 170, 174, 190. Arredondo acted to implement UCISD's new barricade policy, by repeatedly ordering those officers under his command to not breach the classrooms, though they knew that children were being shot at in the classrooms. *Id.* ¶¶ 147, 149, 164, 170. That is deliberate indifference, and the precise scenario envisioned by the state-created danger theory.

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

Plaintiffs have also stated a "failure to train" claim under *Monell* as the Amended 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 Amended Complaint plainly alleges that UCISD "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. Plaintiffs meet the first *Porter* prong.

Second, the Amended Complaint is replete with allegations that plausibly establish a causal link between UCISD's failure to effectively train its officers in active shooter response and the harms E.T. suffered, and thus that the failure to train was a "moving force" in causing E.T.'s death. *Porter*, 659 F.3d at 446. Further, 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 Amended Complaint details at length the specific national standards for active shooter trainings and how UCISD'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." Am. Compl. ¶ 108. The Amended Complaint further alleges that the officers—including Arredondo 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.* ¶ 166. Because officers were not adequately trained to "immediately distract, isolate, and neutralize the shooter," UCISD 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 UCISD's failure to train its officers and the harms to Plaintiffs, 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, contrary to UCISD's main argument on this claim, the Amended Complaint adequately alleges deliberate indifference. *Porter*, 659 F.3d at 446. While UCISD relies on the need for "actual or constructive notice" regarding their inadequate training programs, Br. at 16-17, 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). As noted above, the inadequacy was obvious in light of the national standards UCSID's training failed to adhere to. UCISD further argues that "a pattern of similar constitutional violations by untrained employees" would be needed to state a failure to train claim. Br. at 16. Preliminarily, 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 UCISD on notice regarding its inadequate training policies, the Amended Complaint alleges facts demonstrating that the UCISD was on notice that failing to properly train its officers on active shooter protocols would likely result in these constitutional violations. For example, the Amended 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." Am. Compl. ¶ 98. The Amended 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.* ¶¶ 108, 290. Further, national standards promulgated by the ALERRT Center put UCISD on notice that innocent civilians could be killed if officers were not trained properly on responding to active shooters. *Id.* ¶ 108. UCISD 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.

VII. PLAINTIFFS HAVE STANDING AND CAPACITY TO BRING THIS SUIT

UCISD makes three arguments as to Plaintiffs' standing and capacity. First, UCISD argues that Sandra Torres has no standing because "a parent cannot assert claims under Section 1983 on their own behalf based solely on constitutional injuries to their child." Br. at 3-4. But Sandra Torres, as E.T.'s mother, has standing to bring claims for her own loss of comfort and emotional distress under the Texas Wrongful Death Act and Section 1983. The Fifth Circuit has held that "individuals who are within the class of people entitled to recover under Texas's wrongful death statute have standing to sue under § 1983 for their own injuries resulting from the deprivation of decedent's constitutional rights." *Baker v. Putnal*, 75 F.3d 190, 195 (5th Cir. 1996). Sandra Torres suffered extreme trauma and emotional distress from the wrongful death of her daughter and can recover for those injuries. As the Amended Complaint alleges, Sandra Torres has been devastated by E.T.'s death. Am. Compl. ¶¶ 194-

99. This suffices at this early stage to establish standing to bring §1983 claims for "injuries resulting from the deprivation of decedent's constitutional rights." *Baker*, 75 F.3d at 195.

Second, UCISD argues that it retains sovereign immunity because the Texas Wrongful Death Act does not apply to school districts. Br. at 4-6. This is incorrect. UCISD overlooks the fact that Plaintiffs' claims are brought pursuant to Section 1983, a federal law. "Municipal defenses—including an assertion of sovereign immunity—to a federal right of action are, of course, controlled by federal law." *Howlett v. Rose*, 496 U.S. 356, 376 (1990); *see also County of Dallas v. Sempe*, 151 S.W.3d 291, 299 (Tex. App. 2004) (pet. dism'd w.o.j.) (quoting *Howlett* and holding County not immune from 1983 action despite immunity provision in Texas Wrongful Death Act). "By including municipalities within the class of 'persons' subject to liability for violations of the Federal Constitution and laws, Congress—the supreme sovereign on matters of federal law—abolished whatever vestige of the State's sovereign immunity the municipality possessed." *Howlett*, 496 U.S. at 376 (quoting *Owen v. City of Independence*, 445 U.S. 622, 647-48 (1980)). The Fifth Circuit has made plain that Texas school districts are "persons" eligible to be sued under Section 1983. *Littell v. Houston Indep. Sch. Dist.*, 894 F.3d 616, 622 (5th Cir. 2018) (holding "municipal entities like the school district qualify as 'persons'" under § 1983). "Any attempt to provide immunity beyond that of section 1983 directly violates federal law." *Sempe*, 151 S.W.3d at 299-300 (citing *Howlett*, 496 U.S. at 375). UCISD cannot look to state law for immunity from suit under Section 1983.[6]

Finally, UCISD argues that Sandra Torres lacks capacity to sue because she is not the estate's representative. Br. at 6-8. However, under both the Survival and Wrongful Death statutes, heirs-at-law (which Sandra Torres, as the mother of E.T., certainly is) can maintain suit. *See Valle v. City of Houston*, 613 F.3d 536, 541 (5th Cir. 2010). In any event, since UCISD filed its motion to dismiss, an application for letters of administration for the estate of E.T. has been filed by Sandra Torres's uncle,

[6] UCISD also argues that it is immune from claims brought under the Texas Tort Claims Act, Br. at 5-6, but Plaintiffs have brought no such claims.

Albino Salinas, Jr., in the County Court of Uvalde County, and the Plaintiffs will notify the Court once such letters are granted.[7]

VIII. IN THE ALTERNATIVE, THE COURT SHOULD PERMIT AMENDMENT

Plaintiffs have met the pleading standard necessary to assert viable claims, and UCISD'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, 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 a student'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 UCISD's motion to dismiss. In the alternative, Plaintiffs respectfully request the opportunity to further amend their Complaint.

[7] The case number is 7426-23 (filed July 26, 2023).

Dated: New York, New York
August 4, 2023

By: ***/s/Molly Thomas-Jensen***

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