NO. 09-60406

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JANE DOE, A MINOR, BY AND THROUGH HER NEXT FRIENDS, DANIEL MAGEE AND GENEVA MAGEE; DANIEL MAGEE, INDIVIDUALLY, AND ON BEHALF OF JANE DOE; GENEVA MAGEE, INDIVIDUALLY AND ON BEHALF OF JANE DOE, A MINOR

Plaintiffs-Appellees,
v.

COVINGTON COUNTY SCHOOL DISTRICT, BY AND THROUGH ITS BOARD OF EDUCATION AND ITS PRESIDENT, ANDREW KEYS AND ITS SUPERINTENDENT OF SCHOOLS, I.S. SANFORD, JR.; COVINGTON COUNTY SUPERINTENDENT OF EDUCATION, I.S. SANFORD, JR., OFFICIALLY AND IN HIS INDIVIDUAL CAPACITY; COVINGTON COUNTY BOARD OF EDUCATION, BY AND THROUGH ITS PRESIDENT, ANDREW KEYS; ANDREW KEYS, OFFICIALLY AND IN HIS INDIVIDUAL CAPACITY; TOMMY KEYES; OTHER UNKNOWN JOHN DOE AND JANE DOE EDUCATION DEFENDANTS A-Z, IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES

Defendants-Appellants

On Appeal From The United States District Court for
the Southern District Of Mississippi – Hattiesburg Division

EN BANC BRIEF OF AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION, THE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND, AND THE MISSISSIPPI SCHOOL BOARDS ASSOCIATION IN SUPPORT OF THE COVINGTON COUNTY SCHOOL DISTRICT DEFENDANTS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to those persons listed in the briefs previously filed by the parties to this appeal, the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. National School Boards Association, Alexandria, Virginia – *Amicus Curiae,* Alexandria, Virginia

2. Texas Association of School Boards Legal Assistance Fund (including the Texas Association of School Boards, Texas Association of School Administrators, and the Texas Council of School Attorneys) – *Amicus Curiae,* Austin, Texas

3. Mississippi School Boards Association – *Amicus Curiae,* Clinton, Mississippi

4. Thompson & Horton LLP, Phoenix Tower, Suite 2000, 3200 Southwest Freeway, Houston, Texas 77027 – Attorneys for Amici Curiae National School Boards Association, Texas Association of School Boards Legal Assistance Fund, and Mississippi School Boards Association

/s/ Lisa A. Brown

Attorney for Amici Curiae National
School Boards Association,
Texas Association of School Boards Legal
Assistance Fund, and
Mississippi School Boards Association

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

The National School Boards Association ("NSBA") is a federation of state associations of school boards from throughout the United States, the Hawaii State Board of Education, and the Board of Education of the U.S. Virgin Islands. Through its state associations, NSBA represents more than 95,000 of the nation's school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 49.4 million public school students—which is approximately 90 percent of the elementary and secondary students in the nation.

The Texas Association of School Boards (TASB) is a Texas non-profit corporation whose voluntary membership consists of the 1,036 school boards in the State of Texas. TASB's mission is to promote educational excellence for Texas school children through advocacy, leadership, and high quality services to school districts. TASB established the Legal Assistance Fund (LAF) under a Trust Agreement nearly three decades ago. The purpose of the LAF is to assist parties whose positions are aligned with the interests of Texas school districts by advocating through litigation for issues or causes that generally affect or will affect the public schools of Texas. Nearly 800 Texas school districts are members of the LAF. The LAF's board of trustees is governed by nine members representing

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[1] No attorney for any party has authored this brief in whole or in part, and no person or entity other than Amici and their counsel have made any monetary contribution to the preparation or submission of this brief.

TASB, the Texas Association of School Administrators, and the Texas Council of School Attorneys.

The Mississippi School Boards Association ("MSBA") is a professional, nonprofit organization whose mission is to ensure quality school board performance through advocacy, leadership training, technical assistance, and information dissemination. MSBA represents all 150 public school boards of education in the State of Mississippi. MSBA is governed by a 20-member board whose membership comes from local school boards in each of the state's four congressional districts.

Amici have submitted this brief because of the substantial impact that this Court's eventual ruling will have on the operation of the public schools in this Circuit. Appellants' "special relationship" theory, if accepted by the Court, would expand constitutional liability to a wide range of school contexts far beyond the facts of this particular lawsuit. A key element in Appellants' theory is whether a student has been "separated," even for a short time, from his guardians or regular teachers. By narrowly focusing on whether a student has been "separated" from his guardians or teachers, Appellants' theory effectively opens the door to litigation over any number of routine "separations" that happen during the school day, such as riding a school bus or serving an in-school detention. This approach is contrary to this Court's opinions in *Walton* and *Hillsboro* and is contrary to the

approach taken in other circuits, which have held that a "special relationship" does not exist unless the state's restrictions on an individual's liberty are severe and continuous. Appellants' theory would make Section 1983 virtually coterminous with state tort law, an approach repeatedly rejected by the Supreme Court. By providing real-world examples and perspective, Amici believe that this brief will aid the Court in evaluating the issues presented by this appeal.

ARGUMENT

I. Appellants' "special relationship" theory is contrary to long-standing principles of constitutional law and, if adopted by the *en banc* Court, would result in a new constitutional duty to protect that would apply in a broad range of school contexts far beyond the facts of this particular lawsuit.

Amici urge the *en banc* court to reject the Appellants' "special relationship" theory. The proposed standard is contrary to established law, redefines the concept of constitutional restraint under the Due Process Clause, would produce expansive new sources of liability against schools, and would create a subjective standard that will be costly to litigate.

Appellants' proposed standard of liability, if accepted, would expand constitutional liability to a wide range of school contexts far beyond the facts of this particular lawsuit. By focusing on whether a student has been "separated" from his guardians or teachers, Appellants' special relationship theory effectively opens the door to litigation over any number of routine "separations" that happen

during the school day, such as riding a school bus or serving a disciplinary detention.[2] The broad impact of this approach is well illustrated by a district court opinion that was issued within days of the panel's opinion in this case. Relying on the panel opinion, a federal district court in Texas held that a school district owed a constitutional duty to protect a nine-year-old special education student who killed himself in a school bathroom while serving an in-school suspension.[3] The court found that the student's personal characteristics in conjunction with the school's "affirmative" act of assigning the student to in-school detention gave rise to a constitutional duty to protect.[4]

Imposing a constitutional duty to protect based on the minimal intrusions on liberty that characterize public school enrollment is contrary to both *Walton v. Alexander*, 44 F.3d 1297, 1301-02 (5th Cir. 1995) (en banc) and *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1415 (5th Cir. 1997) (en banc). Special relationships exist only in "extreme circumstances" involving loss of liberty such as imprisonment or institutionalization. *Walton*, 44 F.3d at 1305 (concluding that a

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[2] The panel majority frames the issue as whether there is a duty to protect when the student "is *apart* from her legal guardian" and observes that younger students are less able to protect themselves "while they are mandatorily *separated* from their legal guardians." *Doe et al v. Covington County Sch. Dist. et al*, 649 F.3d 335, 346 (5th Cir. 2011) (emphasis added). Elsewhere the opinion describes the minor plaintiff as being rendered helpless "by *separating* her" from her teachers and classmates. *Id.* at 347 (emphasis added).

[3] *Estate of Lance v. Lewisville Indep. Sch. Dist.*, 2011 WL 4100960 at *7 (E.D. Tex., Aug. 23, 2011) (opinion of magistrate judge), *adopted by*, 2011 WL 4101164 (E.D. Tex., Sept. 13, 2011).

[4] *Id.* at *7.

student's relinquishment "of a small fraction of liberty is simply not comparable" to the "almost total deprivation" found with imprisonment or institutionalization). *Walton* and *Hillsboro* are consistent with the approach taken in other circuits, which have focused on whether the deprivation of liberty is *severe* and *continuous*. *See generally Covington*, 649 F.3d at 356, 361-62 (King, J., dissenting) (collecting cases); *J.O. v. Alton Comm. United Sch. Dist.*, 909 F.2d 267, 272 (7th Cir. 1990) (although the "analogy of a schoolyard to a prison may be a popular one for school-age children," schools do not exercise the full severe and continuous restrictions of liberty found in prison or state mental institutions); *see, e.g.*, *Patel v. Kent School District*, 648 F.3d 965, 974 (9th Cir. 2011) (although the school allegedly agreed to provide enhanced supervision to a special education student and failed to do so, leading to sexual activity between students in a restroom, the school did not so restrain the student's liberty as to render parent unable to take care of the student's basic needs). Compared to the restrictions seen in institutions where a special relationship has been found to exist, schools are relatively open environments (even for the youngest of pupils), and the school day itself is only six or seven hours long. Parents may visit the campus for a variety of purposes, and they may withdraw their children at any time. *See also Ingraham v. Wright*, 430 U.S. 651, 670 (1977) (students retain the support of family, teachers, and friends to protest mistreatment).

Appellants' argument disregards the fact that the minimal restraints placed on students – such as being required to attend school on time or to follow school rules – are a fundamental part of the educational experience itself and contribute to the development of skills necessary to function in society. Schools could not perform their mission – educating children – if students could attend class whenever they want or disrupt the learning environment without consequence. A school's "performance of the very acts for which an individual voluntarily enters state care does not transform the custodial relationship into an involuntary one." *Campbell v. State of Washington*, 2011 WL 5304109 at *5 (9th Cir., Nov. 7, 2011) (the state's "liberty-restraining acts were merely part" of the agency's effort to provide services to a mentally disabled adult and did not transform the relationship into involuntary custody).

In light of the circuit courts' agreement that public school enrollment does not give rise to a special relationship, federal courts historically have rejected duty-to-protect claims that are based on the minimal restraints on liberty found in an educational setting: (i) students on a school bus;[5] (ii) students on a field trip or

[5] *See, e.g., Worthington v. Elmore County Bd. of Educ.*, 160 Fed.Appx. 877 (11th Cir. 2005) (rejecting due process claim of a 7-year-old special education child who rode a special education bus to a special education campus and was molested by older, disturbed students on a day when the regular driver was absent) (not designated for publication); *Sargi v. Kent City Bd. Of Educ.*, 70 F.3d 907 (6th Cir. 1995) (rejecting due process claim where student died after suffering seizures on school bus; bus transportation did not restrain student's liberty, and parents retained the freedom to decide whether to utilize school transportation).

overnight school trip[6]; (iii) students serving detention[7]; (iv) students in an unsupervised locker room or restroom[8]; (v) students being assigned specific classroom seats,[9] (vi) students on a playground or in the lunch room;[10] and (vii) restraints on student movement during a campus emergency such as the Columbine High School massacre.[11]

These cases reflect the Supreme Court's long-standing view that not "all common law duties owed by government actors" are "constitutionalized by the

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[6] *See, e.g., Lee v. Pine Bluff Sch. Dist.*, 472 F.3d 1026 (8th Cir. 2007) (rejecting special relationship claim where student died during school band trip; parent's permission slip for student to attend trip did not give rise to an affirmative duty to protect).

[7] *See, e.g., O'Hayre v. Board of Educ.*, 109 F.Supp.2d 1284 (D. Colo. 2000) (holding that principal's placement of a student in lunchtime detention was not a restraint of liberty sufficient to give rise to a duty to protect); *Hunter v. Carbondale Area Sch. Dist.*, 829 F.Supp. 714 (M.D. Pa. 1993) (rejecting claim brought by parents of 12-year-old special education student who was assigned after-school detention with non-special education students and who was chased off school grounds and drowned).

[8] *See, e.g., Hasenfus v. Lajeunesse*, 175 F.3d 68 (1st Cir. 1999) (rejecting due process claim where student killed herself after being reprimanded and was banished to an unsupervised locker room); *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 734 (8th Cir. 1993) (rejecting claim of mentally retarded high school boy who was sexually assaulted by another mentally retarded student in the school shower).

[9] *See, e.g., Doe v. Detroit Board of Educ.*, 310 F.Supp. 871 (E.D. Mich. 2004) (rejecting claim of special education student who was abused by other students; the "alleged affirmative act of directing Plaintiff to sit in a certain location [near aggressive students] is not a 'restraint of personal liberty' similar to incarceration or institutionalization").

[10] *See, e.g., Stevenson ex rel. Stevenson v. Martin County Bd. of Educ.*, 3 Fed.Appx. 25, 31 (4th Cir. 2001) (not designated for publication) (rejecting claim of 10-year-old student who allegedly was assaulted by his classmates in the lunch yard); *Breece v. Board of Educ.*, 142 F.3d 432 (6th Cir. 1998) (not designated for publication) (rejecting claim of parents of boy who died after falling on the playground; no special relationship despite allegation that school knew about boy's rare medical condition).

[11] *See, e.g., Schnurr v. Jefferson County Sheriff's Dept. et al*, 189 F.Supp.2d 1105, 1133 (D. Colo. 2001) (rejecting claim by students who were shot in the school library by two fellow students; victims had claimed that a "special relationship" was created when law enforcement officials told the students to stay in the library and prevented other rescuers from entering library).

Fourteenth Amendment." *Daniels v. Williams*, 474 U.S. 327, 333 (1986). Appellants' theory, if accepted, would make Section 1983 virtually coterminous with state tort law, an approach rejected by the Supreme Court in *DeShaney,*[12] *Collins v. City of Harker Heights*,[13] and *Town of Castle Rock v. Gonzales*.[14] It is "no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns." *Daniels*, 474 U.S. at 335.

If these legal principles are disrupted and students are permitted to assert these types of claims, the number of potential "special relationship" claimants would be staggering. The public schools in Texas, Mississippi, and Louisiana enroll nearly 6 million children,[15] while nationally the public schools enroll more than 49.4 million students.[16] In contrast, the nation's entire jail and prison

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[12] *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189 (1989).

[13] 503 U.S. 115, 129 (1992) (holding that substantive due process does not "guarantee municipal employees a workplace that is free of unreasonable risks of harm"). "As a general matter, the Court has always been reluctant to expand the concept of substantive due process, because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Id.* at 125, 129.

[14] 545 U.S. 748 (2005) (rejecting the procedural due process claim of a mother who sued a city after its officers failed to enforce a protective order against her former husband who murdered her children). "This result reflects our continuing reluctance to treat the Fourteenth Amendment as 'a font of tort law.'" *Id.* at 768. Although the federal constitution provided no remedy, "the people of Colorado are free to craft such a system under state law." *Id.*

[15] *See* U.S. Dept. of Educ., National Center for Education Statistics, http://nces.ed.gov/programs/stateprofiles.

[16] U.S. Dept. of Educ., National Center for Education Statistics, http://nces.ed.gov/fastfacts/display.asp?id=372. Approximately 34.9 million students are in grades pre-kindergarten through eighth grade. *Id.*

population in all states is less than 3 million offenders.[17] No local government collectively has a greater responsibility for more individuals than the public schools.

As framed by the Appellants, the proposed "special relationship" theory would be broad enough to encompass injuries caused when students are separated or isolated by school authorities and then suffer injury due to medical emergencies, student fights and bullying, and natural disasters. Imposition of a broad-based duty to protect students from third parties would dramatically expand federal liability against schools and would divert limited school funds to pay money judgments that otherwise would go toward enhancement of school security and educational programs. *See generally Walton*, 44 F.3d at 1305 ("extending the Due Process Clause to impose on the state the obligation to defend and to pay for the acts of non-state third parties is a burden not supported by the text or history of the Clause, nor by general principles of constitutional jurisprudence").

Amici are particularly concerned about the impact of this theory on school bus transportation. If separation from one's guardian and regular teachers is a factor in determining whether a student possesses a right to protection, then riding a moving school bus would appear to fit squarely within the proposed zone of liability – a result that would expose schools to federal civil rights liability for

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[17] U.S. Dept. of Justice, Bureau of Justice Statistics, CORRECTIONAL POPULATION IN THE UNITED STATES 2010 at 3 (December 2011).

transportation-related torts. In *Walton*, however, this Court expressly overruled a 1987 decision that had held that compulsory attendance laws gave rise to a duty to protect students on a school bus. *See Walton,* 44 F.3d at 1304 n. 4, *overruling Lopez v. Houston Indep. Sch. Dist.*, 817 F.2d 351, 356 (5th Cir. 1987) ("Clearly, [bus ridership] is not the type of restraint on personal liberty nor the type of affirmative act by the state intended by *DeShaney*").

Expanding due process liability to encompass injuries occurring on buses would produce a far-reaching source of liability for public schools. Nationally, approximately 25,000,000 students ride school buses at an annual cost of nearly $22,000,000.00.[18] In a perfect world, every student would ride a school bus with a security camera and a security guard or monitor; each bus driver would have advanced first aid training; young children would never ride with older children; and each bus would have a small number of students so that routes would take less time. In our less than perfect world, however, few schools are able to provide all of these protective measures.

As with many policy and financial choices, the manner in which transportation is provided is driven in large part by budgetary constraints. All government policy choices come with risk, yet "it is not a tort for government to govern" by picking one option over another. *Schroeder v. City of Fort Thomas*,

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[18] U.S. Dept. of Educ., National Center for Education Statistics, "Fast Facts," http://nces.ed.gov/fastfacts/display.asp?id=67.

412 F.3d 724 (6th Cir. 2005), citing *Scheurer v. Rhodes,* 416 U.S. 232, 241 (1974). A school district that does not provide all potential safety measures in no way deliberately chooses to expose children to danger yet could be subject to liability under Appellants' theory of liability. Moreover, even providing such measures does not guarantee injury-free transportation services. School districts faced with shrinking budgets, particularly those in smaller communities, may have little choice but to opt out of providing transportation rather than taking on these expenses and the risks associated with increased liability.

II. Appellants' reliance on student age and competence as the foundation of a "special relationship" is contrary to the weight of authority and will produce anomalous results.

In holding that a "special relationship" existed between Jane Doe and her school, the panel majority relied in part on the girl's "very young" age. 649 F.3d at 345, 347. It further explained that the existence of a special relationship will depend upon a "continuum" of subjective conditions. *Id.* at 345. This approach is contrary to *DeShaney* and other circuits, which agree that the existence of a special relationship depends upon objective factors within the control of the state and not subjective factors that are unique to the individual. An individual's age, maturity, and mental competence are irrelevant to the inquiry because these conditions are

not imposed by the state.[19] This Court, too, on at least one occasion has concluded that an individual's mental disabilities were insufficient to give rise to a special relationship.[20]

By focusing on the personal characteristics of students, the "continuum" approach will require educators to conduct on-the-spot individualized assessments of each child any time they make one of the innumerable decisions that theoretically could affect a student's security or safety. Specific information about students, however, may not always be available to school personnel, particularly school secretaries, school bus drivers, and other non-administrative personnel. Even administrators and teachers who have greater access to confidential student records may not have this information readily available. Additionally, in the event of litigation, the "continuum" approach will require the parties to expend resources on the threshold issue of the child's competence/maturity. Parents and schools will litigate, likely with the assistance of costly expert witnesses, the relative precocity

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[19] *See, e.g., Black v. Indiana Area Sch. Dist.*, 985 F.2d 707, 714 (3d Cir. 1993) (rejecting "special relationship" claim of six girls ages 6 to 8 who allegedly were abused by bus driver; "We acknowledge, as plaintiffs stress, that school children may be reluctant to seek help in situations of this kind ... But these concerns are products of the age and circumstances of children; they do not emanate from any state imposed restraint").

[20] *See Randolph v. Cervantes*, 130 F.3d 727, 730 (5th Cir. 1997) (although mentally disturbed woman voluntarily resided in a state-subsidized apartment and was "functionally dependent" on her caretaker, these conditions were insufficient to create a "special relationship").

of the student or the degree of impairment in the case of an intellectually impaired student.

The "continuum" approach also is likely to produce anomalous results. Special education teachers who teach a mixed group of students (different ages, different disabilities) or bus drivers with a diverse group of riders may end up with a constitutional duty to protect some, but not all, of their students. Additionally, under Appellants' theory, within the course of a single year, a student literally could "age out" of constitutional protection.[21] This subjective approach is contrary to *DeShaney*, *Walton*, and *Hillsboro* and should be rejected.

III. A discretionary school policy that permits, but does not require, the checking of identification does not offend the Constitution and is not tantamount to a policy of requiring office staff to release a student to an adult under plainly dangerous circumstances.

Even when a special relationship exists, the "mere creation of a special relationship" is "not enough to make out a substantive due process claim for any harm that may follow." *J.R. et al v. Gloria et al*, 593 F.3d 73, 79 (1st Cir. 2010). Rather, the plaintiff must show that the state actor engaged in "conscience-shocking" conduct while the individual was in custody. *Id.; see generally McClendon v. City of Columbia*, 305 F.3d 314, 326 (5th Cir. 2002) (en banc) ("the

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[21] As Judge King observed in her dissent: "If thirteen-year-old children do have these traits [*i.e.*, the ability to recognize harm], but nine-year-old children do not, we are left to wonder when, exactly, children acquire these traits for constitutional purposes. Do schools need to evaluate the maturity of each student to determine whether the school has a 'special relationship' with that student? What about mentally disabled students?" *Covington*, 649 F.3d at 363 (King, J., dissenting).

due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm") (citation omitted). "[T]he constitutional concept of conscience shocking duplicates no traditional category of common law fault." *County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998). This standard requires a "cognizable level of executive abuse of power" and applies only to the "most egregious" forms of state action. *Hernandez v. Texas Dept. of Protective & Reg. Servs.*, 380 F.3d 872, 880 (5th Cir. 2004), quoting *Lewis*, 523 U.S. at 846. The state actor must consciously disregard a "known" and "obvious" risk of severe physical abuse to the victim. *Id.* at 881.

Here, the Appellants' core theory is one of nonfeasance, not malfeasance: that the school district failed to "promulgate a proper policy for the safety and protection of children." (CR:20, ¶27.) The Appellants admit that the policy allowed school personnel to check identification of adults seeking to remove a student; the policy simply did not require it. (*Id.*) Although a school policy that requires identification is prudent, a policy that allows for the exercise of professional judgment and discretion is not inherently dangerous and, more importantly, not unconstitutional. In some communities, particularly those with small campus enrollments, school personnel often know parents, grandparents, babysitters, and other visitors by sight. An ironclad rule precluding any exercise of discretion would prevent the release of children to parents and guardians who have

lost or forgotten their identification (a not uncommon occurrence), and it would prevent the release of children in circumstances in which the legal guardian is unavailable (*e.g.*, a parent is sick or in jail and a neighbor is asked to pick up the child). Such a rule also could hinder compliance with changes to state custody orders that might not yet be reflected in school records.[22] A school policy that is silent on whether to check identification is not tantamount to a policy of *prohibiting* the checking of identification or *requiring* office staff to release a student to an adult under plainly dangerous circumstances. *Compare Sargi*, 70 F.3d at 912 (rejecting Section 1983 claim where school board failed to instruct bus drivers on medical emergencies; although no board policy addressed the subject, no board policy prevented drivers from obtaining medical assistance for students).

The risk from any particular instance of not checking identification is not obvious in the abstract but is wholly dependent on the surrounding circumstances. Remarkably, Appellants' complaint contains no description of the actual circumstances of Jane's removal from campus, and it contains no facts identifying Tommy Keyes' true relationship to Jane.[23] In particular, the Appellants have not

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[22] Even when copies of custody orders are current and available, feuding parents often do not agree on their meaning – and school employees often end up in the cross hairs. *See, e.g., Schmidt v. Des Moines Pub. Schs.*, 655 F.3d 811 (8th Cir. 2011) (non-custodial parent sued school attendance clerk and other school officials who denied parent access to children; parent claimed that school officials "misconstrued" the state court order regarding her visitation rights).

[23] Although the complaint refers to Keyes as being "unauthorized" to remove Jane from school, it never describes him as a stranger or as someone unknown to Jane. The odds of a young child being molested by a complete stranger are less than 5 percent. *See* U.S. Dept. of

alleged any facts indicating that any school employee knew that Keyes was likely to harm Jane. The Appellants do not even identify which school employee actually released Jane to Keyes – was it the attendance clerk, the school secretary, or perhaps the assistant principal? Did the same school employee release Jane each time, or was it always a different employee such that no suspicious pattern was observable? Did Jane greet Keyes with familiarity, or did she show fear or discomfort? Had Keyes *ever* been to the school for a purpose related to Jane on a prior occasion *with* the consent of the parent such that his appearance on campus to retrieve the child would not have been suspicious on these subsequent occasions? What was Jane's physical appearance upon her return to campus? The complaint provides no illuminating details.

In a tragically similar case, the Sixth Circuit rejected a claim by the family of a 10-year-old boy who was checked out of school by his step-mother who then killed him. In *Baker v. Clay County Bd. of Educ.*, 871 F.Supp. 930 (E.D. Ky. 1994), *aff'd*, 78 F.3d 584, 1996 WL 99387 (6th Cir. 1996) (not designated for publication), the step-mother and an accomplice used a false identity to remove the boy from school. The school secretary did not check identification because the boy acted as if he knew the female visitor and said that he wanted to leave with her. There was no "identification process" to verify that the adult was authorized

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Justice, Bureau of Justice Statistics, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS at 10 (2000).

to remove the child from school, and the secretary received "no instruction" on how to determine whether an adult was authorized to remove a child or what to do if an unauthorized person attempted to take a child. The district court rejected the special relationship claim and granted summary judgment, relying in large part on *DeShaney* and *Collins.* 871 F.Supp. at 932. The court of appeals affirmed, adopting the reasoning of the district court. 1996 WL 99387 at *1. *Baker* demonstrates that releasing a student to a visitor under circumstances that are not obviously dangerous is not shocking in the constitutional sense.

In other contexts, this Court and other courts have declined to anoint a background check as a constitutional requirement and have focused instead on whether the surrounding circumstances pointed to obvious danger. For example, in *Hernandez*, this Court rejected liability in a case involving the death of a newborn infant who had been placed by state social workers into a foster home with a history of questionable care. 380 F.3d at 883. The Court agreed that the child's right to a reasonably safe foster home included the right "not to be handed over by state officials to a foster parent ... *whom the state knows or suspects to be a child abuser.*" *Id.* (quotation and citation omitted; emphasis in original). Nonetheless, although a more diligent background investigation regarding the foster family might have prevented the baby's death, deliberate indifference could not be inferred from the social workers' alleged negligence. *Id.* at 883-84. Similarly, in

J.R. et al v. Gloria et al, 593 F.3d 73, 81 (1st Cir. 2010), the court rejected the due process claim of twin 4-year-old boys who were abused by an unauthorized adult male living in their foster home. Although the social workers violated state law by failing to complete a background check on the new residents and failed to report the unauthorized residents to the state agency, the social workers were not aware of any specific danger and did not make "a reasoned decision to deliberately ignore the risk of harm to the twins in the course of supervising the twins' foster care placement." *See also Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998) (although the police department's screening policies fell below "national standards," the plaintiff's injury was not the "plainly obvious consequence" of the department's decision).

In short, while the failure to check identification before releasing a child may be negligent in some circumstances, the failure to check identification in and of itself is not arbitrary or shocking in the constitutional sense. In fact, it is a common occurrence at dismissal time in elementary schools across the country. When the dismissal bell rings at the end of the day, the driveway in front of the typical elementary school is lined with dozens of cars driven by parents, grandmothers, nannies, neighbors, older siblings, and others seeking to pick up a child. As cars pull up to the front of the line, the driver either holds up a sign with a child's name or the driver announces the child's name through the car window.

The teacher on duty then retrieves that child and, in many instances, actually opens the car door, helps the child get into the car, and then shuts the door. Given its ubiquity and acceptance through parental participation, this practice may not reasonably be characterized as arbitrary and shocking.

Appellants argue that, in allowing parents to sign a permission-to-check-out form, schools necessarily guarantee that students will not be released to persons not listed on the form. During the course of their child's enrollment, parents complete any number of school forms including medical information forms. Under *DeShaney*, schools may not be held liable for failing to use parent-provided information to prevent injury to students from third parties.[24] A contrary holding is possible only if one is prepared to set aside both *DeShaney* and *Monell*, which prohibits *respondeat superior* liability under Section 1983.[25]

The distinction between not mandating identification and prohibiting identification is crucial. In this case, the alleged policy – *i.e.*, allowing but not mandating verification of a visitor's identification – is not itself unconstitutional and does not compel unconstitutional conduct but in fact is consistent with constitutional conduct such as releasing a child to a parent whose identification has been stolen. Here, the Appellants do not allege that the policy actually compelled

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[24] *See, e.g.*, *Sargi*, 70 F.3d at 911 (school's knowledge of child's medical condition did not give rise to a constitutional duty to protect from harm).

[25] *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 691 (1978).

Keyes to assault Jane Doe. Rather, Appellants' complaint turns on ordinary state-law tort principles: that, "but for" the check-out policy, Jane Doe would not have been assaulted. (CR:18, ¶22.) Municipal liability under Section 1983, however, requires much "more than a mere 'but for' coupling between cause and effect." *Valle v. City of Houston*, 613 F.3d 536, 546 (5th Cir. 2010) (citation omitted). The entity's policy or custom must be the "moving force" that caused a constitutional violation. *Id.*

In *Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745 (5th Cir. 1993), this Court analyzed the difference between policies that compel unconstitutional action and policies that do not. In *Gonzalez*, a teacher was reprimanded and transferred to a new school after allegedly molesting a girl. At the second school, the teacher molested the plaintiff's daughter. The parents argued that, but for the school's transfer decision, the molester would not have had access to their daughter. The parents prevailed at trial, but this Court reversed and rendered judgment in favor of the school district. Although the school board's decision to transfer the teacher constituted a "policy" decision for purposes of Section 1983, the "policy" was not in and of itself unconstitutional and did not compel unconstitutional conduct:

> [T]he Gonzalezes do not maintain that the Board ordered Mares to assault their daughter or that it intended this result. The Board's 'policy' may have produced or caused the constitutional violation but, unlike the policymaker's actions in *Monell* and *Pembaur*, it is not itself unconstitutional. ... [W]here, as here, a policy in some sense causes, but does not compel, a

> constitutional violation, plaintiffs must establish that the particular harm-producing deficiency 'resulted from conscious choice,' that is, they must supply 'proof that the policymakers deliberately chose [measures] which would prove inadequate.'" ...
>
> In order for municipal liability to attach, plaintiffs must offer evidence of not simply a decision, but a 'decision by the city itself to violate the Constitution.' ...

Id. at 754-55, 760. The Court held that liability against a school district is not permitted unless the board's decision demonstrates deliberate indifference to the student's constitutional rights. *Id.* at 762. The "deliberate indifference" standard permits courts to separate omissions that "amount to an intentional choice" from those that are merely "unintentionally negligent oversight[s]." *Id.* at 756 (citation omitted). Here, Appellants do not contend that the school district intentionally chose a defective policy or that it intended Jane to suffer.

IV. This Court's precedents lend no support to the application of the state-created danger exception to this case.

Although both the panel majority and dissent declined to apply the state-created danger exception to this case, the Appellants press the Court to recognize and apply this theory. This Court's precedents lend no support to the application of the state-created danger exception to this case. Even in circuits that recognize this exception, liability is not permitted unless the defendant had actual knowledge of a specific risk of harm to a known victim. The allegations in Appellants' complaint do not satisfy this element. Their conception of actual knowledge is

broad, generic, and diffuse – so much so that it threatens to convert the state-created danger *exception* into a low-threshold general tort. As shown below, the panel appropriately refused to apply the state-created danger exception to this case.

This Court on numerous occasions has stressed that the state-created danger exception turns on the state actor's "actual knowledge of a specific risk of harm to a known victim." *Morin v. Moore*, 309 F.3d 316, 322-23 (5th Cir. 2002). Actual knowledge is a "critical" threshold element. *See McClendon v. City of Columbia*, 305 F.3d 314, 326 n.8 (5th Cir. 2002) (en banc). For example, in *Luevano v. Geyer*, 355 Fed.Appx. 834, 2009 WL 4798142 (5th Cir. 2009) (not designated for publication), the Court rejected the state-created danger exception in a case in which an on-duty officer left a firearm accessible to children, and one child shot another. It was "not enough to allege knowledge that the children were in the house and *could* acquire the shotgun. Appellant must allege knowledge that the children *would* acquire the shotgun." *Id.* at *2 (emphasis in original).

The Appellants' allegations fall short of this standard. They generically state that public schools utilize student check-out procedures because it is "common knowledge" that "pedophiles and disgruntled non-custodial parents" are dangerous. (Appellants' En Banc Brief at 16-17.) They also vaguely allege that the Covington school district had internal discussions and safety meetings to discuss complaints and inquiries "concerning checkout policies" and "access to

students" by "unauthorized individuals." (CR:22, ¶34.) They do not, however, allege that there had been any prior incidents in which other students were harmed due to the check-out procedure, nor do they allege that school officials knew that Keyes was a dangerous person. *Compare Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 531 (5th Cir. 1994) ("This was not a case in which the state *knowingly* brought the victim into close proximity with a specific individual *known* to be likely to commit violence") (emphasis added).

At worst, Appellants' allegation shows that the school district was in the process of reviewing its practices and procedures. School board policy-making by its very nature involves review and assessment of data and campus experiences and requires the input of a variety of stakeholders. Under Appellants' concept of actual knowledge, however, even the act of processing safety information and assessing policy options would be sufficient to meet the knowledge element of the state-created danger exception. This is contrary to *Monell*.

General awareness of the risks posed by pedophiles is insufficient to satisfy the requirement that the plaintiff show actual knowledge and disregard of a specific risk of harm to the plaintiff. *Compare Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 249-50 (5th Cir. 2003) (although the middle school was in an area "where gang activity has existed for years," to hold the school district liable "for the ultimate ineffectiveness" of its anti-gang policies "would turn the Due Process

Clause's limited duty of care into a guarantee of shelter from private violence"). Here, the school district attempted to develop an appropriate procedure for facilitating the release of a student from school. The "ultimate ineffectiveness" of the procedure, while tragic in this particular instance, is not actionable as a violation of substantive due process. *See also Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 202 (5th Cir. 1994) ("Even if the deployment of such security measures was haphazard or negligent, it may not be inferred that the conduct of the defendants rose to the level of deliberate indifference... the most that can be said of defendants' ultimately ineffective attempts to secure the environment is that they were negligent....").

If the rule were otherwise, then the prohibition on *respondeat superior* liability under *Monell* would collapse. For example, although it is "common knowledge" that public schools have heightened concern over the risk posed by firearms to school safety, most schools have not installed metal detectors.[26] Similarly, although schools in approximately 10 states now screen school visitors using an electronic drivers' license scanning device to identify sex offenders, most states do not yet employ this technology.[27] Under Appellants' reasoning, a

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[26] U.S. Dept. of Educ., National Center for Education Statistics, INDICATORS OF SCHOOL CRIME AND SAFETY: 2010, Table 20.1, found at http://nces.ed.gov/programs/crimeindicators/crimeindicators2010/tables/table_20_1.asp.

[27] *See generally Meadows v. Lake Travis Indep. Sch. Dist.*, 397 Fed.Appx. 1, 2010 WL 3516622 (5th Cir., Sept. 8, 2010) (describing "Raptor" screening technology and rejecting claims of parents who did not want to scan her driver's license at child's school).

school's failure to implement these measures would be a failure of constitutional dimension, particularly if the school district had discussed the possibility of installing these measures but had rejected them for economic, pedagogical, operational, or other legitimate reasons. The Due Process Clause, however, does not mandate the provision of particular technology or the content of administrative regulations. *See, e.g., Salas v. Carpenter*, 980 F.2d 299, 310 (5th Cit. 1992) (stating that the Constitution "does not mandate that law enforcement agencies maintain equipment useful in all foreseeable situations").

V. Notwithstanding the federal courts' recognition that there is no constitutional duty to protect students, school districts have used their limited resources to enhance student safety.

Student safety is of paramount concern to all schools. During the last decade, even in the absence of federal civil rights liability under Section 1983, schools and state legislatures have responded to the challenge with a variety of programs and policy initiatives to improve school security and student safety.

For example, the Texas Legislature created the Texas School Safety Center which provides training and technical assistance to Texas public schools and assists schools in the performance of mandatory safety and security audits in accordance with a model procedure and recommended safety standards. *See* TEXAS EDUC. CODE §§ 37.108-37.109, 37.202-37.209.[28] In Mississippi, similar

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[28] *See generally* Texas School Safety Center web resources at http://www.txssc.txstate.edu/.

initiatives are in place through the state's Department of Education. *See* Miss. Dept. of Educ., SCHOOL SAFETY MANUAL at 2 (2008 ed.) (stating that the Division of School Safety was created in 1999 to furnish technical assistance, consulting services, and training for schools).[29] In Louisiana, the state recently received a federal grant to assist the state in launching a Safe and Supportive Schools Initiative.[30]

It bears stating the obvious: educators have *no* incentive to promote practices that will injure children. Individuals who choose public education for their careers do so because they care about children and wish to contribute positively to their development. Protecting children is a common goal for all educators. It is not, however, a constitutional guarantee. Expanding substantive due process to encompass the Appellants' claims is contrary to *DeShaney*, *Walton*, and *Hillsboro* and ultimately would divert resources away from the enhancement of student safety.

CONCLUSION

Amici pray that the Court will affirm the judgment of the district court.

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[29] *See* Mississippi Dept. of Educ., www.mde.k12.ms.us/lead/osos/SchoolSafety.html.

[30] *See* Louisiana Dept. of Educ., http://louisianaschools.net/divisions/sls/lsssi.html.

Respectfully submitted,

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I hereby certify that, on December 30, 2011, I electronically filed the foregoing brief as an attachment to Amici's Motion for Leave by using the appellate CM/ECF system. I certify that I have served this document electronically to all attorneys of record who are registered CM/ECF users. Additionally, I certify that I have served all counsel of record by placing a copy of this document in the U.S. Mail, postage prepaid.

/s/ Lisa A. Brown
Lisa A. Brown

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Dated: December 30, 2011