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.	§	
	§	
	§	
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	§	

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' 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 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 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, UCISD officers, including Police Chief and chief policymaker Defendant Pedro Arredondo, instituted a policy of treating the shooter as barricaded rather than active. 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, M.Z. and K.T. included, were wounded and suffered extreme and severe psychological trauma.

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 in classroom 112. As Police Chief, Arredondo was required to instruct the officers under his command to act in accordance with their training breach and 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 and 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 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, 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 and stopped the killing, 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 UCSID's motion.

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.

Approximately three minutes after the shooting began, Arredondo entered the school from the south side of the building. *Id.* ¶ 128. He was one of the first officers to arrive to classrooms 111

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

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 his arrival, Ramos resumed shooting inside the classrooms. *Id.* ¶ 132.

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 M.Z. and K.T., inside a classroom with an active shooter, delaying rescue and emergency medical services and depriving them of the comfort of their family." *Id.* ¶¶ 132-33. "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.* ¶ 153. 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.* ¶ 168. 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.* ¶ 174. 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.* ¶ 181. 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.* ¶ 197. As he later explained in an interview, the only other idea he had was "'to start shooting through that wall.'" *Id.* ¶ 174.

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.* ¶ 168. In an interview shortly after the shooting, he admitted he "had [Ramos] contained" and "kn[e]w there's probably victims in there," referring to classrooms 111 and 112. *Id.* ¶ 133.

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 to my room?'" *Id.* K.T. bravely suggested to the dispatcher that she could do what should have been Arredondo's 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.* 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.

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.* ¶ 188.

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).[2]

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 Defendant Arredondo was not one such policymaker. Generally, 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 the departments they oversee. 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,*

[2] Plaintiffs Christina and Ruben Zamora and Jamie Torres no longer maintain their individual claims. UCISD argued that the Court lacked jurisdiction over their individual claims but does not challenge the Court's jurisdiction over their claims as next friends of Plaintiffs M.Z. and K.T., respectively. Similarly, Plaintiffs no longer maintain their claims against Defendant Arredondo in his official capacity or their claim for punitive damages against UCISD.

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 official policymaking authority. Compl. ¶ 29.

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 8.[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

[3] Citations to "Br." are to UCISD's 12(B)(1) Motion to Dismiss and 12(B)(6) Motion to Dismiss Plaintiffs' Original Complaint, ECF No. 103.

various 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 9 (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 9 (quoting Tex. Educ. Code § 37.081(f)), as governing bodies 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 8, 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) (emphasis added). *Jett* is instructive in how it distinguishes between a delegation of decision-making authority 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). *Prapotnik* 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. Here, Arredondo was the co-author of the school's active shooter policy, which had been ratified by the school board; he had no discretion under the active

shooter policy to not breach the classrooms; his departure from that policy was rhus 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 final policymaking authority), *report and recommendation adopted*, No. 4:19-CV-00166-P, 2019 WL 5684492 (N.D. Tex. Nov. 1, 2019); Compl. ¶¶ 110-11, 132.

Plaintiffs have thus met their burden at the pleading stage to allege that Arredondo was the official 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. UCISD is liable under *Monell* for Arredondo's actions on May 24, 2022. *See Brooks v. George Cnty, Miss.*, 84 F.3d 157, 165 (5th Cir. 1996).

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 9-10. UCISD is incorrect. In considering this question, courts evaluate whether the constitutional violation stemmed from "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. *Cherry Knoll, L.L.C.*, 922 F.3d 309, at 317 (emphasis added). The 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 that day, which resulted in Plaintiffs' constitutional violations. *Cherry Knoll*, 922 F.3d at 317 (quoting *Pembaur*, 475 U.S. at 483).

The 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. Compl. ¶ 128. It alleges that "he intentionally trapped children in the room with the shooter." *Id.* ¶ 133. Instead of breaching the classroom, Arredondo affirmatively acted to perpetuated UCISD's new barricade policy: he called police dispatch and requested yet more officers to barricade the classrooms, and "did not request or set up for a breach of the classroom," *id.* ¶ 151; he actively 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.* ¶¶ 153, 168; 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.* ¶ 174; 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.* ¶ 197.

The 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, Compl. ¶ 168, and admitted that he immediately heard gunshots and saw bullets coming out through the walls of the classroom, *id.* ¶ 128. 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 10. 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*, 84 F.3d at 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 10.

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 7. 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 as discussed above, the 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." *Id.* at ¶ 155. Plaintiff K.T. called 911 multiple times while trapped in the classroom with the shooter, begging for assistance from Arredondo or any of his fellow officers. Compl. ¶¶ 169–70, 179. The second time she called 911, she asked the dispatcher if they could "tell the police to come to my room," and asked if was permitted to "open the door to her classroom so that the police gathered outside could enter" and so that she could leave. *Id.* ¶ 179. But because of Arredondo's decision to create a policy of barricading children inside the classroom rather than breaching it, the dispatcher ordered K.T. not to do so. *Id.* ¶ 179. And children, including M.Z. and K.T., heard Arredondo 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 Arredondo's show of authority and barricade policy, and thus that a seizure occurred. A jury could plainly conclude that had K.T. attempted to leave the classroom, the masses of law enforcement officers waiting outside the classroom would have assumed that the person opening the door was the shooter and would have been likely to shoot her. As such, contrary to UCISD's argument, Plaintiffs have adequately alleged that they were "impeded from" leaving the classroom due to Arredondo's barricade policy. 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.

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 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, 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 found a *Monell* claim. 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*, 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. *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 6. 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. 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 6. 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. Compl. ¶ 13.

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 6. But it is a reasonable inference from the facts alleged in the 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. 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 facts in a light most favorable to the plaintiff." *Schydlower*, 231 F.R.D. at 498. As described *supra*, Sections II.B. and Factual Background, the Complaint alleges that the Arredondo, on behalf of UCISD, 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.

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. 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 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 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).[4] Since at least 1994, the Fifth Circuit has repeatedly recognized and

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[4] 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).

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 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 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*, __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. 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 Arredondo, on behalf of UCISD and joined by the officers under his command, "knowingly place[d]" M.Z. and K.T. in danger. *Johnson*, 38 F.3d at 200. They knew that children were still alive and being shot at, and yet decided to barricade them in the classroom anyways. *See* Compl. ¶¶ 128, 131–33, 151, 153, 158, 168, 174, 178, 197. Arredondo affirmatively acted to implement UCISD's new barricade policy, by repeatedly ordering those officers under his command to not breach the classrooms, even as they heard gunshots and knew that children were alive and being shot at in the classrooms. *Id.* ¶¶ 151, 153, 168, 174. That is deliberate indifference, and the precise scenario envisioned by the state-created danger theory.

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

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 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 UCISD "failed to ensure that their police officers were adequately trained and failed to develop meaningful plans to address an active shooter incident." Compl. ¶ 287. Plaintiffs meet the first *Porter* prong.

Second, the 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 Plaintiffs suffered, and thus that the failure to train was a "moving force" in causing Plaintiffs' injuries. *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 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." Compl. ¶ 110. The 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.* ¶ 170. 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.* ¶ 195. These allegations make plain the causal link between UCISD'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 UCISD's main argument on this claim, the 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, *see* Br. at 11, 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. *See* Br. at 12. 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 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 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. 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 UCISD on notice that innocent civilians could be killed if officers were not trained properly on responding to active shooters. *Id.* ¶ 110. 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. IN THE ALTERNATIVE, THE COURT SHOULD PERMIT PLAINTIFFS TO AMEND

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 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 UCISD's motion to dismiss. In the alternative, Plaintiffs respectfully request the opportunity to amend their Complaint.

Dated: New York, New York
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By: */s/Eric Abrams*

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