

Nos. 25-1326, 25-1328, and 25-1329

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IN THE

**United States Court of Appeals for the Tenth Circuit**

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ADRIANA VANCE, for deceased on behalf of Raymond Green, et al.,  
Plaintiffs-Appellants/Cross-Appellees,

v.

ANDERSON LEE ALDRICH, Consolidated Defendant-Appellee,  
EL PASO COUNTY BOARD OF COMMISSIONERS, et al., Defendants-  
Appellees, and  
G.I.G., INC., d/b/a/ CLUB Q, et al., Defendants-Appellees/Cross-Appellants.

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BARRETT HUDSON, Consolidated Plaintiff-Appellant/Cross-Appellee, and  
ADRIANA VANCE, for deceased on behalf of Raymond Green, et al., Plaintiffs,

v.

EL PASO COUNTY BOARD OF COMMISSIONERS, et al.,  
Defendants-Appellees; and  
ANDERSON LEE ALDRICH, Consolidated Defendant-Appellee.

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ADRIANA VANCE, for deceased on behalf of Raymond Green, et al.,  
Plaintiff-Appellees, and  
BARRETT HUDSON, Consolidated Plaintiff-Appellee,

v.

G.I.G., INC., d/b/a CLUB Q, et al., Defendants-Appellants,  
ANDERSON LEE ALDRICH, Consolidated Defendant, and  
EL PASO COUNTY BOARD OF COMMISSIONERS, et al., Defendants.

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On Appeal from the  
United States District Court for the District of Colorado  
The Honorable William J. Martinez, District Judge  
Civil Action No. 24-cv-03190-WJM-MDB,  
*Consolidated with*  
*Civil Action No. 24-cv-3193-WJM-MDB*

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**SECOND BRIEF ON CROSS APPEAL**

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ORAL ARGUMENT IS NOT REQUESTED

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## STATEMENT OF RELATED CASES

As explained below, the district court declined to exercise supplemental jurisdiction over some of Plaintiffs’ state law claims. Thereafter, Plaintiffs refiled those claims in state court in an action captioned *Vance, et al. v. G.I.G., Inc. d/b/a Club Q*, Civ. No. 2025CV31959 (Dist. Ct. El Paso Cnty. 2025). The state court case is stayed pending resolution of this appeal.

## INTRODUCTION

On November 19, 2022, Anderson Aldrich<sup>1</sup> carried out a mass shooting at Club Q, an LGBTQIA+ nightclub in Colorado Springs, killing five people and wounding many others. Nearly two years later, Plaintiffs—each a victim of Aldrich’s attack—filed suit in the District of Colorado against El Paso County officials (the County Defendants<sup>2</sup>), several individuals and entities associated with Club Q (the Club Q Defendants<sup>3</sup>), and Aldrich.

Plaintiffs asserted claims under 42 U.S.C. § 1983 against the County Defendants under a state-created danger theory, alleging that official policies of inaction allowed Aldrich to acquire and retain weapons and ultimately carry out the

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<sup>1</sup> Aldrich uses they/them pronouns. App. Vol. 1 at 37, fn. 1.

<sup>2</sup> Defendants El Paso County Board of Commissioners and Sheriff Bill Elder are referred to collectively as the “County Defendants.”

<sup>3</sup> Defendants G.I.G. Inc., Club Q, LLC, 3430 N. Academy LLC, Academy3430, LLC, and Matthew Haynes are referred to collectively as “Club Q Defendants.” Plaintiffs also named Kenneth Romines and Nicholas Grzecka. Romines was never served. Grzecka filed bankruptcy; the case was stayed as to him. App. Vol. 2 at 269.

shooting. Plaintiffs asserted claims against Club Q Defendants under Colorado’s Premises Liability Act (“CPLA”), C.R.S. § 13-21-115, as well as common-law negligence and wrongful-death claims. Jurisdiction over those claims was asserted solely through supplemental jurisdiction under 28 U.S.C. § 1367.

Defendants moved to dismiss under Rule 12(b)(6). Club Q Defendants separately moved to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), arguing that the state-law claims against them did not form part of the same Article III case or controversy as the federal claims.

While recognizing the horrific nature of the shooting, the district court correctly held that the allegations do not state a § 1983 claim against the County Defendants. The Constitution imposes no duty on state actors to protect individuals from private violence absent affirmative conduct. *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 197 (1989). “Perceiving no allegations establishing ‘affirmative conduct’ by the [County Defendants],” the court dismissed the § 1983 claims. App. Vol. 2 at 236.

The court also dismissed Plaintiffs’ CPLA claim against the Club Q Defendants, concluding that “pertinent caselaw and legislative authority” establish that “Aldrich was the ‘predominant cause’ of [Plaintiffs’] injuries.” App. Vol. 2 at 217. But the court declined to dismiss Plaintiffs’ common-law negligence and wrongful-death claims, holding that those claims were not preempted by the CPLA.

Although the Club Q Defendants were sued solely under supplemental jurisdiction and moved to dismiss on the ground that such jurisdiction never existed, the district court declined to decide whether supplemental jurisdiction attached under 28 U.S.C. § 1367(a). Instead, after dismissing the federal claims and the CPLA claim, the court declined to further exercise supplemental jurisdiction and dismissed the remaining common-law claims without prejudice.

Plaintiffs now appeal the dismissal of their § 1983 claims against the County Defendants and the dismissal of their CPLA claim against the Club Q Defendants. Club Q Defendants cross-appeal, challenging the district court's refusal to dismiss all claims against them for lack of subject matter jurisdiction and, assuming jurisdiction existed, the court's determination that the CPLA does not preempt Plaintiffs' negligence and wrongful-death claims.

### **JURISDICTIONAL STATEMENT**

The district court had jurisdiction over Plaintiffs' § 1983 claims pursuant to 28 U.S.C. § 1331. That court lacked supplemental jurisdiction under 28 U.S.C. § 1367 over Plaintiffs' claims against Club Q Defendants. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

### **STATEMENT OF THE ISSUES**

ISSUE 1: Rights protected by the Fourteenth Amendment's substantive due process component must be deeply rooted in this Nation's history and implicit in

ordered liberty. Do the rights protected by this Court’s iteration of the state-created danger doctrine satisfy this standard?

ISSUE 2: Was the trial court’s dismissal of Plaintiffs’ state-created danger claims for the failure to satisfy the “affirmative conduct” precondition correct?

ISSUE 3: Plaintiffs’ Complaints failed to allege “conscience-shocking” conduct. Should this Court affirm the trial court’s dismissal for this alternative reason?

ISSUE 4: Did the district court err by declining to dismiss the state-law claims against Club Q Defendants for lack of subject matter jurisdiction where those claims did not form part of the same Article III case or controversy as the dismissed federal claims and therefore fell outside the court’s supplemental jurisdiction under 28 U.S.C. § 1367(a)?

ISSUE 5: Assuming *arguendo* the district court had jurisdiction of the claims against the Club Q Defendants, did the district court correctly dismiss Plaintiffs’ claims under the CPLA because the complaint failed, as a matter of law, to allege that any conduct by the landowner was a substantial, proximate cause of injuries resulting from an intentional third-party criminal act?

ISSUE 6: Assuming *arguendo* the district court had jurisdiction of the claims against the Club Q Defendants, did the district court err in allowing Plaintiffs’ common-law negligence and wrongful-death claims to proceed where the CPLA

provides the exclusive remedy for injuries arising from conditions or activities on a landowner's property and therefore preempts those claims?

## STATEMENT OF FACTS

### I. The Complaints' Material Allegations and Relevant Authority.

#### A. The Parties.

Plaintiffs are all victims of Aldrich's shooting. App. Vol. 1 at 27-34, 254; App. Vol. 2 at 21.

The El Paso County Board of County Commissioners ("BoCC") acts as the primary policymaking body for El Paso County. App. Vol. 1 at 35; App. Vol. 2 at 21-22. Bill Elder ("Elder") was the elected sheriff of the El Paso County Sheriff's Office ("EPSO"). App. Vol. 1 at 35; App. Vol. 2 at 21. EPSO and the BoCC are separate entities with different responsibilities. *See Bristol v. Bd. of Cnty Com'rs of Cnty. of Clear Creek*, 312 F.3d 1213, 1219 (10th Cir. 2002).

G.I.G., Inc. and Club Q, LLC operated the nightclub known as "Club Q." App. Vol. 1 at 35. Plaintiffs allege that Matthew Haynes and Kenneth Romines co-owned the Club Q entities. App. Vol. 1 at 35-36. 3430 N. Academy, LLC and Academy3430, LLC are entities that owned the building out of which Club Q operated. *Id.*

#### B. Colorado's Red Flag Law.

In January 2020, Colorado enacted its Red Flag Law which permits—but does not require—qualifying petitioners, such as law enforcement officers and agencies,

to seek an Extreme Risk Protection Order (“ERPO”) directing an individual displaying a pattern of statements and behaviors indicating an intent to inflict violence to surrender all firearms. App. Vol. 1 at 41, n.18; App. Vol. 2 at 25; C.R.S. §§ 13-14.5-103, -104, -113(4).

The Red Flag Law permits state courts to issue two types of ERPOs. The first is a temporary order issued without notice to the respondent. C.R.S. § 13-14.5-103(1)(a). Whenever a temporary order is issued, the court must conduct an evidentiary hearing within 14 days with notice to the respondent. *Id.* at § -103(5)(a). At this hearing, the court decides whether to issue the second type of ERPO by extending the temporary order into a three hundred sixty-four-day order. *Id.* at § -105(2). The 364-day ERPO may be extended if a qualifying petitioner files a successful motion to renew it. C.R.S. § 13-14.5-107(2)(a)-(e).

### **C. The BoCC’s Resolution and EPSO’s Statement.**

On March 12, 2019, the BoCC passed a generally applicable Resolution critical of the then-proposed Red Flag Law. App. Vol. 1 at 46-50; App. Vol. 2 at 29-31. In 2020, after passage of the Red Flag Law, Elder issued a generally applicable Statement describing the circumstances under which EPSO might pursue an ERPO. App. Vol. 1 at 50; App. Vol. 2 at 29.

**D. Aldrich's 2021 Arrest and Prosecution.**

In June 2021, Aldrich's grandparents called law enforcement because Aldrich threatened to kill the grandparents, was making a bomb, told the grandparents Aldrich planned to be the next mass killer, and was amassing ammunition and body armor. App. Vol. 1 at 51-52; App. Vol. 2 at 33-35. When EPSO SWAT responded, Aldrich told a negotiator that Aldrich possessed a gas mask and armor-piercing rounds and was "ready to go to the end." App. Vol. 1 at 52; *see also* App. Vol. 2 at 35. After Aldrich was taken into custody, law enforcement officers found materials consistent with bomb making as well as ammunition, firearms, and body armor. App. Vol. 1 at 52-53.

Aldrich was arrested on multiple felony charges and issued a \$1,000,000 bond but posted bond shortly after the state court held a bond modification hearing on August 5, 2021. App. Vol. 1 at 53; App. Vol. 2 at 35. About three months later, the state court (not the County Defendants) received a letter from Aldrich's relatives detailing their concerns, including that Aldrich bought two 3-D printers and used them to make gun parts and that Aldrich would "hurt or murder [them]." App. Vol. 1 at 53-54; App. Vol. 2 at 35-36. During an August 2021 court hearing, the presiding judge expressed concern that Aldrich was "planning for something else" such as a "shootout." App. Vol. 1 at 54; App. Vol. 2 at 37-38.

In July 2022, the state court dismissed Aldrich's criminal case because the district attorney's office had difficulties serving Aldrich's grandparents, who had relocated to Florida. App. Vol. 1 at 54; App. Vol. 2 at 36. On August 11, 2022, the state court sealed records of Aldrich's criminal case and thereafter denied Aldrich's request to release the firearms that were seized during his 2021 arrest. App. Vol. 1 at 54-55; App. Vol. 2 at 36-37.

**E. The Shooting at Club Q and Aldrich's Criminal Convictions.**

Months later, on November 19, 2022, Aldrich perpetrated a shooting at Club Q, killing five people and wounding at least twenty-five others using an AR-15-style rifle and handgun strapped to a vest. App. Vol. 1 at 25, 37-39; App. Vol. 2 at 51-52.

Aldrich was prosecuted in state and federal court. In state court, Aldrich pled guilty to five counts of first-degree murder and other offenses and received five consecutive life sentences. App. Vol. 1 at 40; App. Vol. 2 at 53. In federal court, Aldrich pled guilty to seventy-four federal hate crimes and gun charges and received fifty-five life sentences. App. Vol. 1 at 40; App. Vol. 2 at 53.

**F. Allegations Regarding Club Q Security.**

Plaintiffs alleged Club Q's security diminished between 2016 and 2022. In 2016, Club Q allegedly employed up to five security guards, including at least one armed guard. App. Vol. 1 at 58. By November 2022, Plaintiffs alleged Club Q had reduced security staffing to a single, unarmed employee stationed at the front door

and lacked effective security protocols. App. Vol. 1. at 58-59. Plaintiffs further alleged that Club Q advertised itself as a “safe space” for LGBTQIA+ individuals, while patrons retained some responsibility for their own security. App. Vol. 1 at 56.

Plaintiffs alleged deficiencies in Club Q’s security policies and physical layout, including no active-shooter training, the lack of pat-downs or wandering of patrons, the decision not to use handheld metal detectors, and the absence of exterior security screening. App. Vol. 1 at 57-58. Plaintiffs alleged that Club Q focused security efforts on monitoring employees, capacity, and underage drinking rather than detecting weapons or preventing violent acts. App. Vol. 1 at 59. They further alleged that Club Q had an unsafe layout, with a single front-door entrance, a blocked rear door, an enclosed smoking patio, and inadequate exits for evacuation. *Id.*

Plaintiffs alleged prior security-related incidents at Club Q, including an attempted stabbing in 2021, and a successful employee-initiated lockdown after nearby gunshots in October 2022. App. Vol. 1 at 62. Plaintiffs also alleged that, in the weeks before the shooting, employees received unspecified threats of violence by phone and were generally aware of increased hostility and threats directed toward the LGBTQIA+ community. App. Vol. 1 at 63.

Though Plaintiffs alleged that El Paso County officials had prior knowledge of Aldrich’s potential dangerousness based on criminal charges and related proceedings approximately sixteen months before the shooting, as well as later court

filings and statements, Plaintiffs did *not* allege that Club Q Defendants had knowledge of those proceedings, the related court filings, judicial statements, the eventual dismissal of the charges, or an FBI warning issued nationwide in September 2022. Plaintiffs alleged that only County officials had reason to know of the shooter’s potential for violence.

Plaintiffs alleged that Aldrich visited Club Q at least seven times between August 2021 and October 2022 without incident and, during those visits, asked questions about security and evacuation procedures. Plaintiffs alleged that Club Q was generally aware of increasing threats of violence against LGBTQIA+ venues nationwide but did not allege that Club Q had prior knowledge of the shooter’s specific actions or intentions—nor his prior run-ins with the law—before the shooting.

**G. Plaintiffs’ § 1983 Claims Against the County Defendants.**

Relying on the following assertions of inaction, Plaintiffs brought state-created danger claims against the County Defendants alleging that they maintained policies of inaction that enabled Aldrich to amass weapons and carry out the shooting at Club Q:

- “Despite these warnings and ample grounds for an [ERPO], El Paso County law enforcement failed to act...This deliberate inaction allowed the shooter continued access to firearms, directly enabling the attack on Club Q.” App. Vol. 1 at 26; *see also* App. Vol. 2 at 18.

- “Refusing to enforce Colorado’s Red Flag Law...” App. Vol. 1 at 70; App. Vol. 2 at 68.
- “Failing to take reasonable steps to prevent...” App. Vol. 1 at 70; App. Vol. 2 at 68.
- “Maintaining a policy of non-enforcement of ERPOs...” App. Vol. 1 at 70; App. Vol. 2 at 68.
- “[H]e failed to take action under Colorado’s Red Flag Law or otherwise to prevent the shooter from obtaining or possessing weapons.” App. Vol. 1 at 71; *see also* App. Vol. 2 at 69.
- “[His] refusal to act on this information...left the shooter armed and emboldened to carry out [their] violent intentions...” App. Vol. 1 at 73; App. Vol. 2 at 71.
- “Failing to seek an ERPO to disarm [the shooter], despite the wealth of evidence and statutory authority under Colorado’s Red Flag Law.” App. Vol. 1 at 74; App. Vol. 2 at 73.
- “Ignoring credible and specific warnings about the shooter’s violent intentions and efforts to recover firearms.” App. Vol. 1 at 78; App. Vol. 2 at 73.
- “Maintaining a formal or de facto policy of non-enforcement of Colorado’s Red Flag Law, even in cases of known and imminent danger.” App. Vol. 1 at 74, 75; App. Vol. 2 at 73.
- “[E]stablishing a formal policy of refusing to allocate resources to enforce the law...” App. Vol. 1 at 75; App. Vol. 2 at 58.
- “Failing to oversee or intervene in the Sheriff’s Office’s inaction...” App. Vol. 1 at 76; App. Vol. 2 at 58.

- “Ignoring warnings that the [shooter] intended to commit a mass shooting...” App. Vol 1 76; App. Vol. 2 at 59.
- “Failing to adopt or enforce policies requiring follow-up investigations or ongoing monitoring of individuals, such as [the shooter], with documented histories of violent behavior.” App. Vol 1 at 76; App. Vol. 2 at 59.
- “[T]he Board chose to maintain is policy of non-enforcement...and failed to implement measures to address the ongoing threat...” App. Vol. 1 at 78; *see also* App. Vol. 2 at 63.
- “Failing to implement oversight mechanisms to ensure enforcement of ERPOs in cases involving imminent threats, such as the shooter.” App. Vol. 1 at 79; App. Vol. 2 at 62.
- “Failing to take any steps to mitigate the risk posed by the shooter, despite having the authority and responsibility to do so.” App. Vol. 1 at 56; App. Vol. 2 at 63.
- “The deliberate indifference demonstrated by the Board in refusing to address known threats, coupled with its policy of non-enforcement of Colorado’s Red Flag Law, created conditions that directly facilitated the Club Q shooting.” App. Vol 1. 79; App. Vol. 2 at 64.
- “**The Board’s...Inactions Led to Private Violence...**” App. Vol. 2 at 59 (emphasis in original).
- “The Policy and Resolution were the causal link between the inaction of the Sheriff’s Department and the deprivation of Plaintiff’s Constitutional right to liberty and bodily integrity.” *Id.* at 65.
- “**Elder’s...Inactions Led to Private Violence...**” *Id.* at 70 (emphasis in original).

Plaintiffs sought to recast these omissions as affirmative acts, claiming that by failing to seek an ERPO against Aldrich, the County Defendants effectively allowed Aldrich to procure weapons and carry out the shooting at Club Q. *See, e.g.*, App. Vol. 1 at 70, 74, 79; App. Vol. 2 at 63.

#### **H. Plaintiffs' Claims Against the Club Q Defendants.**

Plaintiffs asserted three categories of claims against the Club Q Defendants. First, Plaintiffs brought claims under the CPLA, alleging that the Club Q Defendants were landowners who failed to exercise reasonable care to protect invitees from known or foreseeable dangers on the premises. App. Vol. 1 at 81. Plaintiffs alleged that inadequate security staffing, deficient security policies and procedures, and the physical configuration of the premises rendered Club Q unreasonably dangerous and contributed to Plaintiffs' injuries and deaths during the November 19, 2022, shooting. App. Vol. 1 at 82.

Second, Plaintiffs asserted common-law negligence claims, alleging that Club Q Defendants breached duties of reasonable care by, *inter alia*, reducing security personnel, failing to implement active-shooter protocols, inadequately screening patrons for weapons, failing to train staff, and failing to allocate sufficient resources to security and safety measures. App. Vol. 1 at 84. Plaintiffs alleged that these acts and omissions constituted negligent conduct independent of the CPLA.

Third, Plaintiffs asserted six wrongful-death claims, App. Vol. 1 at 80-87, seeking damages for deaths allegedly caused by the same purported security failures and negligent acts or omissions attributed to the Club Q Defendants. These wrongful-death claims were predicated on the same factual allegations underlying the CPLA and negligence claims.

## **II. Procedural Background.**

On November 17, 2024, Plaintiff Hudson filed a complaint against the Defendants under case number 24-cv-3193. *See* App. Vol. 1 at 4. On the same day, the remaining Plaintiffs filed their complaint against the Defendants under case number 24-cv-3190. *Id.* Plaintiffs amended their respective complaints twice.

The operative Complaints contain largely the same allegations and claims, with the notable difference being that Plaintiff Hudson sued Aldrich whereas the remaining Plaintiffs did not. App. Vol. 1 at 24; App. Vol. 2 at 17. As relevant here, Plaintiffs brought state-created danger § 1983 claims against the County Defendants alleging that they maintained official policies of inaction that allowed Aldrich to amass weapons and carry out the shooting at Club Q. *See* Section I.G. above. Plaintiffs also brought CPLA, negligence, and wrongful death claims against the Club Q Defendants.

On February 11, 2025, the County Defendants moved to dismiss the § 1983 claims under Rule 12(b)(6). App. Vol 1. at 253-79; App. Vol. 2 at 86-111. The County

Defendants argued for dismissal for the following reasons: (1) Plaintiffs' allegations of inaction cannot support a state-created danger claim under *DeShaney*, (2) Plaintiffs failed to plausibly allege five of the six remaining elements of a state-created danger claim, (3) Plaintiffs' allegations failed to satisfy the rigorous standards of culpability and causation required to impose *Monell* liability, and (4) Elder, individually, was entitled to qualified immunity. *See* App. Vol. 1 at 253-79; App. Vol. 2 at 86-111.

On February 14, 2025, 3430 N. Academy, LLC, and Matthew Haynes (part of the Club Q Defendants) moved to dismiss the CPLA claims under Rule 12(b)(6) arguing that Plaintiffs' claims are barred as a matter of law because the intentional, criminal acts of the shooter were the predominant proximate cause of Plaintiffs' injuries under the CPLA, precluding liability for alleged security deficiencies. They further argued that the CPLA provides the exclusive remedy for injuries occurring on the premises, requiring dismissal of Plaintiffs' common-law negligence and wrongful-death claims, and that the Complaint fails to plausibly allege notice, duty, or causation sufficient to state any claim against the Club Q Defendants. App. Vol. 1 at 289-295. G.I.G., Inc., Club Q, LLC, and Academy3430 filed a motion to join this Motion to Dismiss on February 14, 2025. App. Vol. 2 at 6-12.

On March 10, 2025, the Plaintiffs moved to consolidate both cases. *See App. Vol 1 at 14.* The trial court granted this motion on March 19, 2025, and both cases were consolidated under case number 24-cv-3190. *App. Vol. 2 at 13.*

Plaintiffs then filed a single, unified response to the motions to dismiss. *App. Vol. 2 at 140-157; 158-186.* The County Defendants filed a single reply in support of their motions to dismiss. *App. Vol. 2 at 187-199.* 3430 N. Academy, LLC and Matthew Haynes filed a reply in support of their motion to dismiss which G.I.G., Inc., Club Q, LLC, and Academy3430 joined. *App. Vol. 2 at 200-213.*

On June 26, 2025, the trial court issued an order granting in part and denying in part the Club Q Defendants' motion to dismiss. *App. Vol 2 at 214-230.* The court dismissed the CPLA claim but allowed the negligence and wrongful-death claims to proceed. It held that, under the amended CPLA, the shooter's intentional and premeditated criminal acts were the predominant cause of Plaintiffs' injuries as a matter of law, foreclosing premises-liability claims based on alleged security deficiencies. The court declined to dismiss the negligence and wrongful-death claims at the pleading stage, concluding that Plaintiffs alleged broader misconduct beyond premises conditions and that CPLA exclusivity presents a fact-intensive question better resolved after discovery

On July 7, 2025, the trial court dismissed the § 1983 claims because "they are not based on affirmative state conduct." *App. Vol. 2 at 238.* The trial court found that

the Resolution and Statement could not satisfy the “affirmative conduct” precondition because they were formal policy pronouncements “*to do nothing*[,]” App. Vol. 2 at 239 (emphasis in original), that “did not create ‘an immediate threat of harm, which by its nature has a limited range and duration[,]’” *id.* at 241, and “were generally applicable to the public at large.” *Id.* at 242. The trial court found that Plaintiffs’ arguments also sought to improperly “recast [] allegations of nonfeasance into allegations of malfeasance.” *Id.* at 240. Lastly, the trial court rejected the Plaintiffs’ argument that “deliberate inaction” can satisfy the affirmative precondition of the state-created danger-analysis. *Id.* at 243-45.

On July 16, 2025, Club Q Defendants moved to dismiss the remaining negligence and wrongful-death claims for lack of subject matter jurisdiction, arguing that the state law claims never shared a common nucleus of operative fact with the now-dismissed § 1983 claims against County Defendants and therefore fell outside the court’s supplemental jurisdiction under 28 U.S.C. § 1367(a). In the alternative, they moved the court to decline supplemental jurisdiction under § 1367(c) now that the federal question had been dismissed. App. Vol. 2 at 254-268, 275-278.

Plaintiffs filed a motion for an order declining supplemental jurisdiction in light of the court’s resolution of the federal question. App. Vol. 2 at 249-251.

On July 31, 2025, the court entered an order declining to further exercise supplemental jurisdiction in light of the dismissed federal question claim. App. Vol.

2 at 291-294. The court expressly observed that “Defendants’ argument regarding the lack of supplemental jurisdiction may have merit,” App. Vol. 2 at 293, but declined to decide the issue. Instead, the court expressly “assume[d]” supplemental jurisdiction and dismissed the action without prejudice under 28 U.S.C. § 1367(c). App. Vol. 2 at 293.

Plaintiffs appealed the dismissal of their claims. The Club Q Defendants cross-appealed the district court’s refusal to decline supplemental jurisdiction and its Rule 12(b)(6) ruling to the extent it failed to dismiss Plaintiffs’ negligence and wrongful-death claims.

### **SUMMARY OF ARGUMENT**

The trial court’s dismissal of the § 1983 claims is correct and can be affirmed for three reasons. First,<sup>4</sup> the Court can re-examine the viability of state-created danger doctrine in light of the Supreme Court’s repeated admonishment that substantive due process rights must be “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty[,]” *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231 (2022) quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), and the growing chorus of critics doubting that it meets

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<sup>4</sup> County Defendants did not raise this argument below. This Court is “free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court.” *Medina v. City & Cnty. of Denver*, 960 F.2d 1493, 1495 n.1 (10th Cir. 1992) (quotation marks and citations omitted).

this standard. *See Fisher v. Moore*, 73 F.4th 367, 369 (5th Cir. 2023) *cert. denied* 144 S.Ct. 569 (2024); *Johnson v. City of Philadelphia*, 975 F.3d 394, 399-400 (3rd Cir. 2020); *Murguia v. Langdon*, 73 F.4th 1103, 1104 (9th Cir. 2023) (Bumatay, J. joined by Callahan, J., Ikuta, J., and R. Nelson, J., dissenting from the denial of rehearing en banc). If this Court chooses to do so, it will be hard-pressed to find any basis for this doctrine in our Nation’s history.

Second, the Court must find that Plaintiffs’ arguments bend the state-created danger doctrine beyond its breaking point. “Affirmative conduct” is a fundamental precondition of a state-create danger claim. *Estate of B.I.C. v. Gillen*, 761 F.3d 1099, 1105 (10th Cir. 2014). Yet, the Complaints repeatedly assert that the County Defendants failed to act to prevent the shooting at Club Q, not that they acted affirmatively to place Plaintiffs in harm’s way. *See* Section I.G. above. No amount of semantics or wordsmithing can disguise this fact. This Court must, therefore, affirm the trial court’s dismissal of the state-created danger claims.

Third, seizing on the trial court’s parting commentary, Plaintiffs argue that they adequately pleaded the sixth element of their state-create danger claims, conscience shocking conduct. This Court need not consider Plaintiffs’ arguments because the trial court’s legal analysis did not reach beyond the “affirmative act” precondition for good reason. But if the Court entertains Plaintiffs’ argument, it must

still affirm because the County Defendants' enactment of the Resolution and Statement simply cannot suffice to show conscience-shocking conduct here.

As to the Club Q Defendants, the district court proceeded on an erroneous threshold assumption—that it possessed subject matter jurisdiction over the state-law claims. Operating from that flawed premise, the court purported to dismiss the CPLA claims on the merits, reasoned (incorrectly) that the CPLA did not preempt Plaintiffs' common-law negligence and wrongful-death claims, and—only after dismissing the § 1983 claims against the County Defendants—declined to further exercise supplemental jurisdiction over the remaining common-law claims.

The subject matter jurisdiction flaw is dispositive. The state law claims against the Club Q Defendants never formed part of the same Article III case or controversy as the § 1983 claims against the County Defendants. The claims share only a tragic shooting, not a common nucleus of operative fact. The § 1983 claims turned on alleged governmental inaction and policy decisions occurring long before the shooting; the CPLA and common-law claims turned on alleged premises-security failures by private landowners on the night of the shooting. That disconnect foreclosed supplemental jurisdiction under 28 U.S.C. § 1367(a).

Because the district court never acquired subject matter jurisdiction over the CPLA or common-law claims, it was required to dismiss those claims under Rule 12(b)(1). Its contrary approach—assuming jurisdiction, ruling (incorrectly in part)

on the merits, and only then declining supplemental jurisdiction and dismissing without prejudice—exceeded the limits of Article III.

Accordingly, this Court should affirm the dismissal of the claims against the County Defendants, and either remand with instructions to dismiss the claims against the Club Q Defendants for lack of subject matter jurisdiction or undertake such dismissal here. Alternatively, if this Court determines that the lower court had jurisdiction of the claims against the Club Q Defendants, this Court should remand with instructions to dismiss the negligence/wrongful death claims as preempted by the CPLA.

## ARGUMENT

### **I. The District Court’s Dismissal of Plaintiffs’ § 1983 Claims Must Be Affirmed.**

#### **A. The Rights Protected by the State-Created Danger Doctrine Are Not Deeply Rooted in This Nation’s History and Implicit in Ordered Liberty.**

The state-created danger doctrine traces its roots to two sentences in *DeShaney*. There, a four-year-old child named Joshua, who had been briefly placed in the county’s protective custody, was subjected to repeated abuse after he was returned to his father’s care. *DeShaney*, 489 U.S. at 192-93. Aware of this abuse, the county failed to remove Joshua into protective custody again. *Id.* The father eventually beat Joshua so severely that he suffered severe brain damage. *Id.* at 193.

Joshua and his mother sued the county under § 1983 alleging violations of the Fourteenth Amendment based on the county's failure to act. *Id.*

The Supreme Court ruled that the county was not at fault because it had no duty to protect Joshua from private violence under the substantive due process component of the Fourteenth Amendment. *Id.* at 196, 203. But it also fashioned a narrow exception to this general rule where a special relationship exists, writing that,

*it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint on personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.*

*Id.* at 200 (emphasis added). In this context, it further explained that,

“[w]hile the State may have been aware of the dangers Joshua faced in the free world, *it played no part in their creation, nor did it do anything to render him any more vulnerable to them.* That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had int not acted at all...”

*Id.* at 201 (emphasis added). 00These latter two sentences gave rise to the state-created danger doctrine. *See, e.g., Wood v. Ostrander*, 879 F.2d 583, 590 (9th Cir. 1989).

This Court first recognized and applied the state-created danger doctrine in *Medina v. City & Cnty. of Denver*, 960 F.2d 1493, 1497 n.5 (10th Cir. 1992), *Graham v. Independent Sch. Dist. No. I-89*, 22 F.3d 991, 995 (10th Cir. 1994), *Uhlrig v.*

*Harder*, 64 F.3d 567, 572-73 (10th Cir. 1995), *Seamons v. Snow*, 84 F.3d 1226, 1236 (10th Cir. 1996), *Liebson v. New Mexico Dep't of Corr.*, 73 F.3d 274, 276 (10th Cir. 1996), and *Armijo v. Wagon Mound Public Schools*, 159 F.3d 1253, 1260 (10th Cir. 1998). But the Supreme Court has never validated it. *T.D. v. Patton*, 868 F.3d 1209, 1221 (10th Cir. 2017). Different Circuit Courts have thus created their own state-created danger tests. *See Murguia*, 73 F.4th at 1112-13 (charting the different tests in a dissent from the denial of a petition for rehearing en banc.). “[T]he Fifth Circuit has never recognized this ‘state-created-danger’ exception.” *Keller v. Fleming*, 952 F.3d 216, 227 (5th Cir. 2020).

More recently, the Supreme Court forcefully reaffirmed that substantive due process rights must be “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.” *Dobbs*, 597 U.S. at 231 *quoting Washington*, 521 U.S. at 721. Applying this standard, the Supreme Court overturned its own long-standing precedents, *Roe v. Wade* and *Planned Parenthood v. Casey*, because they recognized a right that was not so rooted. *Id.*

This Court appears to have never asked the question of whether the rights protected by its state-created danger doctrine are deeply rooted in this Nation’s history and implicit in ordered liberty. Like most other Circuit Courts, it instead adopted this doctrine because two sentences from *DeShaney* supposedly left open

the door to the possibility of liability under a state-created danger theory. *See Graham*, 22 F.3d at 995.

Now there is a growing chorus of critics questioning whether the state-created danger doctrine has any roots in our Nation’s history at all. The Third Circuit denounced this doctrine “since it does not stem from the text of the Constitution or any other positive law, and consequently vests open-ended lawmaking power in the judiciary.” *Johnson*, 975 F.3d at 400 (citations omitted). Judges from the Ninth Circuit have excoriated the state-created danger doctrine, calling it a “Frankenstein’s monster-like doctrine[.]” *Martinez v. High*, 91 F.4th 1022, 1032 (9th Cir. 2024) (Bumatay, J., concurring), that finds “no support in the text of the Constitution, the historical understanding of the ‘due process of law,’ or even Supreme Court precedent.” *Murguia*, 73 F.4th at 1104 (Bumatay, J., joined by Callahan, J., Ikuta, J., and R. Nelson, dissenting from the denial of rehearing en banc). And, the Fifth Circuit has refused to recognize this doctrine in part because of the “Supreme Court’s recent forceful pronouncements signaling unease with implied rights not deeply rooted in our Nation’s history and tradition.” *Fisher*, 73 F.4th at 369.

Legal scholars have likewise concluded that the state-created danger doctrine “has no mooring to the Due Process Clause from which it derives[.]” Matthew Pritchard, *Reviving DeShaney: State-Created Dangers and Due Process First Principles*, 74 Rutgers U.L. Rev. 161, 213 (2021), and is “not the form of liberty our

Framers had in mind.” Julia Steiner, *Beware of the Dangers of the State-Created Danger Doctrine: A Look at the Ninth Circuit’s Approach*, 79 U. Mia. L. Rev. 573, 605 (2025).

Based on the foregoing, the Court may take this opportunity to revisit the state-created danger doctrine. While a panel of this Court generally cannot overturn Circuit precedent, *see United States v. Walling*, 936 F.2d 469, 472 (10th Cir. 1991), an exception exists when there is an “intervening” Supreme Court decision that “is contrary to or invalidates [this Court’s] previous analysis.” *United States v. Brooks*, 751 F.3d 1204, 1209 (10th Cir. 2014) (internal quotation marks omitted). “[A] Supreme Court decision that predates a decision of this [C]ourt can still qualify as ‘intervening’ if this [C]ourt’s decision did not mention or address the Supreme Court decision.” *Lincoln v. BNSF*, 900 F.3d 1166, 1183 (10th Cir. 2018) (citation omitted).

Such is the case here. In *Dobbs*, the Supreme Court reaffirmed that substantive due process rights must be “deeply rooted in this Nation’s history” and “implicit in ordered liberty.” 597 U.S. at 231. Yet, this Court recognized the state-created danger doctrine because two sentences in *DeShaney* supposedly left open the door to the possibility of liability under a state-created danger theory. *See Graham*, 22 F.3d at 995. Consequently, this Court may re-evaluate this doctrine because *Dobbs* is an “intervening” Supreme Court decision that invalidates this Court’s analysis regarding the doctrine’s foundation.

If this Court chooses to do so, it will be hard-pressed to find this doctrine's roots anywhere in our Nation's history. It is rather a judge-made rule plucked from two sentences in *DeShaney*. Those two sentences are, however, best read as contextualization of the special relationship exception. That is to say, the Supreme Court was explaining why the special relationship that briefly existed between the county and Joshua played no role in the harm he suffered.

Properly read, *DeShaney* stands for the proposition that a state's "affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint on personal liberty—" may give rise to liability if it creates a danger from, or renders an individual more vulnerable to, harm by a third party. 489 U.S. at 200. But that is not the case here.

Accordingly, the Court can affirm the dismissal of Plaintiffs' § 1983 claims because the state-created danger doctrine, in its current iteration, is invalid.

**B. Plaintiffs Failed to Allege "Affirmative Conduct."**

The trial court's dismissal of Plaintiffs' state-created danger claims for the failure to allege "affirmative conduct" was unquestionably correct. As set forth in Section I.G. above, the Complaints exclusively claim that the County Defendants failed to act to prevent the shooting at Club Q. Notwithstanding, Plaintiffs seek to recast these omissions into affirmative acts in new and unpersuasive ways in this appeal. This Court must reject Plaintiffs' unpersuasive arguments.

This Court’s state-created danger test requires a plaintiff to establish two preconditions: (1) affirmative action by a state actor and (2) private violence. *Estate of B.I.C.*, 761 F.3d at 1105. Affirmative conduct “typically involve[s] conduct that imposes an immediate threat of harm, which by its nature has a limited range and duration[]” and is “directed at a discrete plaintiff rather than at the public at large.” *Ruiz v. McDonnell*, 299 F.3d 1173, 1183 (10th Cir. 2002) (citations omitted). The implementation of generally applicable policies is not an “affirmative act” for purposes of this Court’s state-created danger analysis. *Gray v. Univ. Colo Hosp. Auth.*, 672 F.3d 909, 927 (10th Cir. 2012) (“[W]e conclude Defendants' adoption of policies and customs generally applicable to all EMU patients, even if done in reckless disregard of a *generalized* risk, did not constitute affirmative conduct...”)(emphasis in original).

If the preconditions are met, a plaintiff must then show that: (1) the state actor created the danger or increased plaintiff’s vulnerability to the danger in some way; (2) plaintiff was a member of a limited and specifically definable group; (3) defendant’s conduct put plaintiff at substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known; (5) defendant acted recklessly in conscious disregard of that risk; and (6) such conduct, when viewed in total, is conscience-shocking. *Ruiz*, 299 F.3d at 1182-83.

Plaintiffs' state-created danger claims fail to clear the first hurdle because they do not allege "affirmative conduct." *See* Section I.G. above. Plaintiffs argue otherwise, pointing to the County Defendants' enactment of the Resolution and Statement approximately two years before the shooting at Club Q and many months before Aldrich's 2021 arrest. *See id.* The Resolution and Statement are, however, generally applicable policies that "d[id] not foist upon anyone an immediate threat of harm having a limited range and duration[,]" *Gray*, 672 F.3d. at 926 (quotation marks and citations omitted), and "affected the public at large." *Ruiz*, 299 F.3d at 1183. Thus, they cannot constitute "affirmative conduct" under binding Tenth Circuit precedent. If anything, the Resolution and Statement are generally applicable policies enacted by locally elected officials that should not be second-guessed by a court. *See Collins v. City of Harker Heights*, 503 U.S. 115, 129 (1992).

Notwithstanding, Plaintiffs argue that several out-of-circuit cases mandate reversal. *See* First Brief, pp. 39-41. A full reading of these cases shows that they are factually inapposite and have no application here.

Plaintiffs rely on *Kallstrom v. City of Columbus*, where three undercover officers complained that their personnel files were released to criminal defendants in contravention of the City's assurances that their files would be held in strict confidence and that the release of their files created a special danger for them and their family members. 136 F.3d 1055, 1059 (6th Cir. 1998). Calling the file releases

a “policy,” the Sixth Circuit ruled that they “create[d] a constitutionally cognizable ‘special danger,’” *id.* at 1067, which it defined to mean a “state’s actions [that] place the victim specifically at risk, as distinguished from a risk that affects the public at large.” *Id.* at 1066. Conversely, Plaintiffs allege that the County Defendants’ inactions created a risk of harm applicable to public at large. *Kallstrom*, therefore, has no application here.

Plaintiffs analogize this case to *Okin v. Village of Cornwall-on-Hudson* where police officers told a known domestic violence abuser his conduct would go unpunished, 577 F.3d 415, 429-30 (2d Cir. 2009), and *Pena v. DePrisco* where police officers communicated to their off-duty colleague that “he was free to drink to excess and drive in that condition[.]” before he was involved in a drunk-driving accident. 432 F.3d 98, 110 (2nd Cir. 2005). Unlike these Second Circuit cases, the County Defendants never encouraged or authorized Aldrich’s heinous act or indicated it would go unpunished. Instead, EPSO personnel arrested Aldrich in 2021 after a tense standoff and refused to return Aldrich’s weapons after dismissal of the 2021 criminal case. These facts bear no resemblance to *Okin* and *Pena*.

Plaintiffs also rely on *Pauluk v. Savage*, a workplace safety case where the harm was caused by toxic mold. 836 F.3d 1117, 1119-20 (9th Cir. 2016). Contrary to Plaintiffs’ First Brief, *Pauluk* did not concern workplace policies. *See id.* at 1126 (“We express no view on the possible *Monell* liability of CCHD...”). Instead, the

Ninth Circuit found that the deceased employee’s supervisors acted affirmatively when they (1) involuntarily transferred the employee from a safe work environment to one infested with toxic mold and (2) actively concealed the amount of, and danger posed by, the toxic mold. *Id.* at 1125. This out-of-circuit toxic mold case is of no analogous value here where Plaintiffs point to formal policies of inaction.

Beyond the enactment of the Resolution and Statement, Plaintiffs argue that the County Defendants should have sought an ERPO against Aldrich because it was foreseeable that they would commit a shooting. *See* Section I.G. above. But “foreseeability cannot create an affirmative duty to protect when plaintiff remains unable to allege a custodial relationship.” *Graham*, 22 F.3d at 994. 960 F.2d 1493. Since Plaintiffs do not allege a special relationship, their arguments regarding foreseeability fail to pass muster.

As in the trial court, Plaintiffs present no legitimate reason to avoid dismissal. There, Plaintiffs repeatedly misapplied this Court’s precedents, including *Currier*. *See* App. Vol. 2 at 165 (wrongly claiming that, under *Currier*, deliberate inaction alone can satisfy the affirmative conduct precondition); 243-45 (the court rejected this argument).

Plaintiffs follow the same playbook here. They maintain that, under *Currier*, the “affirmative conduct” precondition was met because the Resolution and Statement “rescinded th[e] discretion” of law enforcement officers and “interfered

with protective services” otherwise available in the community. First Brief, p. 33. This assertion fails for at least two fundamental reasons. First, Plaintiffs’ theory ignores this Court’s holding in *Gray* that enactment and implementation of generally applicable policies, such as the Resolution and Statement, cannot satisfy the “affirmative conduct” precondition. Second, the Complaints are devoid of any plausible allegation showing that a law enforcement officer desired to seek an ERPO against Aldrich but was denied the opportunity to do so because of the Resolution or Statement. Plaintiffs’ argument is *post hoc* conjecture.

Indeed, a full reading of *Currier* (a child custody case) proves it has no application here (a mass-shooting case). There, Devonne Juarez, the mother of Latasha and Anthony, brought state-created danger claims against several Children, Youth and Families Department (“CYF”) caseworkers. 242 F.3d 905, 909 (10th Cir. 2001). Based on the recommendation of Medina, one of the case workers, a state court transferred custody of the children from Juarez to Vargas, their father. *Id.* Medina, however, knew that Vargas had not previously supported his children and allowed them to live in “alarming conditions[.]” when she made the recommendation. *Id.* While in Vargas’ custody, Juarez reported potential abuse to CYF case workers on several occasions. *Id.* at 909-10. CYF case workers also noticed indicia of abuse on the children but failed to adequately investigate. *Id.* Medina instead told Juarez to stop making reports of abuse. *Id.* at 910. The children

were briefly removed from Vargas' custody but returned shortly thereafter without a strong objection from the CYF case workers. *Id.* Vargas then killed Anthony and Latasha was found covered in bruises. *Id.*

Under these different facts, the court found affirmative conduct because “Anthony and Latasha would not have been exposed to the dangers from their father but for the affirmative acts of the state....” *Id.* at 918. Relying in part on *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990), the court further held that Medina's instruction to Juarez to stop making complaints was “an affirmative act by a state actor to interfere with protective services which would have otherwise been available in the community.” *Id.* at 921-22 (quoting *Freeman* 911 F.2d at 54).

*Currier's* facts have no application here for many reasons. First, in *Currier*, the DYS case workers caused the children to be transferred to, and remaining in, Vargas' custody—a more dangerous environment. But here, Aldrich maintained the ability to possess firearms before and after the enactment of the Resolution and Statement. The threat he posed, therefore, remained the same. Second, in *Currier*, case worker Medina directly discouraged Juarez from making reports of abuse that, if made, might have altered the outcome. The same cannot be said here. The Resolution and Statement did not directly prevent any specific individual from seeking ERPO. In fact, Aldrich's grandparents were always free to seek an ERPO. *See* C.R.S. § 13-14.5-103(1). Third, the Resolution and Statement were enacted

without any knowledge of Aldrich, or the threat Aldrich posed, as both pre-date Aldrich's 2021 arrest. This is contrary to *Currier* where the case workers knew of the threat Vargas posed all along. Fourth and finally, in *Currier*, the DYS case workers *acted* with knowledge of the harm posed by Vargas when they recommended that the children be transferred to his custody and discouraged Juarez from making further reports of abuse. Here, Plaintiffs complain that the County Defendants *failed to act* once they were made aware of the threat posed by Aldrich. *See* Section I.G. above.

Plaintiffs finally recycle the same last-ditch arguments the trial court rightfully found to be unpersuasive. Plaintiffs again claim that they have asserted “affirmative conduct” under *Dwares v. City of New York*, which concerned a government official's prearranged sanction of private violence. 985 F.2d 94, 99 (2d Cir. 1993). Unlike *Dwares*, the County Defendants never sanctioned, approved, or encouraged Aldrich's heinous act. *See Pinto v. Lake Shore Cent. Sch. Dist.*, No. 1:23-CV-00977-JLS-MJR, 2024 WL 5010617, at \*6 (W.D.N.Y. Sept. 20, 2024), *report and recommendation adopted*, No. 23-CV-977-LJV-MJR, 2024 WL 5008373 (W.D.N.Y. Dec. 6, 2024) (The court's persuasive explanation regarding the inapplicability of *Dwares*, *Okin*, and *Pena* applies with equal force here). Thus, Plaintiffs' reliance on *Dwares* is wholly misplaced.

Plaintiffs further claim that *Armijo* supports their position. First Brief, p. 43. This case concerned a school official's decision to send a suicidal special education student home without parental supervision which directly and immediately led to the student's death by suicide. 159 F.3d at 1256-57. *Armijo* is factually inapposite from this case where Plaintiffs allege that the County Defendants failed to act over the course of months and years.

The final case on which Plaintiffs rely is *McArthur ex rel. McArthur v. Academy Sch. Dist. Twenty*, a District of Colorado decision where a mentally disabled female student, who required constant adult supervision, was assigned to work alone with a troubled fifteen-year-old male student. Civ. No. 06-cv-01048-WDM-CBS, 2007 WL 915430, at \* 1 (D. Colo. Mar. 22, 2007). While alone with the female student, the male student sexually assaulted her. *Id.* The district court “analogized [the case] to child custody cases such as *Currier v. Duran*...where the state actors place children with a parent or other guardian despite knowledge of facts indicating that the children are at substantial risk of harm from the parent[]” and found affirmative conduct because the “school officials affirmatively placed a severely disabled young woman who required constant adult supervision in the *unsupervised* care and custody of a fifteen-year-old male student...” *Id.* at 2. (emphasis in original). The court then contrasted these facts with those from *Castaldo v. Stone*, 192 F.Supp.2d 1124 (D. Colo. 2001), where victims of the tragic

Columbine shooting brought unsuccessful state-created danger claims alleging that school officials failed to detect and prevent the harm posed by the shooters. *Id.*

For the reasons explained in *McArthur*, this case is on point with *Castaldo*, not *Currier*. Here and in *Castaldo*, the plaintiffs, all victims of mass-shootings, claimed that they suffered harm because the defendants failed to prevent the risk of harm caused by the shooters. *See id.* at \* 2. Both sets of plaintiffs, therefore, failed to satisfy the “affirmative conduct” precondition under this Court’s precedents.

In sum, the Complaints repeatedly and exclusively allege that the County Defendants failed to act. *See* Section I.G. above. They can be read no other way. Accordingly, this Court must affirm the trial court’s dismissal of Plaintiffs’ state-created danger claims.

### **C. Plaintiffs Failed to Alleged Conscience-Shocking Conduct.**

Aside from one footnote, the trial court did not analyze the remaining elements of Plaintiffs’ state-create danger claims because the “affirmative conduct” precondition was not satisfied. App. Vol. 2 at 239, fn. 5. Yet on appeal, Plaintiffs argue that they sufficiently alleged the sixth element, conscience-shocking conduct. First Brief, pp. 44-45.

Plaintiffs’ argument is largely based on the trial court’s commentary that the County Defendants’ inaction was “much more than mere negligence...” App. Vol. 2 at 274. It is clear, however, that this statement was an expressions of the trial court’s

personal thoughts, not legal analysis. *See id.* at 274-75. Indeed, under Colorado law, the County Defendants’ inaction was not even negligent because they did not owe Plaintiffs a legal duty of care. *See Schnurr v. Bd. of Cnty. Comm’rs of Jefferson Cnty.*, 189 F. Supp. 2d 1105, 1140–41 (D. Colo. 2001).

Plaintiffs’ Complaints fail to allege conscience-shocking conduct for two fundamental reasons. First, this Court must give deference to the County Defendants’ decisions to implement the Resolution and Statement rather than declare them “conscience-shocking.” *Green v. Post*, 574 F.3d 1294, 1303 (10th Cir. 2009). Second, the County Defendants could not have been deliberately indifferent to the threat posed by Aldrich when they enacted the Resolution and Statement as both pre-date Aldrich’s 2021 arrest. *See id.* at 1303. This Court may, therefore, affirm the trial court’s dismissal because Plaintiffs failed to allege this element, and several others, for the reasons stated herein and in the County Defendants’ Motion to Dismiss which are fully incorporated herein.

## **II. The District Court Lacked Subject Matter Jurisdiction Over Plaintiffs’ Claims Against Club Q Defendants.**

The district court never acquired supplemental jurisdiction over Plaintiffs’ state-law claims against the Club Q Defendants under 28 U.S.C. § 1367(a) and therefore erred by declining to dismiss those claims for lack of subject matter jurisdiction. Whether supplemental jurisdiction attaches in the first instance under § 1367(a) is a threshold constitutional question reviewed de novo. *United States v.*

*Hopson*, 150 F.4th 1290, 1297 (10th Cir. 2025). Applying that standard, this Court should reverse and remand with instructions to dismiss the claims against the Club Q Defendants under Rule 12(b)(1).

**A. Supplemental Jurisdiction Is a Constitutional Threshold Requiring a Common Nucleus of Operative Fact.**

Federal courts are courts of limited jurisdiction and may not adjudicate state-law claims absent a valid jurisdictional basis. *Min. Res. Int’l v. U.S. Dep’t of Health & Hum. Servs.*, 53 F.3d 305, 307 (10th Cir. 1995). Federal courts must “presume no jurisdiction exists absent a showing of proof by the party asserting federal jurisdiction.” *Id.*

The constitutional limits of supplemental jurisdiction are best understood against the historical backdrop from which 28 U.S.C. § 1367 emerged. In *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), this Court held that federal courts adjudicating claims within their federal-question jurisdiction may hear related state-law claims only where those claims “derive from a common nucleus of operative fact” and comprise “but one constitutional ‘case.’” *Id.* at 725. That doctrine—then known as pendent jurisdiction—was carefully circumscribed. As the Court later made clear, absent express congressional authorization, federal courts could not extend pendent jurisdiction to claims involving additional parties not already subject to federal jurisdiction. *Finley v. United States*, 490 U.S. 545 (1989).

In response to *Finley*, Congress enacted § 1367 as part of the Judicial Improvements Act of 1990. As the Court explained in *Raygor v. Regents of the University of Minnesota*, § 1367 was intended to restore limited pendent-party jurisdiction—but only within the constitutional boundaries articulated in *Gibbs*. 534 U.S. 533, 539–40 (2002). § 1367(a) thus did not expand federal jurisdiction beyond Article III; it codified *Gibbs*’s “common nucleus of operative fact” requirement as a threshold constitutional constraint, particularly where plaintiffs seek to hail new parties into federal court on purely state-law claims.

Consistent with that history, § 1367(a) permits the exercise of supplemental jurisdiction only where the state-law claims are “so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III.” This limitation is constitutional, not discretionary. Supplemental jurisdiction exists only where the claims share operative facts so central that a plaintiff “would ordinarily be expected to try them all in one judicial proceeding.” *Gibbs*, 383 U.S. at 725.

That standard is exacting. Supplemental jurisdiction does not arise from a shared backdrop, a common historical event, or a merely narrative connection. A “mere tangential overlap of facts is insufficient.” *Nanavati v. Burdette Tomlin Mem’l Hosp.*, 857 F.2d 96, 105 (3d Cir. 1988). Nor is it enough that claims relate generally to the same broader dispute or share a tragic outcome; they must turn on the same

operative conduct. *See AngioScore, Inc. v. TriReme Med., LLC*, 666 F. App'x 884, 887 (Fed. Cir. 2016); *Berg v. BCS Fin. Corp.*, 372 F. Supp. 2d 1080, 1093 (N.D. Ill. 2005) (“Supplemental jurisdiction does not exist where the federal and state claims merely share a factual background.”).

**B. This Court Has Never Adopted a “Loosely Connected” Standard for Supplemental Jurisdiction.**

Critically, this Court has never adopted a “loosely connected” standard for supplemental jurisdiction. *See, e.g., Shaw v. AAA Eng'g & Drafting Inc.*, 138 F. App'x 62, 70 (10th Cir. 2005); *see also Price v. Wolford*, 608 F.3d 698, 702–03 (10th Cir. 2010). That formulation, which originated in the Seventh Circuit, holds that the *Gibbs*' “common nucleus” test is broader than the “transaction or occurrence” test used in the Rules of Civil Procedure; rather the claims need only have some loose factual connection. *Baer v. First Options of Chicago, Inc.*, 72 F.3d 1294, 1299 (7th Cir. 1995).

But that test cannot be squared with *Gibbs*'s constitutional test and has been repeatedly rejected by courts. *See Lyon v. Whisman*, 45 F.3d 758, 762 (3d Cir. 1995) (“Numerous other decisions implicitly reject the loose nexus test.”); *Mason v. Richmond Motor Co.*, 625 F.Supp. 883, 887 (E.D.Va. 1986) (rejecting the loose nexus test, finding that it expands judicial power beyond the limits set by Article III of the Constitution); *Deasy v. Optimal Home Care, Inc.*, No. 1:17-CV-00287-MSK,

2018 WL 10911745, at \*2 (D. Colo. Nov. 2, 2018); *Wilhelm v. TLC Lawn Care, Inc.*, No. CIV.A. 07-2465-KHV, 2008 WL 640733, at \*2 (D. Kan. Mar. 6, 2008).

In assessing whether claims form part of the same Article III case or controversy, courts therefore examine whether they involve “the same witnesses, presentation of the same evidence, and determination of the same, or very similar, facts.” *Warming Trends, LLC v. Flame DesignZ, LLC*, No. 22-CV-00252-PAB-STV, 2023 WL 196288, at \*5 (D. Colo. Jan. 17, 2023); see also *Lyndonville Sav. Bank & Tr. Co. v. Lussier*, 211 F.3d 697, 704 (2d Cir. 2000); *Palmer v. Hosp. Auth. of Randolph Cty.*, 22 F.3d 1559, 1563–64 (11th Cir. 1994).

**C. Plaintiffs’ Federal and State Claims Do Not Share a Common Nucleus of Operative Fact.**

Measured against these principles, the district court never possessed supplemental jurisdiction over the state-law claims asserted against the Club Q Defendants.

Plaintiffs’ sole federal claims were brought under § 1983 against County Defendants. Those claims turned exclusively on alleged governmental failures—specifically, law enforcement’s handling of the shooter’s 2021 conduct, decisions regarding ERPO initiation, and purported municipal policies or customs governing ERPO enforcement. The operative facts concerned governmental knowledge, internal law-enforcement decision-making, constitutional standards governing state

action and inaction, and causation linking those alleged failures to the shooter's access to firearms in November 2022.

The state-law claims against Club Q Defendants are categorically different. They are private tort claims governed exclusively by Colorado law, focusing on the reasonableness of on-site security at a private business, foreseeability of third-party criminal acts, and proximate causation under Colorado premises-liability principles. These claims involve different defendants, different legal duties, different timeframes, different witnesses, and different evidence. No element of the § 1983 claims would establish—or defeat—any element of the claims against the Club Q Defendants, and vice versa.

District courts have routinely held that such claims do not form the same Article III case or controversy, even when arising from the same tragic incident. *See Jones v. Haga*, No. CIV.A.05CV02268PSFCB, 2006 WL 2038006, at \*6 (D. Colo. July 17, 2006) (no supplemental jurisdiction over state-law claims against private defendants where sole federal claim was a § 1983 claim against government actors and the claims involved distinct conduct and operative facts); *Angsten v. Blameuser*, No. 05C4254, 2005 WL 3095513, at \*5 (N.D. Ill. Nov. 16, 2005) (no supplemental jurisdiction where state-law claims shared only a “general factual background” with § 1983 claims and the claims were not interdependent); *Smith v. Esports One, Inc.*,

2024 WL 4502320, at \*3 (E.D. Wis. Oct. 16, 2024); *Wildearth Guardians v. Lamar Utilities Bd.*, 2010 WL 3239242, at \*7 (D. Colo. Aug. 13, 2010).

The factual divide here is even more pronounced. The § 1983 claims concern events occurring more than a year before the shooting—law-enforcement knowledge, ERPO policies, and alleged governmental inaction. Those facts have no connection to the Club Q Defendants’ conduct. By contrast, the state-law claims arise from the Club Q Defendants’ alleged failures in managing and securing the Club Q premises on or immediately around the night of the shooting.

Plaintiffs’ Complaint, App. Vol. I at 56-61, alleges that Matthew Haynes (as controlling member) treated Club Q as an undercapitalized alter ego, prioritized profits over safety, reduced security staffing from five guards to two (¶¶ 144, 275), declined to hire adequate armed guards or provide active shooter training (¶¶ 104, 163–167), refused to use metal detectors despite owning them (¶ 172), and failed to implement basic protocols such as background checks for security personnel or facility improvements (¶¶ 164–166, 275). These allegations concern day-to-day business decisions in 2022, financial mismanagement, and on-site security lapses. Notably, the Amended Complaint does not allege that the Club Q Defendants had any prior knowledge of the shooter’s propensities, his 2021 arrest, or the government’s ERPO failures. *See, e.g.*, ¶¶ 96–124.

This bifurcation of operative facts is dispositive under *Gibbs*. Supplemental jurisdiction requires more than a shared outcome; it requires overlapping proof of the same operative conduct. 383 U.S. at 725–26. Here, proving the § 1983 claims would require police reports from the 2021 bomb threat, sheriff’s office records on ERPO decisions, expert testimony on constitutional deliberate indifference, and causation linking governmental inaction to the shooter’s armament. Proving the state-law claims would require Club Q’s internal staffing records, financial statements showing undercapitalization, witness testimony regarding security conditions on November 19, 2022, and Colorado-specific premises-liability standards, including C.R.S. § 13-21-115.

There is no evidentiary overlap. A trial on the federal claims could proceed without any reference to Club Q’s security practices, and a trial on the premises-liability claims could proceed without any inquiry into ERPO policies or law-enforcement decision-making. The shooting itself is merely a shared “but-for” consequence, not a common nucleus of operative fact. *Gibbs*, 383 U.S. at 725.

Accordingly, Plaintiffs would not “ordinarily be expected” to try these claims together. *Id.* Allowing jurisdiction here would improperly federalize a purely state-law premises dispute simply because a shooter—allegedly enabled by unrelated governmental conduct—committed a crime on the property. *See M.M.A. Design, LLC v. Capella Space Corp.*, No. 18-CV-02957-MSK-NRN, 2020 WL 789190, at

\*2–3 (D. Colo. Feb. 18, 2020) (no supplemental jurisdiction where it was “entirely possible” to prove one set of claims “without ever reaching the facts” of the other).

**D. Because Supplemental Jurisdiction Never Attached, Dismissal Under Rule 12(b)(1) Was Required.**

Although the district court acknowledged that the Club Q Defendants’ jurisdictional argument “may have merit,” it refused to decide whether supplemental jurisdiction existed under § 1367(a). Instead, the court assumed jurisdiction and dismissed the claims under § 1367(c) after dismissing the federal claims.

That approach was error. Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). § 1367(c) presupposes that jurisdiction exists under § 1367(a); it does not permit a court to bypass the constitutional inquiry. A court cannot “assume” jurisdiction it never possessed.

Nor does dismissal of the federal claims cure an initial jurisdictional defect. The principle that a court may retain supplemental jurisdiction after federal claims are dismissed applies only where jurisdiction properly attached in the first instance. *Koch v. City of Del City*, 660 F.3d 1228, 1248 (10th Cir. 2011) (holding decision to decline to exercise supplemental jurisdiction is discretionary).

Because the state-law claims against the Club Q Defendants never formed part of the same Article III case or controversy as the § 1983 claims, the district court lacked subject matter jurisdiction over those claims *ab initio*. The proper disposition

was dismissal under Rule 12(b)(1), not a discretionary dismissal under § 1367(c). By assuming jurisdiction rather than deciding it, the district court exceeded the limits of federal judicial power.

**III. Assuming *Arguendo* the District Court Had Supplemental Jurisdiction, It Correctly Dismissed Plaintiffs’ CPLA Claim Under Rule 12(b)(6) Because the Shooter’s Intentional Criminal Acts Were the Predominant Cause as a Matter of Law.**

If the lower court was correct in “assuming” supplemental jurisdiction, that court properly dismissed Plaintiffs’ claim under the CPLA because, even accepting the complaint’s allegations as true, the shooter’s deliberate, premeditated criminal conduct was the predominant cause of Plaintiffs’ injuries. Under the CPLA, as amended in response to *Rocky Mountain Planned Parenthood, Inc. v. Wagner*, 467 P.3d 287, 290 (Colo. 2020), that conclusion forecloses proximate causation as a matter of law and required dismissal.

**A. The CPLA Requires Courts to Consider Whether a Third-Party Criminal Act Was the Predominant Cause of the Harm.**

Colorado law has long recognized that proximate cause includes a limiting principle: while multiple factors may contribute to an injury, one cause may have such a predominant effect that other alleged causes become legally insignificant and cannot satisfy the “substantial factor” test. *See Smith v. State Compensation Ins. Fund*, 749 P.2d 462, 464 (Colo. App. 1987). In such circumstances, causation may be resolved as a matter of law.

That principle has particular force in cases involving intentional, violent criminal acts by third parties. In *Wagner*, 467 P.3d 287 (Colo. 2020), the Colorado Supreme Court confronted whether a landowner’s alleged security failures could constitute a substantial factor in a mass-shooting case. There, the district court had granted summary judgment for the landowner, holding that the shooter’s conduct was the predominant cause of the plaintiffs’ injuries. *Id.* at 290.

A divided supreme court reversed, concluding that—on the summary-judgment record before it—a jury could find otherwise. *Id.* at 293–94. But the majority emphasized that it was not adopting a categorical rule and made clear that the ruling was limited to the specific facts before that court. *Id.*

Three justices dissented. The dissent rejected the premise that landowner negligence can be a substantial factor when confronted with a mass shooter’s deliberate acts, explaining:

The premeditated and intentional actions of a mass shooter are the ‘predominant’ cause of the injuries he inflicts such that any negligence on the part of a property owner simply is not a ‘substantial factor’ in causing those injuries.

*Id.* at 300 (Márquez, J., dissenting).

The dissent further explained that mass shooters are not motivated by rational cost-benefit analysis, making it irrational to ask courts or juries to weigh what security measures would have been “sufficient” to prevent or mitigate “a shooter’s senseless acts of violence.” *Id.* at 300–01.

In 2022, the Colorado General Assembly amended the CPLA to expressly reject key aspects of the *Wagner* majority and to restore a predominant-cause limitation on landowner liability. The statute now provides:

C.R.S. § 13-21-115(4)(e)(I):

The [*Wagner*] decisions do not accurately reflect the intent of the general assembly regarding landowner liability and must not be relied upon in applying this section to the extent that the majority opinions determined:

(A) The foreseeability of third-party criminal conduct based upon whether the goods or services offered by a landowner are controversial; and

(B) That a landowner could be held liable as a substantial factor in causing harm without considering whether a third-party criminal act was the predominant cause of that harm, as noted by the dissenting justices and judge.”

(emphasis added).

This amendment leaves no doubt that the General Assembly amended CPLA to accord with the *Wagner* dissent on causation. Courts must now consider whether a third-party criminal act was the predominant cause of the harm—and where it was, a landowner cannot be held liable as a substantial factor under the CPLA.

Although the statute does not expressly state whether predominant cause is always a question of law or fact, its explicit reference to the *Wagner* dissent confirms that courts may—and in appropriate cases must—resolve predominant causation as a threshold legal issue, particularly in mass-shooting cases.

Moreover, long before the CPLA amendment, federal courts applying Colorado law repeatedly held that, in mass-shooting cases, the shooter's intentional acts may be the predominant cause as a matter of law. In the litigation arising from the Columbine school shooting, courts held that the shooters' actions were "the predominant, if not sole, cause" of plaintiffs' injuries, even where other defendants' conduct allegedly contributed in some way. *See Castaldo*, 92 F. Supp. 2d at 1171; *Ireland v. Jefferson County Sheriff's Dep't*, 193 F. Supp. 2d 1201, 1232 (D. Colo. 2002).

Courts reached the same conclusion in cases arising from the Aurora theater shooting. *See Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1228 (D. Colo. 2015); *Nowlan v. Cinemark Holdings, Inc.*, No. 12-CV-02517-RBJ-MEH, 2016 WL 4092468, at \*3 (D. Colo. June 24, 2016). In *Nowlan*, the court held that even if defendants failed to provide certain safety measures, the shooter's "premeditated and intentional actions were the predominant cause of plaintiffs' losses," defeating proximate cause as a matter of law.

These decisions reflect the same causation principle codified by the General Assembly after *Wagner*: when a mass shooter's conduct overwhelms all other alleged factors, landowner omissions cannot plausibly be treated as a substantial factor under the CPLA.

**B. The District Court Faithfully Applied the Amended CPLA to Plaintiffs' Allegations.**

Applying this framework, the district court correctly concluded that the shooter's intentional, premeditated criminal acts were the predominant cause of Plaintiffs' injuries. The court found no meaningful distinction between the shooter's conduct here and the conduct at issue in *Wagner* and other mass-shooting cases, nor any principled basis to treat the alleged security deficiencies as a substantial factor in comparison.

Importantly, the court did not create categorical immunity for landowners. It did exactly what the amended statute requires: it considered whether the third-party criminal act predominated and concluded that it did. Because the shooter's conduct so clearly overwhelmed any alleged omissions or actions by the Club Q Defendants, Plaintiffs failed as a matter of law to plead CPLA causation.

Furthermore, Plaintiffs' reliance on *Traynom v. Cinemark USA, Inc.*, 940 F. Supp. 2d 1339 (D. Colo. 2013) and *Axelrod v. Cinemark Holdings, Inc.*, 65 F. Supp. 3d 1093 (D. Colo. 2014), is misplaced because they predated the 2022 amendment to the CPLA. Regardless, those cases addressed duty and foreseeability—not predominant causation—and therefore do not conflict with the district court's causation ruling under the amended CPLA.

Under the CPLA as amended, and under controlling mass-shooting precedent, a landowner cannot be held liable where a third-party criminal act was the

predominant cause of the harm. The district court correctly treated that inquiry as a legal question on the pleaded facts and correctly concluded that the shooter’s conduct predominated as a matter of law. If this court disagrees with Club Q Defendants’ principal argument that the lower court lacked subject matter jurisdiction of the state law claims *ab initio*, the lower court’s dismissal of Plaintiffs’ CPLA claim should be affirmed.

**IV. The District Court Erred in Refusing to Dismiss the Negligence and Wrongful-Death Claims as Preempted by the CPLA.**

The district court correctly recognized the governing rule: the CPLA “provides the sole remedy against landowners for injuries on their property.” It nevertheless declined to dismiss Plaintiffs’ negligence and wrongful-death claims at the pleading stage, reasoning that Plaintiffs alleged “a broader pattern of misconduct” (corporate staffing, training, and operational decisions) beyond the premises layout and that CPLA exclusivity therefore presented a “fact-intensive” question better left for discovery. That was error, which this Court reviews *de novo*. *See Macomber v. Nations Roof, LLC*, 574 P.3d 757, 761 (Colo. App. 2025).

Plaintiffs’ negligence and wrongful-death claims seek to impose liability on Club Q Defendants for the same alleged on-premises “conditions, activities, and circumstances” that form the heart of the premises-liability theory—security staffing, screening protocols, training, exits, and emergency procedures at Club Q—and therefore fall squarely within the CPLA’s exclusive-remedy provision.

**A. The CPLA is the exclusive remedy for injuries occurring on a landowner’s property “by reason of” conditions, activities, or circumstances on that property.**

The CPLA states that “[i]n any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, or activities conducted or circumstances existing on such property, the landowner is liable only as provided in” the Act. C.R.S. § 13-21-115(3). The Colorado Supreme Court has held the CPLA “evidences the General Assembly’s intent to establish a comprehensive and exclusive specification of the duties landowners owe to those injured on their property.” *Vigil v. Franklin*, 103 P.3d 322, 323 (Colo. 2004). When it applies, the CPLA “supplies the sole and exclusive remedy against a landowner for injuries occurring on their property.” *Macomber*, 574 P.3d at 761. Thus, the CPLA preempts common law tort claims against landowners by specifying the duties owed to particular classes of injured plaintiffs.” *Tancrede v. Freund*, 401 P.3d 132, 134 (Colo. App. 2017).

To be sure, the Colorado Supreme Court has clarified that the CPLA does not apply “to any tort that happens to occur on another’s property.” *Larrieu v. Best Buy Stores, L.P.*, 303 P.3d 558, 559 (Colo. 2013). Rather, it applies to “conditions, activities, and circumstances on the property that the landowner is liable for in its legal capacity as a landowner,” and courts assess preemption case-by-case by asking:

(1) did the injury occur while on the property, and (2) did it occur “by reason of” the property’s condition or activities/circumstances on the property.

But *Larrieu* does not create an escape hatch for claims repackaged as “corporate” decisions; it simply prevents the CPLA from swallowing claims wholly unrelated to the landowner’s on-premises duties (e.g., certain independent product-liability or off-premises conduct). Where, as here, the pleaded misconduct is the landowner’s alleged failure to provide adequate security and safe egress to invitees on its premises, the claim is paradigmatically about “conditions, activities, [and] circumstances” on the property and the landowner’s duties “in its legal capacity as a landowner.”

**B. Plaintiffs’ negligence claim is preempted because it targets the landowners’ on-premises security conditions and operations—the very subject the CPLA governs.**

Plaintiffs’ negligence claim does not allege an independent tort divorced from the landowner-invitee relationship. It alleges that the Club Q Defendants failed to provide reasonable security and safety measures at Club Q and thereby failed to protect invitees from foreseeable harm. Those allegations track the CPLA’s invitee-duty formulation—reasonable care to protect against dangers the landowner knew or should have known about—and target classic “circumstances existing on [the] property” and “activities conducted” there: security staffing levels, armed/unarmed guards, screening protocols (pat-downs, wandings, metal detectors), training

(including active-shooter training), surveillance/monitoring practices, and emergency/evacuation procedures, as implemented at Club Q during operations.

The district court’s reason for allowing negligence to proceed—that Plaintiffs alleged “targeted corporate decisions, training, and staffing deficiencies” beyond premises layout—misapprehends CPLA’s breadth. Staffing, training, screening, and emergency procedures are not external to premises liability; they are precisely the “activities conducted” and “circumstances existing” on the land that define whether the premises were reasonably safe for invitees. Nothing about labeling these decisions “corporate” changes their legal character. The CPLA does not turn on whether a safety practice was adopted by a manager, owner, or corporate entity; it turns on whether the injury occurred on the property and by reason of a condition, activity or circumstance there. On Plaintiffs’ own pleadings below, that is exactly what they allege.

Nor is discovery required to decide preemption here. CPLA exclusivity may be decided at the pleading stage when the complaint itself shows the claim arises from on-premises conditions or operations implicating landowner duties. The operative complaint alleges that Plaintiffs were injured during a shooting at Club Q, while on the premises, and that the Club Q Defendants’ alleged security failures and physical-layout limitations contributed to their inability to prevent or mitigate the harm. That is the CPLA’s domain. The negligence count simply seeks to impose a

different standard of care and a parallel set of remedies for the same on-premises duty breach—precisely what the exclusive-remedy provision forbids.

**C. The wrongful-death claims are likewise preempted because they are derivative of the same alleged on-premises duty breaches.**

Wrongful death is not an independent duty-creating tort; as applicable here, it is a statutory mechanism under C.R.S. § 13-21-202 for recovering damages when death is caused by a defendant’s wrongful act or omission. Here, Plaintiffs’ wrongful death theories against the Club Q Defendants rise and fall with the same alleged failures to provide adequate security and safe egress at Club Q. Those theories therefore depend on the same landowner-duty allegations that trigger CPLA exclusivity. If the underlying duty and breach are governed exclusively by the CPLA, Plaintiffs cannot preserve a separate wrongful death cause of action premised on common law negligence to avoid the Act’s comprehensive allocation of landowner duties and liability.

Allowing wrongful death claims to proceed under common law while the CPLA governs the underlying duty would also create the very end-run the General Assembly sought to foreclose: it would permit plaintiffs to plead around the statute by re-captioning the same premises-based allegations as “wrongful death,” thereby reintroducing common-law standards and remedies that the CPLA displaced “in any

civil action brought against a landowner” for on-premises injuries “by reason of” conditions/activities/circumstances on the land.

**D. Plaintiffs’ theory of “broader misconduct” does not take these claims outside the CPLA; it confirms they are about on-premises circumstances and invitee protection.**

Even under *Larrieu*’s framework, Plaintiffs’ allegations remain within the CPLA. Plaintiffs do not allege off-premises misconduct, independent misrepresentations unrelated to visitor safety, or a distinct product defect. They allege that the Club Q Defendants operated a nightclub and failed to implement reasonable security and emergency practices for patrons on the premises. That is the landowner’s “legal capacity as a landowner.”

Indeed, the district court itself described Plaintiffs’ remaining claims as “negligence and wrongful death claims against Defendants” that stem from the on-premises shooting and the alleged security omissions at the venue.

Once the lower court determined that Plaintiffs’ injuries occurred on the premises, and given that the pleaded misconduct concerns conditions and operational circumstances at the club, the CPLA’s exclusive-remedy command applied with full force. The court therefore should have dismissed the negligence and wrongful-death claims as preempted.

Because the Complaints seek to impose liability on landowners for injuries occurring on their property by reason of conditions, activities, and circumstances

existing there, the CPLA provides the exclusive remedy. The district court (assuming it had supplemental jurisdiction in the first instance) should have dismissed the non-CPLA claims, as Plaintiffs' sole remedy, if any, was under the CPLA.

### CONCLUSION

For the foregoing reasons, this Court should affirm the district court's dismissal of Plaintiffs' § 1983 claims against the County Defendants. As to the Club Q Defendants, the Court should reverse the order "assum[ing]" supplemental jurisdiction and remand with instructions to dismiss all claims for lack of subject matter jurisdiction. Alternatively, if this Court concludes that jurisdiction existed, it should affirm the dismissal of the CPLA claims and reverse the ruling that the CPLA does not preempt Plaintiffs' common-law negligence and wrongful-death claims.

Dated: January 23, 2026

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## CERTIFICATE OF SERVICE

I hereby certify that on the January 23, 2026, I electronically filed the **SECOND BRIEF ON CROSS APPEAL** with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system, as follows:

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