No. _____

In the
Supreme Court of the United States

WARREN BALOGH,
Petitioner,
v.

CHIEF AL THOMAS;
LIEUTENANT BECKY CRANNIS-CURL;
CITY OF CHARLOTTESVILLE,
Respondents.

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

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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[FILED OCTOBER 23, 2024]

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1581

WARREN BALOGH,

Plaintiff − Appellant,

and

GREGORY CONTE,

Plaintiff,

v.

COMMONWEALTH OF VIRGINIA; TERENCE R. MCAULIFFE; VIRGINIA STATE POLICE; STEVEN FLAHERTY; BECKY CRANNIS-CURL; BRIAN JOSEPH MORAN; CITY OF CHARLOTTESVILLE; MICHAEL SIGNER; WES BELLAMY; CHARLOTTESVILLE POLICE DEPARTMENT; AL THOMAS, JR.; EDWARD GORCENSKI; SETH WISPELWEY; DWAYNE DIXON; DARYL LAMONT JENKINS; LACEY MACAULEY,

Defendants – Appellees.

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. Norman K. Moon, Senior District Judge. (3:20−cv−00038−NKM)

Argued: May 9, 2024 Decided: October 23, 2024

Before DIAZ, Chief Judge, and NIEMEYER and RICHARDSON, Circuit Judges.

Affirmed by published opinion. Chief Judge Diaz wrote the opinion, in which Judge Niemeyer and Judge Richardson joined.

ARGUED: Frederick Charles Kelly, III, LAW OFFICE OF FREDERICK C. KELLY, Monroe, New York, for Appellant. Erin Rose McNeill, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia; Melissa Yvonne York, HARMAN CLAYTOR CORRIGAN WELLMAN, Glen Allen, Virginia, for Appellees. **ON BRIEF:** Glen K. Allen, GLEN K. ALLEN LAW, Baltimore, Maryland, for Appellant. Richard H. Milnor, ZUNKA, MILNOR & CARTER LTD, Charlottesville, Virginia, for Appellees City of Charlottesville and Charlottesville Police Department. Rosalie P. Fessier, Brittany E. Shipley, TIMBERLAKE SMITH, Staunton, Virginia, for Appellee Wes Bellamy. David P. Corrigan, HARMAN CLAYTON CORRIGAN & WELLMAN, Richmond, Virginia, for Appellee Al Thomas, Jr.

DIAZ, Chief Judge:

This appeal asks a straightforward legal question: does the First Amendment protect speech amid violence? More specifically, does the First Amendment obligate police officers to protect the constitutional rights of protesters amid violence? We've already suggested that the answer is no.

Kessler v. City of Charlottesville, No. 20-1704, 2022 WL 17985704, at *1 (4th Cir. Dec. 29, 2022) (per curiam). We say so explicitly today.

Warren Balogh asks that we hold otherwise to revive his complaint following the district court's dismissal under Federal Rule of Civil Procedure 12(b)(6). *Conte v. Virginia*, No. 3:20-cv-00038, 2023 WL 3121220, at *1 (W.D. Va. Apr. 27, 2023).[1] Balogh sued under 42 U.S.C. § 1983, broadly alleging that Al Thomas, Jr., Charlottesville's Chief of Police; Becky Crannis-Curl, a Virginia State Police Lieutenant; and the City of Charlottesville, violated Balogh's First and Fourteenth Amendment rights during his participation in the so-called "Unite the Right" rally.[2]

The rally erupted into violence between protesters (including Balogh) and counterprotesters, effectively cutting off everyone's speech and ultimately leading to multiple injuries, widespread property damage, and one death.[3] Despite the mayhem, law enforcement followed Chief Thomas's directive not to intervene and did little to interrupt the participants' "mutual combat." *Conte*, 2023 WL 3121220, at *5.

Balogh would have us seize on these facts to transform the First Amendment from a shield to guard against invasive speech regulations into a

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[1] Gregory Conte, another named plaintiff, isn't a party to this appeal.

[2] Balogh also sued the Commonwealth of Virginia, the Virginia State Police, the Charlottesville Police Department, and ten other individual defendants. The district court dismissed the claims against these defendants, and Balogh doesn't challenge that decision.

[3] James Alex Fields, Jr. killed Heather Heyer after he deliberately drove his car into her and a group of other counterprotesters. J.A. 113.

sword to wield against violent speech disruptions. We decline to forge such a weapon, and instead affirm the district court's judgment dismissing the complaint.

I.

A.

Because the district court dismissed Balogh's complaint at the Rule 12(b)(6) stage, "we take as true all well-pleaded allegations in the complaint." *Turner v. Thomas*, 930 F.3d 640, 643 (4th Cir. 2019). We generally restrict our review to the complaint, but here, the district court granted the parties' request to incorporate by reference into the complaint an independent report prepared in the Unite the Right rally's aftermath ("Heaphy Report").[4]4 Thus, we consider that report in our review.

At the Rule 12(b)(6) stage, the "[f]actual allegations [in a complaint] must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Our review "does not . . . resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *See King v. Rubenstein*, 825 F.3d 206, 212 (4th Cir. 2016) (cleaned up). Rather, to reverse the order of dismissal, we must find that the factual allegations "cross 'the line between possibility and plausibility of entitlement to relief.'" *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (quoting *Twombly*, 550 U.S. at 557).

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[4] The law firm of Hunton & Williams (now Hunton Andrews Kurth), led by partner Timothy Heaphy, prepared the report, entitled "Independent Review of the 2017 Protest Events in Charlottesville, Virginia."

B.

In June 2017, the City of Charlottesville granted Jason Kessler a permit to hold the Unite the Right rally in Emancipation Park (formerly Lee Park) on August 12 of that year. Kessler and his compatriots organized the rally to protest the City Council's proposal to remove a statue of Robert E. Lee from the park.

The rally—even in its planning stages—attracted counterprotesters, many of whom were affiliated with Antifa.[5] These groups had "violently clashed" at earlier protests, "including [at] rallies in Portland, Berkeley, Sacramento, and Anaheim." J.A. 177. Indeed, local law enforcement received reports that the "Unite [t]he Right supporters would bring bats, batons, flag sticks, knives, and firearms to confront their political opponents," while counterprotesters "would attempt to disrupt the event using soda cans filled with cement and balloons or water bottles filled with paint, urine, or fuel." J.A. 177.

Because of these (then-)generalized threats of violence, the City of Charlottesville revoked Kessler's permit days before the scheduled rally, requiring him to move the demonstration to a different location. *See* J.A. 18 ¶ 29. But Kessler sued the city, seeking to enjoin its cancellation of his permit. The district court granted an injunction, allowing the planned rally at Emancipation Park to proceed. *Kessler v. City of Charlottesville*, No. 3:17-cv-00056, 2017 WL 3474071, at *1 (W.D. Va. Aug. 11, 2017).

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[5] Antifa is "a portmanteau of the words, 'anti' and 'fascists.'" *Sines v. Hill*, 106 F.4th 341, 345 n.2 (4th Cir. 2024).

"Rather than engage the crowd and prevent fights, the [law enforcement] plan [as conceived by Chief Thomas] was to declare the event unlawful [if violence ensued] and disperse the crowd." J.A. 205; *see also* J.A. 207–08. But the plan "was erratic and produced inconsistent approaches to the event." J.A. 145. Some officers understood their orders to require them to "make arrests and actively engage if necessary," J.A. 204, but others said they were instructed against "engaging attendees over 'every little thing,'" or "going . . . in and break[ing] up fights . . . unless it was something so serious that someone [would] get killed," J.A. 205.

As expected, the gathering sparked violence almost immediately. Groups of counterprotesters, for example, sought to block the protesters from entering Emancipation Park, which prompted the protesters to push back with shields. Brawls broke out with "video footage show[ing] demonstrators violently jabbing [flagpoles] at counter[]protesters' faces." J.A. 237. The counterprotesters then "fought back and tried to grab the flagpoles away." J.A. 237. "Eventually, the demonstrators pushed the counter[]protesters away with brute force and a cloud of pepper spray." J.A. 237.

As the violence worsened, both protesters and counterprotesters pleaded with law enforcement to protect them. But consistent with the operational plan, "[t]he officers continued to stand in silence." J.A. 238. That is, until Chief Thomas declared an unlawful assembly, ordering everyone to disperse.[6]

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[6] Balogh's complaint asserts that law enforcement didn't order that the counterprotesters disperse. J.A. 23 ¶ 48. But the Heaphy Report belies this claim. *See, e.g.*, J.A. 240 ("Zone

The execution of that order, however, was haphazard, and did not "ensure separation between [the] conflicting groups." J.A. 242. As a result, the violence continued, leading to Balogh's alleged assault by counterprotesters and law enforcement.

C.

1.

Balogh filed a pro se complaint against numerous defendants, alleging four claims under 42 U.S.C. § 1983 and two under 18 U.S.C. § 1962. As relevant here, Balogh alleges under § 1983 that Chief Thomas and Lieutenant Crannis-Curl, and through them, the City of Charlottesville, violated his First and Fourteenth Amendment rights.

As to his First Amendment claims, Balogh argues that Chief Thomas and Lieutenant Crannis-Curl's refusal to intervene and Thomas's unlawful assembly declaration "restrict[ed] [Unite the Right] demonstrators from expressing specific viewpoints while at the same time permitting counter[]protesters to engage in violent and lawless behavior." J.A. 19 ¶ 32. In doing so, says Balogh, the defendants "engineered, ratified[,] and effectuated a heckler's veto, joining and facilitating a mob of counter[]protesters intent on suppressing speech." J.A. 26 ¶ 65.

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commanders were instructed to announce the unlawful assembly and that *all present must disperse* or else be arrested." (emphasis added)). Here, where there's a "conflict between the bare allegations of the complaint and any exhibit attached, the exhibit prevails." *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016) (cleaned up).

As to his Fourteenth Amendment claims, Balogh asserts that "[b]y granting use of a public forum to people whose political views Defendants find acceptable, but denying use to those expressing less favored or more controversial views, . . . Defendants have violated the Equal Protection Clause." J.A. 27 ¶ 71.

Balogh also alleges a municipal liability claim against the City of Charlottesville. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Relying on a *respondeat superior* theory, Balogh argues that the City is liable for Chief Thomas's refusal to intervene and the injuries that followed.

2.

The district court dismissed Balogh's complaint, relying primarily on two of our earlier decisions. In the first, *Turner v. Thomas*, 930 F.3d 640 (4th Cir. 2019), we affirmed the district court's dismissal of similar § 1983 claims brought by a counterprotester who attended the Unite the Right rally. *Id.* at 643. The counterprotester alleged that Chief Thomas and the City of Charlottesville violated his Fourteenth Amendment rights by refusing to intervene. *Id.* Then, in *Kessler v. City of Charlottesville*, No. 20-1704, 2022 WL 17985704 (4th Cir. Dec. 29, 2022) (per curiam), we affirmed the district court's dismissal of First and Fourteenth Amendment claims brought by the Unite the Right rally's organizer, Jason Kessler, which were nearly identical to the claims that Balogh asserts here. *Id.* at *1.

Taking those decisions together, the district court held that Thomas and Crannis-Curl were entitled to qualified immunity because "there was no clearly established right to police intervention at the time of

the [Unite the Right] rally," nor was there a "clearly established right to state protection of one's First Amendment rights from third parties." *Conte*, 2023 WL 3121220, at *5 (cleaned up).

Although the district court could have stopped there, it went further by addressing—and rejecting—Balogh's substantive First and Fourteenth Amendment claims. As to the former, the district court was unpersuaded by Balogh's arguments that the defendants had a duty to protect him from a hostile audience and that they imposed a heckler's veto by refusing to intervene and then later declaring an unlawful assembly. The court again relied on our decision in *Kessler*, explaining that Balogh's complaint "lack[ed] any plausible allegation that the unlawful assembly declaration and dispersal order discriminated based on content or viewpoint." *Id.* at *6.

The district court was even less impressed by Balogh's Fourteenth Amendment claim, noting that Balogh "devote[d] [only] four short allegations" to it. *Id.* at *7. Looking to *Kessler*, the district court found once more that Balogh failed to allege that the defendants "discriminated based on content or viewpoint." *Id.* (cleaned up). The district court noted that Balogh's allegations were either conclusory or failed to "permit[] a reasonable inference of disparate application or intentional discrimination" and that Balogh had conceded in the complaint that Thomas enforced his unlawful assembly order against "the people gathered in and around [Emancipation] Park—thus encompassing both Plaintiffs and the allegedly violent counter[]protesters." *Id.* (cleaned up).

Separately, the district court also rejected Balogh's *Monell* claim because he "alleged no facts indicating the City acted through an express policy, through decisions of persons with final policymaking authority, . . . or through a practice so persistent and widespread as to constitute custom or usage with the force of law." *Id.* at *6. The Charlottesville City Code provided that the City Manager "was the chief executive and administrative officer of the city government," as well as "the director of public safety, with general supervision over the police department of the city." *Id.* (cleaned up). Thus, the City Manager, rather than Chief Thomas, was the "final policymaker" for *Monell* purposes. *Id.*

From the district court's dismissal of the complaint, this appeal followed.

II.

We review the district court's dismissal of Balogh's complaint de novo, "accepting all well-pleaded facts as true and drawing all reasonable inferences in favor of the plaintiff." *Turner*, 930 F.3d at 644. But "we need not accept legal conclusions couched as facts or unwarranted inferences, unreasonable conclusions, or arguments." *Id.* (cleaned up).

A.

As did the district court, we begin our review of Balogh's claims against Chief Thomas and Lieutenant Crannis-Curl through the lens of qualified immunity. And, as did the district court, we find that both defendants are immune.

"Qualified immunity shields state actors from liability under § 1983 . . . when their conduct does not violate clearly established statutory or constitutional

rights of which a reasonable person would have known." *Turner*, 930 F.3d at 644 (cleaned up). So, to defeat qualified immunity, Balogh must do two things: (1) allege "a violation of a federal right," and (2) show that "the right at issue [was] clearly established at the time of the alleged violation." *Id.* If Balogh fails to meet his burden at either step, then the defendants are entitled to qualified immunity.

Because Balogh's burden is two-fold, we can begin with either step, and needn't reach the second step if the first proves dispositive. That's what we did in *Turner*, beginning—and ending—with the clearly established prong. *Id.* We could do the same here, but instead will explain why Balogh fails at both steps.

B.

Start with Balogh's alleged constitutional violations, which he argues fall under the First and Fourteenth Amendments. Balogh's clear focus, however, is on his First Amendment claim, which takes up nearly all his briefing. First, he initially posits that we should import into the First Amendment context a Fourteenth Amendment doctrine that obligates a state to act. From there, he argues that Chief Thomas's and Lieutenant Crannis-Curl's actions (or inactions) during the rally amounted to a heckler's veto, which unlawfully suppressed his speech.

Turning to Balogh's first contention, "as 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." *Turner*, 930 F.3d at 645 (cleaned up). That said, in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 199–201 (1989), the Supreme Court

established two exceptions to this rule that we later applied in *Pinder v. Johnson*, 54 F.3d 1169, 1174–77 (4th Cir. 1995) (en banc). One exception is the state-created danger doctrine, "under which state actors may be liable for failing to protect injured parties from dangers which the state actors either created or enhanced." *Turner*, 930 F.3d at 644.

The problem for Balogh is that by the close of briefing, he all but abandons this Fourteenth-turned-First-Amendment theory of liability. He insists, for instance, that "*DeShaney* and *Pinder* should not govern this First Amendment case," because allowing them to would be "akin to hammering a square peg into a round hole." Reply Br. at 12. Putting a finer point on it, Balogh explains that these cases "were fashioned to address Due Process, not First Amendment claims."[7] *Id.* On this narrow issue, we agree with Balogh.

Neither we nor, seemingly, any other court has ever applied this Fourteenth Amendment exception to a First Amendment claim. Moreover, and as the district court explained in *Kessler*, "the First Amendment merely guarantees that the state will not suppress one's speech . . . [,] [i]t does not guarantee that the state will protect individuals when private parties seek to suppress it." *Kessler v. City of Charlottesville*, 441 F. Supp. 3d 277, 286–87 (W.D. Va.

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[7] Balogh doesn't try to make this argument for his actual Fourteenth Amendment claim. He cites *Hernandez v. City of San Jose*, 897 F.3d 1125, 1133–35 (9th Cir. 2018), a due process analog under reasonably similar facts, but only for his First Amendment claim. Because Balogh barely nods at a due process argument, we decline to "research and construct" one for him. *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 727 (4th Cir. 2021) (cleaned up).

2020). Following Balogh's lead, we won't expand the First Amendment beyond where it belongs.

C.

Balogh's second argument invoking the heckler's veto has more legs, but ultimately, none to stand on.

The heckler's veto doctrine, which, at bottom, prohibits a state from suppressing the speech of a peaceful speaker because of a hostile audience, was born out of several First Amendment concerns.

To begin, the First Amendment has long protected unpopular and even offensive speech. *See Nat'l Socialist White People's Party v. Ringers*, 473 F.2d 1010, 1016 (4th Cir. 1973) (en banc). Indeed, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (cleaned up).

Thus, "if speech provokes wrongful acts on the part of hecklers, the government must deal with those wrongful acts directly; it may not avoid doing so by suppressing the speech." *Meinecke v. City of Seattle*, 99 F.4th 514, 518 (9th Cir. 2024) (cleaned up). Put another way, a state can't "silence[] *particular* speech or a *particular* speaker due to an anticipated disorderly or violent reaction of the audience." *Id.* at 522 (cleaned up).

We've recognized the heckler's veto as "one of the most persistent and insidious threats to [F]irst [A]mendment rights," "imposed by the successful importuning of government to curtail 'offensive' speech at peril of suffering disruptions of public

order." *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985). Though the heckler's veto may involve an "understandable impulse to buy. . . peace," a state offends the Constitution when its restrictions "chill speech." *Id.* Curbing speech under those circumstances is an "impermissible form of content-based speech regulation." *Rock for Life-UMBC v. Hrabowski*, 411 F. App'x 541, 554 (4th Cir. 2010).

Balogh alleges that the defendants imposed a heckler's veto by refusing to intervene and issuing an unlawful assembly order. He relies on *Bible Believers v. Wayne County*, 805 F.3d 228 (6th Cir. 2015) (en banc), for the proposition that "police officers cannot 'sit idly on the sidelines—watching as the crowd imposes, through violence, a tyrannical majoritarian rule.'" Appellant's Br. at 45 (quoting *Bible Believers*, 805 F.3d at 253). Rather, argues Balogh, "the police must first make bona fide efforts to protect the speaker from the crowd's hostility." *Id.* (quoting *Bible Believers*, 805 F.3d at 255).

Bible Believers warrants a closer look. There, the plaintiffs, an evangelical Christian group and its members, attended an Arab International Festival and preached offensive messages to the mostly Muslim crowd, with signs reinforcing these messages. *Bible Believers*, 805 F.3d at 238. The group carried a severed pig's head on a spike. *Id.*

The crowd's response to the plaintiffs' message was hostile—jeering, throwing bottles and other debris, and shouting profanities. *Id.* at 239. The Bible Believers' conduct in response "was at all times peaceful while they passionately advocated for their cause." *Id.* at 257.

Law enforcement did not intervene to stop the crowd's "belligerence and . . . assaultive behavior." *Id.* at 239. To the contrary, an officer told the group that they were "a danger to public safety right now," *id.*, explaining that "what you are saying to them and what they are saying back to you is creating danger," *id.* at 240. The officer then left. *Id.* When the crowd resumed throwing bottles at the group, officers returned and escorted the group from the festival, effectively "cutting off [their] speech." *Id.* at 243.

An en banc Sixth Circuit held that the officers "effectuated a heckler's veto," violating the First Amendment. *Id.* The court explained that "[w]hen *a peaceful speaker*, whose message is constitutionally protected, is confronted by a hostile crowd, the state may not silence the speaker as an expedient alternative to containing or snuffing out the lawless behavior *of the rioting individuals*." *Id.* at 252 (emphases added). But the court also recognized an officer-safety backstop to the heckler's veto: "[T]he Constitution does not require that the officer 'go down with the speaker.'" *Id.* at 253. "If, in protecting the speaker or attempting to quash the lawless behavior, the officer must retreat due to risk of injury, then retreat would be warranted." *Id.* (cleaned up).

The Ninth Circuit faced a similar scenario this year in *Meinecke v. City of Seattle*, 99 F.4th 514 (9th Cir. 2024). There, plaintiff Matthew Meinecke peacefully read Bible passages at a pair of events—an abortion rally and an LGBTQ pride festival—and attendees at both events "began to abuse and physically assault [him]." *Id.* at 517. Police, "rather than deal[ing] with the wrongdoers directly," "asked Meinecke to move and ultimately arrested him when he refused." *Id.*

Meinecke never responded violently to the attendees, nor did he threaten them, even when they "seized and ripped his Bible, poured water on him, took his shoes, and physically carried him across the street." *Id.* at 523. The Ninth Circuit thus found it "indisputable that the officers curbed Meinecke's speech because of the potential reaction of the listeners," *id.*, "target[ing] [his] speech only once the audience's hostile reaction manifested," *id.* at 523–24.

Bible Believers and Meinecke illustrate several hallmarks of a heckler's veto: (1) a peaceful speaker; (2) a hostile crowd; and (3) a state actor that "cuts off" only the peaceful speaker because of the crowd's reaction to their speech. But even the most deferential reading of Balogh's complaint would show a mismatch between these hallmarks and his alleged facts. To borrow Balogh's earlier phrase, comparing those cases to his is "akin to hammering a square peg into a round hole."

However peaceful the Unite the Right protesters may have been at the rally's inception, they did not remain so. Balogh casts the protesters as merely fighting back to avoid "martyrdom" at the hands of Antifa, Appellant's Br. at 40, and that the protesters "were not *primarily* looking to fight,"[8] Reply Br. at 5

[8] Although we take as true all well-pleaded facts in Balogh's complaint and those facts in the Heaphy Report, there's good reason to be skeptical of Balogh's account. We recently reinstated in part a multi-million-dollar damages verdict awarded to a group of counterprotesters who had been injured by protesters during the Unite the Right rally. *See Sines*, 106 F.4th at 344. The evidence in that case showed that "[Kessler] and his codefendants planned for months to provoke Antifa and its followers into a violent battle at Unite the Right," so that "any punch thrown by an Antifa supporter would give them a chance to respond with brutal and overwhelming violence." *Id.* at 345

(emphasis added). But he doesn't dispute that the protesters were "prepared for combat" and engaged in it. *Id.* at 5–6.

More strikingly, law enforcement didn't decline to intervene on behalf of only one group. And when Chief Thomas declared an unlawful assembly, he didn't enforce that directive selectively. If we accept Balogh's proposition that law enforcement failed to keep the peace or to protect First Amendment rights, that failure was total, at least until everyone was ordered to disperse.

In fact, even if Balogh had not engaged in mutual combat, a heckler's veto claim would fail all the same because law enforcement silenced the so-called hecklers too. Moreover, the police here are entitled to the benefit of *Bible Believers*' officer-safety backstop. They did not have to "go down with the speaker" during the escalating violence between the protesters and counterprotesters. 805 F.3d at 253.

We affirm the district court's ruling rejecting Balogh's First Amendment claim.

D.

Balogh alleges next that the district court erred in dismissing his Fourteenth Amendment equal protection claim because the court's "assertion that

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(cleaned up); *see also id.* (noting Kessler asked his followers to "taunt Antifa a little on social media" and to "tip off Antifa" about the rally location to ensure confrontations (cleaned up)). The *Sines* jury also heard that the protesters shared online messages before the rally "demonstrating that they shared expectations of, hoped for, planned for, and purposefully sought to instigate violence at Unite the Right—including discussing whether someone could drive a car through a crowd of demonstrators that might be blocking the street." *Id.* (cleaned up).

[his] allegations were merely conclusory fails to take into account the relevant detail the Heaphy Report provides," and because the district court's opinion "profoundly skews basic First Amendment jurisprudence" by concluding that the "pro-monument dissident right protesters and the Antifa/counter[]protesters were . . . on equal footing." Appellant's Br. at 48.

But aside from directing us to First Amendment cases that he claims supports his Fourteenth Amendment claim, Balogh devotes a scant three pages of his briefing to the claim and fails to provide a single legal or record citation supporting it in his opening brief. We have dismissed claims on this ground alone, and could do so here. *Edwards v. City of Greensboro*, 178 F.3d 231, 248 n.6 (4th Cir. 1999) (citing Fed. R. App. P. 28(a)(9)(A) (1998), which now appears at Fed. R. App. P. 28(a)(8)(A)).

In any event, the claim fails on the merits. To state a Fourteenth Amendment equal protection claim, "a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Sandlands C & D LLC v. County of Horry*, 737 F.3d 45, 55 (4th Cir. 2013). Should a plaintiff make that showing, we then "analyze[] the disparity under an appropriate level of scrutiny." *Id.*

Although Balogh argues that "it is manifest . . . that [he] and the other pro-monument protesters were intentionally and harmfully discriminated against based on their viewpoint," Reply Br. at 19, he doesn't direct us to any supporting facts in the Heaphy Report or his complaint. And the conclusory

allegations Balogh makes about some concerted animus toward his views aren't sufficient to ascribe that animus to Chief Thomas or Lieutenant Crannis-Curl (or, by extension, the City of Charlottesville).

The Rule 12(b)(6) standard is deferential to plaintiffs, but it still requires facts from which we can plausibly infer a constitutional violation. *See Francis*, 588 F.3d at 193 ("[N]aked assertions of wrongdoing necessitate some factual enhancement within the complaint to cross the line between possibility and plausibility of entitlement to relief." (cleaned up)). Because Balogh's complaint gives us none, the district court was right to reject the Fourteenth Amendment claim.

E.

As explained above, the defendants did not violate Balogh's constitutional rights. But the constitutional claims also fail because the alleged rights were not clearly established.

Balogh cites general First Amendment principles to contend that Chief Thomas and Lieutenant Crannis-Curl were on notice that he had "the right to some level of police protection." Appellant's Br. at 44. But the cases he relies on didn't grapple with the circumstances here—a violent confrontation between protesters and counterprotesters. And our precedent requires that we "not define clearly established law at a high level of generality." *Atkinson v. Godfrey*, 100 F.4th 498, 505 (4th Cir. 2024) (cleaned up).

"Defining the right at a high level of generality avoids the crucial question whether the officer acted reasonably in the particular circumstances that he or she faced." *Id.* (cleaned up). Balogh never reaches

beyond this high level of generality to explain why Chief Thomas or Lieutenant Crannis-Curl would know that they had to intervene on his behalf during an increasingly violent protest. So for this separate reason, the district court correctly dismissed Balogh's constitutional claims.

F.

Balogh's *Monell* claim fares no better. Like qualified immunity, it too requires an underlying constitutional violation. *See Washington v. Hous. Auth. of Columbia*, 58 F.4th 170, 182 (4th Cir. 2023). As we've already found, Balogh hasn't articulated one.

But Balogh's *Monell* claim would fail even if he had. As the district court found, the City Manager, rather than the Chief of Police, is the final policymaker for the City of Charlottesville. Balogh argues in passing that the City Manager ratified Chief Thomas's nonintervention order or delegated his authority to Thomas. But the only fact Balogh identifies for this proposition is the Heaphy Report's single mention that the City Manager may have been present in law enforcement's "Command Center" with Chief Thomas during the rally. *See* Appellant's Br. at 47; *see also* J.A. 217. Such a bare assertion doesn't constitute either delegation or ratification. *See Hunter v. Town of Mocksville*, 897 F.3d 538, 555–58 (4th Cir. 2018); *Starbuck v. Williamsburg James City Cnty. Sch. Bd.*, 28 F.4th 529, 534–36 (4th Cir. 2022).

The district court properly dismissed this claim too.

III.

The right to protest is a core First Amendment guarantee. Nothing about our decision today changes that. Rather, we reiterate that the First Amendment protects peaceful protesters from a state seeking to suppress their speech.

But this isn't a case where state actors silenced Balogh's voice while permitting lawlessness from a hostile public. Nor is it a case where that hostile public received preferential treatment from the state. Instead, the state treated all speakers equally in disbanding a violent protest.

For these reasons, the district court's judgment dismissing the complaint is

AFFIRMED.

[FILED OCTOBER 23, 2024]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1581
(3:20-cv-00038-NKM)

WARREN BALOGH

Plaintiff - Appellant

and

GREGORY CONTE

Plaintiff

v.

COMMONWEALTH OF VIRGINIA; TERENCE R. MCAULIFFE; VIRGINIA STATE POLICE; STEVEN FLAHERTY; BECKY CRANNIS-CURL; BRIAN JOSEPH MORAN; CITY OF CHARLOTTESVILLE; MICHAEL SIGNER; WES BELLAMY; CHARLOTTESVILLE POLICE DEPARTMENT; AL THOMAS, JR.; EDWARD GORCENSKI; SETH WISPELWEY; DWAYNE DIXON; DARYL LAMONT JENKINS; LACEY MACAULEY

Defendants - Appellees

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK

[FILED APRIL 27, 2023]

GREGORY CONTE AND WARREN BALOGH

Plaintiffs,

v.

COMMONWEALTH OF VIRGINIA, *et al.*

Defendants.

CASE NO. 3:20-CV-00038
JUDGE NORMAN K. MOON

MEMORANDUM OPINION

This matter is before the Court on Defendants' motions to dismiss, Dkts. 10, 16, 21, 23, and 28. Plaintiffs Gregory Conte and Warren Balogh, attendees of the 2017 Unite the Right rally, have sued sixteen defendants, including the Commonwealth of Virginia, Virginia's Governor, Virginia State Police officials, Virginia's Secretary of Public Safety and Homeland Security, the City of Charlottesville, Charlottesville's Mayor and Vice Mayor, the Charlottesville Police Department, Charlottesville's Police Chief, and alleged Antifa leaders. They claim that Defendants violated their First Amendment speech rights and Fourteenth Amendment rights to due process and equal protection, and violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Plaintiffs' Complaint is partially foreclosed by the Fourth Circuit's opinion in *Kessler v. City of Charlottesville*, No. 20-1704, 2022 WL 17985704 (4th Cir. Dec. 29, 2022) (per curiam) (unpublished), which raised similar claims. Plaintiffs' other claims fare no better. For the following reasons, their *pro se* suit will be dismissed.

Background

The following facts are alleged in Plaintiffs' Complaint and must be assumed true for purposes of resolving a motion to dismiss. *See King v. Rubenstein*, 825 F.3d 206, 212 (4th Cir. 2016) (reiterating the appropriate standard of review). Plaintiffs attended the Unite the Right ("UTR") rally in Charlottesville in 2017 "to engage in expressive political activity in opposition to a proposal by the Charlottesville City Council to remove the statue of Confederate General Robert E. Lee" from Charlottesville's Lee Park. Dkt. 1 ("Compl.") ¶ 23. On June 13, 2017, Jason Kessler secured a permit for the UTR rally to take place on August 12, 2017. *Id.* ¶ 28. The City of Charlottesville ("the City") notified Kessler on August 7, 2017, that it was revoking the permit, but it did nothing "to modify or revoke the permits issued to counter-protestors for demonstrations planned within blocks of Lee Park." *Id.* ¶¶ 29–30. Judge Glen E. Conrad granted a preliminary injunction on August 11, 2017, which enjoined the City and its City Manager Maurice Jones from enforcing their attempt to revoke the permit, allowing the demonstration to proceed. *Id.* ¶¶ 2, 31 (citing *Kessler v. City of Charlottesville, Va., et al.*, No. 3:17-cv-00056, 2017 WL 3474071 (W.D. Va. Aug. 11, 2017)).

Plaintiffs assert that, while acting under color of state law and "with deliberate hostility and indifference to the rights of Plaintiffs and other UTR demonstrators," Defendants acted to "restrict UTR demonstrators from expressing specific viewpoints while at the same time permitting counter-protestors to engage in violent and lawless behavior." *Id.* ¶ 32. Near Lee Park, on Market Street, counter-protestors "rallied" and City and State Police "restrict[ed] UTR

demonstrators from entering by any means other than the Market Street entrances." *Id.* ¶ 33. Plaintiffs allege that the counter-protestors "includ[ed] large numbers of 'Antifa.'" *Id.* Plaintiffs further allege that, "[w]hen attendees tried to pass, Antifa locked arms and attacked with fists, poles, hammers, and other weapons." *Id.* ¶ 34. In Plaintiffs' view, "[n]o such combat would have occurred at the UTR demonstration if not for the deliberate acts of Defendants." *Id.* ¶ 35.

Charlottesville Chief of Police Al Thomas and Virginia State Police ("VSP") Lieutenant Becky Crannis-Curl "were present in supervisory and/or final decision making capacities." *Id.* ¶ 36. Chief Thomas, after learning violence erupted, allegedly stated: "Let them fight, it will make it easier to declare an unlawful assembly." *Id.* ¶ 38. Lt. Crannis-Curl said "VSP was going 'offplan' and that she was not going to send any troopers out into the crowds to make arrests." *Id.* ¶ 42. VSP Superintendent Colonel Steven Flaherty stated that "VSP's primary role on August 12 was 'park security,' and troopers were not going to 'wade into the mess on Market Street.'" *Id.* Similarly, Chief Thomas put forward a non-intervention order for Charlottesville police, which they obeyed. *Id.* ¶¶ 45, 47. "He told his subordinates after a previous July 8, 2017 demonstration that 'I'm not going to get [protestors] in and out' during the UTR rally." *Id.* ¶ 45. Therefore, Plaintiffs allege that when counter-protestors refused to let UTR attendees access the rally location, "[t]he officers stood in silence." *Id.* ¶ 47.

Law enforcement eventually "moved in . . . to declare an unlawful assembly." *Id.* ¶ 48. However, Plaintiffs allege that the officers enforced the order to

disperse against only UTR demonstrators, not counter protestors. *Id.* Plaintiffs assert that they and other UTR demonstrators could not "peacefully rally, hear any speakers, or engage in any other lawful political speech or expressive activity" because of "Defendants' deliberate interference and pretextual dispersal order." *Id.* ¶ 50. They also assert that they "were forced to defend themselves from physical violence wrongfully perpetrated by violent counter-protestors and by VSP officers themselves." *Id.* Plaintiffs allege that they "and the vast majority of other UTR demonstrators dispersed" after police declared an unlawful assembly, but "Antifa did not." *Id.* ¶ 49.

Police deployed a "chemical 'pepper spray' like substance," which hit Plaintiff Balogh in his head, causing him to "suffer[] a burning sensation as the chemical mixed with his sweat," and he "suffered temporary loss of vision." *Id.* ¶ 54. Plaintiffs assert that Defendants' use of such a substance was not needed because "there was no violence within the park." *Id.* ¶ 60. Days later, Plaintiff Balogh continued to "experience[] a burning feeling," and "[w]hen he showered, the residue from the chemical burned his eyes days after the incident." *Id.* ¶ 55. Also, "a masked attacker wielding a stick like weapon from behind" struck him in the arm after he exited Lee Park, injuring him. *Id.* ¶ 56. Plaintiffs assert Plaintiff Balogh could not "properly identify his attacker due to Defendants[] failure to enforce [Va.] Code § 18.2-422 'Prohibition of wearing of masks in certain places' and exceptions regarding counter-protestors such as Antifa." *Id.* ¶ 57.

Defendants include the Commonwealth of Virginia, Terence McAuliffe (Governor of Virginia at

the time of the events alleged in the Complaint, named in his individual capacity), Virginia State Police, Steven Flaherty (a Colonel in the Virginia State Police at the time of the events alleged in the Complaint, named in his individual capacity), Becky Crannis-Curl (a Lieutenant in the Virginia State Police at the time of the events alleged in the Complaint, named in her individual capacity), Brian Joseph Moran (Secretary of Public Safety and Homeland Security for Virginia at the time of the events alleged in the Complaint), the City of Charlottesville, Michael Signer (Mayor of Charlottesville at the time of the events alleged in the Complaint, named in his individual capacity), Wes Bellamy (Vice Mayor of Charlottesville at the time of the events alleged in the Complaint, named in his individual capacity), the Charlottesville Police Department, and Al Thomas, Jr. (Chief of Police of the City of Charlottesville at the time of the events alleged in the Complaint, named in his individual and official capacities).[1]

After Plaintiffs filed their Complaint and Defendants filed their motions to dismiss, this case was stayed until fifteen days after issuance of the Fourth Circuit's mandate in *Kessler v. City of Charlottesville*, No. 3:17-cv-72, Dkt. 61. The Fourth Circuit affirmed *Kessler v. City of Charlottesville*, 441 F. Supp. 3d 277, 292 (W.D. Va. 2020), *aff'd*, No. 20-

[1] Plaintiffs also name as Defendants Gorcenski, Wispelwey, Dixon, Jenkins, and MacAuley, *id.* ¶¶ 6–21, but never served process on them, warranting the dismissal of claims against them.

1704, 2022 WL 17985704, and Defendants' motions to dismiss are now ripe for review.[2]

Standard of Review

To survive a Rule 12(b)(6) motion to dismiss, a complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The purpose of a Rule 12(b)(6) motion is to "test the sufficiency of a complaint," not to "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *King*, 825 F.3d at 214 (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 243–44 (4th Cir. 1999)). "Thus, when considering a motion to dismiss, a court must consider the factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff." *Bing v. Brivo Systems, LLC*, 959 F.3d 605, 616 (4th Cir. 2020). Nevertheless, only facts can render a claim for relief plausible. "[F]ormulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Nor is it sufficient for a plaintiff to plead facts merely consistent with liability. The plaintiff must plead enough factual content to nudge a claim across the border from mere

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[2] The Court notes that Plaintiffs argue their claims should be regarded separately from *Kessler v. City of Charlottesville, Va., et al.*, No. 3:17-cv-00056, 2017 WL 3474071 (W.D. Va. Aug. 11, 2017) "because that case is ripe for appeal, and there exists a possible conflict for Judge Moon," since two of his law clerks knew the lead party in *Sines v. Kessler*, No. 3:17-cv-72. Dkt. 36 at 6–7. During their time working for the Court from 2019 to 2020, the law clerks at issue had no involvement in this case (or *Sines* for that matter), since it was transferred to the Court back in August 2019. Nor have those law clerks worked for the Court since August 2020. And, for reasons delivered at a hearing held on January 11, 2021, the Court denied Plaintiffs' motion for recusal. Dkt. 60. No conflict exists.

possibility to plausibility. *Id*. at 570; *see also Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009). Further, district courts must construe *pro se* complaints liberally, but that "does not require those courts to conjure up questions never squarely presented to them." *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985).

Analysis

A. Sovereign Immunity Bars Claims Against the Commonwealth of Virginia and the Virginia State Police

Plaintiffs bring First Amendment, Fourteenth Amendment, gross negligence – failure to train, RICO, and RICO conspiracy claims against the Commonwealth and the VSP. State sovereign immunity under the Eleventh Amendment bars these claims.

"[A]n unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990) (internal citations omitted); *see also Alden v. Maine*, 527 U.S. 706, 713 (1999). State sovereign immunity extends to "arms of the State," including state agencies like the VSP. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70–71 (1989); *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997). Congress may waive a State's immunity, but it must do so either "explicitly and by clear language" or via a statutory history that "shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the State." *Quern v. Jordan*, 440 U.S. 332, 345 (1979).

Plaintiffs bring their First Amendment, Fourteenth Amendment, and gross negligence – failure to train claims[3] under 42 U.S.C. § 1983, which allows suit against a "person who, under color of any statute, ordinance, regulation, custom, or usage" violates another's statutory or constitutional rights. "[N]either a State nor its officials acting in their official capacities are 'persons' under § 1983." *Will*, 491 U.S. at 71; *see also Quern*, 440 U.S. at 345 ("[Section] 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States."). Further, "[s]tate police departments are considered arms of the state and are immune from civil liability." *Benton v. Layton*, No. 3:22-cv-225, 2022 WL 4274121, at *3 (E.D. Va. Sept. 15, 2022) (internal citation omitted). Thus, neither the Commonwealth nor the VSP is a person who can be sued under § 1983, and these Defendants have not otherwise consented to be sued, so Plaintiffs have no basis to overcome sovereign immunity. Section 1983

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[3] Plaintiffs argue the Commonwealth and Municipal Defendants were "grossly negligent" in "fail[ing] to plan for the rally as reestablished at its original location[]" and in "fail[ing] to train police and deliberately interfere[ing] in the duties of each and every officer assigned to the rally that day, resulting in irreparable harm to the Plaintiffs." Compl. ¶¶ 80, 85, 86. Though this claim cites § 1983, it fails to allege constitutional harm. *Id.* at 17. Plaintiffs cannot sue under § 1983 to recover for alleged common law harms. *See Mitchum v. Foster*, 407 U.S. 225, 242 (1972). And even if Plaintiffs could bring their common law claim under § 1983, the claim would fail because negligent training is not an actionable tort in Virginia. *E.g.*, *Gray v. Home Depot*, No. 3:14-cv-488, 2015 WL 224989, at *7 (E.D. Va. Jan. 15, 2015); *Morgan v. Wal-Mart Stores East, LP*, No. 3:10CV669-HEH, 2010 WL 4394096, at *4 (E.D. Va. Nov. 1, 2010). Thus, Plaintiffs' failure to train claim must be dismissed.

claims against the Commonwealth and the VSP will accordingly be dismissed.

Sovereign immunity also forecloses Plaintiffs' RICO claims. Plaintiffs bring their RICO claims under 18 U.S.C. § 1962, which states that "[i]t shall be unlawful for any person" to engage in or profit from racketeering. 18 U.S.C. § 1962(a)–(d). Section 1962 does not explicitly and by clear language or by statutory history evince an intention to waive State sovereign immunity, and thus the § 1962 claims against the Commonwealth and VSP will also be dismissed. *See Stewart v. Univ. of N.C. Sys.*, 673 F. App'x 269, 270 (4th Cir. 2016) (per curiam) (unpublished) (affirming that RICO claims against a state university system and its employees were barred by Eleventh Amendment immunity); *see also Holloman v. Va. Dep't of Corr.*, No. 7:22-cv-00478, 2022 WL 17477924, at *1 (W.D. Va. Dec. 6, 2022).

B. Claims Against the Charlottesville Police Department Must Be Dismissed as It is Not a Separate Suable Entity Under Virginia Law

Plaintiffs improperly name the Charlottesville Police Department ("CPD") as a defendant. The CPD lacks capacity to be sued, a standard determined by state law. Fed. R. Civ. P. 17(b); *see also Mukuna v. Gibson*, No. 1:11-cv-493, 2011 WL 3793336, at *5 n.2 (E.D. Va. Aug. 25, 2011) (citing Fed. R. Civ. P. 17(b)(3)). Under Virginia law, "an operating division of a governmental entity . . . cannot be sued unless the legislature has vested the operating division with the capacity to be sued." *Smith v. Town of South Hill*, 611 F. Supp. 3d 148, 167 (E.D. Va. 2020) (internal citations and quotations omitted). Because CPD is "merely an arm of [the City] . . . without capacity to

be sued separately," *see* Va. Code Ann. § 15.2-823, the Court will dismiss the claims brought against CPD. *Guerrero v. Deane*, No. 1:09-cv-1313, 2010 WL 670089, at *17 (E.D. Va. Feb. 19, 2010); *see also Mercer v. Fairfax Cnty. Child Protective Servs.*, No. l:15–cv–302, 2015 WL 5037636, at *3 (E.D. Va. Aug. 25, 2015).

C. The Individually Named Defendants Have Qualified Immunity for the § 1983 Speech and Due Process Claims and the RICO Claims

When state actors' conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, qualified immunity shields them from liability. *Turner v. Thomas*, 930 F.3d 640, 644 (4th Cir. 2019). "A government official violates clearly established law when, at the time of the challenged conduct, the contours of the right are sufficiently clear such that every reasonable official would understand that what he is doing violates that right—in other words, the legal question must be 'beyond debate.'" *Doe v. Rector & Visitors of George Mason Univ.*, 132 F. Supp. 3d 712, 725 (E.D. Va. 2015) (citing *Ashcroft v. al- Kidd*, 563 U.S. 731, 741 (2011)). The Fourth Circuit treats as relevant the decisions of the U.S. Supreme Court, the Fourth Circuit, and the highest court of the state in which the conduct occurred. *Doe ex rel. Johnson v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163, 176 (4th Cir. 2010) (internal citations omitted). And qualified immunity applies to § 1983 and RICO claims. *Turner*, 930 F.3d at 644; *U.S. Tobacco Cooperative, Inc. v. Big South Wholesale of Va., LLC*, 365 F. Supp. 3d 604, 615 (E.D.N.C. 2019) (finding that "defendants are entitled to qualified immunity on plaintiffs' federal RICO

claims"); *Cockrell v. Cates*, 121 F.3d 705 (5th Cir. 1997) (unpublished) (per curiam) ("We are aware of nothing in the RICO statute that would allow plaintiffs' artful pleading to prevent these defendants from asserting qualified immunity.").

Plaintiffs argue that Defendants Thomas, Crannis-Curl, Flaherty, and Moran are liable for the actions of police who failed to stop hecklers from interrupting the UTR rally. Compl. ¶ 76. Plaintiffs base their supervisory liability claim on the allegation that these Defendants "issued orders and/or acquiesced in actions that violated the rights of the Plaintiff[s] as stated herein." *Id.* But the Fourth Circuit has held that there was no clearly established right to police intervention at the time of the UTR Rally. *Turner*, 930 F.3d at 646–47. The Fourth Circuit also affirmed *Kessler*, 441 F. Supp. at 293, *aff'd*, 2022 WL 17985704, which held there was no clearly established right "to state protection of one's First Amendment rights from third parties." Similarly, no clearly established law governed the alleged RICO violations. Indeed, these violations fail on the merits, as will be discussed *infra* Section G. Thus, the individually named state actor Defendants have qualified immunity from suit for the § 1983 speech and due process claims and the RICO claims.

D. Plaintiffs Have Failed to State a Plausible *Monell* Claim Against the City

Plaintiffs attempt to bring a claim against the City based on Police Chief "order[s] not to engage over 'every little thing'; not to 'go in and break up fights'; not to interrupt 'mutual combat'; and [that] officers were not to be sent out among the crowd where they might get hurt." Compl. ¶ 46. But "a municipality

cannot be held liable *solely* because it employs a tortfeasor." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978) (emphasis in original). Municipal corporations are not vicariously liable under § 1983 for their employees' actions under a *respondeat superior* theory. *Connick v. Thompson*, 563 U.S. 51, 60–61 (2011) (also explaining that "a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983" "[i]n limited circumstances"); *Pembaur v. Cinncinati*, 475 U.S. 469, 479 (1986). Instead, liability only attaches to the municipality directly, as opposed to its officials in their official capacity, in cases where the municipality causes the deprivation "through an official policy or custom." *Lytle v. Doyle*, 326 F.3d 463, 471 (4th Cir. 2003) (internal citation omitted). The Fourth Circuit has recognized that

> [a] policy or custom for which a municipality may be held liable can arise in four ways: (1) through an express policy, such as a written ordinance or regulation; (2) through the decisions of a person with final policymaking authority; (3) through an omission, such as a failure to properly train officers, that 'manifest[s] deliberate indifference to the rights of citizens'; or (4) through a practice that is so 'persistent and widespread' as to constitute a 'custom or usage with the force of law.'

Id. (internal citation omitted).

Plaintiffs have alleged no facts indicating the City acted through an express policy, through decisions of

persons with final policymaking authority, through any omission manifesting deliberate indifference to the rights of citizens, or through a practice so persistent and widespread as to constitute a custom or usage with the force of law. Pursuant to § 5.01 of the Charlottesville City Charter, the CPD is expressly under the general supervision of the City Manager. Charlottesville City Code § 2-146 (1990) provides that the City Manager was the "chief executive and administrative officer of the city government" responsible for "enforce[ment] of the laws of the city" and was "the director of public safety, with general supervision over the . . . police department of the city." Further, pursuant to Charlottesville City Code § 2-149 (1990), the City Manager had the "power to dismiss, suspend and discipline, in accordance with duly adopted personnel regulations, all officers and employees in such departments, except as otherwise specifically provided by law." And under § 20-3, the chief of police "shall always be subject to the orders and regulations of the city manager and the city council." Police Chief Thomas, who proffered the orders alleged above, was thus not the "final policymaker," with regards to the orders, and Plaintiffs do not allege that the City Manager ever reviewed or approved the orders. Also, Plaintiffs allege that City Council member Defendants Michael Signer and Wes Bellamy were final policymakers for the City, Compl. ¶¶ 13–14, but Plaintiffs do not allege any actions for which they used this authority,[4] and under the City's Charter, City Council members lack

[4] The same is true for the other individual Defendants Plaintiffs describe as having final policymaking authority.

any corporate power or legislative and executive authority as individuals.

Therefore, Plaintiffs' claims that the City violated their First and Fourteenth Amendment rights will be dismissed.

E. Plaintiffs Failed to State a Claim for Violation of the First Amendment Through a Heckler's Veto or Failure to Protect

The Fourth Circuit affirmed the dismissal of similar First Amendment claims, i.e., claims of a heckler's veto and failure to protect brought by UTR attendees, in *Kessler*, 2022 WL 17985704, at *1. The Fourth Circuit recognized that the First Amendment did not impose an affirmative obligation on the City and its officials to prevent public hostility to the events of the UTR rally. *Id.* (citing *Doe v. Rosa*, 795 F.3d 429, 440 (4th Cir. 2005)); *Musso v. Hourigan*, 836 F.2d 736, 743 (2d Cir. 1988)). As in *Kessler*, Plaintiffs' Complaint lacks any plausible allegation that the unlawful assembly declaration and dispersal order discriminated based on content or viewpoint. *Id.* Nor did Defendants impose an effective "heckler's veto." *Id.* Plaintiffs thus failed to state a claim for relief based on the First Amendment.

F. Plaintiffs Failed to State a Fourteenth Amendment Equal Protection Claim

"[T]o survive a motion to dismiss an equal protection claim, a plaintiff must plead sufficient facts to demonstrate plausibly that he was treated differently from others who were similarly situated and that the unequal treatment was the result of discriminatory animus." *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 108 (4th Cir. 2011)

(internal citation omitted). Similarly situated means that individuals "are in all relevant respects alike." *Veney v. Wyche*, 293 F.3d 726, 730–31 (4th Cir. 2002) (internal citation omitted). As discussed above, the Fourth Circuit held in *Kessler*, a case with analogous facts, that the complaint "lack[ed] any plausible allegation that the unlawful-assembly declaration and dispersal order discriminated based on content or viewpoint." 2022 WL 17985704, at *1. So too here Plaintiffs' Complaint fails to state a claim that the unlawful-assembly declaration and dispersal order discriminated against Plaintiffs in a manner violating their Fourteenth Amendment rights.

The Complaint devotes four short allegations exclusively to the Equal Protection Clause claim. The first, plainly conclusory, alleges that Defendants deprived Plaintiffs of equal protection under the law by "above-referenced acts, policies, practices, procedures, and/or customs, created, adopted, and/or enforced under color of state law." Compl. ¶ 70. Plaintiffs also summarily allege that Defendants' policies and practices "as applied on August 12, 2017 violated the Equal Protection Clause." *Id.* ¶ 72. To the extent that Plaintiffs allege unequal treatment, there is nothing in the Complaint that permits a reasonable inference of disparate application or intentional discrimination. Conclusory allegations that Defendants did not agree with Plaintiffs' views are insufficient without factual support. *See e.g.*, *id.* ¶¶ 26, 52, 64, 66, 71; *see Simmons*, 634 F.3d at 768 ("[The Court need not] accept as true unwarranted inferences, unreasonable conclusions, or arguments.").

The claim fails for other reasons, too. Plaintiffs allege that Defendants granted the use of a public

forum to people whose political views Defendants found acceptable but denied use to those whom they disagreed with. *Id.* ¶ 71.[5] And Plaintiffs allege that "[u]pon being advised that violence had broken out the Chief stated, in a complete capitulation to violent counter-protestors, 'Let them fight, it will make it easier to declare an unlawful assembly.'" *Id.* ¶ 38. But Plaintiffs' own allegations are contradicted by other allegations in the Complaint. *Id.* ¶¶ 2, 31, 84. Judge Conrad granted the ACLU's motion for a preliminary injunction after the City of Charlottesville tried to move the protest. *Kessler v. City of Charlottesville, Virginia*, No. 3:17CV00056, 2017 WL 3474071, at *2–3 (W.D. Va. Aug. 11, 2017). And Plaintiffs allege that an unlawful assembly was declared on August 12, 2017, against "the people gathered in and around Lee Park"—thus encompassing both Plaintiffs and the allegedly violent counter-protestors. Compl. ¶ 49. Therefore, the allegations show that Plaintiffs were treated in the same manner as counterprotestors. Further, Plaintiffs allege no non-conclusory facts showing that they and the counterprotestors were similarly situated, i.e., that they were "in all relevant

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[5] In bringing this claim, Plaintiffs have not alleged that Police Chief Thomas granted or denied anyone use of a public forum. Plaintiffs allege the City revoked Kessler's permit, not Chief Thomas. Compl. ¶¶ 29–31. Thus, much like *Kessler*, 2022 WL 17985704, at *1, the case differs from *Bible Believers v. Wayne Cnty., Mich.*, 805 F.3d 228, 256–57 (6th Cir. 2015), in which disparate treatment of a particular group, the Bible Believers, "was based explicitly on the fact that the Bible Believers' speech was found to be objectionable by a number of people attending the Festival," and the County violated the group's equal protection rights "by treating them in a manner different from other speakers, whose messages were not objectionable to Festival-goers, by burdening their First Amendment rights." (internal citation omitted).

respects alike." *See Veney*, 293 F.3d at 730–31 (internal citation omitted) Thus, Plaintiffs' Equal Protection claim must be dismissed.

G. Plaintiffs Lack Standing to Bring Claims Under RICO

For reasons already addressed, Defendants have immunity from Plaintiffs' RICO claims. And even without such immunity, Plaintiffs' allegations fail to state a claim for a RICO violation. To state a RICO claim, a plaintiff must allege "'(1) conduct (2) of an enterprise (3) through a pattern (4) or racketeering activity,'" and that "(5) he was injured in his business or property (6) by reason of the RICO violation." *D'Addario v. Geller*, 264 F. Supp. 2d 367, 388 (E.D. Va. 2003) (citing *Sedima, S.P.R.L. v. Imrex, Co.*, 473 U.S. 479, 496–97 (1985)). The latter two elements "are viewed as standing requirements." *D'Addario*, 264 F. Supp. 28 at 388 (citing *Sedima*, 473 U.S. at 496–97). "An allegation of personal injury and pecuniary losses occurring therefrom are not sufficient to meet the statutory requirement of injury to 'business or property.'" *Bast v. Cohen, Dunn & Sinclair, PC*, 59 F.3d 492, 495 (4th Cir. 1995) (internal citations omitted). Further, "[p]hysical or emotional harm to a *person* is not property under civil RICO and losses which flow from personal injuries are not property under RICO." *Dickson v. FBI Newport News Field Office*, 2016 WL 8261800, at * 1 (E.D. Va. Mar. 2, 2016) (internal citations and quotation marks omitted) (emphasis in original). Plaintiffs have failed to allege injury in their business or property[6] and

[6] They try to claim a deprivation of property rights based on the alleged deprivation of "their right of use, of their permit to peaceable assembl[y]," but the UTR rally permit was issued to

thus lack standing to assert their RICO claims. *Sedima*, 473 U.S. at 496.

Plaintiffs also fail to state a RICO claim because they have not alleged a pattern of racketeering activity. Racketeering activity is any act "'chargeable' under several generically described state criminal laws, any act 'indictable' under numerous specific federal criminal provisions, including mail and wire fraud, and any 'offense' involving bankruptcy or securities fraud or drug-related activities that is 'punishable' under federal law." *Sedima*, 473 U.S. at 481–82 (quoting 18 U.S.C. § 1961(1)). Plaintiffs assert racketeering activity based on violations of various statutes.[7] But for each assertion, Plaintiffs fail to provide supporting factual allegations, and many of the statutory violations they list do not involve statutes within the definition of racketeering activity. *See* 18 U.S.C. § 1961(1) (including, of the listed statutes, only § 1951). Thus, the RICO claims must be dismissed.

Kessler, not Plaintiffs. *Id.* ¶¶ 93 n.2, 28. Without alleging sufficient facts to show injury in their business or property, Plaintiffs' RICO claims must be dismissed for lack of standing.

[7] They contend that Defendants violated 18 U.S.C. § 1961(1)(A) ("obstruction of State or local law enforcement"), violated 18 U.S.C. § 2339 ("relating to harboring terrorists"), violated 18 U.S.C. § 2339A ("relating to providing material support to terrorists"), violated 18 U.S.C. § 2339B ("relating to providing material support to foreign terrorist organizations"), violated 18 U.S.C. § 2339C ("relating to financing of terrorism"), and violated 18 U.S.C. §§ 1962(1)(B) and 1951(a) by interfering with commerce by threats or violence. Compl. ¶¶ 93–94. They argue that "the terrorists, terrorist organizations, and terrorism" at issue are "the Antifa and related organizations." *Id.* ¶ 94.

Conclusion

For the foregoing reasons, Defendants' motions to dismiss will be granted.

The Clerk of the Court is hereby directed to send this Memorandum Opinion to all counsel of record.

Entered this 27th day of April, 2023.

NORMAN K. MOON
SENIOR UNITED STATES DISTRICT JUDGE

[FILED NOVEMBER 19, 2024]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1581
(3:20-cv-00038-NKM)

WARREN BALOGH

Plaintiff - Appellant

and

GREGORY CONTE

Plaintiff

v.

COMMONWEALTH OF VIRGINIA; TERENCE R. MCAULIFFE; VIRGINIA STATE POLICE; STEVEN FLAHERTY; BECKY CRANNIS-CURL; BRIAN JOSEPH MORAN; CITY OF CHARLOTTESVILLE; MICHAEL SIGNER; WES BELLAMY; CHARLOTTESVILLE POLICE DEPARTMENT; AL THOMAS, JR.; EDWARD GORCENSKI; SETH WISPELWEY; DWAYNE DIXON; DARYL LAMONT JENKINS; LACEY MACAULEY

Defendants - Appellees

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed.

R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk