No. 19-

IN THE

Supreme Court of the United States

ROBERT SANCHEZ TURNER,

Petitioner,

v.

AL THOMAS, JR., IN HIS INDIVIDUAL CAPACITY AND HIS OFFICIAL CAPACITY AS CHIEF OF CHARLOTTESVILLE POLICE DEPARTMENT; CITY OF CHARLOTTESVILLE, VIRGINIA; W. STEVEN FLAHERTY, IN HIS INDIVIDUAL CAPACITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The following questions stem from the Fourth Circuit's Published Opinion regarding claims asserted by Mr. Turner:

1. What analytical framework applies to the state-created danger doctrine regarding (1) what constitutes an affirmative act; (2) whether a government action must create a risk of harm to a specific individual or the public at large; (3) whether a government actor must possess actual knowledge of a danger; (4) whether a government's affirmative action must shock the conscience to constitute state-created danger; and (5) whether a government's affirmative action must cut off all avenues of recourse available to a person?

2. Did the Fourth Circuit Court of Appeals err by reasoning that a verbal order to law enforcement officers to stand down in front of racially-charged felonious assaults is not an affirmative act under precedent of this Court and the Fourth Circuit Court of Appeals, when the considered-true facts demonstrated that law enforcement officials sent subordinate law enforcement officers to the location of anticipated racial violence with orders to stand down in front of felonious assault until the violence reached a level to justify declaring a state of emergency so that the subject 'rally' could be moved to a preferred location?

3. Did the Fourth Circuit Court of Appeals err by defining the right at issue in this case at an unlawfully high level of generality that did not take into account the considered-true facts of this case nor the Fourth Circuit Court of Appeals' own binding precedent, which expressly delineates the contours of qualified immunity in the context of the state-created danger doctrine?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Robert Sanchez Turner is the Petitioner. The Respondents are Al Thomas, Jr., in his individual capacity as Chief of Charlottesville Police Department, and W. Steven Flaherty, in his individual capacity.

RELATED CASES STATEMENT

- Turner v. Thomas, No. 18-1733, U.S. Court of Appeals for the Fourth Circuit. Judgment Entered July 19, 2019

- Turner v. Thomas, No. 3:17-cv-64-NKM-JCH, U.S. District Court for the Western District of Virginia. Judgment Entered May 29, 2018.

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PETITION FOR A WRIT OF CERTIORARI

Mr. Turner respectfully submits his petition for a writ of certiorari to review the Fourth Circuit Court of Appeals' Published Opinion.

OPINIONS BELOW

The Published Opinion of the United States Court of Appeals for the Fourth Circuit, which affirmed the District Court, is available at Turner v. Thomas, 930 F.3d 640 (4th Cir. 2019), and is reprinted in the appendix at Appx. 1a-11a. The Order of the United States District Court for the Western District of Virginia, which granted qualified immunity to Respondents, is available at Turner v. Thomas, 313 F. Supp. 3d 704 (W.D. Va. 2018), aff'd, 930 F.3d 640 (4th Cir. 2019) and is reprinted at Appx. 12a-32a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit rendered its Published Opinion on July 19, 2019. (Appx. 1a-11a.) As a result, this Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides, in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

> State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[U.S. Const. amend. XIV.]

INTRODUCTION

One thing is for no generalized duty to exist requiring law enforcement officers to protect people from random acts of violence. Quite another thing is for law enforcement officials to know that one of the most violent, racially charged riots in recent history is about to occur; know the specific location and time that it will occur; know the location is a small confined park, and then deliberately order subordinate officers to go to said park, watch people be savagely beaten and do absolutely nothing—all so that law enforcement could declare a state of emergency and move the racist rally to a preferred venue, as was the Respondents objective all along. It is important to note that these officers did intervene to stop these beatings *but only after reaching their objective* of permitting the violence to reach a level that justified declaring a state of emergency. This conduct caused Mr. Turner serious emotional and physical injury, as law enforcement stood about ten feet from him and casually looked on as he was beaten in racist mob violence.

Breathtaking was the Fourth Circuit's Opinion in this case, which asserts that known, video-recorded and

racist, violent assaults/felonies were mere "suspicious circumstances" that did not warrant officer intervention: "[a]cting under Pinder's teaching that state actors may not be held liable for "st[anding] by and d[oing] nothing when *suspicious circumstances* dictated a more active role for them." Moreover, the Fourth Circuit violated its own precedent pertaining directly to qualified immunity within the context of the state-created danger doctrine by refusing to even address the expressed purpose of its precedential opinion, in which it stated we "granted *en banc review…* to *define the contours* of qualified immunity under 42 U.S.C. § 1983 when a plaintiff alleges an affirmative duty on the part of a police officer to protect citizens from the actions of a third party." The Fourth Circuit's Opinion represents a step back in time for a circuit that includes Virginia, whose reputation took a hit with respect to its Governor dressing up in blackface with the nickname "coonman."

This Court's dicta in DeShaney has created division amongst the lower courts' regarding the so-called state-created danger doctrine. Courts have developed diverging analytical standards which have afflicted both government actors and claimants, for decades, throughout our country. Some of these significant inconsistencies include the following: (1) what constitutes an affirmative act; (2) whether a government action must create a risk of harm to a specific individual or the public at large; (3) whether a government actor must possess actual knowledge of a danger; (4) whether a government's affirmative action must shock the conscience to constitute state-created danger; and (5) whether a government's affirmative action must cut off all avenues of recourse available to a person.

Ultimately, this case will determine whether all law enforcement agencies throughout our country can escape liability after law enforcement officers, charged with the duty to serve and protect, deliberately watch people get savagely beaten while telling those very people that "[w]e'll not intervene unless given a command to do so," and protecting you is "not my job." Mr. Turner asks this Court to bring some precedential order to this situation by not allowing the Fourth Circuit to treat the facts of this case as merely a request for generalized protection for an indiscernible group of people, when nothing could be further from the truth. Moreover, if the Fourth Circuit's holding is allowed to stand, then the Circuit's broad holding of DeShaney forecloses a remedy intended by § 1983. DeShaney, 489 U.S. 189 (1989).

STATEMENT

A. Factual background

1. The event at issue

The City of Charlottesville (the "City") owns a park, historically called Lee Park, which contained a statute of Robert E. Lee. (JA, p. 12-13.) On June 5, 2017, the City changed the park's name from Lee Park to Emancipation Park (the "Park"). Id. at p. 12. A plan to remove and sell the statue of Robert E. Lee was announced and met with protests. Id. at p. 13. Jason Kessler, leader of the white nationalist group Unity & Security for America, opposed both the name change and removal of the statute. Id. Mr. Kessler organized a Unite the Right rally in the Park to express this opposition. Id.

Initially granting a permit for the rally to be held at Emancipation Park, the City later revoked that permit, citing traffic congestion and the expected crowd size. Id. at p. 14-15. Respondents announced the decision to revoke the permit at a press conference, but never stated that they would be unable to protect the demonstrators, counterdemonstrators, and the public. Id. at p. 17. This decision came after a closed-door meeting of the City Council at which some representatives of law enforcement were present. Id. at p. 19.

2. Facts relevant to revoking protections at Emancipation Park if Mr. Kessler insisted on holding the rally there

After the revocation of the permit for the Unite the Right rally at the Park, Chief Thomas initially assured Mr. Kessler that all of the security precautions agreed upon would still be offered. Id. at p. 20. The next day, however, Mr. Kessler was informed by police representatives that Chief Thomas had changed his mind; none of the protections promised would be provided at Emancipation Park. Id. at p. 21. In response, Mr. Kessler successfully filed suit against the City to enjoin them from preventing his demonstration on August 12, 2017. Id. at p. 23.

3. Facts relevant to the stand down order

The Department of Homeland Security warned Respondents Thomas and Flaherty, based on gathered intelligence, that this rally would be very violent. (JA, p. 31.) After Mr. Kessler insisted on holding the subject rally at Emancipation Park, Chief Thomas and Colonel Flaherty issued a stand down order to their respective

officers that created a special policy for the Unite the Right rally. Id. at p. 24-26. Law enforcement officers at the scene informed demonstrators that "[w]e'll not intervene unless given a command to do so." Id. at p. 26. Subsequently, racially charged violent acts broke out. Officers under Respondents' command observed these violent incidents and did not intervene, as demanded by the stand down order. Id. ¶ 59, 66. When asked if police were going to respond to violent attacks, at least one officer stated, "that's not my job." Id. ¶ 69.

The officers under the command of the Respondents did not wear any riot gear to the rally. Eventually, the violence reached a level that justified the Respondents commanding subordinate officers to disperse the protesters, and only then did officers leave the scene to put on riot gear and return to Emancipation Park, where protestors were led to the previously rejected McIntire Park. Id.

After a sharply critical report, Respondent Thomas stepped down as police chief of Charlottesville Police Department. Trip Gabriel, Charlottesville Police Chief Steps Down after Handling of Rallies Is Criticized, New York Times (Dec. 18, 2017) https://www.nytimes.com/2017/12/18/us/charlottesville-police-al-thomas.html.

B. District Court's Decision

1. The District Court's Order on affirmative acts sufficient for the state-created danger doctrine

The District Court dismissed Mr. Turner's Complaint, reasoning not that the stand down order was not an

affirmative act, but that there is no duty for police to intervene. (Appx. 22a.) In making that ruling, the District Court found that "the only individuals who engaged in affirmative conduct were the third-party criminals." Id. The Court stated that "looking to the immediate interactions between the officer and the plaintiff, Turner has not alleged Defendants did anything to "directly" cause his injuries." Id. (internal citations omitted). The District Court specifically stated that Turner only "alleges that the Charlottesville Police and the Virginia State Patrol officers stood and watched [the assault] for more than thirty seconds, while doing nothing to intervene." Id.

C. The Fourth Circuit Court of Appeals Decision

The Opinion of the Fourth Circuit Court of Appeals is published. Thus, the findings and reasoning supporting the Fourth Circuit's statement, "[w]e agree with the district court that the facts alleged in Turner's complaint do not amount to a violation of clearly established law. Accordingly, we affirm," is binding on the entire Circuit. (Appx. 2a.) The Fourth Circuit's position is fairly represented by its statement that:

> "Turner has put forth no facts suggesting that a stand-down order crosses the line from inaction to action when the state conduct in *Pinder* and *Doe* did not. Acting under *Pinder*'s teaching that state actors may not be held liable for "st[anding] by and d[oing] nothing when suspicious circumstances dictated a more active role for them," Thomas and Flaherty could have reasonably concluded that a stand-down order violated no constitutional right." (Appx. 10a-11a.)

Based on that reasoning, the Fourth Circuit granted qualified immunity.

STATEMENT

REASONS FOR GRANTING THE PETITION

The right at issue is the following:

> Did government actors create a danger that caused Mr. Thomas physical and emotional harm by knowing and anticipating a violent protest was to take place in a specified park and then (1) ordering their subordinate officers to appear at the park while (2) ordering those same officers to permit felonious assaults in accordance with a stand down order until a state of emergency was declared and the racist rally could be moved lawfully down the street to Respondents' preferred location?

The Fourth Circuit cut off any analysis of whether the Respondents created a danger that caused Mr. Thomas harm by first reasoning that an order to refrain from intervening in racially charged violent assaults, under both this Court's precedent and Fourth Circuit precedent, did not constitute an affirmative act in order to trigger analysis under the state-created danger doctrine. After establishing that point, the Fourth Circuit permitted Respondents to do what this Court has routinely reversed denials of qualified immunity for: define the right at issue, for purposes of qualified immunity, at an unlawfully high level of generality instead of the appropriate level of specificity considering the actual recorded facts. In doing so, the Fourth Circuit refused to address its own

precedent which easily demanded denial of qualified immunity under the facts of this case.

Unfortunately, this Court has recently focused most of its attention on reversing the denial of qualified immunity for law enforcement rather than reversing the granting of qualified immunity for law enforcement. Hopefully this case can be different, given the serious divergence between published opinions throughout every circuit's court of appeals, and the very essences and purpose of § 1983 being eroded by the Fourth Circuit Published Opinion.

I. The Supreme Court has not addressed this issue in many years

The state-created danger doctrine arises as an exception to the general rule that the government has no duty to protect people from privately inflicted harms. See DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 200-202 (1989). In Deshaney, the Court held that the Constitution does not impose affirmative duties on the government, such as the duty to protect people from privately inflicted harms. Id. However, the Court noted two areas where a duty by the government to provide protection does exist. First, a government has a duty to protect when a special relationship arises between an individual and the government, such as when an individual is physically in government custody. Id. at 199-200. Second, a government duty exists if the government took an affirmative step to place the person in danger. See Id. at 200-211; Butera v. D.C., 235 F.3d 637, 648–49 (D.C. Cir. 2001) (noting that federal circuit courts have relied on the passage in DeShaney for the creation of a state-created danger doctrine).

The Supreme Court has only engaged in a substantive discussion of DeShaney one time, in Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 755 (2005). In Gonzales, a woman discovered her three daughters were missing and suspected that her estranged husband, whom she had a restraining order against, had taken the girls. A Colorado law with mandatory language required the police to enforce the terms of restraining orders in domestic violence cases, but the police refused to help. That night, the husband killed the three girls. The Supreme Court held that even if a law is written in mandatory terms, no law creates an "entitlement" because law enforcement officers have discretion on how to enforce any law. The Court's stance in Gonzales caused significant confusion, to the extent that the Fourth Circuit has reasoned, in this case, that ordering officers to show to a rally at a specified place and watch mob violence occur, without intervention, is constitutionally permissible. Some lower courts seem to agree.

Falling in line with the reasoning this Court granted certiorari for in Tolan v. Cotton, 572 U.S. 650 (2014), this case can help to ensure that the lower courts take a consistent approach that *both protects plaintiffs' rights and limits government liability under the Due Process Clause*. Without such guidance, plaintiffs in different circuits are left with completely different standards — which prevents cases, such as this one, from being tested on their merits.

II. The lower courts need precedential guidance well beyond DeShaney

The facts of this case fall under the interpretation of DeShaney v. Winnebago County Dept. of Social Servs.,

489 U.S. 189, 200-202 (1989), which reasoned that a government's failure to protect an individual from private violence, even in the face of known danger, generally, does not violate the Due Process Clause. The circuits are essentially relying on this Court's dicta in DeShaney to create the test for applying the state-created danger doctrine. As a result, inconsistent analytical standards have afflicted both the government and claimants, for decades, throughout our country.

This section will address these significant inconsistencies, including (1) what constitutes an affirmative act; (2) whether a government action must create a risk of harm to a specific individual or the public at large; (3) whether a government actor must possess actual knowledge of a danger; (4) whether a government's affirmative action must shock the conscience to constitute state-created danger; and (5) whether a government's affirmative action must cut off all avenues of recourse available to a person.

a. What constitutes an affirmative act? No guidance from Deshaney

The state-created doctrine analysis, for all the circuit courts, turns on whether government conduct at issue constitutes an affirmative act or passive omission. See e.g. Johnson v. City of Seattle, 474 F.3d 634, 640 (9th Cir. 2007) (discussing whether police conduct was active or passive); Pena v. DePrisco, 432 F.3d 98, 109 (2d Cir. 2005); Pinder v. Johnson, 54 F.3d 1169, 1178 (4th Cir. 1995) ("Claims involving omissions, or the failure to protect, are a third area held to be non-actionable.") It seems straightforward that government actors have a duty to provide protection from private violence when those same government actors

took an affirmative step that "create[ed] a dangerous situation or render[] citizens more vulnerable to danger", but applying the state-created danger doctrine has caused demonstrable division amongst lower courts, including the circuit courts of appeal. Butera, 235 F.3d at 647 (D.C. Cir. 2001). Due to the confusion about what constitutes an affirmative act, some circuits have gone decades avoiding the complexity of the doctrine, leaving perceived victims without a remedy at all.

i. The First and Fifth Circuits

Two circuits, the First and Fifth, have yet to hold that the state-created danger doctrine is a viable claim of action. Rodriguez-Cirilo v. Garcia, 115 F.3d 50, 51 (1st Cir. 1997) (avoiding addressing the "nettlesome legal question" of whether "a police officer's knowing refusal to carry out the express terms of a non-discretionary detention order can be deemed an 'affirmative act.'"); Irish v. Maine, 849 F.3d 521, 526 (1st Cir. 2017) (stating, "[w]hile this circuit has discussed the possible existence of the state-created danger theory, we have never found it applicable to any specific set of facts"); Shumpert v. City of Tupelo, 905 F.3d 310, 324 n.60 (5th Cir. 2018), as revised (Sept. 25, 2018), cert. denied sub nom. Shumpert v. City of Tupelo, Miss., 139 S. Ct. 1211, 203 L. Ed. 2d 206 (2019).

Seemingly, the First Circuit has been reluctant to embrace the state-created danger doctrine out of concern of turning every tort a government actor commits into a constitutional violation. Rodriguez-Cirilo, 115 F.3d at 57 (Campell, J., concurring) (quoting DeShaney, at 202). Indeed, the Fifth Circuit twice adopted the state-created danger doctrine, only to later twice reverse itself.

Shumpert, 905 F.3d at 324 n.60; Saenz v. City of McAllen, 396 F. App'x 173, 177 (5th Cir. 2010) (unpublished) ("On two occasions this court explicitly adopted the state created danger theory but was ultimately reversed."). Obviously, Mr. Turner had little to zero chance of winning in these circuits. Mr. Turner also failed to win in the Fourth Circuit, where the Court of Appeals reasoned that a verbal stand down order simply was not enough to cross the line from inaction to action. Appx. 1a-11a.

ii. The Second and Eighth Circuits

In stark contrast, Mr. Turner's considered-true facts would have met muster in both the Second and Eighth Circuits. There, under controlling law, a police official's verbal order to officers not to intervene in private violence is considered an affirmative act. In Dwares v. City of New York, 985 F.2d 94 (2d Cir. 1993), a group of skinheads attacked demonstrators in the presence of police who did not intervene to protect the demonstrators. Protestors alleged the police had conspired with the skinheads, assuring the skinheads that "unless they got totally out of control" they would face no interference from the police. Id. at 99. The police conduct made the plaintiffs more vulnerable to assault. Id. The court found that prearranged official sanction by government actors of privately inflicted injury violated the protestors' rights under the Due Process Clause. Id.

In fact, later opinions by the Second Circuit went further, finding an affirmative act for purposes of the state-created danger doctrine based on a police officer's inaction. The Second Circuit has read Dwares as holding that an inactive police presence, by itself, can implicitly

signal official sanction of private violence, thus increasing the likelihood of assault on victims. Okin v. Vill. of Cornwall-On-Hudson Police Dep't, 577 F.3d 415, 429 (2d Cir. 2009); see Estate of Rosenbaum by Plotkin v. City of New York, 975 F. Supp. 206, 217 (E.D.N.Y. 1997) (finding that by inappropriately implementing a policy of restraint by police officers toward rioters and ignoring pleas from persons to intervene, the police emboldened participants in the violence and increased the danger to victims of hate crimes).

The Eighth Circuit has opined like results. The plaintiffs in Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990), faced a similar situation when a government actor took a specific action that increased the danger and resulted in the deaths of two people. In Freeman, a wife complained directly to police and demanded enforcement of a restraining order against her husband. Id. at 53-54. However, the chief of police ordered his officers not to interfere since the husband allegedly was a close friend of the chief's; consequently, the husband killed the wife and daughter. Id. at 53. The court reasoned that the police chief's conduct was an affirmative action which increased the danger faced by the decedents and thus warranted the application of the state-created danger exception. Id. at 55.

Mr. Turner's chance of success in the Eighth and Second circuits under his considered-true facts seems promising. But Mr. Turner's fortunes about vindicating his constitutional rights should not depend on which circuit he resides in, when police officers stand ten feet from him, casually watching as he is beaten.

b. Must government action create a risk of harm to a specific individual or the public at large? No guidance from DeShaney

The circuit courts disagree whether a government action must create a risk of harm to a specific individual or the public at large.

i. The Seventh Circuit

In Reed v. Gardner, 986 F.2d 1122, 1127 (7th Cir. 1993), the Seventh Circuit rejected a requirement that a government action must create a risk of harm to a specific individual. The court reasoned that "[w]hen the police create a specific danger, they need not know who in particular will be hurt. Some dangers are so evident, while their victims are so random, that state actors can be held accountable by any injured party." Id. Mr. Turner likely wins in this circuit.

ii. The Third, Sixth, Eighth, and Tenth Circuits

However, the Third, Sixth, Eighth, and Tenth Circuit do require that a specific individual be placed in danger. For example, in Morse v. Lower Merion School Dist., 132 F.3d 902 (3d Cir. 1997), a public-school district did not have a duty to a teacher shot and killed by a private actor who entered through a rear door left unlocked. The court noted, "the state is not obligated to protect its citizens from the random, violent acts of private persons. But it does not appear this limitation necessarily restricts the scope of § 1983 to those instances where a specific individual is placed in danger.» Id. at 913; see also Kallstrom v. City

of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998) ("The state must have known or clearly should have known that its actions specifically endangered an individual."); Carlton v. Cleburne County, Arkansas, 93 F.3d 505, 508 (8th Cir. 1996) ("[C]onduct by government officials directly responsible for placing particular individuals in a position of danger [is necessary]."). Who knows what would have happened to Mr. Turner had the event occurred in any of these circuits?

iii. The Second, Fourth, Ninth, and D.C. Circuits

By contrast, the Second, Fourth, Ninth, and D.C. Circuits have not taken a position, at all, on the issue. Matican v. City of New York, 524 F.3d 151, 157 (2d Cir. 2008) (discussing state-created danger doctrine and not requiring a distinction between a specific individual or the public at large); Hernandez, 897 F.3d at 1133 (noting the test in the Ninth Circuit is whether a plaintiff was placed in a position of danger); Wright v. D.C., 799 F. Supp. 2d 1, 8 (D.D.C. 2011) (noting that "an individual can assert a substantive due process right to protection") (citing Butera, 235 F.3d at 651).

c. Must the government possess actual knowledge of a danger or should the focus be on the government actor's conduct and its resultant effect on the claimant? No guidance from DeShaney

The question of whether a government actor must possess actual knowledge that a danger exists has also produced an inter-circuit conflict. Similar to the individual

public distinction noted above, while a government's actual knowledge of who will be hurt limits liability, it is not always relevant to the analysis. See DeShaney, 489 U.S. at 200. As the Court noted in DeShaney, in the custodial context, an affirmative duty to protect does not arise from the state's knowledge of the individual's predicament, but from the state's deprivation of an individual's liberty. Id. Similarly, outside of the custodial context, the analysis of whether a duty to protect exists focuses on the government's action that exposes an individual to a danger. See Hernandez, 897 F.3d at 1135.

i. The Third and Sixth Circuits

At least two circuits, the Third and Sixth Circuits, require actual knowledge. Mann v. Palmerton Area Sch. Dist., 872 F.3d 165, 171 (3d Cir. 2017), as amended (Sept. 22, 2017) (requiring a plaintiff to allege an awareness that rises to level of actual knowledge) (citing Phillips v. Cty. of Allegheny, 515 F.3d 224, 235 (3d Cir. 2008)); Estate of Romain v. City of Grosse Pointe Farms, 935 F.3d 485, 492 (6th Cir. 2019) (requiring plaintiff to demonstrate that "the state knew or should have known that its actions specifically endangered the plaintiff").

ii. The Eighth, Ninth, and Tenth Circuits

The Eighth, Ninth, and Tenth Circuits add a twist, permitting potential liability if the government actor had actual knowledge or if the danger was obvious. Montgomery v. City of Ames, 829 F.3d 968, 972 (8th Cir. 2016) (requiring that the risk was obvious or known to the defendant); Kennedy v. City of Ridgefield, 439 F.3d 1055, 1062 (9th Cir. 2006) (stating that a plaintiff

must demonstrate the danger was "known or obvious"); Matthews v. Bergdorf, 889 F.3d 1136, 1150 (10th Cir. 2018) (requiring a plaintiff to demonstrate the risk was obvious or known).

iii. The Seventh Circuit

In contrast, the Seventh Circuit does not require that a danger is known by a government actor. Weiland v. Loomis, 938 F.3d 917 (7th Cir. 2019) (listing elements of three-part test which does not contain a knowledge requirement); Reed, 986 F.2d at 1127 ("When the police create a specific danger, they need not know who in particular will be hurt."). In rejecting the requirement that a government actor have knowledge of a danger, the Seventh Circuit stated: "[s]ome dangers are so evident, while their victims are so random, that state actors can be *held accountable by any injured party*." Reed, 986 F.2d at 1127 (emphasis added).

Relevant to this case, while the knowledge requirement is not always relevant, the Seventh Circuit, and many other circuits, would support finding liability when a danger is obvious. This stands in contrast to the issue here, where the Fourth Circuit deemed an absolute obvious risk of harm "suspicious circumstances." See DeShaney, 489 U.S. at 203.

iv. The Fourth, Eleventh, and D.C. Circuits

Notably, three circuits, the Fourth, Eleventh, and D.C. Circuits, have not taken a position on this issue. Appx. 1a-11a (applying state-created danger doctrine, not discussing knowledge requirement); Waddell v. Hendry

Cnty. Sheriff's Office, 329 F.3d 1300, 1305 (11th Cir. 2003) (stating that the state-created danger exception is judged by a shock the conscience standard and making no mention of knowledge); McKenzie v. Talladega City Bd. of Educ., 242 F. Supp. 3d 1244, 1256 (N.D. Ala. 2017), appeal dismissed, No. 17-11514-FF, 2017 WL 4570458 (11th Cir. Aug. 8, 2017) (discussing non-custodial due process claims in the Eleventh Circuit under the shock the conscience standard); Butera, 235 F.3d at 651 (stating test for state-created danger doctrine, not mentioning foreseeability).

d. Must government conduct shock the consciousness or is merely causing harm sufficient to constitute a state-created danger? No guidance from DeShaney

There is a circuit split as to the mental culpability required to support a claim under the state-created danger doctrine.

i. The Second, Third, Eighth, and Ninth Circuits

The Second, Third, Eighth, and Ninth Circuits have held that a deliberate indifference standard may be sufficient to support a state-created danger doctrine. See e.g., Gladden v. Richbourg, 759 F.3d 960 (8th Cir. 2014) (finding deliberate indifference standard sufficient under a state-created danger theory); Johnson, 474 F.3d at 640 (stating that, in the Ninth Circuit, an officer's conduct creates a constitutional claim when a state officer's conduct places a person in peril in deliberate indifference to their safety). These courts have noted that where officers have time for reflection, a deliberate indifferent standard

should apply. See Okin, 577 F.3d at 432 (finding that where officers have time for reflection, the requisite state of mind is deliberate indifference); Estate of Smith v. Marasco, 430 F.3d 140 (3d Cir. 2005) (stating that where the officer has time for deliberation, deliberate indifference may be sufficient); Phillips, 515 F.3d at 241 (same).

ii. The Fourth, Seventh, Tenth, Eleventh, and D.C. Circuits

At least five circuits, including the lower court at issue here, however, have required that a plaintiff meet the shock-the-conscience standard to support a state-created danger claim. Appx. 1a-11a (rejecting "a deliberate indifference standard merely because the State created a danger that resulted in harm"); Jackson v. Indian Prairie Sch. Dist. 204, 653 F.3d 647, 655 (7th Cir. 2011) (requiring a constitutional violation shock the conscience); Armijo v. Wagon Mound Pub. Sch., 159 F.3d 1253, 1262–63 (10th Cir. 1998) (holding as a requisite element that the conduct is "conscience shocking"); Waddell, 329 F.3d at 1305 (finding the state-created danger exception in the Eleventh Circuit is judged by a shock the conscience standard); Butera, 235 F.3d at 651 (holding that plaintiff must also show the government's conduct shocked the conscience).

e. Must the test require all avenues of escape to be exhausted before a government actor may be potentially liable? No guidance from DeShaney

Another factor the courts disagree on is whether all avenues of escape must be closed off to an individual before a government actor can be held responsible for an affirmative action that produces an injury.

i. The Seventh Circuit

An intra-circuit split exists within the Seventh Circuit on this issue. Compare Monfils v. Taylor, 165 F.3d 511, 517 (7th Cir. 1998) ("[A] State can be held to have violated due process by placing a person in a position of heightened danger without cutting off other avenues of aid.") with Estate of Stevens v. City of Green Bay, 105 F.3d 1169, 1177 (7th Cir. 1997) (requiring alternative avenues of aid to be cut off before imposing liability under the state-created danger theory).

ii. The Ninth Circuit

An intra-circuit split also exists within the Ninth Circuit. In Munger v. City of Glasgow Police Dep't, 227 F.3d 1082, 1086 (9th Cir. 2000), the Ninth Circuit suggested it did not require all avenues of escape to be closed off to an individual. Id. (noting the court does not look solely to the agency of an individual, nor rest its opinion on what options may have been available to the individual). However, in Johnson the court did not find a constitutional violation occurred in a police crowd control context. 474 F.3d at 640. In reaching its conclusion, the court noted that the government actors did not confine the plaintiffs to a place where they were unable to leave. Id.

III. The Fourth Circuit's holding is inconsistent with prior decisions of this Court because it conflicts with the intent of § 1983

The application of the state-created danger theory within the context of police misconduct deserves special attention. It is of controlling importance whether a

court deems a police supervisor's conduct of directing subordinate officers to attend an anticipated racist rally while also issuing a verbal order to stand-down in the face of race-based felony assaults an affirmative act. To decide otherwise conflicts with the legislative history of 42 U.S.C. § 1983. Consequently, before discussing the Fourth Circuit turning this Court's precedent regarding qualified-immunity on its head by defining the right at issue at a high level of generality, and before discussing the fact that the Fourth Circuit conspicuously ignored its own precedent to sanction lawless conduct by Respondents, Mr. Turner steps back to harrowing times past regarding race relations.

Congress passed § 1983 of the Civil Rights Act of 1871 as the primary remedy for the violation of Constitutional rights by a state and local actor, out of concern for the non-administration of law by state and local officials in the face of Ku Klux Klan terrorism in the post-Civil War South. See Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 667 (1978) (stating that the purpose of the Sherman amendment was to suppress Ku Klux Klan terrorism); Monroe v. Pape, 365 U.S. 167, 175–76 (1961). The Court in Monroe emphasized that "while one main scourge of the evil—perhaps the leading one—was the Ku Klux Klan, the remedy created [in § 1983] was not a remedy against it or its members but against those who representing a State in some capacity were unable or unwilling to enforce a state law." 365 U.S at 175–76. Similarly, the Supreme Court has recognized the Civil Rights Act of 1871 was more than a simple remedy; instead, it was a sweeping provision intended to redress state "misuse of power." Id. at 172. Finally, it is uncontested that the Due Process Clause was intended to protect the individual's "right to

be free from and to obtain judicial relief, for unjustified intrusions on personal security." Ingraham v. Wright, 430 U.S. 651, 673 (1977); see Archie v. City of Racine, 847 F.2d 1211, 1221 (7th Cir. 1988) (commenting that "[t]he Supreme Court sometimes uses the negative rights of the Constitution as the foundation for positive ones"). With the above in mind, the Fourth Circuit's Published Opinion in this case frees local law enforcement to literally condone known racial violence with impunity.

IV. The Fourth Circuit violated this Court's precedent by defining the right at issue at a high level of generality, while also refusing to apply its own controlling precedent

The Fourth Circuit violated this Court's precedent when it granted qualified immunity by using a highly level of generality to define the right at issue instead of focusing on the appropriate level of specificity as guided by recorded facts. Making matters worse, the Fourth Circuit then refused to apply the very contours it established for the purposes of deciding qualified immunity with respect to the state-created danger doctrine.

a. Legal standard

Prior to even beginning an analysis of whether or not an officer's conduct was proscribed by clearly established law, it is worth mentioning that by law, all courts in this country must define the right allegedly violated at the 'appropriate level of specificity.' Wilson v. Layne, 119 S. Ct. 1692, 1699 (1999) (stating, "[a]s we explained in *Anderson,* the right allegedly violated must be defined at the appropriate level of specificity *before* a court can

determine if it was clearly established.") (emphasis added.) After that's occurred, then—and only then—can a court properly determine whether clearly established statutory or constitutional law was 'pre-existing, 'obvious,' and 'mandatory' enough to place an officer on notice about the apparent unlawfulness of his or her conduct. See e.g., Hope v. Pelzer, 536 U.S. 730, 739 (2002); United States v. Lanier, 117 S. Ct. 1219, 1227 (1997); see also Graham v. Connor, 490 U.S. 386, 394 (1989); Tolan v. Cotton, 134 S. Ct. 1861, 1866 (2014); Mullenix v. Luna, 136 S. Ct. 305, 308 (2015); Saucier v. Katz, 121 S.Ct. 2151 (2001).

That established, demonstrating that pre-existing law clearly placed an officer on notice about the apparent unlawfulness of his or her conduct can be accomplished in a couple of ways. Officers have fair warning of their apparent unlawful conduct when the confluency of controlling case law and relevant training, polices, and/or regulations have sufficiently clarified a particular right in a manner that provided fair notice to an officer about the apparent unlawfulness of his or her conduct, irrespective of factual distinctions. Anderson v. Creighton, 483 U.S. 635, 640 (1987); Hope, 536 U.S. at 741-46; Lanier, 117 S. Ct. at 1227; see also City & Cty. of San Francisco, Calif. v. Sheehan, 135 S. Ct. 1765, 1776 (2015) (reasoning that an officer's training was too general to place him on notice about the apparent unlawfulness of his conduct.)

Qualified immunity should also be denied if a court identifies a general constitutional rule already identified within precedential law that *applies with obvious clarity* to the specific conduct in question. Lanier, 117 S. Ct. at 1227. Under this rule, the apparent unlawfulness of the officer's conduct should be obviously clear in connection

with controlling decisional law and thus resorting to the use of regulations, reports, policies, or training is simply not necessary.

b. This Court should reject the Fourth Circuit's opinion, as it fails to apply the contours the Fourth Circuit, itself, established for deciding qualified immunity with respect to the state-created danger doctrine

In this case, instead of discussing Mr. Thomas's considered-true facts in relation to its own Circuit-binding, precedential principles of law, the Fourth Circuit made a sweeping generalization that misstates both the record that was before it and Mr. Turner's argument. The Fourth Circuit stated in whole that:

> "Turner has put forth no facts suggesting that a stand-down order crosses the line from inaction to action when the state conduct in *Pinder* and *Doe* did not. Acting under *Pinder*'s teaching that state actors may not be held liable for "st[anding] by and d[oing] nothing when suspicious circumstances dictated a more active role for them," Thomas and Flaherty could have reasonably concluded that a stand-down order violated no constitutional right." (Appx. 10a-11a.)

First, standing alone, the act of verbally ordering officers to stand down and take no action is an affirmative act. The Fourth Circuit skirted that issue, entirely, by coupling this obvious affirmative act with its own precedent, reasoning that when viewed in that context,

ordering hundreds of law enforcement officers to not act was not enough to 'cross[] the line' from inaction to action: "Turner has put forth no facts suggesting that a stand-down order crosses the line from inaction to action when the state conduct in *Pinder* and *Doe* did not." Id. But using its own en banc precedent, Pinder, to define what constitutes an affirmative act for purposes of qualified immunity was erroneous, because Pinder itself showed that Mr. Turner's considered-true facts gave fair warning to Respondents Thomas and Flaherty for purposes of denying qualified immunity.

Nowhere in its Published Opinion does the Fourth Circuit meaningfully acknowledge or discuss the fact that, prior to Mr. Turner's case, in Pinder, the Fourth Circuit itself "granted *en banc review…* to *define the contours* of qualified immunity under 42 U.S.C. § 1983 when a plaintiff alleges an affirmative duty on the part of a police officer to protect citizens from the actions of a third party." In doing so, the Fourth established specific principles of law under which a claim under the state-created-danger is valid:

1. "state actors may not disclaim liability when they themselves throw others to the lions";

2. "the Due Process Clause works only as a negative prohibition on state action. Its purpose was to protect the people from the State, not to ensure that the State protected them from each other"; and

3. "[w]hen the state itself creates the dangerous situation that resulted in a victim's injury, *the absence of a custodial relationship may not be dispositive.* In such instances, the state is not

> merely accused of a failure to act; it becomes much more akin to an actor itself directly causing harm to the injured party."

See Pinder, 54 F.3d at 1171.

That established, it is under those guiding principles—contours—established by Pinder that 'facts suggesting that a stand-down order crosses the line from inaction to action…' must be read. Hope, 536 U.S. at 739. So read, Mr. Turner easily pled considered-true facts "plausibly suggesting," at this litigation stage, that Respondents, themselves, threw Mr. Turner "to the lions," thereby causing harm to Mr. Turner. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007) (stating, "the need at the pleading stage for allegations plausibly suggesting….") These facts include:

1. The Department of Homeland Security warning Respondents based on gathered intelligence that this rally would be very violent. (JA, p. 31.);

2. Respondents' subordinate officers showed up with no riot gear, despite being warned of danger and earlier plans to arrive so dressed, a fact that creates the reasonable inference that Respondents ordered their subordinates not to show up with riot gear despite applicable law enforcements standard and DHS' recommendations to the contrary. (JA, p. 30-31);

3. The visible police presence at the scene informed demonstrators that "[w]e'll not intervene unless given a command to do so." Id. at p. 26;

4. Officers under Respondents' command observed violent incidents and did not intervene. Id. ¶ 59, 66; and

5. When asked if police were going to respond to violent attacks, at least one officer stated "that's not my job. Id. ¶ 69.

These facts easily establish a plausible suggestion that the lions in this case were the racist protestors, and Thomas and Flaherty threw Mr. Turner to those lions by (1) directing officers to be present at the subject Park where the known violent racist rally would take place and by also (2) ordering those same officers to stand down, and simply *watch* as felonious assaults occurred until a state of emergency was declared. Then Respondents ordered those very same officers to go put on riot gear in order to stop the violence and move this racist rally down the street.

c. This Court should reject the Fourth Circuit's sweeping generalizations, including its characterization of felonious assaults as 'suspicious circumstances.'

These same facts also demonstrate the error in the Fourth Circuit's statement, "st[anding] by and d[oing] nothing when suspicious circumstances dictated a more active role for them, Thomas and Flaherty could have reasonably concluded that a stand-down order violated no constitutional right." Turner, 930 F.3d at 646. That phrase fails to define the right at issue in this case with the appropriate level of specificity considering the considered-true facts of this case. For example, the Fourth Circuit

flat-out ignored the above-five enumerated facts. Once those facts are applied, the right at issue, defined at the appropriate level of specificity, is the following:

> Did government actors create a danger that caused Mr. Thomas physical and emotional harm by knowing and anticipating a violent protest was to take place in a specified park and then (1) ordering their subordinate officers to appear at the park while (2) ordering those same officers to permit felonious assaults in accordance with a stand down order until a state of emergency was declared and the racist rally could be moved lawfully down the street to Respondents' preferred location?

At that level of specificity, and in accordance with contours of the state-created danger doctrine as delineated by precedential Pinder, Mr. Turner's facts plausibly suggest a violation of Mr. Turner's Constitutional right under the Due Process Clause of the Fourteenth Amendment.

Moreover, and in a jaw-dropping fashion that floored Mr. Turner's counsel, the Fourth Circuit described irrefutable facts regarding video-recorded, felonious assaults as mere "suspicious circumstances" that did *not* require a more active role by Respondents and those officers under their command. If the Fourth Circuit was willing to label anticipated and actual felonious assaults "suspicious circumstances" regarding a racist event where people were maimed, degraded, and murdered, then there is no telling how the Fourth Circuit will use it Published Opinion in the future.

If the Fourth Circuit had been true to its on precedent, which laid out the contours of the state-created danger doctrine quite well, Respondents should have never been afforded qualified immunity. Mr. Turner asks that this Court vacate the Fourth Circuit's order and establish a form of consistency across the circuits regarding the application of this currently amorphous doctrine.

CONCLUSION

The Fourth Circuit's Published Opinion is fraught with unlawful analysis that could haunt this Court's precedent for years to come, if left unchecked. The case is about more than Mr. Turner; it is about the law and its proper application. Please vacate this harmful Published Opinion.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JULY 19, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1733

ROBERT SANCHEZ TURNER,

Plaintiff-Appellant,

v.

AL THOMAS, JR., IN HIS INDIVIDUAL CAPACITY AND HIS OFFICIAL CAPACITY AS CHIEF OF CHARLOTTESVILLE POLICE DEPARTMENT; CITY OF CHARLOTTESVILLE, VIRGINIA; W. STEVEN FLAHERTY, IN HIS INDIVIDUAL CAPACITY,

Defendants-Appellees.

March 21, 2019, Argued;
July 19, 2019, Decided

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. (3:17-cv-00064-NKM-JCH). Norman K. Moon, Senior, District Judge.

Before FLOYD, HARRIS, and RICHARDSON, Circuit Judges.

Appendix A

Affirmed by published opinion. Judge Floyd wrote the opinion in which Judge Harris and Judge Richardson joined.

FLOYD, Circuit Judge:

Appellant Robert Sanchez Turner was attacked by protesters at the "Unite the Right" rally on August 12, 2017 in Charlottesville, Virginia. Turner claims that, pursuant to a stand-down order under which police officers at the rally were instructed not to intervene in violence among protesters, officers watched his attack and did nothing to help. Turner brought suit against Al Thomas Jr., former Chief of the Charlottesville Police Department; W. Stephen Flaherty, Virginia State Police Superintendent; and the City of Charlottesville. The district court concluded that Thomas and Flaherty were entitled to qualified immunity and dismissed Turner's complaint for failure to state a claim. We agree with the district court that the facts alleged in Turner's complaint do not amount to a violation of clearly established law. Accordingly, we affirm.

I.

Because Turner's claim was dismissed on the pleadings, we take as true all well-pleaded allegations in the complaint. *See Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009). On August 12, 2017, the "Unite the Right" rally was held in Charlottesville's Emancipation Park to protest the City's decision to change the Park's name from "Lee Park" and

remove a Confederate monument from its grounds. Jason Kessler, leader of the far-right advocacy group "Unity & Security for America," led efforts to organize the rally.

The City granted Kessler a permit to hold the rally and informed him that heavy police presence and security would be provided. But less than a week before the event, citing traffic and safety concerns, the City revoked the permit. Kessler challenged the revocation in the Western District of Virginia on First and Fourteenth Amendment grounds, and the district court reinstated the permit. According to Turner, Thomas and Flaherty were "enraged" by the decision to reinstate the permit. J.A. 24. In response, they enacted a stand-down order under which officers on duty at the rally would "refrain from intervening in any violent confrontations between white supremacists and counter-protesters unless given a direct command to do so." J.A. 25. Turner alleges that officers told protesters at the rally about the stand-down order. For example, when demonstrators asked if police planned to respond to violent attacks, at least one officer responded by saying "that's not my job." J.A. 26.

Turner attended the rally as a counter-protester. He alleges that while he demonstrated peacefully on the sidewalk adjacent to the Park, "KKK members/sympathizers" exited the Park and began to engage with counter-protesters. J.A. 27-28. According to Turner, the "KKK members/sympathizers" attacked him for more than thirty seconds, spraying his eyes with mace, beating him with a stick, and throwing bottles of urine at him, all while police looked on and did nothing. J.A. 26. Turner alleges that despite a warning from the Department of

Homeland Security that the rally could turn violent, police did not wear riot gear to patrol the rally. Approximately five hours after the rally began, officers changed into riot gear and began to clear the Park, though at that point Turner had already been attacked.

Turner brought suit under 42 U.S.C. § 1983. In relevant part, Turner sought to hold Thomas and Flaherty directly liable for violation of his substantive due process rights based on the police department's failure to protect him from violent protesters at the rally.[1]

II.

We review de novo a dismissal under Federal Rule of Civil Procedure 12(b)(6), accepting all well-pleaded

1. Additionally, Turner's complaint sought to hold Thomas and Flaherty liable under a theory of supervisory liability and the City of Charlottesville liable under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). We need not address the supervisory-liability claim separately, because Turner has not argued that the qualified-immunity analysis should proceed any differently for that claim. We also find that Turner has waived his claim against the City of Charlottesville. At a hearing before the district court, Turner said he had "dropped" this claim. J.A. 178. Then, in his opening brief on appeal, Turner appeared to focus entirely on the qualified-immunity issue, which does not apply to the City. In response, the City argued that this claim had been waived; Turner declined to address the waiver argument in his reply, which did not even mention his claim against City. It was not until oral argument that Turner sought to preserve this claim. We conclude that Turner's inattention to this claim on appeal, combined with his express statement to the district court, effectively waived it. Therefore, we do not address it.

facts as true and drawing all reasonable inferences in favor of the plaintiff. *See Nemet Chevrolet*, 591 F.3d at 253. However, we "need not accept legal conclusions couched as facts or unwarranted inferences, unreasonable conclusions, or arguments." *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) (internal quotation marks omitted). The complaint must provide "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

III.

Before us is Turner's claim that Thomas and Flaherty violated his substantive due process rights by ordering officers at the rally not to intervene in violence among protesters. In general, a defendant's mere failure to act does not give rise to liability for a due process violation. *See DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 196, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). Turner seeks to avoid that rule by invoking the state-created danger exception, under which state actors may be liable for failing to protect injured parties from dangers which the state actors either created or enhanced. *See Pinder v. Johnson*, 54 F.3d 1169, 1176 (4th Cir. 1995). But it was not clearly established at the time of the rally that failing to intervene in violence among the protesters would violate any particular protester's due process rights. Accordingly, we agree with the district court that Thomas and Flaherty are entitled to qualified immunity, and we affirm the dismissal of Turner's complaint.

Appendix A

Qualified immunity shields state actors from liability under § 1983 liability when their "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wiley v. Doory*, 14 F.3d 993, 995 (4th Cir. 1994) (quoting *Harlow v. Fitzgerald*, 457 US. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). To determine whether a defendant is entitled to qualified immunity, we ask two questions: (1) Has the plaintiff alleged a violation of a federal right? (2) Was the right at issue clearly established at the time of the alleged violation? *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). We may decide, on a case-by-case basis, which question to answer first. *Id.* If the answer to either question is "no," then the defendant is entitled to qualified immunity.

In this case, we begin by asking whether the right asserted by Turner was clearly established at the time of its alleged violation. To determine whether a right was clearly established, we typically ask whether, when the defendant violated the right, there existed either controlling authority—such as a published opinion of this Court—or a "robust consensus of persuasive authority," *Booker v. S.C. Dept of Corr.*, 855 F.3d 533, 544 (4th Cir. 2017) (internal quotation marks omitted), that would have given the defendants "fair warning that their conduct was wrongful." *Williamson v. Stirling*, 912 F.3d 154, 187 (4th Cir. 2018) (internal quotation marks omitted). Thus, we must determine whether, at the time of the rally, there existed legal authority giving Thomas and Flaherty fair warning that ordering officers not to intervene in violence among protesters would implicate the state-created

danger doctrine and amount to a violation of protesters' due process rights.

As our starting point, we turn to *DeShaney v. Winnebago County*, 489 U.S. at 196. There, the Supreme Court stated that because the Fourteenth Amendment was intended to protect "the people from the State, not to ensure that the State protected them from each other . . . [a]s a general matter . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 196-97. Given that "the Due Process Clause does not require the State to provide its citizens with particular protective services," wrote the Court, "it follows that the State cannot be held liable for injuries that could have been averted had it chosen to provide them." *Id.* at 196-97.

There are two exceptions to the rule laid out in *DeShaney*. The first arises when the individual and the state have a "special relationship," such as a custodial relationship, that gives rise to an affirmative duty to protect. *See id.* at 199-200 ("It is the State's affirmative act of restraining the individual's freedom to act on his own behalf . . . which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means."). Turner does not claim that the "special relationship" exception applies in this case.

The second, which *DeShaney* implicitly recognized and which Turner relies upon here, is known as the state-created danger doctrine. *See id.* at 201 ("While the

State may have been aware of the dangers that [the child] faced . . . it played no part in their creation, nor did it do anything to render him any more vulnerable to them."). Under this doctrine, a state actor may be held liable for harm resulting from "affirmative actions" that created or enhanced the dangerous conditions that produced the plaintiff's injury. *See Pinder*, 54 F.3d at 1176. "[T]o establish § 1983 liability based on a state-created danger theory, a plaintiff must show that the state actor created or increased the risk of private danger, and did so directly through affirmative acts, not merely through inaction or omissions." *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015). "Put another way, 'state actors may not disclaim liability when they themselves throw others to the lions,' but that does not 'entitle persons who rely on promises of aid to some greater degree of protection from lions at large.'" *Id.* (quoting *Pinder*, 54 F.3d at 1177).

As we recognized in *Pinder*, the state-created danger doctrine is narrowly drawn, and the bar for what constitutes an "affirmative act" is high. 54 F.3d at 1175. In that case, plaintiff Pinder called the police on her former boyfriend, Pittman, who had broken into her home, assaulted her, and threatened to kill her and her three children. *Id.* at 1172. After Pittman was arrested, Pinder asked the investigating officer if it would be safe for her to return to work that evening and leave her children at home. *Id.* The officer assured her that Pittman would be detained overnight on assault charges and could not be released until the county commissioner became available for a hearing the following morning. *Id.* However, instead of the assault charge, the officer filed lesser charges

against Pittman, and he was released from custody that night. *Id.* Pittman then returned to Pinder's home after she left for work and set fire to it, killing her three children who were sleeping inside. *Id.*

Pinder brought a due process claim against the officer who had assured her that Pittman would be detained overnight, seeking to invoke the state-created danger doctrine. *Id.* at 1175. We rejected this application of the doctrine, however, holding that the officer did not *create* the danger that resulted in the children's death, but "simply failed to provide adequate protection from it." *Id.* "It cannot be," we noted, "that the state 'commits an affirmative act' or 'creates a danger' every time it does anything that makes injury at the hands of a third party more likely." *Id.* (internal quotation marks omitted). We acknowledged that "[a]t some point on the spectrum between action and inaction, the state's conduct may implicate it in the harm caused," but we concluded that "no such point [was] reached" in Pinder's case. *Id.*; *see also id.* at 1176 n.* (observing that although "inaction can often be artfully recharacterized as 'action,' courts should resist the temptation to inject this alternate framework into omission cases by stretching the concept of 'affirmative acts' beyond the context of immediate interactions between the officer and the [victim]").

Following *Pinder*'s narrow reading of the state-created danger doctrine, we have never issued a published opinion recognizing a successful state-created danger claim. Rather, our precedent on the issue has emphasized the doctrine's limited reach and the exactingness of the

affirmative-conduct standard. For instance, in *Doe v. Rosa*, we held that the state-created danger doctrine did not apply when a college president, Rosa, failed to intervene after learning that a counselor at the college's summer camp sexually abused campers for several years. 795 F.3d at 431. One of the counselor's victims and the victim's family (the "Does") brought suit, claiming that Rosa not only failed to report the abuse, but also actively took steps to conceal it. *Id.* For example, the Does alleged that Rosa omitted abuse allegations from relevant records and purposefully obfuscated the nature of the Does' complaint to college officials. *Id.* at 434-35. We held that the Does' claims did not describe the "affirmative actions" necessary to implicate the state-created danger doctrine. *Id.* at 441 ("No amount of semantics can disguise the fact that the real 'affirmative act' here was committed by [the counselor] not by Rosa."). We noted that the Does' claims "lack[ed] the nexus necessary for any of Rosa's alleged conduct to be 'affirmative acts'" that created or enhanced the danger to the Does, specifically, because Rosa "did not meet or speak with the Does, and by all accounts, was not even aware [they] existed." *Id.*

Against this background, we conclude that it was not clearly established at the time of the rally that ordering officers *not* to intervene in private violence between protesters was an affirmative act within the meaning of the state-created danger doctrine. Our precedent sets an exactingly high bar for what constitutes affirmative conduct sufficient to invoke the state-created danger doctrine. Turner has put forth no facts suggesting that a stand-down order crosses the line from inaction to

action when the state conduct in *Pinder* and *Doe* did not. Acting under *Pinder*'s teaching that state actors may not be held liable for "st[anding] by and d[oing] nothing when suspicious circumstances dictated a more active role for them," Thomas and Flaherty could have reasonably concluded that a stand-down order violated no constitutional right. 54 F.3d at 1175. Accordingly, Turner has not alleged a violation of clearly established law, and Thomas and Flaherty are entitled to qualified immunity.[2]

IV.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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2. Turner argues that in assessing the merits of his substantive due process claim, we should ask whether Thomas and Flaherty acted with deliberate indifference to Turner's safety. But as we have stated, "apart from situations involving custody, the Supreme Court has never applied a 'deliberate indifference' standard merely because the State created a danger that resulted in harm." *Slaughter v. Mayor & City Council of Baltimore*, 682 F.3d 317, 321 (4th Cir. 2013); *see also Waybright*, 528 F.3d 199, 205 (4th Cir. 2008) ("For a due process challenge to executive action to succeed, the general rule is that the action must have been 'intended to injure in some way unjustifiable by the government interest.'"). Because there was no clearly established law imposing liability based on deliberate indifference in this context, qualified immunity shields Thomas and Flaherty from such liability.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, CHARLOTTESVILLE DIVISION, FILED MAY 29, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

CASE NO. 3:17-CV-00064

ROBERT SANCHEZ TURNER,

Plaintiff,

v.

AL THOMAS, JR., *et al.,*

Defendants.

May 29, 2018, Decided;
May 29, 2018, Filed

MEMORANDUM OPINION

JUDGE NORMAN K. MOON

This case is before the Court on Defendants' motions to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiff Robert Sanchez Turner ("Turner") alleges several claims for damages sustained at the August 12, 2017 "Unite the Right" rally. These claims are asserted against Defendants Al Thomas

Jr. ("Thomas"), former Chief of the Charlottesville Police Department; W. Stephen Flaherty ("Flaherty"), Virginia State Police Superintendent; and the City of Charlottesville ("Charlottesville"). Plaintiff's claims share a common question: whether there is constitutional duty under the Fourteenth Amendment for the police to intervene to protect a citizen from criminal conduct by third parties. Because I find this duty is not "clearly established," his claims are barred by qualified immunity. Therefore, although Defendant Flaherty's jurisdictional argument under Rule 12(b)(1) fails, Defendants' motions to dismiss pursuant to Rule 12(b)(6) will be granted.

I. Standard of Review

Defendants bring motions pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). A motion to dismiss under Rule 12(b)(1) challenges the Court's subject matter jurisdiction. The burden of proving subject matter jurisdiction rests upon the plaintiff. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). Thus, a court must dismiss a complaint which fails to allege facts that demonstrate subject matter jurisdiction.[1] *Id.*

1. Motions to dismiss for lack of subject matter jurisdiction can be brought one of two ways: "First, it may be contended that a complaint simply fails to allege facts upon which subject matter jurisdiction can be based." *Adams*, 697 F.2d at 1219. "Second, it may be contended that the jurisdictional allegations of the complaint were not true." *Id.* Implicated here is only the first (*i.e.*, facial) challenge to subject matter jurisdiction. As such, "all the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration." *Id.*

"In ruling on a 12(b)(6) motion, a court must accept as true all of the factual allegations contained in the complaint and draw all reasonable inferences in favor of the plaintiff." *Kensington Volunteer Fire Dep't, Inc. v. Montgomery Cty., Md.*, 684 F.3d 462, 467 (4th Cir. 2012); *see also Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (internal citations and quotation marks omitted). Stated differently, in order to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Twombly*, 550 U.S. at 570).

II. Facts as Alleged

In Charlottesville, Virginia, a statue of Confederate General Robert E. Lee stands in what was formerly called "Lee Park." (Compl. ¶¶ 6-8). In June 2017, Defendant Charlottesville changed the park's name to "Emancipation Park," ("the Park") and subsequently planned to sell the statue and have it removed. (*Id.* ¶ 7-8). In response, Jason Kessler, leader of the group "Unity & Security for America," organized the "Unite the Right" rally to protest the Park's name change and the decision to sell the statute. (*Id.* ¶ 10-11).

Appendix B

Kessler applied for, and was granted, a permit to hold a "free speech rally in support of the Lee monument" by the City. (*Id.* ¶ 12). Less than a week before the event, the City revoked Kessler's permit, citing traffic and safety concerns. (*Id.* ¶¶ 15-16, 21, 29). Allegedly, Kessler was initially promised that security measures would nevertheless remain in place for the revoked event. However, he was later informed that Defendant Thomas, as Chief of Police, allegedly "changed his mind" and would not provide any of the initially promised protections. (*Id.* ¶ 30).

Kessler then brought suit, challenging the permit's revocation on First and Fourteenth Amendment grounds, seeking injunctive relief. (*Id.* ¶ 32). U.S. District Judge Glen Conrad granted Kessler's request and reinstated the permit. *Kessler v. Cty. of Charlottesville, Virginia*, No. 3:17CV00056, 2017 U.S. Dist. LEXIS 128330, 2017 WL 3474071 (W.D. Va. Aug. 11, 2017). Turner alleges that in response to Judge Conrad's ruling, Defendants Thomas and Flaherty became "enraged," and instituted a "special policy" for the protest, "ordering [their] officers to 'stand down' . . . ." (*Id.* ¶¶ 40-41, 44). This alleged "stand down" order mandated law enforcement to: "refrain from intervening in any violent confrontations between white supremacists and counter-protesters unless given a command to do so." (*Id.* ¶¶ 44-46). Turner alleges law enforcement followed this "stand down" order and even directly told counter-protesters they would "not intervene unless given a command to do so." (*Id.* ¶¶ 49-50).

It is alleged that on August 12, 2017, Turner went to the Park as a counter-protestor. (*Id.* ¶¶ 9-10, 52-53). As he allegedly protested peacefully on the sidewalk adjacent

to the Park, "KKK members/sympathizers" exited the Park and began "to engage counter protesters who were on the sidewalk." (*Id.* ¶ 57). Police allegedly looked on as protesters, unprovoked, sprayed Turner in his eyes with mace, subsequently beat him with a stick, and threw bottles of urine at him. (*Id.* ¶¶ 54-55, 59, 64). He alleges that "Charlottesville Police and Virginia State Patrol officers stood and watched [this] for more than thirty seconds, while doing nothing to intervene." (*Id.* ¶¶ 58, 61-63).[2]

Turner now asserts several claims against Defendants premised on what is known as a "state-created danger" theory of liability. *See generally DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). Turner alleges Defendants Thomas and Flaherty, in their individual capacities, violated his substantive due process rights by failing to intervene in a state-created danger, under both direct (Count I) and supervisory (Count II) theories of liability. He also alleges Defendants acted with "deliberate indifference" towards his assault (Count IV) in violation of the Fourteenth

2. After the incident in question, an unlawful assembly was declared and "police left the scene to change into riot gear." (*Id.* ¶ 70). Plaintiff alleges that Defendants Thomas and Flaherty "ordered their subordinates not to show up in riot gear despite" a warning by the Department of Homeland Security three days before the rally that the rally would be violent. (*Id.* at ECF 2, ¶ 70). Once equipped with riot gear, the "police began to 'clear' the Park, forcing all of the white supremacists . . . directly into the crowd of counter-protesters." (*Id.* ¶ 71). This "funneling" allegedly resulted in "multiple other violent attacks and severe injuries." *Id.* However, the injuries alleged by Plaintiff here occurred before this alleged "funneling" took place.

Amendment. Lastly, he alleges that municipal liability extends to Defendant Charlottesville for violating his substantive due process rights (Count III). *See generally Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Turner also seeks punitive damages (Count V) and attorney's fees (Count VI).

III. Subject Matter Jurisdiction

Defendant Flaherty, as superintendent of the Virginia State Police, contends sovereign immunity bars the claims against him. Specifically, he argues the Court lacks subject matter jurisdiction over the supervisory liability claim, since it was alleged against him in his official capacity. (Dkt. 27 at ECF 12).

"[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) (citation omitted). Section 1983 "does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits . . . ." *Id.* at 66. *See also Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 64, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) ("[T]he Eleventh Amendment [stands] for the constitutional principle that state sovereign immunity limit[s] the federal courts' jurisdiction under Article III.").[3] Unlike official capacity

3. "In effect, the Eleventh Amendment limits the ability of a federal district court to exercise its subject-matter jurisdiction over

suits, suits brought against defendants in their individual capacities do not implicate sovereign immunity, as they "seek to impose *personal* liability upon a government official for actions he takes under color of state law." *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985) (emphasis added).

Here, Turner specifically alleges in his Complaint that each claim is against Defendants Thomas and Flaherty in their "individual capacities." (Dkt. 1 at ECF 26-30). This express pleading is conclusive as to the capacity of Plaintiff's claims. *Biggs v. Meadows*, 66 F.3d 56, 61 (4th Cir. 1995) (holding that capacity can only be determined by the court when not specifically alleged in the complaint). Since the claims are against Defendants in their individual—and not official—capacities, Eleventh Amendment immunity is not implicated, and the Court has subject matter jurisdiction. Therefore, Defendant Flaherty's motion to dismiss under 12(b)(1) will be denied.

IV. Qualified Immunity

The individual Defendants argue they are entitled to qualified immunity, a doctrine that protects government officials from damages lawsuits when their actions did not violate clearly established law. Turner alleges Defendants

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an action brought against a state or one of its entities. Although not a true limit on the subject-matter jurisdiction of the federal courts, the Eleventh Amendment is 'a block on the exercise of that jurisdiction.'" *Roach v. W. Virginia Reg'l Jail & Corr. Facility Auth.*, 74 F.3d 46, 48 (4th Cir. 1996) (quoting *Biggs v. Meadows*, 66 F.3d 56, 60 (4th Cir. 1995)).

Thomas and Flaherty deprived him of substantive due process under the Fourteenth Amendment by issuing "stand down" orders to their officers. These preemptive orders, he argues, resulted in law enforcement's failure to intervene to protect him from injuries at the hands of third party criminal actors, advancing what is known as a "state-created danger" theory of liability.

When determining whether a claim is barred by qualified immunity, the Court must "decide whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). In conducting the clearly established analysis, courts "first examine . . . decisions of the Supreme Court, [the Court of Appeals for the Fourth Circuit], and [the Supreme Court of Virginia]. We ordinarily need not look any further than decisions from these courts."[4] *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 538-39 (4th Cir. 2017) (citations and quotation marks omitted). In determining whether a right is clearly established, it is not required that a case be directly on point. *Mullenix v. Luna*, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015). Rather "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* Such "clearly established" rights should not be defined "at a high level of generality," but "must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548,

4. "But when there are no such decisions from courts of controlling authority, [courts] may look to 'a consensus of cases of persuasive authority' from *other jurisdictions*, if such exists." *Booker*, 855 F.3d at 538-39 (emphasis in original). No such consensus of persuasive authority is implicated here.

552, 196 L. Ed. 2d 463 (2017). "The dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Mullenix*, 136 S. Ct. at 308 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)) (emphasis in original); *see also Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) (holding defendants "can still be on notice that their conduct violates established law even in novel factual circumstances," so long as the law provided "fair warning" that their conduct was unconstitutional).

Below, each claim will be analyzed to determine whether it is supported by a clearly established constitutional right. I find that they are not, and hold that Plaintiff's claims against Defendants Thomas and Flaherty are barred by qualified immunity.

A. Count I: Failure to Intervene in a State-Created Danger

"[T]he Due Process Clause[] generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual. . . ." *DeShaney*, 489 U.S. at 196. "If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them." *Id.* at 196-97. Thus, "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197.

Nonetheless, an "affirmative act" by the state—"not its failure to act to protect [a plaintiff's] liberty interests against harms inflicted by other means"—can be a deprivation of liberty which triggers "the protection of the Due Process Clause." *Id.* at 200. This "affirmative act" exception to the general rule of nonliability is known as the state-created danger doctrine.[5]

"[T]o establish § 1983 liability based on a state-created danger theory, a plaintiff must show [1] that the state actor created or increased the risk of private danger, and [2] did so directly through affirmative acts, not merely through inaction or omission." *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015). "'Affirmative acts,' in the state-created danger context, are quite limited in scope." *Id.* at 441. "It cannot be that the state 'commits an affirmative act' or 'creates a danger' every time it does anything that makes injury at the hands of a third party more likely. If so, the state would be liable for every crime committed by the prisoners it released." *Pinder*, 54 F.3d at 1173 (citing *Martinez v. California*, 444 U.S. 277, 284-

5. Another exception to the general rule of nonliability occurs when a "special relationship" exists between the plaintiff and the state—such as when "the state restrains persons from acting on their own behalf." *Pinder v. Johnson*, 54 F.3d 1169, 1174 (4th Cir. 1995). While the Fourth Circuit acknowledged the narrow "special relationship" exception could apply outside the "traditional custodial context," it emphasized that such an affirmative duty was a manifestation merely of "the proposition that state actors may not disclaim liability when they themselves throw others to the lions . . . ." *Id.* However, because Plaintiff does not alleged that he was in custody, or that any special relationship existed between him and the state, this exception is not implicated here.

85, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980)). "While it is true that inaction can often be artfully recharacterized as 'action,' courts should resist the temptation to inject this [state-created danger] framework into omission cases by stretching the concept of 'affirmative acts' beyond the context of immediate interactions between the officer and the plaintiff." *Id.* at 1176, n.*.

In *Pinder*, the plaintiff brought a § 1983 action against a police officer and a city commissioner after her former boyfriend murdered her three children. *Id.* at 1172. The night of the murders, police responded to a domestic disturbance call at the plaintiff's home. *Id.* Upon the officer's arrival, the boyfriend was arrested and placed in a squad car. *Id.* Plaintiff informed the officer that the boyfriend "had threatened her in the past, and that he had just been released from prison after being convicted of attempted arson at [the plaintiff's] residence some ten months earlier." *Id.* The plaintiff communicated that she was afraid for the safety of her three children, but was assured by the officer that the boyfriend would be locked up overnight, and the plaintiff returned to work. *Id.* That same night, the boyfriend was charged with misdemeanor offenses and released with instructions to stay away from the plaintiff's home. *Id.* Disregarding the instructions, the boyfriend returned to the plaintiff's home and set fire to it. *Id.* All three children died of smoke inhalation. *Id.* The plaintiff brought suit against the police officer and the county commissioner claiming, *inter alia*, that they had violated their affirmative duty under the Fourteenth Amendment to protect her and her children. *Id.*

Relying upon the Supreme Court's decision in *DeShaney*,[6] the Fourth Circuit held the plaintiff's claim was barred by qualified immunity, as she could point to "no clearly established law supporting her claim at the time of the alleged violation." *Id.* at 1173. The court addressed, *inter alia*, the plaintiff's argument that the state engaged in "affirmative conduct" creating or enhancing the danger. *Id.* ("She emphasize[d] the 'actions' that [the defendant] took in making assurances, and in deciding not to charge [the boyfriend] with any serious offense."). The court found the only the party who committed the affirmative act was the boyfriend—not the police. *Id.* The court reasoned that,

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6. The Fourth Circuit in *Pinder* succinctly recounted the Supreme Court's decision in *DeShaney*:

> The facts in *DeShaney* were as poignant as those in this case. There, the Winnebago County Department of Social Services (DSS) received a number of reports that a young boy, Joshua DeShaney, was being abused by his father. As this abuse went on, several DSS workers personally observed the injuries that had been inflicted on Joshua. They knew firsthand of the threat to the boy's safety, yet they failed to remove him from his father's custody or otherwise protect him from abuse. Ultimately, Joshua's father beat him so violently that the boy suffered serious brain damage. Joshua's mother brought a § 1983 action on his behalf, arguing that the County and its employees had deprived Joshua of his liberty interests without due process by failing to provide adequate protection against his father's violent acts. Despite natural sympathy for the plaintiff, the Court held that there was no § 1983 liability under these circumstances.

Pinder, 54 F.3d at 1174 (citations omitted).

"[a]s was true in *DeShaney*, the state did not 'create' the danger, it simply failed to provide adequate protection from it. In both cases, '[t]he most that can be said of the state functionaries . . . is that they *stood by and did nothing when suspicious circumstances dictated a more active role* for them.'" *Id.* at 1175-76 (quoting *DeShaney*, 489 U.S. at 203) (emphasis added).

Here, Turner argues Defendants affirmatively acted by issuing the "stand down" order. However, like the boyfriend in *Pinder*, the only individuals who engaged in affirmative conduct were the third party criminal actors—not the Defendants or their subordinates. Looking to the "immediate interactions between the officer and the plaintiff," *Pinder*, 54 F.3d at 1176, n.*, Turner has not alleged Defendants did anything to "directly" cause his injuries. Rather, he alleges the "Charlottesville Police and Virginia State Patrol officers stood and watched [the assault] for more than thirty seconds, while doing nothing to intervene." (Compl. ¶ 61). Turner does allude to active conduct by the police when they allegedly cleared out the park and "funneled" protesters into counter-protesters. (Compl. ¶¶ 52-69, 71). However, this allegedly occurred *after*, not before, he sustained his injuries. There was simply no affirmative act by police that created the danger that befell Plaintiff. Framing the incident in terms of a "stand down" order is nothing more than an "artful recharacterization" of inaction as action—something the Fourth Circuit in *Pinder* warned was inappropriate.

Ultimately, the Fourth Circuit has never issued a published opinion finding a successful "state-created

danger" claim. *See Doe v. Rosa*, 795 F.3d 429 (4th Cir. 2015) (holding no claim existed where college president allegedly knew of, failed to report, and tried to conceal the fact that a child molester had continued to work at a college's summer kids camp); *Waybright v. Frederick Cty., MD*, 528 F.3d 199, 201 (4th Cir. 2008) (finding no violation for failure to prepare for and treat firefighter trainee's medical needs); *Pinder*, 54 F.3d at 1169. Turner's argument there was "clear fair warning" that such a "stand down" order violated clearly established law, (dkt. 34 at ECF 28), collapses under the weight of controlling precedent finding there is generally no duty to intervene, as well as Turner's inability to identify any U.S. Supreme Court, published Fourth Circuit, or Supreme Court of Virginia precedent recognizing a valid state-created danger claim.

The Fourth Circuit has explained why qualified immunity is so important in this type of case:

> The recognition of a broad constitutional right to affirmative protection from the state would be the first step down the slippery slope of liability. *Such a right potentially would be implicated in nearly every instance where a private actor inflicts injuries that the state could have prevented.* Every time a police officer incorrectly decided it was not necessary to intervene in a domestic dispute, the victims of the ensuing violence could bring a § 1983 action. . . . Indeed, victims of virtually every crime could plausibly argue that if the

> authorities had done their job, they would not have suffered their loss. Broad affirmative duties thus provide a fertile bed for § 1983 litigation, and the resultant governmental liability would wholly defeat the purposes of qualified immunity.

Pinder, 54 F.3d at 1178 (emphasis added). Given that warning, as well as the great weight of binding precedent surveyed above, I find the alleged constitutional right asserted by Plaintiff against Defendants Thomas and Flaherty was not clearly established at the time of Defendants' inaction.

Accordingly, Count I is barred by qualified immunity.

B. Count II: Supervisory Liability

To state a supervisory liability claim under § 1983, Plaintiff must satisfy three elements:

> (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed "a pervasive and unreasonable risk" of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive practices,"; and (3) that there was an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.

Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994) (collecting cases); *Wilkins v. Montgomery*, 751 F.3d 214, 226 (4th Cir. 2014). As to the second prong of *Shaw*, "a plaintiff '[o]rdinarily . . . cannot satisfy his burden of proof by pointing to a single incident or isolated incidents . . . for a supervisor cannot be expected . . . to guard against the deliberate criminal acts of his properly trained employees when he has no basis upon which to anticipate the misconduct.'" *Randall v. Prince George's Cty., Md.*, 302 F.3d 188, 206 (4th Cir. 2002) (quoting *Slakan v. Porter*, 737 F.2d 368, 373 (4th Cir. 1984)).

Under *Shaw*, Plaintiff must make a double showing: (1) whether supervisory liability under § 1983 was clearly established at the time of the incident; and (2) whether the alleged underlying constitutional violation was also clearly established. Here, while supervisory liability in the § 1983 context is clearly established, *id.* at 801, the constitutional violation undergirding his allegation of supervisory liability is not. As demonstrated above, *see supra* Part IV.A, the right he asserts, based on a state-created danger theory, was not clearly established at the time of the August 12, 2017 rally. To the contrary, there is simply no constitutional right to state protection from "criminals or madmen," and a state official's failure to provide such protection "is not actionable under § 1983." *Doe*, 795 F.3d at 440.

Accordingly, Count II is barred by qualified immunity.[7]

7. Plaintiff's claim would also fail on the merits. Turner's failure to successfully plead a state-created danger claim directly against Defendants forecloses on an opportunity to find such liability on a

C. Count IV: Deliberate Indifference

Plaintiff's also asserts claims against Defendants Thomas and Flaherty for deliberate indifference in violation of Plaintiff's Fourteenth Amendment rights. "'The touchstone of due process is protection of the individual against arbitrary action of government,' whether the fault lies in a denial of fundamental procedural fairness or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (citations omitted) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)). "[I]n a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.* at 833 n.8. This "shocks the conscience" element is distinct from a "deliberate indifference" standard. *Sanford v. Stiles*, 456 F.3d 298, 310 (3d Cir. 2006) ("We again clarify that in *any* state-created danger case, the state actor's behavior must *always* shock the conscience. But what is required to meet the conscience-shocking level will depend upon the circumstances of each case, particularly the extent to which deliberation is possible. In some circumstances, deliberate indifference will be sufficient. In others, it will not.") (emphasis in original). The Fourth Circuit has acknowledged that, outside of situations involving custody,

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supervisory theory. *Doe v. Rosa*, 664 F. App'x 301, 303 n.2 (4th Cir. 2016) (noting there can be no supervisory liability when there is no underlying violation of the Constitution).

"the Supreme Court has never applied a 'deliberate indifference' standard merely because the State created a danger that resulted in harm." *Slaughter v. Mayor & City Council of Baltimore*, 682 F.3d 317, 321 (4th Cir. 2012) (analyzing a deliberate indifference claim supported by a state-created danger theory of liability).

Here, Turner alleges that Defendants "showed deliberate indifference" to him by implementing an unconstitutional policy, the "stand down" order, "that substantially increased the harm to [him] and ultimately caused his injuries." (Compl. ¶ 84). As demonstrated above, there is no clearly established law supporting the novel due process right he asserts in this case. *See supra* Part IV.A. Further, there is no support for his position that a "deliberate indifference" standard is proper to satisfy the "shocks the conscience" element of his claim, outside the custodial context, based on a state-created danger theory. *Slaughter*, 682 F.3d at 321. Moreover, Turner's citation to non-binding authority is insufficient to articulate a clearly established right here. *Booker*, 855 F.3d at 538-39.

Accordingly, Count IV is barred by qualified immunity.[8]

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8. Even assuming there was no qualified immunity and such a violation was adequately pled, Defendants conduct during and before the rally would not satisfy a deliberate indifference standard on the merits:

> There were officers standing by and creating a visible presence at the park, press conferences and press releases warning people of the potential for violence that was beyond the ability of law enforcement to

Appendix B

V. Defendant City of Charlottesville

Plaintiff has asserted a *Monell* claim (Count III) against Defendant Charlottesville under the same state-created danger theory discussed above. While Congress intended municipalities to be considered "persons" under § 1983, "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell*, 436 U.S. at 690-91. Among other things, a municipality may be held liable for a particular policy under §1983 "through the decisions of a person with final policy making authority." *Lytle v. Doyle*, 326 F.3d 463 (4th Cir. 2003). Notably, however, "a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell*, 436 U.S. at 691.

For a municipality to be liable under 1983, a plaintiff must demonstrate an underlying constitutional violation. *Waybright v. Frederick Cty., MD*, 528 F.3d 199, 203 (4th Cir. 2008) ("[M]unicipalities cannot be liable under § 1983 without some predicate 'constitutional injury at the hands of the individual [state] officer,' at least in suits for damages." (quoting *City of Los Angeles v. Heller*, 475 U.S.

> control, a "command center" staffed with local, state, and even national law enforcement officials, firefighters, and ambulances, an attempt to shift the protest to another safer park, and officers in riot gear that eventually dispersed the assembly.

(Dkt. 31 at 18 (citing Compl. at ¶¶ 20, 23-25, 47, and 70)). Such conduct demonstrates that Defendants took precautions in anticipation of the rally and worked to ensure, at least on some basic level, public safety and order would be maintained.

796, 799, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986))); *Evans v. Chalmers*, 703 F.3d 636, 654 n.11 (4th Cir. 2012) ("Because we hold that all plaintiffs failed to state predicate § 1983 claims against the individual officers [due to qualified immunity], we must also hold that all plaintiffs have failed to state supervisory liability, *Monell* liability, and 'stigma-plus' claims."); *Stevenson ex rel. Stevenson v. Martin Cty. Bd. of Educ.*, 3 F. App'x 25, 33 (4th Cir. 2001) ("An award of damages against a municipality based on the actions of its officers is not available unless the officers' conduct amounted to a constitutional injury."). Here, although the Court explained above why the individual Defendants are entitled to qualified immunity, *see supra* Part IV.A., the decisions in *DeShaney, Pinder, Waybright, Doe*, and *Stevenson* all lead to the same conclusion that Plaintiff's underlying claims simply fail on the merits too. With no undergirding violation, the City has no § 1983 municipal liability.

Accordingly, Count III will be dismissed for failing to state a claim.

VI. Conclusion

In sum, there is no clearly established constitutional right supporting any of Plaintiff's claims against Defendants Thomas and Flaherty. Therefore, Counts I, II, and IV, are barred by qualified immunity and will be dismissed. Even setting aside the issue of qualified immunity, precedent forecloses Plaintiff's claims. Consequently, with no underlying constitutional violation, Plaintiff's *Monell* claim against Defendant Charlottesville

cannot survive. Therefore, Count III will be dismissed as well. With no remaining substantive claims, Counts V and VI (seeking attorney's fees[9] and punitive damages) will also be dismissed.

The Clerk of the Court is hereby directed to send a certified copy of this memorandum opinion and the accompanying Order to all counsel of record.

Entered this 29th day of May, 2018.

/s/ Norman K. Moon
NORMAN K. MOON
SENIOR UNITED STATES
DISTRICT JUDGE

9. Technically, a request for attorney's fees "is not a separate cause of action." *Greene v. Phipps*, No. CIVA 7:09-CV-00100, 2009 U.S. Dist. LEXIS 88462, 2009 WL 3055232, n.1 (W.D. Va. Sept. 24, 2009).