RECORD NO. 20-1547

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MICHAEL WALKER,
Plaintiff - Appellant,

v.

B.E. DONAHOE, individually,
Defendant - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

RESPONSE BRIEF

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rule 26.1 of the Fourth Circuit, Corporal Brian Donohoe and Deputy Brandon Pauley, Defendants-Appellees, make the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?

No.

2. Does party/amicus have any parent corporations? If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

No.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? If yes, identify all such owners:

No.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? If yes, identify entity and nature of interest:

No.

5. Is party a trade association?:

No.

6. Does this case arise out of a bankruptcy proceeding? If yes, identify any trustee and the members of any creditors' committee:

No.

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STATEMENT OF JURISDICTION

Michael Walker, Appellant and Plaintiff below, filed his Complaint (J.A. 9), pursuant to United States Code, Title 42, Section 1983, that the Appellees and Defendants below, Corporal Brian Donohoe and Deputy Brandon Pauley, violated his rights against unlawful search and seizure under the Fourth Amendment to the United States Constitution. The United States District Court for the Southern District of West Virginia exercised subject-matter jurisdiction pursuant to United States Code, Title 28, Sections 1331 (federal question jurisdiction) and 1343 (civil rights jurisdiction). On March 2, 2020, the District Court entered the Order Granting Motion for Summary Judgment in favor of the Appellees and denying the Summary Judgment motion filed by the Plaintiff/Appellant. (J.A. 322) The jurisdiction of this Court is proper pursuant to United States Code, Title 28, Section 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court correctly differentiated the instant case from that at issue in *United States v. Black*, 707 F.3d 531 (4th Cir. 2013), in holding that the Appellees were entitled to qualified immunity for stopping Mr. Walker, who was openly carrying an uncased AR-15 style rifle in a residential area in close proximity to a school, and that no clearly established right was violated.

2. Whether the District Court was required to treat the presence of an AR-15 style rifle, which is commonly and notoriously used in indiscriminate public gun violence, the same as it would treat the presence of a firearm more commonly used for hunting or self-defense, in determining whether reasonable suspicion existed to stop Mr. Walker in the underlying case.

STATEMENT OF FACTS

Appellant Michael Walker's claims in the underlying case which appear before this Court arise from a brief investigatory stop on or about February 21, 2018, effectuated by the Appellees, Corporal Brian E. Donohoe and Deputy Brandon W. Pauley, both of the Putnam County, West Virginia, Sheriff's Department. The Plaintiff was stopped due to a 9-1-1 call which reported an individual walking down the side of U.S. Route 33 between the Rocky Step area and the Route 35 intersection, in Scott Depot, Putnam County, West Virginia, carrying an AR-15 style rifle. (J.A. 157, Pg. 6, Lines 18-21; J.A. 173, Pg. 22, Lines 1-7; J.A. 227, Pg. 6, Line 17 – Pg. 7, Line 2). As a result of that stop, Mr. Walker pled a 42 U.S.C. § 1983 claim for unlawful search and seizure under the 4th Amendment to the United States Constitution against Cpl. Donohoe, as well as a companion 42 U.S.C. § 1983 claim for bystander liability against Dep. Pauley.

Mr. Walker was born January 11, 1994, making him twenty-four (24) years old at the time of the stop. (J.A. 238, Pg. 6, Lines 20-21). Mr. Walker testified that on the date in question, he was walking to a friend's house to go hunting for coyotes. (J.A. 240, Pg. 22, Lines 10-21). Mr. Walker walked because his epilepsy prevents him from driving. (J.A. 239, Pg. 10, Line 14). In doing so, Mr. Walker walked along the side of Route 33, known as "Teays Valley Road," in Scott Depot, Putnam County, West Virginia, with an AR-15-style rifle slung across his back. (J.A. 227,

Pg. 6, Line 17 – Pg. 7, Line 2; J.A. 232, Pg. 7, Lines 10-15). This is a populated suburban residential area along a major thoroughfare. (J.A. 323). Mr. Walker was dressed in militia-style black and camouflage clothing, and his firearm was uncased. (J.A. 322; see also "Video of Incident," J.A. 180).

The first notice the Defendants received of Mr. Walker's actions was a 9-1-1 call, reporting that a person was walking down Route 33 toward Route 35 carrying an "AR-15" or "assault rifle." (J.A. 322-323). Dep. Pauley and Cpl. Donohoe responded to the call. Dep. Pauley arrived first, and observed Mr. Walker walking westbound on U.S. Route 33. Dep. Pauley got Mr. Walker's attention and asked him to step into a driveway, with which he complied. Cpl. Donohoe then arrived, and Dep. Pauley allowed the more senior and experienced officer to handle the interaction. (J.A. 228, Pg. 9, Line 21 – Pg. 10, Line 9). Dep. Pauley began his law enforcement career in April of 2017, having less than one year of law enforcement experience at the time. (J.A. 227, Pg. 5, Lines 10-19). By contrast, Cpl. Donohoe was a career law enforcement officer with over twenty (20) years of experience. (J.A. 156, Pg. 5, Lines 8-12).

Both officers testified to their concerns that led them to stop Mr. Walker, and led Cpl. Donohoe to request his identification. Being familiar with the area, both officers knew that Mr. Walker was within walking distance of Teays Valley

Christian School, and was walking in the direction of the school.1 (J.A. 234, Pg. 16, Lines 12-20; J.A. 173, Pg. 22, Lines 1-16; J.A. 242, Pg. 31, Lines 7-10). This encounter took place on February 21, 2018, seven (7) days after the well-known, nationally-covered school shooting at Marjory Stoneman Douglas High School in Parkland, Florida, which resulted in the murder of seventeen (17) students and faculty, and the wounding of fourteen (14) more persons, by a gunman with an AR-15 style rifle.2 (J.A. 234, Pg. 16, Lines 21-23; J.A. 173, Pg. 22, Lines 17-21). February 21, 2018 was a Wednesday. Both officers testified that in the aftermath of a major, nationally-known crime such as that, they are on heightened alert for potential copycat crimes.

> Q. When you were -- When you received the call about his location, were you familiar with that area?
>
> A. Yes, sir.
>
> Q. Did you know that area to be less than a mile away from Teays Valley Christian School?
>
> A. Yes, sir.
>
> Q. When you arrived, was he walking in the direction of the school?

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1 The Defendants ask that the Court take judicial notice that Teays Valley Christian School is a private K-12 school, located at 6562 Teays Valley Road, Scott Depot, Putnam County, West Virginia. It is located at the intersection of U.S. Route 33 and U.S. Route 35.

2 See, e.g., Chuck, Elizabeth, Alex Johnson and Corky Siemaszko, *17 killed in mass shooting at high school in Parkland, Florida*, NBC News Online, (Feb. 14, 2018, 3:18 PM), https://www.nbcnews.com/news/us-news/police-respond-shooting-parkland-florida-high-school-n848101

A. Yes, sir.

Q. Did this interaction occur less than a week after the shooting in Parkland, Florida?

A. Yes, sir.

Q. Would you say that after a nationally significant, major crime like that you're on a heightened alert for copycats?

A. Yes, sir. Especially the Parkland shooting.

Q. Did that -- Did that affect your belief as to whether a crime was about to be committed?

A. Yes, sir.

(J.A. 234, Pg. 16, Line 11 – Pg. 17, Line 7).

Q. When you received the call on February 21st, 2018 regarding the -- regarding a person walking down the road with an assault rifle on their back, did the call specify where exactly that person was?

A. Yeah. They were walking between Rocky Step and Route 35 Interchange, walking towards the Route 35 Interchange.

Q. And are you familiar with that area?

A. Yes, sir.

Q. Were you familiar with that area at the time?

A. Yes, sir.

Q. Did you know there to be a school in that area?

A. Yes, sir.

Q. And when you observed Mr. Walker, was he traveling in the

direction of that school?

A. Yes, sir.

Q. And you testified earlier that you were aware at the time that less than a week prior the -- there was a nationally-covered mass shooting in a school in Parkland, Florida?

A. Correct.

Q. And in the immediate after- -- or the days immediately following an event like that, are you on a heightened alert for copycat crimes?

A. Yes, sir.

Q. Was your heightened alert for copycat crimes of the Parkland shooting a factor, again, in your concern about Mr. Walker?

A. Yes, sir.

(J.A. 173, Pg. 22, Line 1 – Pg. 23, Line 5).

Second, both officers observed that Mr. Walker's youthful appearance, and that he possibly was under the age of eighteen (18). This belief was bolstered by the fact that Mr. Walker was walking rather than driving, further hinting at youthfulness. The carrying of firearms by persons under the age of eighteen (18) is a misdemeanor under West Virginia law. See W. Va. Code § 61-7-8.

Q. Did you, based on Mr. Walker's outward appearance, have a reasonable suspicion at the time that he may be under the age of 18?

A. Yes, sir.

[…]

Q. Was the fact that Mr. Walker was walking and not driving -- did that

affect your belief about what his age might be?

A. Yes.

Q. Does someone who is walking and not driving suggest that they might be under age?

A. Yes.

(J.A. 235, Pg. 17, Line 22 – Pg. 18, Line 4; J.A. 236, Pg. 23, Line 23 – Pg. 24, Line 2).

Q. Did you know Mr. Walker's age when you observed him?

A. No, sir.

Q. Did you believe there to be a possibility he could be under the age of 18?

A. Possible.

(J.A. 174, Pg. 23, Lines 6-11).

When Cpl. Donohoe arrived, he perceived Mr. Walker to be ignoring Dep. Pauley by continuing to walk down the road. (J.A. 158, Pg. 7, Lines 7-15). Consequently, Cpl. Donohoe then got Mr. Walker's attention and asked who he was and asked if he had identification. (J.A. 161, Pg. 10, Lines 6-12). Mr. Walker began to video record the encounter on his cell phone at the outset of the stop. Mr. Walker initially stated that he was headed "up to a buddy's," but refused to expound on this vague description, obstinately declaring that he did not have to answer any questions about his identity, his destination, or his intentions. (J.A. 323; J.A. 180 at 0:10, 0:55).

The officers perceived Mr. Walker to be striking a defiant tone with Cpl.

Donohoe, and heated words were exchanged between them. (J.A. at 228, Pg. 11, Line 24 – Pg. 12, Line 17). Mr. Walker initially refused to provide his ID, claiming once again that he did not have to, but eventually relented. (J.A. 228, Pg. 11, Line 24 – Pg. 12, Line 23; J.A. 161, Pg. 10, Lines 1-15). The identification showed that Mr. Walker was over the age of eighteen (18). (J.A. 174, Pg. 23, Lines 12-18). Cpl. Donohoe then called in a background check on Mr. Walker's ID, which discovered that he was not a person prohibited from possessing a firearm. (J.A. 174, Pg. 23, Lines 19-22).

At this point, the officers believed that there was nothing they could legally do to prevent Mr. Walker from continuing the direction he was headed with his firearm, and Mr. Walker was permitted to leave. (J.A. 175, Pg. 24, Line 10 – Pg. 25, Line 3). He was not arrested or injured, and the entire interaction lasted approximately eight (8) minutes. (J.A. 241, Pg. 27, Lines 2-5; J.A. 242, Pg. 30, Lines 6-12; Pg. 36, Lines 12-14; Video of Incident, J.A. 180).

SUMMARY OF ARGUMENT

The Appellees' position is that the District Court correctly held that Officers Donohoe and Pauley had reasonable suspicion to stop Mr. Walker while he was approaching a school on foot down the side of the road, openly carrying an uncased AR-15 style rifle. Failing that, the officers are entitled to qualified immunity because any right Mr. Walker had against this brief investigatory stop was not clearly-

established at the time. Furthermore, Mr. Walker's novel argument that the presence of an AR-15 style rifle may not be considered to raise a different inference than any other legal firearm is unsupported and contrary both to the public interest and simple intuitive sense.

Reasonable suspicion to stop Mr. Walker is premised upon two grounds. First, the officers had reasonable suspicion to believe Mr. Walker may have been carrying a deadly weapon while under the age of eighteen (18), which is a misdemeanor in West Virginia. The fact that Mr. Walker had a youthful appearance, was in close proximity to a high school, was wearing a backpack, and was walking rather than driving down a street which did not have a sidewalk made this a reasonable inference to draw.

Second, the officers had reasonable suspicion to believe Mr. Walker posed a threat to the community generally, and to the nearby Teays Valley Christian School specifically. The officers responded to a 9-1-1 call from a community member who observed Mr. Walker walking down the side of a major thoroughfare passing through a suburban residential and commercial area with a gun, and was alarmed by the conduct. When the responding officers observed Mr. Walker, he was less than a mile from Teays Valley Christian School, and was walking in the direction of the school, wearing a black shirt and camouflage pants, and carrying an uncased AR-15 style rifle. The fact that this conduct was observed seven (7) days after the notorious

and deadly school shooting in Parkland, Florida further raised the reasonable inference of a copycat shooting.

Contrary to Mr. Walker's insistence, the case law of this Circuit is relatively spare regarding what constitutes reasonable suspicion for an investigatory stop of a person openly carrying a firearm. As will be discussed in greater detail in the forthcoming sections of this Brief, this Court's ruling in *United States v. Black*, 707 F.3d 531 (4th Cir. 2013) does not, as the Plaintiff argues, insulate open carrying of a firearm from consideration in a reasonable suspicion analysis – it merely stands for the proposition that the carrying of a firearm *without more* does not constitute reasonable suspicion in an open carry state, and that there is no reasonable suspicion by association. Rather, the facts of this case are nearly identical to those in which reasonable suspicion was found to exist in persuasive case law. A reasonable officer could suspect both that Mr. Walker was carrying a firearm while underage, and that he posed a threat to the community, warranting an investigatory stop.

Nor did the scope or duration of the stop exceed what was reasonable under the Fourth Amendment. Cpl. Donohoe's request for the Plaintiff's identification was a reasonable and expedient method to dispel suspicion that he was underage. Combined with the facts already known to the officers, when Mr. Walker became obstinate and evasive, and refused to answer questions or gave inconsistent answers about his identity, destination, or intentions, Cpl. Donohoe was justified in the *de*

minimis six-and-a-half minute extension of the stop to run a criminal background check. Such a background check would reveal whether Mr. Walker had a history of violent crimes, which is a relevant determination in whether he posed a threat to the community. After the background check showed that Mr. Walker had no felony history, the officers let Mr. Walker go. Mr. Walker was neither harmed nor arrested, and the entire interaction lasted the eminently reasonable time of approximately eight (8) minutes.

However, even if a constitutional violation did occur, the officers would still be entitled to qualified immunity. Qualified immunity insulates law enforcement officers from liability unless they cross a well-established "bright line" to violate the rights of a subject. Officers are not liable for making a bad guess in a gray area or taking the wrong action without prior guidance in a tense situation. Laws governing the open carrying of deadly weapons in the Fourth Amendment arena are just such a gray area. Neither the U.S. Supreme Court nor this Court have issued binding precedent establishing what constitutes reasonable suspicion to stop a person open-carrying in an open carry state – whether out of concern for a threat to the community or for suspicion of underage carrying. However, persuasive case law from outside this Circuit in nearly identical cases has held that an action like that taken by Cpl. Donohoe to be justified. Therefore, the officers' best guidance in this situation was that this stop was legal. Having unclear guidance at best as to how they were

required to balance concerns for community safety against the rights of Mr. Walker to be free of unlawful searches, there was no "bright line" here for them to cross, and qualified immunity should apply.

Finally, Mr. Walker's argument that AR-15 style rifles may not be treated differently than less deadly firearms for reasonable suspicion purposes holds no basis in law, and is contrary to the public safety and intuitive sense. Different firearms have different utilities, purposes, and common uses, and their presence therefore draws different inferences. An AR-15 has more killing power, and is more commonly used in indiscriminate public gun violence than many more commonplace sporting or self-defense weapons, and therefore raises a greater concern for public safety in context. The fact that the AR-15 is so notoriously popular among the deadliest mass shooters also raises reasonable concerns over a copycat mass shooting. Objects need not be illegal for their presence, in appropriate context, to contribute to reasonable suspicion, and there is no reason for bearers of AR-15 style rifles to receive special protection.

The District Court's ruling granting summary judgment to the Appellees and Defendants below was well-reasoned and legally correct. The officers acted reasonably under the law as it existed at the time of the interaction subject to this suit, and should be affirmed.

ARGUMENT

A. Standard of Review.

Federal Circuit Courts of Appeal review a district court's grant or denial of summary judgment de novo. See *Groves v. Commun. Workers of Am.*, 815 F.3d 177, 180-181 (4th Cir. 2016) (quoting *Hunter v. Town of Mocksville*, 789 F.3d 389, 395 (4th Cir. 2015), *cert. denied* 136 S. Ct. 897, 193 L. Ed. 2d 790 (2016)). Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, see *id*., "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id*. (quoting Fed. R. Civ. P. 56(a).

"In assessing a motion for summary judgment all justifiable inferences must be drawn in favor of the nonmoving party for 'credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts.'" *Drewitt v. Pratt*, 999 F.2d 774, 778 (4th Cir. 1993) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). Hence, "the court 'must perform a dual inquiry into the genuineness and materiality of any purported factual issues.'" *Drewitt* at 778 (quoting *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985)).

The substantive law identifies facts that are material. Consequently, "only disputes over facts that might affect the outcome of the suit under the governing law

will properly preclude the entry of summary judgement. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson* at 248. "Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice." *Ross* at 364. Therefore, in reviewing the evidence, a judge must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson* at 252. If no genuine issue of material fact exists, the Court has an obligation "to prevent 'factually unsupported claims and defenses' from proceeding to trial." *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) (quoting *Celotex* at 323-24).

Finally, when a party's "state of mind" is a decisive element of a claim or defense, summary judgment is seldom appropriate because "state of mind" determinations usually depend on the credibility of witnesses or the resolution of conflicting inferences drawn from circumstantial or self-serving evidence. *Thacker v. Peak*, 800 F. Supp. 372, 376 (S.D.W.Va. 1992) (citing *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979) and *Ross* at 364)). Nevertheless, even if motive is material, summary judgment is not precluded if the claim rests solely on unsupported allegations. *Id*. (citing *Ross* at 365).

B. The District Court correctly differentiated the instant case from the facts of *United States v. Black*, 707 F.3d 531 (4th Cir. 2013), as the totality of the objective facts known to the officers at the time of the stop amounted to reasonable suspicion, or in the alternative entitle them to qualified immunity.

Contrary to Mr. Walker's position that the District Court failed to apply this Court's holding in *United States v. Black*, 707 F.3d 531 (4th Cir. 2013), the District Court in fact engaged in a thoughtful, meticulous, and legally correct analysis differentiating the present case from the circumstances in *Black*. Rather, Mr. Walker would have the Court hold that *Black* stands for a proposition it undoubtedly does not, and cannot, in light of the state of the law regarding reasonable suspicion: that in an open-carry state, the presence of a firearm can never contribute to reasonable suspicion absent a facially obvious commission of a crime. What Mr. Walker urges, if adopted, would elevate persons openly carrying firearms above reasonable suspicion, and irreparably frustrate any preventative measures against public gun violence by law enforcement.

1. Statement of the law on qualified immunity.

Under the doctrine of qualified immunity, law enforcement officers performing discretionary duties "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S.

800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Qualified immunity protects government officials from civil damages in § 1983 actions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* at 818 (internal citations omitted).

The qualified immunity defense requires a two-step analysis. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). The first question is whether "[t]aken in the light most favorable to the party asserting the injury . . . the facts alleged show the officer's conduct violated a constitutional right." *Id*. If no violation occurred, the analysis ends, and the plaintiff cannot prevail. See *id*. If the Court finds a violation may have occurred, the Court must consider whether the constitutional right was "clearly established," meaning "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id*. at 201–02 (citation omitted). The "clearly established" standard ensures officers are only liable "for transgressing bright lines" and not for "bad guesses in gray areas." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992) (internal citations omitted); see also *Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst*, 810 F.3d 892, 909 (4th Cir. 2016) (holding officers' conduct violated the Fourth Amendment, but qualified immunity applied because the right at issue was not clearly established).

"[T]here are two levels at which the immunity shield operates. First, the particular right must be clearly established in the law. Second, the manner in which this right applies to the actions of the official must also be apparent." *Maciariello*, 973 F.2d at 298 (citing *Tarantino v. Baker*, 825 F.2d 772, 774-75 (4th Cir. 1987), *cert. denied*, 489 U.S. 1010, 103 L. Ed. 2d 180, 109 S. Ct. 1117 (1989)). It is not sufficient that a right be clearly established in an abstract sense; it must be clearly established in its particularized application.

> [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless that very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Maciariello, 973 F.2d at 298 (quoting *Anderson* at 639-640).

2. The District Court correctly held that reasonable suspicion existed to stop Mr. Walker.

The District Court held, based upon a meticulous analysis, that the investigatory stop of Mr. Walker was based upon reasonable suspicion for two (2) reasons: first, that reasonable suspicion existed to believe posed a threat to the community, and in particular the nearby school, and second, that reasonable suspicion existed to believe that he was violating West Virginia's law against minors carrying deadly weapons. J.A. 327-328.

Mr. Walker's position in arguing that the District Court erred is that this Court's holding in *Black* stands for the proposition that the possession of a firearm in an open-carry state cannot contribute to reasonable suspicion absent the facially obvious commission of a crime. This is a severe misreading of that precedent. Neither the Appellees nor the District Court have suggested that reasonable suspicion may rest *solely* on the carrying of a firearm in an open-carry state like West Virginia. As the District Court noted:

> In determining whether reasonable suspicion existed, the Court is mindful of the Fourth Circuit's instruction that "where a state permits individuals to openly carry firearms, the exercise of this right, ***without more***, cannot justify an investigatory detention." *Black*, 707 F.3d at 540. What qualifies as something "more" is a developing area of law as courts face the expansion of open carry, which can arouse suspicion in combination with other innocent facts. *See U.S. v. Arvizu*, 534 U.S. 266, 277–78 (2002) (holding that factors "susceptible of innocent explanation" may "form a particularized and objective basis" for reasonable suspicion when considered together). ***The parties here only dispute whether the uncontested facts of the encounter constitute the something "more" required for reasonable suspicion to stop Walker as he openly carried his semiautomatic rifle.***

J.A. 326-327 (Emphasis added). In *Black*, this Court addressed an attempted case of "reasonable suspicion by association," which it concluded does not exist, and which can be strongly inferred from the facts at issue was a transparent case of racial profiling. See *Black*, 707 F.3d at 542 ("The facts of this case give us cause to pause and ponder the slow systematic erosion of Fourth Amendment protections for a certain demographic."). The officers in that case spotted an African American

individual seated in a vehicle parked at a gas pump, allegedly located in a high-crime area of Charlotte, North Carolina. See *id*. at 534. They did not see him enter the gas station parking lot, and had no knowledge of how long he had been there, or about his conduct prior to their arrival. See *id*. They ran a check on his license plate and found no outstanding violations. See *id*. Nonetheless, after asserting without evidence that this behavior was indicative of a drug transaction, they followed this individual to a parking lot between two apartment buildings. See *id*. at 534-535.

After exiting his vehicle, the officers observed Mr. Troupe approach a group of five other persons sitting in a semi-circle. See *id*. at 535. This group include the eponymous Mr. Black, an African American male, as well as a Mr. Charles Gates, who one of the officers knew to have a history of prior felony arrests. See *id*. After the officers approached the men, they observed that Mr. Troupe was openly carrying a handgun in a holster on his waist, of which they relieved him. See *id*. Thereafter, they began to search each other member of the group, based on a hypothetical "rule of two," which they claimed without evidence suggested that the presence of one firearm in a group portended another. See *id*. They perceived Mr. Black to be overly cooperative, volunteering his identification, which showed an address in another part of North Carolina. See *id*. at 536. After the officers took possession of Mr. Black's identification, he attempted to walk away, then to flee, at which point he was tackled,

and the police discovered that he had a firearm on his person. See *id*. He was later charged with being a felon in possession of a firearm. See *id*.

In reversing the district court's denial of Mr. Black's motion to suppress the discovery of the firearm, this Court did not hold, as Mr. Walker suggests, that Mr. Troupe's display of an openly-carried handgun could not contribute to reasonable suspicion. Rather, this Court held that open possession of a handgun, without more, did not amount to reasonable suspicion; it did not define what constitutes "something more," only that it was not present in that case. See *id*. at 540. The District Court in this case, by contrast, wrestled with that very question, and came to the correct conclusion that the facts surrounding the brief investigatory stop of Mr. Walker met that standard.

The District Court accurately summarized the state of the law on reasonable suspicion as follows:

> The "touchstone" of any Fourth Amendment analysis is "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977) (citing *Terry v. Ohio*, 392 U.S. 1, 19, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). To be reasonable, a warrantless investigatory stop generally requires "a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000) (citing *Terry*, 392 U.S. at 30). Reasonable suspicion requires officers to "have a particularized and objective basis for suspecting the particular person stopped of criminal activity," for "[t]here is no reasonable suspicion merely by association." *United*

> *States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981); *United States v. Black*, 707 F.3d 531, 539-40 (4th Cir. 2013). Reasonable suspicion considers the "totality of the circumstances," which includes the "various objective observations" from which an officer can make deductions. *Cortez*, 449 U.S. at 417-18.

(J.A. 137-138). Reasonable suspicion does not evaporate merely because there are potential innocent explanations for the subject's conduct. See, e.g., *United States v. Foster*, 824 F.3d 84, 89 (4th Cir. 2016) ("Seemingly innocent factors, when viewed together, can amount to reasonable suspicion."); *United States v. Booker*, 612 F.3d 596, 601 (7th Cir. 2010) ("The possibility of an innocent explanation does not vitiate properly established probable cause."). This purpose of the investigatory stops to which the reasonable suspicion analysis is applied has been posed by the United States Supreme Court as follows:

> The reasonable-suspicion standard is a derivation of the probable-cause command, applicable only to those brief detentions which fall short of being full-scale searches and seizures and which are necessitated by law enforcement exigencies such as the need to stop ongoing crimes, ***to prevent imminent crimes***, and to protect law enforcement officers in highly charged situations.

United States v. Sokolow, 490 U.S. 1, 12, 109 S.Ct. 1581, 104 L. Ed. 2d 1 (1989) (Emphasis added).

Even in the absence of individualized suspicion of criminal activity, an action may still be reasonable when "special governmental needs, beyond the normal need for law enforcement" justify the search. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989) (noting the

"longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness"). This is because "the Fourth Amendment imposes no irreducible requirement of such suspicion." *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-561, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976)). "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 624, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989).

First, the District Court held that reasonable suspicion existed to stop Mr. Walker upon suspicion that he was violating W. Va. Code § 61-7-8, which prohibits the carrying of firearms by persons under the age of eighteen (18). (J.A. 327). At the time of the stop, Mr. Walker was twenty-four (24) years old, and was travelling on foot down the side of a road with no sidewalk, visibly carrying an uncased firearm. (Video of Incident, J.A. 180). Further, he was in walking distance of a high school, and headed in that direction. The fact that he was walking in an area where foot travel is uncommon, was wearing a backpack (J.A. 322; Video of Incident, J.A.

180), and was near a high school, and thus in an area which commonly has a higher concentration of teenagers, also raise the inference that he may have been underage.

The District Court was hardly the first court to hold that reasonable suspicion exists to stop a youthful person apparently engaged in an age-controlled activity. In *Combs v. City of Birmingham*, Case No. 12-14528, 2013 U.S. Dist. LEXIS 124335, 2013 WL 4670699 (E. D. Mich., Aug. 30, 2013), the subject was eighteen (18) years old and openly carrying a rifle across his back when he was stopped by law enforcement and requested to provide his identification due to his youthful appearance. See *id*. at *5-*7. The *Combs* plaintiff insisted he was of legal age, but defiantly refused to provide identification, claiming that he was not required to. See *id*. at *5. While a subsequent search of his person uncovered his driver's license which showed him to be eighteen (18), he was nonetheless arrested for several charges, including obstructing a police officer. See *id*. at *6. The Court granted summary judgment to the officers as to the plaintiff's subsequent § 1983 claim, holding that there was probable cause to arrest the plaintiff for obstruction, because he had refused the officers' "lawful command" that he produce proof of his age. *Id*. at *22-*23.

In so holding, the *Combs* Court relied in part on *Klaucke v. Daly*, 595 F.3d 20 (1st Cir. 2010), wherein the First Circuit held that an officer's demand to see the driver's license of a person suspected of underage possession of alcohol was

reasonable, and that the officer was not required to accept the person's word that they were over twenty-one (21). See *id*. at 25. On a more rational and intuitive level, however, a ruling that reasonable suspicion does not exist to demand identification from a youthful person apparently engaged in an age-controlled activity would be the overturning of substantially every underage drinking ticket ever issued, rendering laws of the type all but unenforceable – what is reasonable suspicion of such an offense if not youthful appearance? While Mr. Walker pleads his beard against the existence of such suspicion, the Court should be loathe to enshrine facial hair, which is not uncommon in teenagers, as an effective immunity from age-control laws.

Aside from his youthful appearance, the District Court also correctly held that reasonable suspicion existed to believe that Mr. Walker posed a threat to the community, and to the nearby school in particular. As pointed out by the District Court, Mr. Walker's conduct is the type of unusual, provocative, and alarming display of firearms which has repeatedly been held to contribute to reasonable suspicion in persuasive case law issued by Courts across multiple circuits. In *Banks v. Gallagher*, 686 F.Supp.2d 499 (M. D. Pa. 2009), the Middle District of Pennsylvania addressed a suit by members of a large group of armed persons who entered a restaurant together and were briefly detained by police following a 9-1-1

call by concerned patrons. Holding that that the investigatory stops were premised upon reasonable suspicion, that Court stated as follows:

> Thus, the question here is not whether an individual in certain jurisdictions of Pennsylvania may legally openly carry firearms. It is not contested by the Individual Defendants (for purposes of this Motion) that such conduct is legal. Rather, the question is whether a police officer has a reasonable suspicion, justifying a stop and a short-lived inspection of a person's driver's license, when they are confronted by a significant number of people exercising their open carry rights in a novel or unexpected way, at an unexpected time and place… There are any number of activities, legal in themselves, but taken collectively may pose risks and dangers (to the public and to officers on the scene) and thereby generate a reasonable suspicion to justify what would otherwise be a Fourth Amendment invasion."

Id. at 523-524. Likewise, in *Baker v. Schwarb*, 40 F.Supp.3d 881 (E. D. Mich. 2014), the Eastern District of Michigan held that "[the plaintiff's] all-black garb and ominous rifle… coupled with his proximity to a hospital was sufficiently unusual for a law-abiding citizen to warrant a degree of alarm for the safety of people nearby." *Id*. at 889. In *Deffert v. Moe*, 111 F.Supp.3d 797 (W. D. Mich. 2015), the Western District of Michigan held that law enforcement had reasonable suspicion for an investigatory stop of the plaintiff who was "walking in a residential neighborhood across the street from a church in service on a Sunday morning… wearing camouflage pants and an FNP-45 Tactical pistol secured in a leg holster" and loudly singing. *Id*. at 809. Further, in *Embody v. Ward*, 695 F.3d 577 (6th Cir. 2012), the Sixth Circuit held a Tennessee park ranger justified in an investigatory

detention of a person walking through a state park "in camouflage carrying an AK-47 across his chest" to determine the legality of the weapon. *Id*. at 580.

This case far more properly falls in the lineage of the above-referenced cases than of *Black*. Mr. Walker was seen to be walking toward a high school in a suburban, residential area, carrying an uncased AR-15 style rifle. He was dressed in militia-style black and camouflage. (J.A. 322; Video of Incident, J.A. 180 at 8:20). This is a suburban residential and commercial area which is unsuitable for hunting or target shooting, and Mr. Walker was not wearing any items of blaze orange, or anything else which would signal to an observer that his intention was hunting. (See *id*.). Furthermore, this interaction occurred in February, when almost no commonly hunted animals, with the exception of noxious pests, are in season. Nor is an AR-15 a weapon commonly used for hunting, such as a deer rifle or shotgun, or carried for self-defense, such as the handgun possessed by Mr. Troupe in *Black*. In short, Mr. Walker's story that he was on his way to a friend's house, after which they would go to a third location to hunt coyotes, and that he was walking because he has a medical condition which prevents him from driving, is a highly unique and unlikely situation which would hardly be a natural conclusion for a reasonable observing law enforcement officer to draw from the above facts.

These facts do, however, create a sufficient concern in a reasonable law enforcement officer of a potential impending mass shooting to warrant an

investigatory stop. The officers responded to a 9-1-1 call reporting Mr. Walker's conduct, which has previously been held to contribute to reasonable suspicion, as it demonstrates the conduct is alarming to community members. See *Deffert v. Moe*, 111 F. Supp. 3d 797, 809 (W.D. Mich. 2015) (holding an officer responding to a 9-1-1 call about a man carrying a firearm, as opposed to an unprompted stop, supports finding reasonable suspicion). Upon arrival, the officers observed Mr. Walker approaching an area of the type which has repeatedly proven particularly vulnerable to gun violence on foot, dressed in a manner evocative of combat, and carrying an uncased AR-15 style rifle, the weapon of choice for the deadliest mass shooters of the past decade.

The mass shooter's preference for AR-15's is because, as former U. S. Marine infantry officer and author of "The Gun," a history of assault rifles and their effects upon security and war, C. J. Chivers, wrote in a February 28, 2018 New York Times column:

> When a gunman walked into Marjory Stoneman Douglas High School on Feb. 14, he was carrying an AR-15-style rifle that allowed him to fire upon people in much the same way that many American soldiers and Marines would fire their M16 and M4 rifles in combat.

See Chivers, C. J., Larry Buchanan, Denise Lu, and Karen Yourish, *With AR-15s, Mass Shooters Attack With the Rifle Firepower Typically Used by Infantry Troops*, The New York Times Online (Feb. 28, 2018),

https://www.nytimes.com/interactive/2018/02/28/us/ar-15-rifle-massshootings.html. In sum, AR-15 style rifles give the wielder the capability to kill more people in a shorter amount of time than more commonplace styles of firearm, making it an appealing choice for a would-be mass shooter whose goal is exactly that, and a greater danger to public safety than would more commonplace, less-powerful, lower-capacity firearms, such as shotguns or handguns.

And its popularity with mass shooters has been repeatedly borne out by its use in substantially all of the deadliest mass shootings since it became legal upon the expiration of the federal assault weapons ban in 2004. On June 20, 2012, James Holmes used an AR-15 style rifle to kill 12 and injure 58 in a movie theater in Aurora, Colorado. On December 14, 2012, Adam Lanza used an AR-15 style rifle to kill 27 at Sandy Hook Elementary School in Newtown, Connecticut. On December 2, 2015, Syed Farook and Tashfeen Malik used AR-15 style rifles to kill 14 and injure 21 in Santa Monica, California. On June 12, 2016, Omar Mateen used an AR-15 style rifle to kill 49 and injure 50 at Pulse night club in Orlando, Florida. On October 1, 2017, Stephen Paddock used several guns, including an AR-15, to kill 58 and injure hundreds in Las Vegas, Nevada. On November 5, 2017, Devin Kelley used an AR-15 style rifle to kill 26 at a church in Sutherland Springs, TX. And on February 14, 2018, seven (7) days before Cpl. Donohoe and Dep. Pauley received the call regarding an individual walking in what they knew to be the direction of a

school with the same type of firearm, Nikolas Cruz used an AR-15 style rifle to kill 17 and injure 14 at Marjory Stoneman Douglas High School in Parkland, Florida. See Cummings, William and Bart Jansen, *Why the AR-15 keeps appearing at America's deadliest mass shootings*, USA Today Online, (Feb. 14, 2018), https://www.usatoday.com/story/news/nation/2018/02/14/ar-15-mass-shootings/339519002/.

Both officers testified that, because the Parkland shooting had happened so recently and been so widely covered in the national media, they were on heightened alert for copycat crimes. (J.A. 173, Pg. 22, Line 1 – Pg. 23, Line 5; J.A. 234, Pg. 16, Line 11 – Pg. 17, Line 7). The District Court found this to be a reasonable inference to draw from this fact (J.A. at 327), and with good reason: it is well-established that wide media coverage of notorious crimes, especially mass shootings, inspires copycats. A 2015 study by researchers at Arizona State University and Northeastern Illinois University found a statistically significant uptick in mass murder events in the immediate aftermath of preceding mass murder events. See Fox, Maggie, *Mass Killings Inspire Copycats, Study Finds*, NBC News Online (July 2, 2015), https://www.nbcnews.com/health/health-news/yes-mass-killings-inspire-copycats-study-finds-n386141. They characterized their finding as one that media-saturated mass killings are "contagious." *Id*. This followed a 2014 FBI report which came to the same conclusion. *Number of Mass Shootings on the Rise, Most at Schools: FBI*

Report, NBC News Online (Sept. 22, 2014), https://www.nbcnews.com/news/us-news/number-mass-shootings-rise-most-schools-fbi-report-n211261. Commenting on their report, an FBI spokesman stated to NBC News as follows:

> "The copycat phenomenon is real" […] "As more and more notable and tragic events occur, we think we're seeing more compromised, marginalized individuals who are seeking inspiration from those past attacks."

Id.

If an individual had intended to commit a copycat shooting of the deadly Parkland attack, or one of the other all-too-numerous incidents of indiscriminate public gun violence which have beset our country in the past decade, they would have appeared indistinguishable from Mr. Walker. He was dressed for combat, was carrying the weapon which has become the hallmark of mass murderers, and appeared to be approaching a school on foot in a way that sufficiently alarmed the community to warrant a 9-1-1 call, with no obvious innocent purpose for his conduct. It was eminently reasonable for the officers to find this sufficiently concerning to warrant an investigatory stop, to the point that they would be arguably derelict had they failed to do so.

The United States Supreme Court expressly included the need "***to prevent imminent crimes***" in its enumeration of the proper purposes for an investigatory stop. *Sokolow*, 490 U.S. at 12 (Emphasis added). Where the open carrying of

firearms is legal, it may often be the case that no illegal action occurs up until the moment the trigger is pulled. If law enforcement is to have any hope of preventing a crime of this nature, they must be permitted to undertake investigatory stops of unusual or alarming displays of firearms which are suggestive of a potential threat. As persuasively stated by the U.S. District Court for the Eastern District of Michigan in *Baker v. Smiscik*, 49 F.Supp.3d 489 (E. D. Mich. 2014), to prevent the "recurrent tragedies triggered by gun violence in public places, … police are properly given sufficient freedom of action to investigate circumstances that reasonably suggest an immediate risk to officer or public safety." *Id*. at 498. Those circumstances were not present in the facts of *Black*. They are here.

Accordingly, whether by suspicion that Mr. Walker may not have been of legal age to carry his firearm, or by suspicion of the potential threat to the community suggested by his conduct, Cpl. Donohoe's investigatory stop of Mr. Walker was supported by reasonable suspicion. The District Court committed no error by so holding.

3. The District Court correctly held that the scope and duration of the stop were reasonable.

The District Court next held that the scope and duration of the stop were reasonable. (J.A. 328-331). While it held that any concern over Mr. Walker's age was satisfied when he produced his identification, the running of a criminal

background check was a reasonable measure to address the legitimate concern for community safety discussed in the foregoing section. This Court should reach the same conclusion.

The extent of investigatory stops must be "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20. The officer effectuating the stop is required to "diligently pursue[…] means of investigation that [are] likely to confirm or dispel their suspicions quickly." *United States v. Sharpe*, 470 U.S. 675, 686 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985). However, reasonable suspicion "may reasonably grow over the course of a [stop] as the circumstances unfold and more suspicious facts are uncovered." *United States v. Linkous*, 285 F.3d 716, 720 (8th Cir. 2002). Officers may rely on "commonsense judgments and inferences about human behavior" to determine the needs and scope of the investigatory stop. *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000)

Mr. Walker's defiant behavior, as well as the nature of the concern to be alleviated by the stop, more than justified detaining Mr. Walker for less than eight (8) minutes, and running a criminal background check. When initially asked his destination, Mr. Walker gave the vague and evasive answer "up to a buddy's," and refused to identify himself. (Video of Incident, J.A. 180 at 0:10). After receiving Mr. Walker's identification, Cpl. Donohoe asked once again what his destination

was, this time receiving the answer of "you don't need to know that," (Video of Incident, J.A. 180 at 0:55) which is not only defiant but contradictory to his prior response, both of which have been held to contribute to reasonable suspicion. See *Wardlow*, 528 U.S. at 124 (holding "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion"); see also *United States v. Mason*, 628 F.3d 123, 126, 129-130 (4th Cir. 2017) (noting that contradictory answers regarding a driver's itinerary and destination raised an inference that they were lying, which contributes to reasonable suspicion that they are engaged in criminal activity); *United States v. Suitt*, 569 F.3d 867, 872 (8th Cir. 2009) (holding that a suspect's "hesitant, evasive, and incomplete answers" justified prolonging a traffic stop for additional questioning after the officer resolved the stop's initial basis).

Courts have also held that running a brief criminal background check is a minimally invasive way to dispel reasonable suspicion that an armed person poses a threat to the community. See *Deffert*, 111 F. Supp. 3d at 810 (holding that running a criminal history check was reasonable to dispel officer's suspicion of man openly carrying). In fact, far more restrictive and invasive measures, and far longer periods of detention, have been held reasonable. Unlike the plaintiffs in *Baker v. Schwarb* and *Baker v. Smiscik*, Mr. Walker was not disarmed during the stop. See *Baker v. Schwarb*, 40 F. Supp. 3d at 893 (holding officers acted reasonably in disarming persons openly carrying on a public sidewalk while running a criminal history

check); see also *Baker v. Smiscik*, 49 F. Supp. 3d at 499 (holding officers reasonably disarmed man openly carrying inside a donut shop). Unlike the plaintiff in Embody, Mr. Walker was not ordered to the ground at gunpoint. See *Embody*, 695 F.3d at 581 (holding that a Park Ranger acted reasonably in ordering a man openly carrying an AK-47 to the ground at gunpoint). Notably, all of these interactions which were held to be reasonable were substantially longer than Mr. Walker's brief, approximately eight (8) minute encounter. See *Deffert*, 111 F. Supp. 3d at 810 (thirteen minute stop); *Smiscik*, 49 F. Supp. 3d at 493 (thirty-minute stop); *Embody*, 695 F.3d at 581 (two-and-a-half-hour stop); see also *United States v. Green*, 740 F.3d 275, 281 (4th Cir. 2014) (a four (4) minute extension of a traffic stop for a criminal history check was "a *de minimis* intrusion on [the defendant's] liberty interest" and did not violate Fourth Amendment).

In this case, the length of the criminal background check, which added six-and-a-half minutes to the total time, was a *de minimis* extension of the stop, both under the precedent of this Court, and persuasive case law from other circuits. (J.A. 330; Video of Incident, J.A. 180). A criminal background check is also rationally related to the concern for community safety presented by Mr. Walker's conduct. In addition to the multiple courts which have found this to be the case in like situations, a criminal background check would inform the officers whether Mr. Walker had a history of violent offenses – unquestionably a relevant factor in determining whether

his conduct posed a threat. When the background check showed that he did not, the officers believed there was no further basis to detain him, and permitted him to leave. (J.A. 175, Pg. 24, Line 10 – Pg. 25, Line 3). This was a minimally invasive, brief inconvenience imposed on Mr. Walker, the scale of which is undoubtedly dwarfed by law enforcement's weighty obligation to protect their community from the scourge of gun violence. The District Court was correct that a stop of this type and scope does not offend the Fourth Amendment in context.

4. The Court correctly held that, to the extent the criminal background check was a violation of the Fourth Amendment, the officers are entitled to qualified immunity.

Even if this Court were to hold that the stop itself, or its scope and duration, violated the Fourth Amendment, the officers would nonetheless be entitled to qualified immunity. In the language of the *Maciariello* Court, they did not transgress a "bright line."

Governmental officials performing discretionary functions are shielded from liability for money damages so long "as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). Moreover, "there are two levels at which the immunity shield operates. First, the particular right must be clearly established in the law. Second, the manner

in which this right applies to the actions of the official must also be apparent." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992) (citing *Tarantino v. Baker*, 825 F.2d 772, 774-75 (4th Cir. 1987), *cert. denied*, 489 U.S. 1010, 103 L. Ed. 2d 180, 109 S. Ct. 1117 (1989)). "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Id*. (citing *Anderson v. Creighton*, 483 U.S. 635, 639-40, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987); *Gooden v. Howard County*, 954 F.2d 960, 968 (4th Cir. 1992) (en banc).

It is not sufficient that a right be clearly established in an abstract sense; it must be clearly established in its particularized application.

> [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless that very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Maciariello at 298 (quoting *Anderson* at 639-640). Applicable to Mr. Walker's case, this means that it would be improper to state that a clearly established right of Mr. Walker's was violated merely because the 4th Amendment and the legality of openly carrying firearms are clearly established. Such an interpretation of qualified immunity "would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified

immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id*.

Nor does *Black* clearly establish a right to carry any weaponry in any context free from the questions of law enforcement. As discussed in earlier sections of this Brief, *Black* is clearly differentiable, and does not stand for the proposition which Mr. Walker attempts to attribute to it. See *supra* pgs. 18-20, 22-31. As noted by the District Court, while this Court held in *Black* that the facts there did not amount to reasonable suspicion, it offers little further guidance as to what facts *do* amount to reasonable suspicion to stop an openly-carrying individual. As the situation at issue in *Black* was materially different than that in the present case, it cannot be said to clearly establish the right claimed by Mr. Walker here in a particularized application.

Aside from *Black*, Mr. Walker has pointed to not legal guidance which could clearly establish the officers' conduct as illegal. No statutory or case law to date has clearly established Mr. Walker's right to walk toward a school with an AR-15, free from the questions of law enforcement. In fact, as discussed in this Brief, the overwhelming weight of persuasive case law in factually analogous circumstances shows the opposite – that an investigatory stop of a person openly carrying a firearm in an unusual and alarming context, including a brief criminal background check, is legal. See *supra* pgs. 24-27. Certainly, the state of the law on stopping persons openly carrying firearms is not such that a reasonable officer observing what Cpl.

Donohoe observed would be unmistakably instructed against stopping Mr. Walker. (J.A. 222) ("The law surrounding the intersection of the open carrying of deadly weapons and the Fourth Amendment is developing. Our review of controlling case law did not provide clear guidance, and, as cited above, persuasive case precedent in fact suggests that Cpl. Donohoe's conduct in stopping Mr. Walker and checking his identification was legal[...]")

Dep. Pauley should be considered even more clearly entitled to qualified immunity. The worst that can be reasonably argued as to the state of the relevant law, as discussed above, is that it arguably does not clearly validate Cpl. Donohoe's actions. It certainly does not clearly establish them as unlawful. And it most certainly does not so clearly establish them as unlawful that a junior officer like Dep. Pauley would be constitutionally remiss in failing to intervene against his far more senior superior officer.

Surely, there is some proximity to a school or other vulnerable location – some degree of alarming conduct or behavior – which permits an officer to detain an openly carrying individual in the interest of community safety. In an environment where openly displaying firearms is not itself a crime, there must be some point at which law enforcement may intervene before the trigger is pulled if any preventative measure against indiscriminate public gun violence is to be possible. If it is this Court's holding that Mr. Walker's conduct does not rise to that level, it begs the

question: what conduct does? If this Court holds that it was not reasonable for the officers to suspect Mr. Walker of being underage, what factors would support that suspicion? These questions have unquestionably not been answered by cases controlling the state of the law in this circuit, and cases from outside this circuit appear to validate their conduct. This is the pre-existing legal environment which goes to the heart of qualified immunity. The officers cannot have crossed *Maciariello*'s "bright line" if no such line has been established. See *Maciariello*, 973 F.2d at 298. Accordingly, the District Court's holding that, even if a constitutional violation did occur, the officers would be entitled to qualified immunity was correctly reached, and should not be disturbed.

5. Mr. Walker's skepticism about the officers' true motivations is inapposite in a reasonable suspicion analysis.

Mr. Walker spend a substantial amount of energy arguing that the grounds for reasonable suspicion articulated by the officers cannot have been their true motivations for stopping him, and that in actuality Cpl. Donohoe stopped him solely for possessing a firearm in public. To argue this, the Mr. Walker points to the fact that Cpl. Donohoe does not ask about school shootings in the video recording of the stop.

Aside from the consideration that "Pardon me, sir, but are you a school shooter?" is not a question likely to elicit a response which is useful for investigative

purposes, this is an irrelevant point in any case. Reasonable suspicion is determined solely based upon the objective facts known to the officers at the time of the stop, and the reasonable inferences which may be drawn therefrom. Any subjective ulterior motives that the officers may have had are irrelevant. As the Fourth Circuit stated in *United States v. Foreman*, 369 F.3d 776 (4th Cir. 2004):

> Because reasonable suspicion is an objective test, we examine the facts within the knowledge of [the officer] to determine the presence or nonexistence of reasonable suspicion; ***we do not examine the subjective beliefs of [the officer] to determine whether he thought the facts constituted reasonable suspicion.*** Additionally, it must be noted that, because the *Terry* reasonable suspicion standard is a commonsensical proposition, courts are not remiss in crediting the practical experience of officers who observe on a daily basis what transpires on the street.

Id. at 781-782 (Emphasis added); see also Syl. Pt. (b), *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (citing, e.g., *United States v. Robinson*, 414 U.S. 218, 221, n. 1, 236, 38 L. Ed. 2d 427, 94 S. Ct. 467 (1973) (holding that ulterior motives by law enforcement officers do not invalidate their conduct in an objective probable cause analysis). Therefore, what may have been the officers' alternate subjective motives for stopping Mr. Walker are irrelevant to any question before this Court, and should not be considered.

Hot on the heels of his precedent-defying argument that the Court should take his suggestions about the officers' alleged ulterior motives for stopping him into account, Mr. Walker next attempts to spin the objectivity standard discussed above

to argue that any concern the officers may have had for a copycat school shooting is just such a subjective belief. This represents a grave misunderstanding of the reasonable suspicion standard, and, if adopted, would require officers to ignore context and inference, viewing all behavior in an artificial sterile vacuum.

The relevant case law is replete with acknowledgement that the reasonable suspicion analysis takes into account the reasonable inferences which may be drawn from the facts within the officers' knowledge. See *United States v. Branch*, 537 F.3d 328, 336 (4th Cir. 2008) (citing *Terry*, 392 U.S. at 21). Facts are not immune from contributing to a reasonable suspicion simply because they might be "consistent with innocent [conduct]" if "when taken together, [might] give rise to reasonable suspicion." *Foreman*, 369 F.3d at 781 (emphasis omitted) (citing *Sokolow*, 490 U.S. at 9); see also *Branch*, 537 F.3d at 336 ("[C]ontext matters: actions that may appear innocuous at a certain time or in a certain place may very well serve as a harbinger of criminal activity under different circumstances"). "It is the entire mosaic that counts, not single tiles." *United States v. Whitehead*, 849 F.2d 849, 858 (4th Cir. 1988).

With that in mind, the officers' heightened alert for copycat crimes in the wake of a notorious school shooting is not a subjective belief; it is a reasonable inference drawn from objective facts, the reasonability of which is backed up by academic research. See *supra* pgs. 27-30. It is an objectively true and knowable fact that the

Parkland shooting occurred seven (7) days prior to the stop. That a person acting as Mr. Walker was in that immediate aftermath may be a potential copycat offender is a reasonable inference drawn from that objective fact, and Mr. Walker's arguments to the contrary are a meritless, if creative, exercise in mental gymnastics.

C. The District Court correctly held that, in the context of the stop at issue, Mr. Walker's possession of an AR-15 style rifle contributed to reasonable suspicion.

Mr. Walker's Brief also makes the novel and unsupported assertion that it was error for the District Court to draw different inferences from the presence of a common deer rifle or a sidearm. This argument asks the Court to cover its eyes and ears, ignoring all reality beyond the simple fact that AR-15's are just as legal to carry in West Virginia as pump shotguns, to create some kind of pseudo protected class for semi-automatic rifles, shielding them from 'discrimination' in reasonable suspicion analyses. This argument should not be entertained.

As discussed in prior sections of this brief, AR-15 style rifles have been featured in substantially all of the deadliest mass shootings in this decade. Mass murderers in Las Vegas and Orlando have killed and wounded over one hundred people in a single event with AR-15. Revolvers and bolt-action deer rifles do not share that infamy. It is therefore reasonable to infer that a person attempting to copycat a mass shooting would likely use the weapon of choice of mass shooters. If

officers are concerned about a potential mass shooter, certainly they would justifiably be more concerned by a person carrying an AR-15 than one of the many firearms more commonly used for hunting or self-defense. Different inferences may be reasonably drawn from the presence of different firearms, because different firearms are used for different things: a person viewed at a gun range carrying a shotgun may be presumed to be there to shoot clay pigeons, whereas a person carrying a rifle is almost certainly not.

Mr. Walker utilizes substantial page space devoted to this position arguing all of the innocent uses to which an AR-15 might be devoted. This is equally irrelevant. In finding reasonable suspicion to search an individual loitering near a gas station, the Sixth Circuit held that the fact that the subject was holding a golf club contributed to reasonable suspicion. See *United States v. Ivy*, 224 Fed. Appx. 461, 464 (6th Cir. 2007). Likewise, the Ninth Circuit held that police had reasonable suspicion to search a car parked outside a house, relying in part on the fact that one of the passengers was holding a baseball bat. See *United States v. DeJear*, 552 F.3d 1196, 1201 (9th Cir. 2009).

These objects are indisputably legal to possess, and legal to carry in public, and their innocent uses are beyond reproach. And yet it would be silly to require police to treat their presence the same as they would that of a badminton racquet or a ping pong paddle. While all sporting equipment is equally legal and has a well-

known innocuous use, common sense dictates that a person holding a golf club or a baseball bat far from the course or diamond, respectively, is more likely to pose a danger – and have illegal intent – than a subject openly wielding a basketball.

AR-15's are notoriously more favored by mass murderers than other guns, and are more efficient for mass murder than other guns available on the private market. While their ownership and carrying is generally legal in West Virginia, this should not immunize them from, in appropriate context, contributing to reasonable suspicion. The ability of law enforcement to rely on commonsensical inferences to protect the public far outweighs any marginal interest in protecting AR-15's from insidious gun discrimination.

CONCLUSION

WHEREFORE, based on the foregoing, the Appellees and Defendants below respectfully pray this Honorable Court AFFIRM the judgment of the United States District Court for the Southern District of West Virginia.

STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellees request oral argument pursuant to Rule 34(a)(2)(C) of the Federal Rules of Appellate Procedure because the decisional process would be significantly aided by oral argument.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of F. R. App. P. 28.1(e)(2) because it contains a total of 10,967 words, omitting excludable portions.
2. This brief complies with the typeface using requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a) because it has been prepared in 14-Point Times New Roman font text using Microsoft Office.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Response Brief of the Appellees has been electronically filed with the Clerk of the Court this 18th day of September, 2020, by using the CM/ECF system which will send notice of electronic filing to all parties of record.

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