No.

IN THE

Supreme Court of the United States

ESTATE OF JIMMA PAL REAT; JAMES PAL REAT; REBECCA AWOK DIAG; RAN PAL; CHANGKUOTH PAL; AND JOSEPH KOLONG, PETITIONERS

v.

JUAN JESUS RODRIGUEZ, INDIVIDUALLY

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

PETITION FOR WRIT OF CERTIORARI

ERWIN CHEMERINSKY

University of California, Irvine
401 East Peltason Drive
Irvine, CA 92697
(949) 824-7722

ERICA T. GROSSMAN
Counsel of Record

JOHN R. HOLLAND

ANNA HOLLAND EDWARDS

Holland, Holland Edwards & Grossman, P.C.
1437 High Street
Denver, CO 80218
erica@hheglaw.com
(303) 860-1331

CURRY & TAYLOR ♦ 202-393-4141

QUESTION PRESENTED

Following the Court's analysis in *DeShaney v. Winnebago*, 489 U.S. 189 (1989), the majority of circuits have recognized a 'state created danger' doctrine under which state actors who create or increase danger to an individual can be held liable for violation of the Fourteenth Amendment. Many years later, however, the federal courts of appeals are intractably divided over the proper test for a state created danger claim, resulting in inconsistent decisions nationwide. The question presented is:

> Whether the Tenth Circuit Court of Appeals erred in reversing a Judgment denying qualified immunity to a 911 operator and holding, in accord with the Fourth and Fifth circuits, but in contrast to the Second, Sixth, Seventh, Eighth, and Ninth Circuits, that a Fourteenth Amendment state created danger claim covers only conduct by a state actor that imposes limitations on a person's freedom to act on his own behalf.

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JURISDICTION

Petitioner seeks review of the decision of the United States Court of Appeals for the Tenth Circuit that was entered on August 12, 2016. A timely petition for rehearing *en banc* was filed and was denied with an amended decision on August 12, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

42 U.S.C. § 1983 provides that:

> Every person, who under color of any statute, ordinance, regulation, custom or usage of any state or territory or the District of Columbia subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the constitution and law shall be liable to the party injured in an action at law, suit in equity, or other appropriate proceeding for redress . .

U.S. CONST. AMEND. XIV.

> The Fourteenth Amendment to the United States Constitution states in relevant part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law."

INTRODUCTION

DeShaney set forth the general constitutional rule that the state has no duty to protect someone from injury at the hands of a third person where the state "played no part in their creation, nor did it do anything to render" an individual "more vulnerable" to danger. 489 U.S. at 201. In this case, the state actor defendant did "play[]" a "part in creating" and rendering an individual "more vulnerable" to the danger. *Id.* It therefore presents the question *DeShaney* left open: what is the scope of the so-called "state created danger" doctrine?

This case meets the Court's criteria for granting certiorari. Since 1989, the majority of Courts of Appeals have agreed that a state actor may be liable for action that creates or increases danger to an individual under *DeShaney*. But they have adopted increasingly divergent tests for "state created danger" claims and are irreconcilably divided on the question presented here – whether the plaintiff must *also* show that the

state action imposed limitations on the person's freedom to act on his own behalf. In this case, a 911 operator sent victims of a hate crime back into danger by refusing to send the police to their apartment complex, to where they had safely fled, and instead directed them to drive back to the crime scene, park their car on the side of the road, flash their hazard lights, and wait for the police – which he never sent. While parked, their assailants found them, shooting and killing Jimma Reat in front of his family.

The Tenth Circuit sided with the Fourth and Fifth Circuits in holding that the state actor must "limit[] in some way the liberty of a citizen to act on his own behalf" to bring a clearly established state created danger claim, and granted immunity to the 911 operator who did not place any such physical limitations on the plaintiffs' freedom. App. 11a-12a. The Second, Sixth, Seventh, Eighth, and Ninth Circuits, have all held to the contrary, explicitly rejecting any such freedom restriction requirement for the doctrine to apply – and instead allowing liability when the state's conduct creates or increases danger, without respect to the plaintiff's liberty.

By requiring a freedom limitation relationship, the minority approach of the Tenth, Fourth and Fifth Circuits renders any distinct danger creation exception toothless, a holding that effectively (and dangerously) immunizes all government conduct in this area absent custody or physical control. As these courts and legal scholars have pointed out in rejecting the minority view, "[s]uch a requirement decisively curbs any operative state-created danger theory" by "instead impos[ing] a special relationship prerequisite."

Christopher M. Eisenhauer, *Police Action and The State-Created Danger Doctrine: A Proposed Uniform Test*, 120 Penn St. L. Rev. 893, 902 (2016); *Velez-Diaz v. Vega-Irizarry*, 421 F.3d 71, 80 (1st Cir. 2005) (finding the Fifth Circuit's freedom limitation requirement amounts to a "flat[ ] reject[ion of] the 'state-created danger' theory of liability.").

Courts of Appeals openly recognize this substantive circuit split. *See Butera v. District of Columbia*, 235 F.3d 637, 654 (D.C. Cir. 2001) (noting the "lack of clarity in the law of the circuits", which are "inconsistent in their elaborations" of danger creation claims); *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990) ("It is not clear, under *DeShaney*, how large a role the state must play in the creation of danger and in the creation of vulnerability before it assumes a corresponding constitutional duty to protect."); *McClendon v. City of Columbia*, 258 F.3d 432 (5th Cir. 2001) (noting the "variety of tests" in the circuits).

Legal scholars analyzing the doctrine also unvaryingly take notice of this significant conflict. *See e.g.* Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV 1, 26 (2007) ("it is striking here that circuits really do have quite different tests. There is a radical difference between the law in the Ninth Circuit in this area and the law in the Fifth Circuit."). Atinuke O. Awoyomi, *The State-Created Danger Doctrine In Domestic Violence Cases: Do We Have A Solution In Okin V. Village Of Cornwall-On-Hudson Police Department*?, 20 COLUM. J. GENDER & L. 1, 3 (2011) ("At present, there is a split among circuit courts as to what constitutes state-created danger.").

Even within the circuits, judges disagree about what the test should be. Notably here, four judges on the Tenth Circuit voted to grant rehearing *en banc*. Certiorari is necessary to resolve the circuit split deepened by the Tenth Circuit's decision regarding what is sufficient to show state-created danger liability, specifically whether a person is required to show a relationship with the state amounting to a restraint on liberty.

State-created danger cases have one theme in common – they all stem from a very tragic set of facts, and they all try to balance the competing interests of affording state actors protection from every decision being second guessed, and allowing citizens to hold state actors responsible for glaring abuses of power. That seems to be the only steadfast consistency among the federal courts of appeals, which have generated directly conflicting rulings over the 27 years since *DeShaney* was decided. *See Eisenhauer*, 120 Penn St. L. Rev. 893 ("Because the U.S. Supreme Court has not addressed the issue, many variations of the state-created danger doctrine exist across the federal circuits. The resulting lack of uniformity has led to inconsistent results, promoting unfairness for litigations throughout the country.").

A national uniform set of rules for this due process doctrine is of utmost importance. Whether the Constitution allows you to sue a 911 operator for directing you back into danger after you have fled to safety (or conversely, whether 911 operators are categorically excluded from such liability for not being in the position to impose physical restrictions on a person) should not depend on whether you live in

Colorado or New York. The Court should use this case to resolve the conflict over whether a restriction on freedom must be shown in danger creation claims, a central question left open in *DeShaney* that has been percolating in the Courts of Appeals for years, with no hope for uniform resolution.

STATEMENT

A. Factual Background

The pertinent facts as found by the District Court and adopted by the Tenth Circuit are summarized as follows:

Early in the morning on April 1, 2012, 911 Operator Defendant Rodriguez received a call from Plaintiff Ran Pal, who reported on a recorded call that: he and his three passengers were previously physically assaulted by a group of Hispanic men; these assailants threw 40 ounce beer bottles through their back windshield, shattering the glass, showering and covering these young men with chards of glass; explosive "bottle rockets" were separately thrown at them, and; their assailants had brandished a gun. App. 37a-41a

Plaintiffs also told Defendant that they had successfully eluded their attackers and had reached the safety of their apartment destination in Wheat Ridge, seven 1/2 blocks outside of Denver city limits, where they planned to remain and wait for the police. Despite knowing that Plaintiffs were hurt, in shock, did not feel safe driving and wanted the police to come to their apartment, Defendant six times directed and instructed

them that police and medical assistance could not be provided unless, over their objection, they returned to Denver. As he admitted during his termination proceedings, in so acting, Mr. Rodriguez was lying to these Plaintiffs about his inability to provide assistance where they were. App. 22a.

While monitoring their return to Denver, Rodriguez then "direct[ed] plaintiffs to park in a conspicuous location on a major road on which he knew the attackers had been traveling just minutes before" and "instructed plaintiffs to activate their hazard lights, making them even more visible and obvious than they already were at that early hour of the morning." App. 22a. Rodriguez was aware that his plan put them in immediate danger and that their assailants might find them there: "Indeed, Mr. Rodriguez acknowledged during the call that the assailants might return."[1] App. 33a.

Their assailants returned and gunned down passenger Jimma Reat. Before Reat was killed, Plaintiffs protested this plan but Mr. Rodriguez repeatedly told them that the police had been sent. This fact of life and death significance he also lied about, knowing that police had not been sent, and that, in fact he had not sent them until 53 seconds after Jimma Reat was killed. Thus, the District Court found: "Most egregiously, Mr. Rodriguez did not dispatch a police officer to plaintiffs' location at any time until after Jimma Pal had been fatally shot." App. 22a.

[1] In denying summary judgment, the District Court incorporated the previous Orders and related factual findings from the denial of Defendant's Motion to Dismiss this claim. 14a.

B. Proceedings Below

On December 16, 2014, the District Court denied Defendant Rodriguez's Motion for Summary Judgment on the state created danger claim, where 911 Operator Defendant Rodriguez's actions placed Plaintiffs in a far worse, much "more vulnerable", position for third party private violence than they would have been had he "not acted at all". *DeShaney*, 489 U.S at 201. App. 13a.

The District Court held that Plaintiffs had satisfied all elements of a clearly established state created danger claim:

> Through his affirmative acts, Mr. Rodriguez sent plaintiffs from a position of relative safety back into the zone of danger from which they had escaped just minutes before. Aware that the assailants had been headed northbound on Sheridan Boulevard after the initial attack, Mr. Rodriguez instructed plaintiffs to stop their car at a major intersection less than 20 blocks north and make themselves even more conspicuous at a time of night when there was unlikely to be much other traffic on the road in any event. Most glaringly, knowing that the driver was injured and that the assailants had a gun, he failed to send help to the scene until after the tragedy was *fait accompli*. Although qualified immunity provides 'ample room for mistaken judgments', I cannot say that 'reasonable officials in the same situation as the defendant could disagree on the appropriate course of action to follow.' App. 24a.

In finding liability, Judge Blackburn agreed with the Magistrate Judge[2] that the state created danger doctrine did not require an actual limitation placed on a person's freedom:

> In the Court's view, Mr. Rodriguez's refusal to send officers to meet Ran Pal and his instructions to return to Denver plausibly constitute affirmative conduct insofar as they moved the Passenger Plaintiffs away from the safety of their apartment toward an area where they were more susceptible to being seen and re-assaulted by their assailants. *See Gillen*, 702 F.3d at 1188. As seen in *Currier* and *Briggs*, instructions need not amount to commands in order to qualify as affirmative conduct. *See Currier*, 242 F.3d at 921; *Briggs*, 274 F. App'x at 735. If discouragement is sufficient to trigger danger creation liability, the same must be true of its equally suggestive antonym. App. 58a.

The District Court followed the majority of circuits' in finding state created danger liability absent any limitation on freedom, reasoning: "even if Ran Pal was not theoretically required to follow Mr. Rodriguez's instructions to drive to Denver, park, and turn on his hazard lights", App. 58a-59a, "Mr. Rodriguez's refusal to send officers to meet Ran Pal and his instructions to return to Denver. . .moved the

[2] In his Recommendation, the Magistrate Judge also found: "A state agent's instructions to a private person qualify as 'affirmative conduct' within the danger creation framework when such instructions effectively discourage the pursuit of either public or private sources of aid" and "encourage" other action. App. 56a-57a.

Passenger Plaintiffs away from the safety of their apartment toward an area where they were more susceptible to being seen and re-assaulted by their assailants", thereby increasing the danger.[3] App. 58a.

Defendant took an interlocutory appeal in the Tenth Circuit, arguing that he was entitled to immunity because, *inter alia*, he did not physically *require* Plaintiffs to return to Denver or otherwise place any limitations on their freedom to act. As this was an interlocutory appeal of an order denying summary judgment on the basis of qualified immunity, the court below accepted the factual determinations of the District Court, and reviewed only the legal challenge to the Court's ruling on whether the facts clearly established a state created danger claim under the Fourteenth Amendment. *See Johnson v. Jones*, 515 U.S. 304, 319-320 (1995).

On May 31, 2016 (amended decision at App. 1a.), the Tenth Circuit reversed the denial of summary judgment, disagreeing with the District Court regarding the appropriate test to apply in state created danger claims, and reversing the legal finding that a state actor's conduct need not amount to physical restriction 'commands' or requirements under *DeShaney*. In finding that there was no violation of any clearly established right, the Tenth Circuit aligned itself with the Fourth and Fifth Circuits, which hold that liability under *DeShaney* requires state conduct

[3] The District Court previously dismissed the special relationship claim because Defendant did not "restrain[] plaintiffs' liberty", finding instead a state created danger violation based on affirmative actions that increased danger. Plaintiffs did not challenge that ruling.

that imposes limitations on a person's freedom to act on his own behalf:

> as the Supreme Court noted in the case that is widely understood to be the progenitor of the state-created danger doctrine, '[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Deshaney v. Winnebago Cty. Dept of Soc. Servs.*, 489 U.S. 189, 200 (1989). . . App. 10a-11a.
>
> As a 911 operator, he was not present at the scene of the attack, nor could he take physical action in response to the unfolding event. He did not impose any limitation on Reat's freedom to act. Rodriguez merely informed the victims, however incompetently, that to get help from the police, they would have to return to Denver. It cannot be said that any of Rodriguez's actions, as foolish as they were, 'limited in some way the liberty of a citizen to act on his own behalf.'" *Graham v. Indep. Sch. Dist., 22 F.3d 991, 995* (10th Cir. 1994).
>
> Furthermore, Reat is unlike the victims in other state-created danger cases. He was not in the custody of the state in the way that prisoners are, and thus was not deprived in that manner of his freedom to act. App. 11a.

Plaintiffs filed a timely Petition for Rehearing *en banc*, arguing that state created danger liability does not require any custodial relationship or show of authority amounting to a limitation of freedom.

On August 12, 2016, a majority of the Tenth Circuit denied the Petition for Rehearing *en banc*, and issued the Amended Decision challenged herein. Notably, four Judges, Judges Lucero, Hartz, Phillips and Moritz, voted to grant *en banc* rehearing. App. 78a.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE IN IRRECONCILABLE CONFLICT AS TO WHETHER IN STATE-CREATED DANGER CLAIMS A STATE ACTOR MUST "LIMIT IN SOME WAY THE LIBERTY OF A CITIZEN TO ACT ON HIS OWN BEHALF".

The Tenth Circuit's danger creation test requiring a restraint on liberty squarely conflicts with other federal court of appeals decisions. Similar to the Tenth Circuit, the Fourth and Fifth Circuits have also confined liability to situations involving custodial relationships described by the Supreme Court in *DeShaney*, "which are limited to cases concerning 'incarceration, institutionalization, or other similar restraint of personal liberty.'" *Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004) (refusing to recognize state created danger as an independent doctrine and citing *DeShaney*, 489 U.S. at 200). *Pinder v. Johnson*, 54 F.3d 1169, 1175 (4th Cir. 1995) ("Pinder was never incarcerated, arrested, or otherwise restricted in any way. Without any such limitation imposed on her liberty, *DeShaney* indicates Pinder was due no affirmative constitutional duty of protection

from the state, and Johnson would not be charged with liability for the criminal acts of a third party."). These circuits all read *DeShaney's* language that has given rise to the special relationship exception, as also applying to liability under danger creation theory.[4]

Conversely, the Second, Sixth, Seventh, Eighth, and Ninth Circuits expressly reject the requirement that a state actor impose limitations on a persons freedom in state created danger claims. *See Pena v. DePrisco*, 432 F.3d 98 (2d Cir. 2005); *Jones v. Reynolds*, 438 F.3d 685, 690 (6th Cir. 2006); *Monfils v. Taylor*, 165 F.3d 511 (7th Cir. 1998); *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990); *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992). The majority approach instead interprets *DeShaney* as providing for two separate paths to liability: first if the individual has a special relationship with the government due to it placing limitations on their freedom, or second, if there is a state-created danger. *Id.* These circuits thus allow for state created danger liability absent limitations on freedom provided, *inter alia*, the state actor created or increased the danger to an individual. *Id.*

[4] The language giving rise to the 'special relationship' exception is: "**[i]t is the State's affirmative act of restraining and individual's freedom to act on his own behalf** – through incarceration, institutionaliziation or other similar restraint of personal liberty – which is the 'deprivation of liberty' triggering the protectinos of the Due Process Clause. . ." *DeShaney*, 489 U.S. at 200 (emphasis supplied). The language giving rise to state created danger comes from Justice Rehnquists finding that: "While the State may have been aware of the dangers that he faced, it played no part in their creation, nor did it do anything to render him more vulnerable to them. *Id.* at 201.

In rejecting the Fifth Circuit's freedom limitation approach, the Second Circuit reasoned:

> Some courts have, indeed, incorporated the 'special relationship' criterion as a prerequisite to liability.[5]
>
> We, by contrast, treat special relationships and state created dangers as separate and distinct theories of liability. *See Ying Jing Gan v. City of New York*, 996 F.2d 522, 533 (2d Cir.1993). In *Dwares*, the state did not breach its duty to protect someone with whom it had a special relationship. Instead, the state itself facilitated and encouraged the private attack at issue, thus creating the danger. In *Ying Jing Gan*, we therefore placed *Dwares* in the same category as an Eighth Circuit case where a police chief instructed subordinates to ignore victim's pleas for protection from her husband, who was the chief's friend, and an Eleventh Circuit case where a town clerk was abducted by a prison inmate whom the government used for work on town hall grounds. *See id.* at 533–34 (citing *Freeman v. Ferguson*, 911 F.2d 52, 54 (8th Cir.1990) and *Cornelius v. Town of Highland Lake*, 880 F.2d 348, 356–59 (11th Cir.1989),[13] *cert. denied*, 494 U.S. 1066, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990)); *see also Vélez–Díaz*, 421 F.3d at 79. Our distinction between these categories of cases suggests that "special relationship" liability arises from the relationship between the state and a particular

[5] Citing *inter alia Beltran*, 367 F.3d at 307.

> victim, whereas "state created danger" liability arises from the relationship between the state and the private assailant. To paraphrase *Bowers*, 686 F.2d at 618, the police officers in *Dwares* did not bring the victim to the snakes; they let loose the snakes upon the victim.

Pena, 432 F.3d at 109 (internal citations omitted) (Sack. J.)

The Sixth Circuit has similarly held that the language in *DeShaney* quoted by the Tenth Circuit for the proposition that a state actor must limit an "individual's freedom to act on his own behalf", applies only to an affirmative duty to protect due to a custodial or freedom limiting relationship, not state created danger liability. *See Stemler v. City of Florence*, 126 F.3d 856, 867–68 (6th Cir. 1997) (applying "custody" exception where state limited "individual's freedom to act on his own behalf") and *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998) (applying "state-created danger" exception without any liberty deprivation because "officers could maintain § 1983 action in absence of special relationship between city and either officers or alleged drug conspirators" where city placed undercover police officers and their family members in danger.)

Likewise, the Seventh, Eighth, and Ninth Circuits also distinguish special relationship claims, which require "custody" or "sufficient control to cut off other avenues of aid", from a claim "based on a state-created danger", where "a state can be held to have violated due process by placing a person in a position of heightened danger without cutting off other avenues of

aid." *Monfils*, 165 F.3d at 517; *Freeman*, 911 F.2d at 55 (finding that while *Deshaney* left a "grey area" in terms of when the state can be liable absent a custodial setting, the state created danger doctrine clearly applies in a setting absent physical control or limitations placed on a person's freedom.); *Grubbs*, 974 F.2d at 122 ("custody is not a prerequisite to the 'danger creation' basis for a section 1983 third party harm claim" under *DeShaney*, and while "some cases have blended the two exceptions together . . . the distinction is important.").[6]

In stark contrast to requiring a restraint on freedom, the majority approach instead holds that the relevant inquiry is whether or not the state actor created the danger or made the individual more vulnerable to harm. The Second, Sixth and Ninth Circuits evaluate whether "affirmative action" (rather than "passive" conduct) created or increased the risk of danger to the victim. *Pena*, 432 F.3d at 109–10; *Grubbs*, 974 F.2d 119; *Reynolds*, 438 F.3d at 690. The Seventh and Eighth Circuits ask whether state action changed the status quo by creating or substantially contributing to the creation of a danger or rendering a victim more vulnerable than he or she otherwise would have been absent state action. *Monfils*, 165 F.3d at 517; *Freeman*, 911 F.2d at 55 (relevant inquiry is whether the "state

[6] The Ninth Circuit explained: "*DeShaney* did not rule that custody was required where the state affirmatively causes the harm. In addition to pointing out that Joshua DeShaney was not in state custody when injured, the Court noted that '[w]hile the State may have been aware of the dangers that 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.*" *Grubbs*, 974 F.2d at 121 (internal citations omitted) (emphasis in original).

has taken affirmative action which increases the individual's danger of, or vulnerability to, such violence beyond the level it would have been at absent state action.")

Applying these principles, these courts consistently find liability in a variety of circumstances outside any limitations on freedom, when their roles created or exposed individuals to danger they otherwise would not have faced. In *Dwares v. City of New York*, 985 F.2d 94, 99 (2nd Cir. 1993), the Second Circuit held that a state-created danger claim was allowed where the police officers letting "skinheads" know they would not be arrested unless they got totally out of control caused them to act with impunity, and thus rendered the demonstrators "more vulnerable to assaults." The Seventh Circuit in *Monfils* upheld a jury verdict against a police officer who allowed an informant's tape to be released despite his knowledge that the tape's release would result in heightened danger to the informant, who was ultimately killed, despite no physical restrictions placed on any person. In *Freeman*, the Eighth Circuit held that a police chief may be liable for damages inflicted by a third party where the refusal to enforce a restraining order against the attacker was due to the police chief's personal friendship with the attacker. In *Grubbs*, the Ninth Circuit reversed the district court's dismissal of state created danger claim "for a failure to allege a custodial relationship", holding state employees could be liable for the rape of a registered nurse because "Defendants affirmatively created the dangerous situation" by assigning nurse to work alone in the medical clinic of a

medium-security institution with a known, violent sex-offender." 974 F.2d 119.[7]

The Third Circuit has, at times, reached similar results to the majority view, and in fact has imposed liability on two 911 operators under the state created danger doctrine absent any limitation on freedom. *See Phillips v. Cty. of Allegheny*, 515 F.3d 224, 243 (3d Cir. 2008) (allowing state created danger claim against two 911 operators who provided confidential personal information to fellow former call operator, who then used it to locate and murder plaintiff).[8]

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[7] *See also Hemphill v. Schott*, 141 F.3d 412 (2d Cir.1998) (state created danger claim could proceed where during drugstore robbery, police had allowed the store's manager to join them in pursuit of the suspect and then returned a gun to the manager, who then used it to shoot the plaintiff.). *Gibson v. City of Chicago*, 910 F.2d 1510 (7th Cir.1990) (duty to protect citizen from former policeman who was permitted to retain his gun despite his being placed on the medical roll as mentally unfit for duty); *Kennedy v. City of Ridgefield*, 439 F.3d 1055 (9th Cir. 2006) (police officer affirmatively created a danger that plaintiff, who was later shot by neighbor, would not otherwise have faced by informing neighbor of plaintiff's allegations of child molestation without first warning her as he had promised to do).

[8] The Third Circuit has not been consistent in its approach, however, and has also at times, required a freedom limitation component in state created danger claims. *See Mark v. Borough of Hatboro*, 51 F.3d 1137, 1153 (3d Cir. 1995), *cert denied*, 516 U.S. 858 (1995) (noting that there are cases in the circuit both "supporting and opposing the existence of a state-created danger theory"). It recently clarified that the person must be "a foreseeable victim of the defendant's acts" and a state actor must "affirmatively use[] his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all. *L.R. v. School District of Philadelphia*, No. 14-4640, 2016 WL 4608133, *3 (3d Cir. 2016).

Notwithstanding the majority of courts holding otherwise, the Tenth Circuit has wrongly sided with the minority view that *DeShaney* requires a show of authority amounting to a restriction of freedom in state-created danger claims. In the Second, Sixth, Seventh, Eighth, Ninth (and potentially Third) circuits, the 911 Operator in this case could be held liable for the death of Jimma Reat, where, (as found by the District Court) Rodriguez's affirmative conduct changed the status quo and increased the danger.

Until now, the Tenth Circuit has never expressly imposed any requirement that a state actor limit a person's freedom to act as part of the danger creation test, as shown by the District Court and Magistrate's interpretation of prior cases including *Currier v. Doran*. 242 F.3d 905, 922 (10th Cir. 2001) (instructions by social worker to mother of abused children to stop making allegations of abuse was sufficient affirmative conduct to state a claim). The District Court logically followed the majority view in finding clearly established state created danger liability, where Rodriguez's "affirmative acts", including "directing plaintiffs to park in a conspicuous location on a major road on which he knew the attackers had been traveling just minutes before" and instruct[ing] plaintiffs to activate their hazard lights, making them even more visible and obvious than they already were at that early hour of the morning," "sent plaintiffs from a position of relative safety back into the zone of danger from which they had escaped just minutes before." App. 22a, 24a.

The Tenth Circuit in reversing, however, made clear that it aligns itself with the minority interpretation of *DeShaney*. While the District Court

rejected the limitation freedom requirement urged by Defendant as applicable in state created danger cases, this Tenth Circuit Panel (which included the author of *Currier*) announced that prior cases involving children such as *Currier* were consistent with a custodial or freedom limitation requirement, because children are inherently "incapable of acting in their own interests" (App. 12a) and were thus similarly restrained in their "freedom to act on their own behalf."

Additionally, the Circuits are in obvious disagreement about other substantive elements necessary to assert the doctrine, and are "inconsistent in the elaborations of the concept." *Butera v. District of Columbia*, 235 F.3d at 654. While recognizing the doctrine under *DeShaney*, varying circuits have adopted different formulations. The First Circuit has examined the doctrine but never found it actionable.[9] The Sixth, Eighth and Tenth Circuit tests require a specific plaintiff to be in danger rather than the public at large, while the Ninth considers the foreseeability of harm.[10] The majority of circuits, including the Third, Eighth and Tenth, also have engrafted the "conscience shocking" due process language as an additional requirement for finding liability, while the Sixth and Ninth Circuits often use the "deliberate indifference" standard.[11]

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[9] *Frances-Colon v. Ramirez*, 107 F.3d 62 (1st Cir. 1997); *Rivera v. Rhode Island*, 402 F.3d 27, 38 (1st Cir. 2005).

[10] *Reynolds*, 438 F.3d at 690-91; *Hart v. City of Little Rock*, 432 F.3d 801, 805-06 (8th Cir. 2005); *Uhlrig v. Harder*, 64 F.3d 567, 574 (10th Cir. 1995); *Lawrence v. U.S.*, 340 F.3d 952, 957 (9th Cir. 2003).

[11] *See Kneipp v. Tedder*, 95 F.3d 1199, 1208-11 (3d Cir. 1996); *Hart v. City of Little Rock*, 432 F.3d at 805-06; *Uhlrig*, 64 F.3d at 574; *Foy v. City of Berea*, 58 F.3d 227, 232 (6th Cir. 1995) *quoting*

Only this Court can provide the desired uniformity of state created danger liability, and resolve the conflict among the circuits that will continue to expand absent such review.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE AND ESTABLISH A UNIFORM TEST TO APPLY TO STATE CREATED DANGER CLAIMS UNDER THE FOURTEENTH AMENDMENT.

The question presented merits the Court's attention. Fundamental due process claims should not result in drastically opposing outcomes depending on where you live, yet that is precisely what happened here. There can be no state created danger liability for this 911 Operator's conduct in the Fourth, Fifth and Tenth Circuits. In the Second, Sixth, Seventh, Eighth, and Ninth (and potentially Third and Eleventh) Circuits, however, these Plaintiffs could clearly sue for the death of Jimma Reat.

Or take the tragic facts of the Fourth Circuit case *Pinder*. There, a woman was threatened by her ex-boyfriend. She called the police, who came and arrested him. The woman asked the police whether they were taking him to the station and locking him up, explaining that she would not go back to work if he could come home because he might harm the children. The officer told her she could go back to work because her ex-boyfriend would be kept locked up overnight. Instead,

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Farmer v. Brennan, 511 U.S. 825 (1970); *Lawrence*, 340 F.3d at 957.

they released him immediately and he returned to the house and burned it down, killing the three children inside.

The Fourth Circuit held (as would the Fifth and Tenth) that there could be no liability for state created danger because there was no "duty to protect individuals outside of the custodial context" and the state did not place any physical limitation on her freedom. *Pinder*, 54 F.3d at 1176. As pointed out in the dissent, however, she could seek redress for this abuse of power in most other circuits. Indeed, Fourth Circuit Judge Russell argued against the minority's custodial approach, citing to the Seventh, Eighth, and Ninth Circuit cases for the proposition that *DeShaney* "did not reject the state's clearly established duty to protect an individual where the state, through its affirmative action, has created a dangerous situation or rendered the individual more vulnerable to danger." *Pinder*, 54 F.3d at 1180 (Russell, J. dissenting).

Likewise, in *McClendon*, Fifth Circuit Judge Parker sharply criticized the circuit's continuous refusal to recognize state created danger claims outside of a custodial relationship. *See McClendon v. City of Columbia*, 305 F.3d at 338 (Parker, J., dissenting) ("The Circuit's modus operandi in these cases plays like a broken record - same approach, same result, and same confusion created for the district courts, state officials, and the general public concerning the Circuit's position on this important issue. In choosing to play this broken record yet again, the majority skirts the central issue in this case: Whether the substantive component of the Due Process Clause guarantees a citizen the right to be free from acts of violence inflicted by a third party

when the state actor played an affirmative role in creating or exacerbating the dangerous situation that led to the citizen's injury. In failing to answer this fundamental question, the majority shirks its constitutional duty.").[12]

Legal scholars analyzing the doctrine widely reach the conclusion that the Court must step in to resolve this circuit conflict. Chemerinsky has commented that, "[o]ne would think, given the large volume of litigation in this area and the splits among the circuits that the Supreme Court would have stepped in." 23 TOURO L. REV. at 26. Another commentator observes that these splits are particularly troublesome for public school officials. Jeff Sanford, *The Constitutional Hall Pass: Rethinking the Gap in §1983 Liability That Schools Have Enjoyed Since DeShaney*, 91 Wash. U. L. Rev. 1633, 1640 (2014) ("But besides these broad themes, and despite over two decades of case law, there still exists nontrivial inconsistencies in the ways circuit courts analyze state-created dangers.") *see also* Laura Oren, *Some Thoughts on the State-Created Danger Doctine: DeShaney is Still Wrong and Castle Rock is More of the Same*, 16 Temple Pol. & Civ. Rts. L. Rev. 47, 63 (2006) ("As the inconsistencies and irrationalities in the special danger cases become more and more troublesome, they create dialectical contradictions . . ."); Eisenhauer, 120 PENN

[12] At times, panels in the Fifth Circuit have adopted state-created danger, only to later abandon it en banc, instead refusing to rule on its existence outside of a custodial relationship. *Scanlan v. Texas A&M Univ.*, 343 F.3d 533 (5th Cir. 2003); *McClendon v. City of Columbia*, 258 F.3d 432 (5th Cir. 2001), *rev'd en banc*, 305 F.3d 314 (5th Cir. 2002).

ST. L. REV. at 902 ("Clouded, enormously complicated, endlessly circular, yet confined to a couple of sentences illustrating a mere afterthought in a first-year Torts textbook, the state-created danger doctrine endures. Almost a quarter of a century after *DeShaney*, circuits continue to struggle with its proper meaning and appropriate function . . . Standardization and simplification would doubtlessly help the courts with this dilemma."); Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1165, 1211 (2005) ("Unless, and until, the Supreme Court makes its pronouncement or the other circuits shake down to a remarkable degree of uniformity, each new case will face the same barrier: We do not say whether the doctrine exists, and even if it does, our not saying makes it not clearly established law.").

Further, the Tenth (and Fourth and Fifth) Circuits have created a categorical exception for 911 operators and any other government worker not in the position to physically limit a person's freedom. As 911 operators inherently are not, and will never be, in the position to impose limitations on "the liberty of a citizen to act on his own behalf", they are essentially immune from all danger creation claims under this test. Unlike, *Phillips*, *supra*, where the Third Circuit held 911 operators liable for state created danger for intentionally giving a former 911 operator confidential information allowing him to locate and kill his ex-girlfriend and her boyfriend, these 911 operators would be immune in the Tenth Circuit.

Even intentional conduct by 911 operators to harm callers' rights would be unactionable. Consider

the following: A woman badly beaten by her husband escapes her house, finds refuge at her neighbor's, and calls 911. A 911 operator who recognizes the woman as his friend's wife, purposely tells her to return home where her husband is to meet the police, knowing that he is intentionally not dispatching the police precisely because he is trying to protect his friend. The woman returns home to have her husband arrested, but the police are never sent and her husband kills her. According to the Fourth, Fifth and Tenth Circuits, there was no restraint on freedom and thus no liability. She still could have ignored his foolish instructions and stayed put. However, in the Second, Sixth, Seventh, Eighth and Ninth Circuits, this 911 operator who intentionally directed a vulnerable caller back to the place of violence while purposely withholding police would not be immune.

A state created danger doctrine that allows for any conduct, no matter how conscience shocking, no matter what type of abuse of power, as long as it doesn't amount to physical limitations on freedom leaves abuses of power completely unchecked. The Court has cautioned that immunity cannot safely be made absolute: "[w]here an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate." *Burns v. Reed*, 500 U.S. 478, 494-95 (1991). We need a system that requires state actors like the 911 Operator in this case to "hesitate" before instructing callers from safety back into a known snake pit.

Furthermore, if a state actor must truly "limit[] in some way the liberty of a citizen to act on his own behalf," such a rule would effectively inoculate broad

categories of state actors beyond just 911 operators, including social service providers, foster care providers, educators, and others who exercise a high degree of authority in life-or-death situations. Without clarification, the state-created danger doctrine will remain either an extremely limited remedy available only within a specific custodial context, or a viable shield against a broad range of conscience-shocking governmental conduct – all depending on where an individual happens to live.

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THE CONFLICT.

This case is a particularly suitable vehicle for resolving the conflict.

First, the decision to grant immunity for lack of clearly established law was based on a fundamental legal split between the circuits in terms of whether the state can be liable for state created danger absent any restriction of freedom. This case crystallizes the problem with this "absence of consistency", which "potentially allows for behavior in one circuit to be actionable while being acceptable in another circuit." Eisenhauer, 120 Penn St. L. Rev. at 909. Intervention by the Court will provide clarity to state actors across the board with respect to what conduct would be considered unconstitutional.

Second, a decision by the Court will have a practical outcome on this litigation. The case was decided, both at the district and circuit levels, on a crisp, posited set of facts. Applying the majority approach to the doctrine, Judge Blackburn made

extensive factual findings in concluding that Rodriguez had violated Plaintiffs' clearly established right, including *inter alia*, that he committed multiple conscience shocking and egregious affirmative acts that increased their vulnerability to danger and caused Jimma Reat's death. These factual findings were not reviewed by the Tenth Circuit on the interlocutory appeal, which instead reversed based on the dispositive legal ruling that no limitation of freedom occurred as required to apply the doctrine. If the Court formally holds that state created danger liability does not require a restriction on freedom, which is consistent with both the letter and spirit of *DeShaney*, Petitioners should be entitled to proceed to trial.

Finally, the circuit split is ripe for resolution. Without such guidance, the doctrine will only grow more muddled, a reality that has led lower courts to call out for the Court's intervention. *Doe v. Covington Cnty. Sch. Dist.*, 675 F.3d 859, 871 (5th Cir. 2012) (Higginson, J., concurring) ("Dicta in *DeShaney* has contributed to twenty-three years of circuit (and intra-circuit) disharmony, and excited legions of law review articles, about whether the Constitution asserts positive or negative liberties, or regulates government action or inaction – all giving uncertain guidance to litigants and courts, as well as public officials, hence necessarily also giving uncertain guidance to citizens whom government persons cause to be subjected to injury.") (Internal citations omitted); *Butera*, 235 F.3d at 654; *Freeman*, 911 F.2d at 55.

In sum, the questions presented in this Petition are both exceptionally important as well as wide

reaching. The Court should use this case to provide uniformity in this area of federal law.

CONCLUSION

For all these reasons, this Court should grant the Estate of Jimma Pal Reat's petition.

Respectfully submitted,

Erica T. Grossman
Counsel of Record
John R. Holland
Anna Holland Edwards
Holland, Holland Edwards & Grossman, P.C.
1437 High Street
Denver, CO 80218
(303) 860-1331

Erwin Chemerinsky
University of California, Irvine
401 East Peltason Drive
Irvine, California 92697-8000
(949) 824-7722

No. 15-1001.

ESTATE OF JIMMA PAL REAT; JAMES PAL REAT; REBECCA AWOK DIAG; RAN PAL; CHANGKUOTH PAL; and JOSEPH KOLONG, Plaintiffs-Appellees,

v.

JUAN JESUS RODRIGUEZ, individually, Defendant-Appellant.

United States Court of Appeals, Tenth Circuit.

Filed August 12, 2016.

Attorney(s) appearing for the Case

Eric M. Ziporin (Jennifer F. Kemp with him on the briefs), Senter Goldfarb & Rice, L.L.C., Denver, Colorado, for Appellant.

Erica Grossman (John R. Holland with her on the brief), Holland, Holland Edwards & Grossman, P.C., Denver, Colorado, for Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. NO. 1:12-CV-02531-REB-MEH)

Before TYMKOVICH, Chief Judge, MURPHY, and BACHARACH, Circuit Judges.

TYMKOVICH, *Chief Judge*.

This case arises out of the fatal shooting of Jimma Pal Reat at a Denver intersection. Reat was killed after Denver 911 operator Juan Rodriguez directed him back into the path of his armed assailants. His estate sued the 911 operator, alleging civil rights claims pursuant to 42 U.S.C. § 1983 and various state law claims.

Rodriguez moved for summary judgment on all claims against him on the basis of qualified immunity. The district court granted summary judgment in his favor on all constitutional claims except for a Fourteenth Amendment substantive due process claim based on a theory of state-created danger. Under that claim, Reat's Estate contends Rodriguez used his governmental authority to subject him to the callous shooting that caused Reat's death.

We conclude the law was not clearly established such that a reasonable 911 operator would have known his conduct violated Reat's constitutional rights. Because we decide only that the law was not clearly established, we do not opine on whether Rodriguez violated Reat's constitutional rights. We therefore reverse and remand for entry of summary judgment in favor of Rodriguez.

I. Background

The facts of this case are tragic. At 4:12 a.m. on April 1, 2012, Ran Pal called 911 to report that several men had thrown a bottle and broken the rear windshield of the car he was driving. He told Operator Rodriguez that although the attack had occurred at Tenth Avenue and Sheridan Boulevard in Denver, he and his passengers had fled to safety in the nearby city of Wheat Ridge on the west side of Sheridan Boulevard.

For reasons that remain unclear, Rodriguez told Pal that because the attack had occurred in Denver, he needed to return to the city in order to receive help from the police. At first, Pal refused to return. He told Rodriguez he was in a state of shock, needed time to recover, and did not want to drive. Pal pleaded with Rodriguez to send help to his current location. Over the course of the fourteen-minute call, Pal told the operator at least six times that he was injured, in shock, and afraid. Still, Rodriguez insisted the police could not help unless he returned to Denver. About three minutes into the call, Pal finally agreed. He remained on the phone with Rodriguez as he drove.

On his way back to Denver, Pal fleshed out the details of the assault on the call. He explained that he, his brother, cousin, and a friend had been driving through Denver when a red jeep pulled up next to them. While both cars were stopped at a red light, the men in the jeep threw bottles and bottle rockets at Pal's car, breaking the windshield. Shards of glass injured Pal's hand and face. He told Rodriguez he had gotten a partial license plate number as the assailants sped off northbound on Sheridan Boulevard. Pal continued to tell the operator he was in shock. Rodriguez asked where Pal was, and Pal replied that he was crossing Sheridan on Twenty-Ninth Avenue. Rodriguez instructed him to stop there, and continued to ask questions to determine whether an ambulance was necessary. Rodriguez failed to dispatch an ambulance or the police at this time.

About eight minutes into the call, Pal revealed to Rodriguez that the assailants had brandished a gun. Rodriguez asked questions about the size, color, and

type of gun. He also asked more questions about the attackers, including their race and what they had been wearing. Pal told the operator that four or five Hispanic men had gotten out of the car and hurled forty-ounce beer bottles at his vehicle. He told Rodriguez he had fled the scene when his brother urged him to do so because the attackers were armed. After questioning the victims about whether they had been drinking, Rodriguez confirmed that Pal was still at Twenty-Ninth Avenue and Sheridan Boulevard. He told Pal to pull over and wait there for the officers whom he would dispatch. Rodriguez also instructed Pal to turn on his hazard lights so that the police could easily locate the vehicle.

About ten minutes into the call, another man in the car picked up the phone. The man repeated that they were all in shock and scared, and asked whether police were on their way to provide help. Though Rodriguez indicated he had sent the police, he in fact had not. Rodriguez asked that the phone be handed back to Pal. Rodriguez then had Pal confirm that his hazard lights were on, and reiterated that Pal needed to wait at that location. He warned Pal, "if you see them come back, I need you to call us right away at 911." Aplt. App., Vol. III, at 281.

Seven seconds later, Pal shouted, "They're back, they're back[!]" *Id.* at 262. Pal handed the phone to someone else, who told Rodriguez that the men were shooting. Pal picked the phone back up to report that his brother had been shot. Over Pal's screams, Rodriguez continued to ask what was happening. Someone else picked up the phone and repeated the information. Rodriguez asked who had been shot, where they were located, and

whether the attackers were still there. The speaker told Rodriguez that Reat was about to die and asked whether he could send an ambulance. Rodriguez continued to ask questions about the victim. Officers were dispatched to the scene about one minute after the shooting. Reat died of his injuries.

II. Analysis

Reat's Estate brought federal claims pursuant to 42 U.S.C. § 1983 and various state law claims against Rodriguez and the City and County of Denver. The defendants claimed they were protected by qualified immunity, arguing they did not violate Reat's rights under clearly established law. The district court dismissed the claims against the City and County. Only claims against Rodriguez proceeded.

A. Qualified Immunity

1. Clearly Established Law

Qualified immunity exists to protect government officials "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." *Dodds v. Richardson*, 614 F.3d 1185, 1191 (10th Cir. 2010) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). Qualified immunity is not only a defense to liability, but immunity from suit; thus, "it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Accordingly, in qualified immunity cases at the summary judgment stage, a "plaintiff must demonstrate on the facts alleged (1) that the defendant violated his constitutional or statutory rights, and (2) that the constitutional right was clearly established at the time of the alleged unlawful activity." *Swanson v. Town of Mountain View*, 577 F.3d 1196, 1199 (10th Cir. 2009). In our review, "we need only find that the plaintiffs failed either requirement" to establish qualified immunity. *Id.* Because there are cases where we can more readily decide the law was not clearly established before reaching the more difficult question of whether there has been a constitutional violation, we may exercise discretion in deciding which prong to address first. *See Pearson*, 555 U.S. at 236.

This is such a case. We therefore confine our analysis of qualified immunity to the second prong, inquiring only whether the law at the time of the incident was "sufficiently clear that a reasonable official would have understood that his conduct violated the right." *Currier v. Doran*, 242 F.3d 905, 923 (10th Cir. 2001). A right is clearly established when it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, 132 S.Ct. 2088, 2093 (2012) (internal quotation marks and alteration omitted). To make this determination, we consider "either if courts have previously ruled that *materially similar conduct* was unconstitutional, or if a general constitutional rule already identified in the decisional law [applies] with *obvious clarity* to the specific conduct at issue." *Buck v. City of Albuquerque*, 549 F.3d 1269, 1290 (10th Cir. 2008) (emphasis added). Usually, this requires either "a Supreme Court or Tenth Circuit decision on point, or

the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Cordova v. City of Albuquerque*, 816 F.3d 645, 658 (10th Cir. 2016) (quoting *Clark v. Wilson*, 625 F.3d 686, 690 (10th Cir. 2010)).

But an earlier decision need not be "materially factually similar or identical to the present case; instead, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014). We look to see if "existing precedent . . . placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). "The dispositive question is whether the violative nature of *particular* conduct is clearly established," *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) (per curiam) (emphasis in original) (internal quotation marks omitted), so that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *Saucier v. Katz*, 533 U.S. 194, 202 (2001). This investigation must be undertaken with a focus on the particular circumstances of the specific case before the court.

In sum, plaintiffs must "demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." *Estate of B.I.C. v. Gillen*, 761 F.3d 1099, 1106 (10th Cir. 2014) (quoting *Trotter v. Regents*, 219 F.3d 1179, 1184 (10th Cir. 2000)).

2. State-Created Danger

The Estate argues that Rodriguez created the danger that led to Reat's death. At the most general level, the parties agree that the state-created danger doctrine is clearly established in this circuit.

Two preconditions are necessary for the application of the state-created danger doctrine: first, the state actor took an affirmative action, and, second, that action led to private violence injuring the plaintiff. *Id.* at 1105. If these preconditions are met, a plaintiff next must show:

> (1) the charged 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) defendants acted recklessly in conscious disregard of that risk; and (6) such conduct, when viewed in total, is conscience shocking.

Id.

Though the elements of the state-created danger test are clearly established, it also must be clear to which fact scenarios and government actors we apply the test, and what types of conduct are "conscience shocking" under the sixth factor. *Green v. Post*, 574 F.3d 1294, 1297 (10th Cir. 2009) (conscience-shocking conduct is "difficult to define and requires an assessment of the totality of the circumstances of each particular case" (internal quotation marks omitted)). But, as we explained above, the application of an established test

even to a new fact pattern does not necessarily require a finding of qualified immunity. *Casey v. City of Federal Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007).

Here, Reat's Estate alleges Rodriguez violated the Fourteenth Amendment by knowingly sending the victims, who had called 911 to report an assault, back into the path of their armed attackers. It contends Rodriguez knew the attackers last had been seen speeding northward on Sheridan Boulevard only minutes earlier, yet he instructed Pal to stop on that road. He then told Pal to pull over and activate his hazard lights at a location nineteen blocks north of the place of the assault. Even after Rodriguez knew the attackers had brandished a gun, he did not suggest that Pal relocate to a less conspicuous place, nor did he send police protection. The district court held "these factual allegations, accepted as true, are sufficiently shocking to the conscience to state a plausible claim for violation of plaintiffs' substantive due process rights under the state-created danger theory." Aplt. App., Vol. V., at 575.

For a number of reasons, we conclude Rodriguez's conduct does not violate the clearly defined contours of the state-created danger doctrine. First, Reat's Estate cannot point to a Supreme Court or Tenth Circuit case involving misconduct by 911 operators. As a general matter, we have considered the doctrine in a number of cases involving a range of state actors. For example, we have analyzed the doctrine in the context of both an off-duty police officer on personal business who crashed his police vehicle, *see Browder v. City of Albuquerque*, 787 F.3d 1076, 1083 (10th Cir. 2015), and on-duty officers engaged in high-speed chases where "the legitimate

governmental objective is so pressing that the luxury of forethought doesn't exist," *id.* at 1080; *see also Sacramento Cty. v. Lewis*, 523 U.S. 833 (1998). We have also applied this theory of liability to other types of first responders, cloaked with government authority, reacting immediately to emergency situations. *See, e.g., Perez v. Unified Gov't of Wyandotte Cty./Kansas City*, 432 F.3d 1163, 1168 (10th Cir. 2005) (applying the state-created danger doctrine to a firefighter who crashed his truck into a car, killing its occupant); *Radecki v. Barela*, 146 F.3d 1227, 1232 (10th Cir. 1998) (applying the doctrine to a deputy sheriff who caused the death of a bystander by instructing him to help physically subdue a suspect who then shot the civilian).

In other settings, we have applied the state-created danger doctrine to social workers, school officials, and hospital administrators. *See, e.g., Currier*, 242 F.3d at 908 (applying the doctrine to social worker who removed a child from his mother's home and placed him with his father, who killed him); *Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253 (10th Cir. 1998) (applying the doctrine to school official who suspended and sent home a special education student who subsequently killed himself); *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995) (applying the doctrine to state mental health administrators who eliminated a special unit for the criminally insane, causing the transfer of a murderer to the general hospital, where he killed his therapist).

But these cases are not particularly instructive here: as the Supreme Court noted in the case that is widely understood to be the progenitor of the state-created danger doctrine, "[t]he affirmative duty to protect

arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Deshaney v. Winnebago Cty. Dept. of Soc. Servs.*, 489 U.S. 189, 200 (1989). In all of these cases where we found it appropriate to apply the doctrine of state-created danger, the victims were unable to care for themselves or had had limitations imposed on their freedom by state actors. "[In a] custodial situation [such as] a prison, forethought about an inmate's welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare." *Lewis*, 523 U.S. at 851.

Rodriguez is unlike any of the defendants in our state-created danger cases. Rodriguez was not a police officer, firefighter, or other similar first responder.[1] As a 911 operator, he was not present at the scene of the attack, nor could he take physical action in response to the unfolding event. He did not impose any limitation on Reat's freedom to act. Rodriguez merely informed the victims, however incompetently, that to get help from the police, they would have to return to Denver. It cannot be said that any of Rodriguez's actions, as foolish as they were, "limited in some way the liberty of a citizen to act on his own behalf." *Graham v. Indep. Sch. Dist. No. I-89*, 22 F.3d 991, 995 (10th Cir. 1994).

Furthermore, Reat is unlike the victims in other state-created danger cases. He was not in the custody of the state in the way that prisoners are, and thus was not deprived in that manner of his freedom to act. Unlike children in school or under the care of social workers,

Reat and his companions were not incapable of acting in their own interest at the time of the shooting. Though the state-created danger doctrine itself may be clearly established, it is far from clear that it applies to Rodriguez's conduct in this particular situation.

In sum, all cases cited by Reat's Estate "are simply too factually distinct to speak clearly to the specific circumstances here." *Mullenix*, 136 S. Ct. at 312. No reasonable 911 operator could have known that these actions would have resulted in liability under the Fourteenth Amendment. Because we dispose of this case on the clearly-established prong of the qualified immunity test, we express no opinion as to whether Rodriguez's actions violated Reat's constitutional rights. Thus, our decision does not foreclose liability for similarly-situated actors in future cases. *See Pearson*, 555 U.S. at 242-43.

B. State Law Claims

Reat's Estate also asks us to exercise supplemental jurisdiction over related state law claims against Rodriguez. When we have held defendants are entitled to summary judgment on all federal claims, we have declined to exercise our supplemental jurisdiction over issues of state law, and instead, when in the interests of comity and justice, remanded with instructions to dismiss. *See Brooks v. Gaenzle*, 614 F.3d 1213, 1229-30 (10th Cir. 2010); *see also United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966). Accordingly, we decline to exercise jurisdiction over the remaining state law claims.

III. Conclusion

For the foregoing reasons, we REVERSE AND REMAND with instructions to DISMISS without prejudice the state law claims.

FootNotes

1. Only one circuit court has even considered imposing liability under the state-created danger doctrine on a 911 operator for conduct responding to an emergency call. *See Beltran v. City of El Paso*, 367 F.3d 299 (5th Cir. 2004) (finding operator was entitled to qualified immunity where she miscoded a 911 call, leading to the death of the child caller and her mother).

Filed 12/16/14

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO Judge Robert E. Blackburn

Civil Action No. 12–cv–02531–REB–MEH ESTATE OF JIMMA PAL REAT, et al., Plaintiffs,

v.

JUAN JESUS RODRIGUEZ, individually, Defendant.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Blackburn, J.

The matter before is defendant's Motion for Summary Judgment [#188],[1] filed September 26, 2014. I have jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 (federal question) and 1367 (supplemental jurisdiction). Having reviewed the motion and response and the apposite arguments, authorities, and evidence presented by the parties, and viewing the evidence in the light most favorable to plaintiffs, see Simms v. Oklahoma ex rel. Department of Mental Health and Substance Abuse Services, 165 F.3d 1321, 1326 (10th Cir.), cert. denied, 120 S.Ct. 53 (1999), it is apparent that there exist genuine disputes of material fact that are not appropriate for summary resolution.[2]
THEREFORE, IT IS ORDERED that defendant's Motion for Summary Judgment [#188], filed September 26, 2014, is DENIED.
Dated December 16, 2014, at Denver, Colorado.

BY THE COURT:

Footnotes

1 "[#188]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's case management and electronic case filing system (CM/ECF). I use this convention throughout this order.

2 The legal authority and analysis supporting my conclusion in this regard are fully expatiated in my Order Re: Recommendation of United States Magistrate Judge [#111], filed June 17, 2013, and those portions of the Recommendation of United States Magistrate Judge [#92], filed April 9, 2013, approved and adopted therein, and I therefore will not repeat them here. Suffice it to say that plaintiffs' evidence is sufficient to substantiate the allegations of their pleadings and create genuine disputes of material fact as to each element of their substantive due process claim against defendant. Defendant's motion does little more than presents his own version on the facts, which clearly is amenable to a less sanitized interpretation.

ESTATE OF JIMMA PAL REAT, JAMES PAL REAT, REBECCA AWOK DIAG, RAN PAL, CHANGKUOTH PAL, JOSEPH KOLONG,

Plaintiff,

v.

JUAN JESUS RODRIGUEZ, individually, and CITY AND COUNTY OF DENVER, Defendants.

United States District Court, D. Colorado.

June 17, 2013.

Attorney(s) appearing for the Case

Estate of Jimma Pal Reat, Plaintiff, represented by Anna C. Holland-Edwards, Holland Holland Edwards & Grossman, P.C., Erica Tick Grossman, Holland Holland Edwards & Grossman, P.C. & John R. Holland, Holland Holland Edwards & Grossman, P.C..

James Pal Reat, Plaintiff, represented by Anna C. Holland-Edwards, Holland Holland Edwards & Grossman, P.C., Erica Tick Grossman, Holland Holland Edwards & Grossman, P.C. & John R. Holland, Holland Holland Edwards & Grossman, P.C..

Rebecca Awok Diag, Plaintiff, represented by Anna C. Holland-Edwards, Holland Holland Edwards & Grossman, P.C., Erica Tick Grossman, Holland Holland Edwards & Grossman, P.C. & John R. Holland, Holland Holland Edwards & Grossman, P.C..

Ran Pal, Plaintiff, represented by Anna C. Holland-Edwards, Holland Holland Edwards & Grossman, P.C., Erica Tick Grossman, Holland Holland Edwards & Grossman, P.C. & John R. Holland, Holland Holland Edwards & Grossman, P.C..

Changkuoth Pal, Plaintiff, represented by Anna C. Holland-Edwards, Holland Holland Edwards & Grossman, P.C., Erica Tick Grossman, Holland Holland Edwards & Grossman, P.C. & John R. Holland, Holland Holland Edwards & Grossman, P.C..

Joseph Kolong, Plaintiff, represented by Anna C. Holland-Edwards, Holland Holland Edwards & Grossman, P.C., Erica Tick Grossman, Holland Holland Edwards & Grossman, P.C. & John R. Holland, Holland Holland Edwards & Grossman, P.C..

Juan Jesus Rodriguez, Defendant, represented by Eric Michael Ziporin, Senter Goldfarb & Rice, LLC, Jennifer Fawn Kemp, Senter Goldfarb & Rice, LLC & Thomas Sullivan Rice, Senter Goldfarb & Rice, LLC.

ORDER RE: RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

ROBERT E. BLACKBURN, District Judge.

This matters before me are (1) the Recommendation of United States Magistrate Judge [#92],[1] filed April 09, 2013; (2) Plaintiffs' Partial Objection to Recommendation of United States Magistrate Judge Dated April 9, 2013 [Document 92] [#94], filed April 22, 2013; (3) defendant the City and County of Denver's Objection in Part to Recommendation of United States

Magistrate Judge [Docket No. 92] [#96], filed April 23, 2013; (4) Defendant Rodriguez's Objection in Part to United States Magistrate Judge's Recommendation [#97], filed April 23, 2013; and (5) Plaintiffs' Request for Hearing and Oral Argument on the Parties' Objections to Magistrate Recommendations [#108], filed May 23, 2013. I find that oral argument would not materially assist the court in resolving the issues inherent to the substantive motions, and therefore deny plaintiffs' request for same. Having reviewed *de novo* all portions of the recommendation to which objections have been filed, as required by 28 U.S.C. § 636(b), and having considered carefully the recommendation, objections, and applicable caselaw, I adopt the magistrate judge's recommendation in part and respectfully reject it in part as set forth more fully herein.

The magistrate judge recommends that plaintiffs' federal due process and equal protection claims be dismissed for failure to adequately allege plausible constitutional violations. With respect to the latter, I agree, although not for the reasons stated by the magistrate judge. However, contrary to the magistrate judge's interpretation, I find and conclude that the First Amended Complaint contains allegations sufficient to plausibly suggest that Mr. Rodriguez knew that plaintiffs were African-American. *See Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1269 (10th Cir. 1989) (to state equal protection claim, plaintiffs must allege that defendant was motivated by racial animus).[2] Nevertheless, it fails to assert any plausible facts (as opposed to conclusory legal allegations) to suggest that plaintiffs were treated differently from other 911 callers because of their race. *Watson v. City of Kansas City, Kansas*, 857 F.2d 690, 696 (10th Cir. 1988). I

therefore find and conclude that both Mr. Rodriguez and the City are entitled to dismissal of this claim.

I disagree, however, with the magistrate judge's recommendation that plaintiffs' substantive due process claim be dismissed for failure to allege facts sufficient to plausibly suggest that defendant Rodriguez's actions are sufficiently shocking to the conscience to state a claim under the "state-created danger" test.[3] *See Gray v. University of Colorado Hospital Authority*, 672 F.3d 909, 921 (10th Cir. 2012). Admittedly, this standard sets a lofty bar, "requir[ing] a high level of outrageousness." *Uhlrig v. Harder*, 64 F.3d 567, 574 (10th Cir. 1995), *cert. denied*, 116 S.Ct. 924 (1996). Nevertheless, reviewing the allegations of the First Amended Complaint, and cognizant of the appropriate standard of review applicable to motions under Fed. R. Civ. P. 12(b)(6),[4] I must agree with plaintiffs that they have plausibly asserted a claim for violation of their rights to substantive due process under this theory of liability.

As the magistrate judge noted, courts generally apply a standard akin to deliberate indifference in determining whether a particular course of conduct was conscience shocking. *See County of Sacramento v. Lewis*, 523 U.S. 833, 850, 118 S.Ct. 1708, 1718, 140 L.Ed.2d 1043 (1998). Yet the Supreme Court has cautioned that this standard is fluid and fact-specific and that "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another." *Id.* In particular, "[a]s the very term `deliberate indifference' implies, the standard is sensibly employed only when actual deliberation is practical." *Id.* Therefore, when officials act in emergent and rapidly developing circumstances,

the level of indifference necessary to shock the conscience is concomitantly higher:

In hyperpressurized environments, an intent to cause harm is usually required. In cases, however, where deliberation is possible and officials have the time to make unhurried judgments, deliberate indifference is sufficient to show conscience shocking behavior. In between these two extremes, there are cases in which a state actor is confronted with making something less urgent than a split-second decision but more urgent than an unhurried judgment. In such circumstances where a state actor must act with hurried deliberation to reach a decision in a matter of hours or minutes, a plaintiff must show that a defendant consciously disregarded a great risk of harm.

Hoover v. Beard, 248 Fed. Appx. 393, 395 (3rd Cir. Sept. 21, 2007) (citations and internal quotation marks omitted). *See also Schnurr v. Board of County Commissioners of Jefferson County*, 189 F.Supp.2d 1105, 1130 (D. Colo 2001).

Although noting that the 911 call lasted some 11 minutes before the shooting occurred, the magistrate judge focused on the last three minutes of that critical period — after Mr. Rodriguez learned that the assailants had brandished a gun during the initial attack. The magistrate judge concluded that this period of time was so brief and so chaotic that Mr. Rodriguez did not have adequate time to deliberate. He thus found that Mr. Rodriguez's conduct did not meet the high level of outrageousness needed to state a claim where emergent circumstances exist.

I find no principled reason to artificially cabin Mr. Rodriguez's conduct in this manner in determining whether plaintiffs have stated a viable claim for relief. As set forth more fully below, Mr. Rodriguez's actions during the first eight minutes of the call allegedly created the circumstances which culminated in the subsequent tragedy. It cannot be the law that a state actor is entitled to the benefit of the heightened state of mind standard when he himself allegedly set in motion the series of events giving rise to the emergency.

Moreover, the facts alleged in the First Amended Complaint — illuminated by the transcript of the 911 call appended thereto and the disciplinary report referenced therein — plausibly suggest that Mr. Rodriguez did not subjectively believe that he was dealing with an emergency situation at any point during the call. *See Terrell v. Larson*, 396 F.3d 975, 980 (8th Cir. 2005) (key consideration in this context is defendant's subjective intent, i.e., "whether [he] subjectively believed that [he was] responding to an emergency."). *See also Burgin v. Leach*, 2012 WL 5906658 at *5 (N.D. Okla. Nov. 26, 2012). The very fact that Mr. Rodriguez did not dispatch a police officer to plaintiffs' location until *after* shots were fired supports a plausible inference that he perceived no emergency prior to that time.

Given the facts alleged in the First Amended Complaint, I find that the intermediate standard referenced above — whether Mr. Rodriguez "consciously disregarded a great risk of harm" — is the appropriate one by which to measure Mr. Rodriguez's conduct. *Hoover*, 248 Fed. Appx. at 395. These facts are sufficient to plausibly assert that this standard is met.

Plaintiffs assert that Mr. Rodriguez knew that plaintiffs had been assaulted at 10th Avenue and Sheridan Boulevard and that the attack was serious enough to have shattered the car's window. In his disciplinary report, Mr. Rodriguez acknowledged that he knew plaintiffs did not need to return to Denver in order to file a police report. Nevertheless, he sent them from their location of relative safety in Lakewood back south along Sheridan into Denver, despite having been informed that the assailants were headed northbound on Sheridan immediately after the attack. It is thus plausible to conclude from these allegations that Mr. Rodriguez's directions created a substantial risk that plaintiffs would re-encounter their attackers.[5]

The facts also plausibly suggest that Mr. Rodriguez consciously disregarded this risk. After directing plaintiffs to park in a conspicuous location on a major road on which he knew the attackers had been traveling just minutes before, Mr. Rodriguez then instructed plaintiffs to activate their hazard lights, making them even more visible and obvious than they already were at that early hour of the morning. He then learned that the attackers had brandished a gun during the initial altercation. Despite this knowledge, Mr. Rodriguez did not suggest that plaintiffs find a more discrete location, even within the city of Denver, or otherwise make their whereabouts less obvious. Most egregiously, Mr. Rodriguez did not dispatch a police officer to plaintiffs' location at any time until after Jimma Pal had been fatally shot.

I find and conclude that these factual allegations, accepted as true, are sufficiently shocking to the conscience to state a plausible claim for violation of

plaintiffs' substantive due process rights under the state-created-danger theory. My inquiry therefore must proceed to consider whether the unconstitutionality of that conduct was clearly established at the time of the underlying events. *See Novitsky v. City of Aurora*, 491 F.3d 1244, 1255-56 (10th Cir. 2007). I find that it was.

Mr. Rodriguez argues that there is no Tenth Circuit case suggesting liability under the particular facts of this case. His argument is too facile, however. "The law is clearly established either if courts have previously ruled that materially similar conduct was unconstitutional, or if a general constitutional rule already identified in the decisional law [applies] with obvious clarity to the specific conduct at issue." *Buck v. City of Albuquerque*, 549 F.3d 1269, 1290 (10th Cir. 2008) (quoting

United States v. Lanier, 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) (internal quotation marks omitted; alteration in original)). *See also Casey v. City of Federal Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007) ("The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.") (citation and internal quotation marks omitted). In fact, the viability of the danger creation theory of substantive due process liability has been clearly established in this Circuit for many years. *See Kuyper v. Board of County Commissioners of Weld County*, 2010 WL 1287534 at *9 (D. Colo. March 30, 2010). Thus, the relevant question for present purposes is whether "a reasonable state official would have known [at the time of the events in question] that

reckless, conscience shocking conduct that altered the status quo and placed a [plaintiff] at substantial risk of serious, immediate, and proximate harm was unconstitutional." *Currier v. Doran*, 242 F.3d 905, 924 (10th Cir.), *cert. denied*, 122 S.Ct. 543 (2001).

Based on the facts alleged in the First Amended Complaint, I find that this standard is met here. Through his affirmative acts, Mr. Rodriguez sent plaintiffs from a position of relative safety back into the zone of danger from which they had escaped just minutes before. Aware that the assailants had been headed northbound on Sheridan Boulevard after the initial attack, Mr. Rodriguez instructed plaintiffs to stop their car at a major intersection less than 20 blocks north and make themselves even more conspicuous at a time of night when there was unlikely to be much other traffic on the road in any event. Most glaringly, knowing that the driver was injured and that the assailants had a gun, he failed to send help to the scene until after the tragedy was *fait accompli*. Although qualified immunity provides "ample room for mistaken judgments," *Malley v. Briggs*, 475 U.S. 335, 343, 106 S.Ct. 1092, 1097, 89 L.Ed.2d 271 (1986), I cannot say that "reasonable officials in the same situation as the defendant[] could disagree on the appropriate course of action to follow," *Whitington v. Lawson*, 2009 WL 3497791 at *3 (D. Colo. Oct. 29, 2009), *aff'd*, 424 Fed. Appx 777 (10th Cir. June 1, 2011). I therefore reject the magistrate's judge's recommendation as to this aspect of plaintiffs' substantive due process claim and thus will deny Mr. Rodriguez's motion to dismiss that claim.[6]

Having found that plaintiffs failed to plead a constitutional injury, the magistrate judge

recommended that plaintiffs' second cause of action against the City of Denver be dismissed. *See Wilson v. Meeks*, 98 F.3d 1247, 1255 (10th Cir. 1996) ("A municipality may not be held liable where there was no underlying constitutional violation by any of its officers."). Because I have found otherwise, I must consider the City's other substantive arguments. *See Moss v. Kopp*, 559 F.3d 1155, 1169 (10th Cir. 2009) (municipality cannot be held liable based merely on underlying constitutional violation by one of its officers); *see also Brown v. Montoya*, 662 F.3d 1152, 1164 (10th Cir. 2011) ("Section 1983 does not authorize liability under a theory of *respondeat superior*.").

Plaintiffs assert that the First Amended Complaint states a viable claim under 42 U.S.C. § 1983 against the City for failure to train and supervise Mr. Rodriguez. Specifically, they allege that the City maintains a

longstanding widespread deliberately indifferent dangerous custom, habit, practice and/or policy for emergency communications operators to refuse to timely dispatch units where the victims are safely located, and instead direct them to go back into city limits in the proximity of where the attackers were known to have just been, or even instruct the callers to remain at scenes known to have involved crimes against persons[.]

(First Am. Compl. ¶ 169 at 31 [#59], filed December 21, 2012.) "A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick v. Thompson*, ___ U.S. ___, 131 S.Ct. 1350, 1359, 179 L.Ed.2d 417 (2011). In this context, plaintiffs must allege facts sufficient to suggest

that the failure to train "amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 1204, 103 L.Ed.2d 412 (1989). Deliberate indifference is established only "when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights." *Connick*, 131 S.Ct. at 1360.

Plaintiffs allege that the allegedly unconstitutional practice of the city has been in effect since "at least the 1980s" and point to three incidents in which 911 callers who had been attacked were told to return to the city limits in order to file a police report. (First Am. Compl. ¶¶ 99-105 at 18-19.) *See Connick*, 131 S.Ct. at 1360 ("A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train.") (internal citation and quotation marks omitted). To the extent that three incidents spread over a period of 20 or more years can be said to constitute a "pattern," I am unpersuaded that these incidents sufficiently allege the existence of a policy or custom such as plaintiffs suggest. In two of these incidents, although the callers allegedly were instructed to return to Denver, there is no allegation that they were specifically told to return to the scene of the attack or otherwise reenter the zone of danger.[7] In the third — a 2011 incident in which a woman reported a road range incident and protested after being told to pull over immediately to await police officers — there is no allegation suggesting that the 911 operator's directive was intended to require the caller to remain within the city limits.

This leaves plaintiffs to rely exclusively on their allegations regarding Mr. Rodriguez's own deficiencies as a 911 operator. In addition to Mr. Rodriguez's shortcomings in connection with the events underlying this case, plaintiffs allege that Mr. Rodriguez exhibited similar deficiencies in performance in relation to an incident in February 2012. In that instance, although the caller reported that he had just choked his mother's boyfriend to death, Mr. Rodriguez failed to appreciate the seriousness of the situation, asking largely irrelevant questions and failing to queue the call for over five minutes. In addition, after directing the caller to leave the house to confirm the street address, Mr. Rodriguez then directed him to return to the house to perform CPR on the victim, without any appreciation of the potential for further violence. Mr. Rodriguez received a verbal reprimand in connection with this incident. (First Am. Compl. ¶¶ 114-126 at 20-22.)

Accepting these allegations as true, I do not believe they sufficiently plead a claim that "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *City of Canton*, 109 S.Ct. at 1205. For one thing, the fact that Mr. Rodriguez was reprimanded for his conduct in connection with the February 2012, call supports the inference that the City's official policy was contrary to that which plaintiffs allege. Moreover, the fact that he was reprimanded implies that he was counseled and thus aware that it was *not* the policy of the City of Denver to require 911 callers to return to the scene of the crime in order to give a report. "That a particular officer may be unsatisfactorily trained will

not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program." *Id.* at 1206.

Moreover, nothing alleged in the First Amended Complaint comes close to suggesting that the need for more or better training was obvious in light of Mr. Rodriguez's past lapses. There is no allegation or other indication that the February 2012, incident actually resulted in a violation of anyone's constitutional rights. Without such an allegation, the fact that Mr. Rodriguez — or any other 911 operator — sent a caller back into the City of Denver or back to the vicinity of the crime is irrelevant in terms of the deliberate indifference inquiry. A constitutional violation in the air does not make out a viable allegation of deliberate indifference. City officials could not have had actual or constructive notice that such incidents were likely to violate the constitutional rights of 911 callers.[8] *See Ross v. Town of Austin, Indiana*, 343 F.3d 915, 918 (7th Cir. 2003) ("[Section] 1983 imposes upon municipalities no constitutional duty to provide law enforcement officers with advanced, specialized training based upon a general history of criminal activity in the community. . . . [D]eliberate indifference does not equate with a lack of strategic prescience."). Plaintiffs' claim against the City therefore is properly dismissed.

THEREFORE, IT IS ORDERED as follows:

1. That the Recommendation of United States Magistrate Judge [#92], filed April 9, 2013, is ADOPTED IN PART and respectfully REJECTED IN PART as follows:

a. That the recommendation is REJECTED insofar as it recommends dismissing plaintiffs' substantive due process claims against Mr. Rodriguez under the state-created-danger theory; b. That the recommendation is REJECTED also to the extent it recommends that plaintiffs' claims against the City and County of Denver should be dismissed for failure to prove an underlying constitutional violation based on the alleged violation of plaintiffs' rights of substantive due process under a danger creation theory; and c. That in all other respects, the recommendation is APPROVED AND ADOPTED as an order of this court;

2. That Plaintiffs' Request for Hearing and Oral Argument on the Parties' Objections to Magistrate Recommendations [#108], filed May 23, 2013, is DENIED;

3. That Plaintiffs' Partial Objection to Recommendation of United States Magistrate Judge Dated April 9, 2013 [Document 92] [#94], filed April 22, 2013, is SUSTAINED IN PART and OVERRULED IN PART, as follows:

a. That the objection is SUSTAINED insofar as it is directed to the magistrate judge's recommendation that plaintiffs' substantive due process claim against Mr. Rodriguez under the danger creation theory be dismissed; and b. That in all other respects, the objection is OVERRULED;

4. That the objections stated by the defendant, the City and County of Denver, in its Objection in Part to Recommendation of United States Magistrate Judge

[Docket No. 92] [#96], filed April 23, 2013, are OVERRULED;

5. That the objections stated in Defendant Rodriguez's Objection in Part to United States Magistrate Judge's Recommendation [#97], filed April 23, 2013, are OVERRULED;

6. That defendant Rodriguez's Motion To Dismiss Substituted Amended Complaint [#66], filed January 2, 2013, is GRANTED IN PART and DENIED IN PART as follows:

a. That the motion is GRANTED with respect to plaintiffs' substantive due process claim insofar as that claim is based on the allegation of a special relationship between plaintiffs and Mr. Rodriguez; b. That the motion is GRANTED further with respect to plaintiffs' equal protection claim; and c. That in all other respects, the motion is DENIED;

7. That plaintiffs' claims for violation of their rights to equal protection and to substantive due process, insofar as that claim is based on the allegation of a special relationship between plaintiffs and Mr. Rodriguez, are DISMISSED WITHOUT PREJUDICE;

8. That defendant the City and County of Denver's Motion To Dismiss [#62], filed December 24, 2012, is GRANTED;

9. That the claims of the plaintiffs against the City and County of Denver are DISMISSED WITHOUT PREJUDICE;

10. That at the time judgment enters, judgment SHALL ENTER as follows:

a. On behalf of defendant, Juan Jesus Rodriguez, individually, against plaintiffs, Estate of Jimma Pal Reat; James Pal Reat; Rebecca Awok Diag; Ran Pal, Changkuoth Pal; and Joseph Kolong, as to plaintiffs' claims for violation of their rights to equal protection and to substantive due process, insofar as that claim is based on the allegation of a special relationship between plaintiffs and Mr. Rodriguez; provided, that the judgment as to these claims shall be without prejudice; and b. On behalf of defendant, The City and County of Denver, against plaintiffs, Estate of Jimma Pal Reat; James Pal Reat; Rebecca Awok Diag; Ran Pal, Changkuoth Pal; and Joseph Kolong, as to plaintiffs' claims against the City; provided, that the judgment as to this claim shall be without prejudice; and

11. That defendant, the City and County of Denver, is DROPPED as a named party to this action, and the case caption AMENDED accordingly.

FootNotes

1. "[#92]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's electronic case filing and management system (CM/ECF). I use this convention throughout this order.

2. The magistrate judge concluded to the contrary. However, the First Amended Complaint alleges that the caller, plaintiff Ran Pal, speaks with a distinct accent that positively identifies him as African.

Although the magistrate judge noted that Ran Pal's name, phonetically, is not distinctively African (and apparently sounds like "Rand Paul"), Mr. Rodriguez asked Pal to spell his name, which he did.

3. The magistrate judge also concluded that plaintiffs failed to allege a plausible claim for violation of their substantive due process rights under the "special relationship" theory of liability. I agree with the magistrate judge's conclusion that the facts alleged in the First Amended Complaint do not set forth a plausible claim that Mr. Rodriguez restrained plaintiffs' liberty in a manner that would invoke this theory of liability. *See Armijo v. Wagon Mound Public School*, 159 F.3d 1253, 1261 (10th Cir. 1998). *See also Gray* 672 F.3d at 924 (special relationship requires proof of "state action involving force, the threat of force, or a show of authority, with the intent of exercising dominion and control over the person"). *See also Thornton v. City of Pittsburgh*, 777 F.Supp.2d 946, 953-54 (W.D. Pa. 2011); *Ireland v. Jefferson County Sheriff's Department*, 193 F.Supp.2d 1201, 1217-18 (D. Colo. 2002); *Park v. City of Atlanta*, 938 F.Supp. 836, 842-43 (N.D. Ga. 1996), *rev'd on other grounds*, 120 F.3d 1157 (11th Cir. 1997). The motion to dismiss on this basis therefore will be granted.

4. Pursuant to the dictates of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562, 127 S.Ct. 1955, 1969, 167 L.Ed.2d 929 (2007), I review the complaint to determine whether it "`contains enough facts to state a claim to relief that is plausible on its face.'" *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Twombly*, 127 S.Ct. at 1974). Although I must accept all well-pleaded factual allegations of the complaint as true, *McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 997 (10th Cir. 2002), mere "labels and

conclusions or a formulaic recitation of the elements of a cause of action" will not be sufficient to defeat a motion to dismiss, *Ashcroft v. Iqbal*, 556 U.S. 662, ___, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (citations and internal quotation marks omitted). To meet the plausibility standard, the complaint must suggest "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 129 S.Ct. at 1949. For this reason, the complaint must allege facts sufficient to "raise a right to relief above the speculative level." *Kansas Penn Gaming v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011) (quoting *Twombly*, 127 S.Ct. at 1965).

The nature and specificity of the allegations required to state a plausible claim will vary based on context and will "require[] the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S.Ct. at 1950; *see also Kansas Penn Gaming*, 656 F.3d at 1215. Nevertheless, the standard remains a liberal one, and "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Dias v. City and County of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) (quoting *Twombly*, 127 S.Ct. at 1965) (internal quotation marks omitted).

5. Indeed, Mr. Rodriguez acknowledged during the call that the assailants might return.

6. Concomitantly, I agree with that portion of the magistrate judge's recommendation suggesting the plaintiffs have pled facts sufficient to suggest that Mr. Rodriguez's conduct was willful and wanton, thus denying him the protections of the Colorado Governmental Immunity Act. His motion to dismiss the state law claims therefore will be denied.

7. For similar reasons, the allegation that a former Denver 911 dispatch trainer "has publicly stated that callers who are outside the city "are routinely told to go back to Denver" does not speak with sufficient specificity to the allegation that callers are told to return to city limits regardless of the danger doing so might present. (*See* First Am. Compl. ¶ 106 at 19.)

8. Nor are the factual circumstances of the two calls implicating Mr. Rodriguez, although certainly reflecting poorly on his judgment in general, sufficiently similar to assert a plausible claim that the City of Denver was deliberately indifferent for failure to train.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 12-cv-02531-REB-MEH

ESTATE OF JIMMA PAL REAT;
JAMES PAL REAT;
REBECCA AWOK DIAG;
RAN PAL;
CHANGKUOTH PAL;
JOSEPH KOLONG;

Plaintiffs,

v.

JUAN JESUS RODRIGUEZ, individually, and;
CITY AND COUNTY OF DENVER;

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Michael E. Hegarty, United States Magistrate Judge.

Pending before the Court are a Motion to Dismiss [filed December 24, 2012; docket #62] filed by Defendant City and County of Denver (hereinafter "the City") and a Motion to Dismiss Substituted

Amended Complaint [filed January 3, 2013; docket #66] filed by Defendant Juan Jesus Rodriguez (hereinafter "Mr. Rodriguez"). Pursuant to 28 U.S.C. § 636(b)(1)(B) and D.C. Colo. LCivR 72.1C, the Motions are referred to this Court for recommendation. (Dockets ## 63,67.) After the Motions were fully briefed, the Court heard oral argument on February 26, 2013. (Docket #83.) For the reasons set forth below, the Court respectfully RECOMMENDS that the City's Motion [filed December 24, 2012; docket #62] be **GRANTED** and that Mr. Rodriguez's Motion to Dismiss Substituted Amended Complaint [filed January 3, 2013; docket #66] be **GRANTED IN PART** and **DENIED IN PART** as stated herein.[1]

BACKGROUND

I. Allegations of Fact

[1] Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72. The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *In re Garcia*, 347 F. App'x 381, 382-83 (10th Cir. 2009).

The following are factual allegations (as opposed to legal conclusions, bare assertions or merely conclusory allegations) made by the Plaintiffs in their Substituted First Amended Civil Rights Complaint with Request for Trial by Jury [docket #59] ("First Amended Complaint") and presented in the Transcript of Recording of 911 Operator [docket #59-1] ("the Transcript") attached to the First Amended Complaint. *See Oxendine v. Kaplan*, 241 F.3d 1272, 1275 (10th Cir. 2001) (allowing courts to consider documents attached to the pleading as exhibits). Both are taken as true for analysis under Fed. R. Civ. P. 12(b)(6) pursuant to *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court also considers the audio recording of the 911 phone call ("the Recording") filed as conventionally submitted material in conjunction with the First Amended Complaint. (Docket #60.)

A. 911 Call

Plaintiffs' claims arise from a 911 telephone call placed by Ran Pal in the early morning hours of April 1, 2012, to report an incident of harassment. Mr. Rodriguez, a 911 operator, answered the call by asking for the address of the emergency.[2] Ran Pal told Mr. Rodriguez that he was at 10th and Sheridan when

[2] In describing the 911 call, the Court relies primarily on the Transcript provided by Plaintiffs with their First Amended Complaint. Though Plaintiffs' First Amended Complaint presents the facts in a slightly different order, the Court must assess the constitutionality of Mr. Rodriguez's conduct in light of what he knew at the time he acted or failed to act. *See DeShaney v. Winnebago County Dept. of Soc. Serv.*, 489 U.S. 189, 202 (1989) (rejecting hindsight considerations in due process analysis).

somebody had "busted [his] vehicle" and sped off. (Docket #59-1, 1.) Mr. Rodriguez asked a second time for Ran Pal's location. (*Id.*) Ran Pal stated he was trying to get home and recover because he had been "hit with a bunch of shards." (*Id.*)

Mr. Rodriguez told Ran Pal that "he need[ed] to have an officer go take a report," and asked a third time for Ran Pal's location so he could send an officer out to meet him. (*Id.*) Ran Pal provided an address in Lakewood, and Mr. Rodriguez sought further clarification regarding the location of the incident. (*Id.* at 2.) After Ran Pal reported that he had been traveling northbound on Sheridan, Mr. Rodriguez indicated that "[they] needed [Ran Pal] to be inside of Denver so [they] could send an officer out." (*Id.* at 2-3.) Ran Pal informed Mr. Rodriguez that he had just pulled in at his brother's house at 5992 West 29th Avenue, which was outside of Denver. (*Id.* at 3.) Mr. Rodriguez stated, "I need to you come back into Denver so we can make a report." (*Id.*) Ran Pal asked where he needed to go, and Mr. Rodriguez said, "as long as you're on the [] east side of Sheridan, that's Denver." (*Id.*)

Ran Pal expressed that he was in shock because he had been hit with a bottle. (*Id.*) Hoping to recover, Ran Pal told Mr. Rodriguez that he did not want to drive and asked whether Mr. Rodriguez could send someone over to his location to take the report. (*Id.*) Mr. Rodriguez reiterated "[he] needed [Ran Pal] to come into Denver to take a report because [the police] can't go outside of Denver." (*Id.* at 4.)

Once Ran Pal agreed to return to Denver, Mr. Rodriguez asked, "can you come back or do you want to--?" (*Id.*) Ran Pal stated, "Yeah, I'm gonna come back." (*Id.*) Mr. Rodriguez inquired as to whether Ran

Pal was "going to start coming back right now...or come back in a while?" (*Id.*) Ran Pal clarified that he was "coming back right now" and asked whether Mr. Rodriguez would stay on the phone with him. (*Id.*)

Approximately three minutes and thirty seconds into the phone call, Mr. Rodriguez asked Ran Pal what happened. (*Id.* at 5.) Ran Pal explained that "[they] were just driving along, just trying to come to [his] brother's house[,]...[a]nd this red Jeep pulled up next to [them] and then [they] caught up to them at [] a red light[.]" (*Id.*) Ran Pal told Mr. Rodriguez that the occupants of the red Jeep "threw a bottle right though [his] windshield, like the back one...[and] shattered it and came and hit [him] on [his] right hand -- on [his] right side...on [his] face." (*Id.*)

Mr. Rodriguez asked for a description of the vehicle, and Ran Pal described his efforts to "catch up with them and get their [] license plate." (*Id.* at 5-6.) Ran Pal explained that the red Jeep "was going through lights, heading north [] on Sheridan," and that he could not catch the last digit because "they were trying just to escape...and they were throwing -- [.]" (*Id.* at 6.) In attempting to recall what the occupants of the red Jeep were throwing, Ran Pal interjected, "[o]h, I'm in shock. I'm in shock, boy. I'm bleeding, dog." (*Id.*) Ran Pal then stated that "they were throwing bottles [and] [t]hey also threw like bottle rockets." (*Id.*)

The conversation returned to Ran Pal's location. Ran Pal told Mr. Rodriguez that he was crossing Sheridan and heading eastbound on 29th. (*Id.* at 7.) Mr. Rodriguez asked where Ran Pal was going to stop and what kind of vehicle he was driving. (*Id.*) Ran Pal told him he was driving a white Dodge Charger and would stop at the east corner of 29th and Sheridan. (*Id.*)

Once the car was parked at 29th and Sheridan, Mr. Rodriguez asked whether Ran Pal needed an ambulance. (*Id.*) Initially, Ran Pal thought he was bleeding; however, he quickly reported that what he thought was blood was actually his energy drink. (*Id.* at 7-8.) Mr. Rodriguez told Ran Pal to stay on the phone and began to gather additional information about the incident, including when it occurred, who was in the vehicle, and whether anyone else needed an ambulance. (*Id.* at 8.) Ran Pal told Mr. Rodriguez that his brother, cousin, and friend were with him, but that none of them needed medical assistance. (*Id.*)

Approximately eight minutes and five seconds into the call, while Mr. Rodriguez was confirming the license plate information, Ran Pal told him that he believed the occupants of the red Jeep had a gun. (*Id.* at 9.) Mr. Rodriguez attempted to elicit information about the gun, including its color and type. (*Id.*) Ran Pal described the weapon as a black handgun. (*Id.*) Mr. Rodriguez asked whether Ran Pal knew the occupants of the red Jeep, and Ran Pal replied that he did not. (*Id.*) Mr. Rodriguez requested a more detailed description of the occupants of the red Jeep, including their race and what they were wearing. (*Id.* at 10.) Ran Pal recalled that there were four or five Hispanic men, one of whom was wearing red. (*Id.*) Ran Pal explained that the men got out of the car and were throwing forty-ounce beer bottles when one of the men pulled out a gun. (*Id.*) Mr. Rodriguez asked whether the occupants of the red Jeep appeared to be under the influence of drugs or alcohol. (*Id.*) Ran Pal speculated that they were drunk because they were throwing beer bottles. (*Id.* at 11.) Mr. Rodriguez then inquired as to whether Ran Pal or his passengers had

been drinking or using drugs, to which Ran Pal replied, "no sir." (*Id.*)

After receiving this information, Mr. Rodriguez instructed Ran Pal to wait at the east side of 29th and Sheridan and to turn his hazard lights on so the police could find him. (*Id.*) Another person picked up the phone and asked whether anyone was coming to help them. (*Id.*) Mr. Rodriguez responded, "Yeah, we're gonna send an officer out. I'm just getting some information from Ran. Can you put him back on?" (*Id.*) The new speaker explained that Ran was in shock because "it kinda happened quick [] and [they] didn't do nothing." (*Id.*)

At ten minutes and forty-three seconds into the call, Mr. Rodriguez indicated that he "got the call up." (*Id.* at 12.) When Ran Pal picked up the phone again, Mr. Rodriguez reiterated that he was sending an officer out and that he "need[ed] [Ran Pal] to wait there." (*Id.*) At Mr. Rodriguez's request, Ran Pal confirmed that the vehicle's hazard lights were activated. (*Id.*)

Eleven minutes and four seconds into the call, Mr. Rodriguez told Ran Pal that "if [he] s[aw] them come back, [he] need[ed] [Ran Pal] to call [him] right away at 911." (*Id.*) Seven seconds later, Ran Pal exclaimed "They're back, they're back[!]" Ran Pal handed the phone over to someone else, who told Mr. Rodriguez that "they're shooting." Ran Pal picked up the phone again and said, "My brother's down, my brother's down, man, he's down...he's down." (*Id.*) Mr. Rodriguez instructed Ran Pal to get away if he could. (*Id.*) Ran Pal repeated, "My brother's down, my brother's down...they hit Jimma, they hit Jimma...[t]hey hit Jimma." (*Id.* at 13.)

Amidst Ran Pal's shrieks, Mr. Rodriguez asked what was happening and indicated he could not hear him. (*Id.*) Ran Pal told Mr. Rodriguez that "they shot Jimma" and then turned the phone over to someone else who repeated the information. (*Id.* at 13-14) Mr. Rodriguez asked where they were, who had been shot, and whether the red Jeep was still there. (*Id.* at 14.) The speaker indicated that his friend was about to die and asked whether Mr. Rodriguez would send an ambulance. (*Id.*) Mr. Rodriguez continued to ask questions regarding the identity of the victim and whether he was awake or breathing. (*Id.* at 16-17.)

Approximately fourteen minutes into the call, the speaker reported that police had arrived. (*Id.* at 17.) Mr. Rodriguez reiterated that help was coming and directed the speaker to talk to the police. (*Id.*) The call was terminated at fourteen minutes and forty-two seconds. (*Id.*) Thereafter, Ran Pal cradled Jimma Reat as he died. (Docket #59 at ¶ 74.)

B. Media Coverage

The City and County of Denver Police Department ("the Department"), through Captain Ron Saunier, initially told the Denver Post that "we're not sure what caused [the shooting]," but "at one point, riders from both vehicles were in the street exchanging words." (*Id.* at ¶ 90.) Captain Saunier further reported that he "[did]n't know if you would say it was a fight." (*Id.*) Plaintiffs believe these statements characterized the shooting as gang-related, and that Mr. Rodriguez may have "plant[ed] the idea of gang activity" in Captain Saunier's mind to divert attention away from his own misconduct. (*Id.* at ¶ 91.)

Less than a day later, the City began publicly apologizing in all media outlets for the 911 conduct of Mr. Rodriguez. (*Id.* at ¶ 92.) Captain Saunier, on behalf the Department, categorically renounced speculation that the shooting was gang-related. (*Id.*) The Denver Post quoted Captain Saunier as stating, "There is no indication that the Sunday shooting was gang- related ... and none of those in the car that was fired on were gang members." (*Id.*) In a news release after the shooting, the Department indicated that Mr. Rodriguez was aware of the gun during the call by stating, "One of the occupants of the Jeep threw a bottle at the rental vehicle, breaking the rear window and one brandished a gun." (*Id.* at ¶ 93.)

C. Disciplinary Action

1. *April 1, 2012 Incident*

In addition to publicly apologizing, the City also acted internally to discipline and ultimately terminate Mr. Rodriguez. The termination documents authored by 911 Director Carl Simpson detail the various problems with Mr. Rodriguez's conduct during the call, including his instructions to Ran Pal and his communications with dispatch. As set forth in the First Amended Complaint, Director Simpson found that:

> [Mr Rodriguez] directed the caller to return to the city. The male caller then, reluctantly, drove back within Denver City limits, parked his vehicle with hazard lights on, at 29th and [S]heridan, [and] waited for officers to arrive. While the caller and the passengers in his car

> waited, per [Mr. Rodriguez's] instructions, the other vehicle involved in the altercation passed though the intersection, saw the caller's vehicle and opened fire, shooting and killing the caller's brother.

(*Id.* at ¶ 60.) Along with Director Simpson's findings, the Manager of Safety's office created a time line documenting Mr. Rodriguez's communications with dispatch. The time line shows that, despite learning of the damaged vehicle and the caller's injury and shock within the first three minutes of the call, Mr. Rodriguez did not send the call to the dispatch queue until seven minutes and nineteen seconds had elapsed. Mr. Rodriguez improperly coded the call as "Criminal Mischief." (*Id.* at ¶ 69.) In light of Mr. Rodriguez's knowledge of the injuries sustained by the caller, Mr. Rodriguez should have initially categorized the call as a criminal assault. (*Id.*)

Approximately a minute after sending the call to the queue, Mr. Rodriguez learned that a gun was involved; however, he did not update the report with this information. (*Id.* at ¶¶ 69, 80.) According to the City, there was an existing incident under investigation by the Department at 10th and Sheridan with officers deployed from a "Shots Fired" call while Mr. Rodriguez was on the phone with Ran Pal. (*Id.* at ¶ 82.) Mr. Rodriguez did not append the call. (*Id.*) The first police unit was not assigned until approximately one minute after the shooting occurred. (*Id.* At ¶ 69.) The ambulance was dispatched three minutes after the police unit was assigned and arrived on the scene about six minutes later. (*Id.*)

In discussing the failures with Mr. Rodriguez, Director Simpson observed that "during the first seven minutes of the call, the caller stated six separate times that he was injured, in shock, didn't want to drive, and needed to recover." (*Id.* at ¶ 84.) Though Mr. Rodriguez acknowledged that he understood, he "did not ask the caller to pull over, send him an ambulance and triage the call per the EMD protocol policy." (*Id.*) Mr. Rodriguez also admitted that he knew the assailants "were throwing bottle rockets at them" and that Ran Pal reported that "he was covered in shards of glass." (*Id.* at ¶ 87.)

Ultimately, Director Simpson concluded that Mr. Rodriguez "showed a blatant disregard for the caller's health and safety in [his] quest to have the caller return to Denver city limits, when he actually parked at one point only seven and a half blocks outside the city limits." (*Id.* ¶ 94.) As a result, Mr. Rodriguez "wasted crucial minutes and compromised public safety by instructing the caller to return to the city." (*Id.*) Director Simpson went on to criticize Mr. Rodriguez's delay in queuing the call for dispatch, noting that "[i]t was only after the caller told [Mr. Rodriguez] that he was at 29th and Sheridan and on the east side of the intersection that [he] created an incident for dispatch," while "all the while discounting any injuries to the occupants of the caller's vehicle by [his] failure to enter comments in the CAD incident relating to the assault and injury." (*Id.*)

2. *February 2012 Incident*

Upon announcing Mr. Rodriguez's dismissal, Director Simpson noted that the precipitating call was

not the first Mr. Rodriguez had mishandled. (*Id.* at ¶ 113.) In February 2012, Mr. Rodriguez received a 911 call from a person who claimed he may have choked his mother's boyfriend to death after the boyfriend had been violent toward the caller's mother. (*Id.* at ¶ 115.) Specifically, the February 2012 caller stated, "I choked him out and I think I killed him ... I think he is deceased." (*Id.* at ¶ 116.) The caller explained that he was "in a really, really stressed situation" and that "his mind [was] racing really fast..." (*Id.* at ¶ 117.) Despite these statements, Mr. Rodriguez directed the caller to go out into the street to get the exact address. (*Id.* at ¶ 118.) According to the City, this instruction was unnecessary since Mr. Rodriguez already had enough information with the intersections to complete the address verification. (*Id.*)

The City further found that Mr. Rodriguez "did not demonstrate any urgency to process that information," and that the call should have been sent to the dispatch queue within 60 seconds. (*Id.* at ¶ 119.) Instead, it took Mr. Rodriguez over five minutes to process the call. (*Id.*) As stated by the City, "[w]ithout acknowledging the criminality of the statement," Mr. Rodriguez "embarked on the medical triage aspect of the interview" by asking a number of questions about the victim and directing the caller to "perform CPR." (*Id.* at ¶ 120.) The City found that "[a]t no point in the conversation did [Mr. Rodriguez] actively listen to what the caller had to say or appear to understand that a homicide had occurred and that scene safety was paramount." (*Id.* at ¶ 121.) Instead, Mr. Rodriguez "repeatedly harangued the caller with questions and appeared to have no appreciation for the caller's environment and his effort to assist [Mr. Rodriguez] with processing the call." (*Id.*)

In a disciplinary warning statement issued two months before the April 2012 incident, the City found that, in handling the February 2012 incident, Mr. Rodriguez "failed to address scene safety and the integrity of a crime scene ... Allowing the caller to return to the apartment could have resulted in further violence ...." (*Id.* at ¶ 122.) Though the City took no formal action against Mr. Rodriguez beyond a verbal reprimand, it informed Mr. Rodriguez that "[his] handling of [the February 2012] call demonstrates an inability to discern, based on [his] caller's comments, what type of situation [he] [was] dealing with when processing the call." (*Id.* at ¶ 123.) The City further noted that "in [Mr. Rodriguez's] attempt to get an exact location, [he] failed to demonstrate any urgency in finding out what happened, and in the process, dismissed the confession [he] [was] provided and failed to recognize the potential consequences of sending the caller back into the crime scene." (*Id.*)

D. The City's Policies and Practices

Plaintiffs assert that Mr. Rodriguez received no formal training or discipline following the February 2012 incident. They also allege that the City has failed to provide proper training to other 911 operators, resulting in the widespread mishandling of calls. Plaintiffs identify three such instances.

The first incident occurred "in the 1980s" when Denver 911 operators allegedly instructed several young boys who had been attacked in a McDonald's restaurant to return to Denver to meet with officers after the boys had reached a point of safety in Lakewood. (*Id.* at ¶ 99.) Similarly, in 2004, a woman called 911 to report an incident in which two men

pulled up next to her, threw things in her car, and used a baseball bat to hit her back windshield. (*Id.* at ¶ 100.) Though the woman was "hysterical," 911 operators directed her to return to Denver to make a report. (*Id.*) In describing the 2004 incident to the media, the City explained that if the caller is outside the city limits, "they will be told to return to make a report." (*Id.* at ¶ 101.) The third incident occurred last year, when a female called 911 to report a road rage confrontation wherein another driver "physically threatened [her] and reached into the car after he stopped at a green light." (*Id.* at ¶ 102.) The 911 operator told the caller to "pull over and wait for a Denver police officer." (*Id.* at ¶ 103.) The caller objected to the instruction "because the road rager could see [her] parked and [she] was in great danger." (*Id.* at ¶ 104.) Though the caller provided the license plate number and description of her attacker, the Denver 911 operator "was firm that this was [the] procedure." (*Id.* at ¶ 105.)

These incidents are underscored by remarks from former 911 dispatch trainer Lenny Rubner, who publicly stated that callers who are outside the city "are routinely told to go back to Denver ... [as] the overall policy is for them to go back into the jurisdiction to make a report." (*Id.* at ¶ 106.) According to CBS4, the City "has no specific policy about when to send a caller back to Denver when a crime has occurred." (*Id.* at ¶ 107.) Plaintiffs believe that Mr. Rodriguez's admitted failure to "put the call up regardless and have dispatchers or officers decide if they were going to go out there or not" is further evidence of the confusion created by Denver's policy, or lack thereof. (*Id.* at ¶¶ 110-110.) According to Mr.

Rodriguez, he "just got stuck on them being outside of Denver." (*Id.* at ¶ 112.)

II. Procedural History

Plaintiffs initiated this action pursuant to 28 U.S.C. § 1983 against Mr. Rodriguez and the City on September 24, 2012. The following day, the Court granted a joint motion to stay the action through October 3, 2012, pending settlement negotiations. (Docket #13.) In the interim, Plaintiffs filed an amended complaint[3] asserting five claims for relief: (1) violation of due process and equal protection under the Fourteenth Amendment against Mr. Rodriguez; (2) deliberately indifferent policies, practices, customs, training, supervision, ratification, and acquiescence against the City; (3) wrongful death against Mr. Rodriguez; (4) negligent infliction of emotional distress against Mr. Rodriguez; and (5) intentional infliction of emotional distress against Mr. Rodriguez. Plaintiffs Ran Pal, the Estate of Jimma Reat, Changkouth Pal, and Joseph Kolong ("the Passenger Plaintiffs") join in the first and second claims based on their status as passengers in the vehicle on April 1, 2012. Plaintiffs James Pal Reat and Rebecca Awok Diag are Jimma Reat's parents, and as such, participate only in the wrongful death claim. Ran Pal, Joseph Kolong, and Changkouth Pal assert the remaining claims as survivors of the April 1, 2012 attack.

Unable to reach an agreement during settlement negotiations, Defendants each moved to

[3] Due to the sensitive nature of the Transcript, Plaintiffs filed the pleading and exhibit under seal at Restriction Level 1. (Dockets ##31, 33.)

dismiss Plaintiffs' amended complaint on November 30, 2012. (Dockets ##45, 47.) In conjunction with their respective motions to dismiss, Defendants moved to stay discovery.[4] (Docket #46.) Shortly thereafter, Plaintiffs filed a Substituted First Amended Complaint, which differed from the amended complaint only in its unrestricted designation. (*See* docket #59 at 1, n.1.) In the interest of clarity, the Court accepted the pleading as filed and denied Defendants' motions to dismiss as moot. (Docket #61.)

Pursuant to the Court's instructions, the City filed the present Motion to Dismiss on December 24, 2012, and Mr. Rodriguez did likewise on January 3, 2013.[5] (Dockets ##62, 66.) Both motions were referred to this Court for recommendation. (Dockets ##63, 67.) Mr. Rodriguez's Motion to Dismiss asserts an entitlement to qualified immunity regarding Passenger Plaintiffs' Fourteenth Amendment claim and invokes the protections of the Colorado Governmental Immunity Act ("the CGIA") regarding Plaintiffs' state law claims. In its motion, the City contends that Plaintiffs have failed to state a claim for municipal liability.

APPLICABLE LEGAL STANDARD

[4] In its order on Defendants' motion to stay, the Court determined that (1) Plaintiffs could not seek any discovery from Mr. Rodriguez; and (2) Plaintiffs could seek limited discovery from the City pending the District Court's resolution of the Motions to Dismiss. (Docket #77.) Judge Blackburn overruled Mr. Rodriguez's partial objection to the Court's order on April 3, 2013. (Docket #89.)

[5] As permitted by the Court's December 21, 2012 minute order, the renewed Motions to Dismiss incorporate the original motions by reference. (*See* docket #61.)

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff pled facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* *Twombly* requires a two-prong analysis. First, a court must identify "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusions, bare assertions, or merely conclusory. *Id.* at 678-80. Second, the Court must consider the factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id.* at 681. "Thus, in ruling on a motion to dismiss, a court should disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if assumed to be true, plausibly suggest the defendant is liable." *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011).

Plausibility refers "to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) (quoting *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008)). "The nature and specificity of the allegations required to state a plausible claim will vary based on context." *Kansas Penn Gaming, LLC*, 656 F.3d at 1215. Thus, while the Rule 12(b)(6) standard does not require that a plaintiff establish a

prima facie case in a complaint, the elements of each alleged cause of action may help to determine whether the plaintiff has set forth a plausible claim. *Khalik*, 671 F.3d at 1191.

ANALYSIS

As noted above, Mr. Rodriguez asserts an entitlement to (1) qualified immunity regarding Passenger Plaintiffs' Fourteenth Amendment claim; and (2) sovereign immunity under the CGIA regarding Plaintiffs' state law claims. The Court will consider each category of claims in turn. After assessing the sufficiency of Plaintiffs' claims against Mr. Rodriguez and the strength of Mr. Rodriguez's corresponding immunity, the Court will determine whether Plaintiffs have stated a viable claim for municipal liability against the City.

I. Qualified Immunity

Though singularly asserted, Passenger Plaintiffs' first claim seeks relief under both the due process and equal protection provisions of the Fourteenth Amendment. Mr. Rodriguez contends that he is entitled to qualified immunity under all constitutional theories of recovery articulated in the First Amended Complaint.

Qualified immunity protects from litigation a public official whose possible violation of a plaintiff's civil rights was not clearly a violation at the time of the official's actions. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). It is an entitlement not to stand trial or face the other burdens of litigation. *Ahmad v. Furlong*, 435 F.3d 1196, 1198 (10th Cir. 2006) (internal

quotations and citations omitted). The privilege is an immunity from suit rather than a mere defense to liability. *Id.* When a defendant asserts the defense of qualified immunity, the burden shifts to the plaintiff to overcome the asserted immunity. *Riggins v. Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009). "The plaintiff must demonstrate on the facts alleged both that the defendant violated his constitutional or statutory rights, and that the right was clearly established at the time of the alleged unlawful activity." *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 818 (2009)).

The Supreme Court has discarded a review process that required courts to examine the elements of qualified immunity sequentially, first considering whether a right had been violated, and then second - if the court concluded a right had been violated - whether that right was clearly established at the time of the alleged violation. *Pearson,* 129 S. Ct. at 816-22. *Pearson* retired this process, instead affording courts the discretion to decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* at 818.

For purposes of dismissal under Fed. R. Civ. P. 12(b)(6), a right is clearly established if, at the time of the alleged violation, "the contours of the right were sufficiently clear that a reasonable officer would understand that what he [or she] is doing violates that right." *Christensen v. Park City Mun. Corp.*, 554 F.3d 1271, 1278 (10th Cir. 2009) (citations and internal quotations omitted). In the Tenth Circuit, "[a] plaintiff can demonstrate a constitutional right is clearly established by references to cases from the Supreme Court, the Tenth Circuit, or the weight of

authority from other circuits." *Id.* This standard is not satisfied simply by identifying generalized constitutional principles. *Kerns v. Bader*, 663 F.3d 1173, 1182 (10th Cir. 2011). Although a plaintiff need not present a case "directly on point," a district court may not deny immunity "unless existing precedent has placed the statutory or constitutional question *beyond* debate." *Id.* (emphasis in original).

The Court will consider first whether Passenger Plaintiffs have plausibly alleged a constitutional violation under either the Due Process or Equal Protection Clauses of the Fourteenth Amendment. Upon so finding, the Court will assess whether Passenger Plaintiffs' corresponding rights were clearly established at the time of the alleged violation.

A. Due Process Claim

As a general rule, the government's failure to provide protection "against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney*, 489 U.S. at 197. Nor does "[a] constitutional duty to protect on the part of the State [] arise 'from the State's knowledge of the individual's predicament or from its expressions of intent to help him.'" *Gray v. Univ. Colo. Hosp. Auth.*, 672 F.3d 909, 918 (10th Cir. 2012) (quoting *DeShaney*, 489 U.S. at 200). Though the State may impose duties upon its agents through common law tort principles, "the Due Process Clause of the Fourteenth Amendment ... does not transform every tort committed by a state actor into a constitutional violation." *DeShaney*, 489 U.S. at 202.

Relying on the Supreme Court's discussion in *DeShaney*, the Tenth Circuit has articulated two

exceptions to the general rule established therein. The first exception, known as the danger creation theory, provides for liability "where the State creates a dangerous situation for citizens of the free world or renders them more vulnerable to danger." *Gray*, 672 F.3d at 916 (citing *Graham v. Indep. Sch. Dist. No. 1-89*, 22 F.3d 991, 995 (10th Cir. 1994)). The second exception, known as the special relationship theory, recognizes that "when a the State takes a person into custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Gray*, 672 F.3d at 916-17 (quoting *DeShaney*, 489 U.S. at 199-200). Passenger Plaintiffs seek relief under both theories of liability.

1. *Danger Creation Theory*

As established in *Graham* and reiterated in *Gray*, "th[e] state-created danger doctrine *necessarily involves affirmative conduct* on the part of the state in placing the plaintiff in danger." *Gray*, 672 F.3d at 909 (quoting *Graham*, 22 F.3d at 995) (emphasis in *Gray*). The affirmative act requirement is a necessary precondition, but it does not end the inquiry. In the Tenth Circuit, a plaintiff alleging a due process violation under the danger creation theory must additionally demonstrate that (1) he or she was a member of a limited and specifically definable group; (2) the defendant's conduct put the plaintiff at risk of serious, immediate, and proximate harm; (3) the risk was obvious or known; (4) the defendant acted recklessly in conscious disregard of that risk; (5) such conduct, when viewed in total, is conscious-shocking; and (6) the defendant created the danger or increased

the plaintiff's vulnerability to the danger in some way. *Gray*, 672 F.3d at 921 (citing *DeAnzona v. City & Cnty. of Denver*, 222 F.3d 1229,1235 (10th Cir. 2000)) (explaining that the affirmative act and private violence requirements must not be supplanted by the six-part test). Essentially, "the key to the state-created danger cases ... lies in the state actor's culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of aid." *Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1263 (10th Cir. 1998).

As a threshold matter, Mr. Rodriguez denies that he engaged in any affirmative conduct that rendered the Passenger Plaintiffs more vulnerable to attack. In response, Passenger Plaintiffs identify what appear to be two categories of affirmative conduct: (1) Mr. Rodriguez's instructions to Ran Pal during the phone call; and (2) Mr. Rodriguez's alleged misrepresentations regarding forthcoming assistance from police. Because these are the same categories of conduct contemplated in and refuted by Mr. Rodriguez's Motion to Dismiss, the Court will focus its analysis on whether either or both constitute affirmative conduct.

A state agent's instructions to a private person qualify as "affirmative conduct" within the danger creation framework when such instructions effectively discourage the pursuit of either public or private sources of aid. *See Currier v. Doran*, 242 F.3d 905, 921 (10th Cir. 2001) (finding affirmative conduct where social worker instructed mother of abused children to "stop making allegations of abuse" such that mother declined to seek help from either child

protective services or the police). *Cf. Briggs v. Johnson*, 274 F. App'x 730, 735 (10th Cir. 2008) (concluding that "discouraging" reports of child abuse also qualifies as affirmative conduct). The same holds true when state officials instruct a person to seek help elsewhere or refuse to accept evidence of a crime. *See Estate of B.I.C. v. Gillen*, 702 F.3d 1182, 1188 (10th Cir. 2012) (affirming district court's recognition of "at least two affirmative acts" where social worker instructed grandparents of abused children to contact the police for information and refused to accept a CD of photographs showing the children's injuries). As the Tenth Circuit noted in *Gillen*, "a refusal is more than a mere failure to act." *Id.*

Mr. Rodriguez contends that his statements to Ran Pal and others do not qualify as affirmative acts because he gave Ran Pal the option of returning to Denver immediately or "com[ing] back in a while" to file the police report. (*See* docket #59-1 at 4.) According to Mr. Rodriguez, this sort of equivocation undermines Passenger Plaintiffs' contention that he acted affirmatively to bring them into Denver. Because Ran Pal knew he had the option of returning later and, nevertheless, chose to return immediately, Mr. Rodriguez disclaims any responsibility for the danger Passenger Plaintiffs subsequently encountered.

Passenger Plaintiffs proffer that Ran Pal was particularly inclined to follow instructions from authority figures in light of his upbringing and status as a refugee. While this may be true, the law does not account for these subjective factors. However, the Court sees sufficient objective reasons why a reasonable person in Ran Pal's position would have wanted to file a police report as soon as possible. As

the Court observed during oral argument, one of the primary objectives of a police report is to enable police to "catch the bad guys." As time passes, the likelihood of locating and apprehending the perpetrators decreases exponentially. In a case such as this where there has been property damage, a person's interests in locating the wrongdoer is especially strong. Beyond seeking compensation for the property damage, Ran Pal also had a reasonable interest in police intervention to prevent any ongoing violence. In either case, Ran Pal's urgency can be inferred from his request that Mr. Rodriguez send officers to his location in Lakewood. (*Id.* at 3.) When Mr. Rodriguez foreclosed this possibility, Ran Pal was theoretically left with two choices: to return immediately or "come back later." Given the host of circumstances described above, the latter choice was, at a minimum, considerably less appealing. In this sense, it is plausible that Mr. Rodriguez's decision to "cut off" the option of local assistance effectively channeled Ran Pal and the Passenger Plaintiffs back to Denver.

In the Court's view, Mr. Rodriguez's refusal to send officers to meet Ran Pal and his instructions to return to Denver plausibly constitute affirmative conduct insofar as they moved the Passenger Plaintiffs away from the safety of their apartment toward an area where they were more susceptible to being seen and re-assaulted by their assailants. *See Gillen*, 702 F.3d at 1188. As seen in *Currier* and *Briggs*, instructions need not amount to commands in order to qualify as affirmative conduct. *See Currier*, 242 F.3d at 921; *Briggs*, 274 F. App'x at 735. If discouragement is sufficient to trigger danger creation liability, the same must be true of its equally suggestive antonym. *See id.* Thus, even if Ran Pal was not theoretically

required to follow Mr. Rodriguez's instructions to drive to Denver, park, and turn on his hazard lights, the fact that Mr. Rodriguez encouraged him to do so is enough to plausibly satisfy the affirmative conduct requirement of Passenger Plaintiffs' danger creation theory.

Passenger Plaintiffs also allege affirmative conduct arising from Mr. Rodriguez's representations that the police had been sent to meet Passenger Plaintiffs at 10th and Sheridan. In so arguing, Passenger Plaintiffs rely heavily on Judge Brimmer's decision in *Kuyper v. Board of County Commissioners of Weld County*, No. 09-cv-00342-PAB-MEH, 2010 WL 1287534 (D. Colo. March 30, 2010), wherein Judge Brimmer declined to dismiss the danger creation claim of a parent whose child was sexually assaulted by a foster child after the state misrepresented the foster child's history of sexual misconduct. In the Court's view, this reliance is misplaced.

First, to the extent *Kuyper* stands for the proposition that a state official may be liable for misrepresentations which create or increase the danger of private citizens, it would nevertheless fail to provide Mr. Rodriguez with sufficient notice that his conduct violated clearly established law. *See Christensen*, 554 F.3d at 1278. More significantly, the Court questions the persuasive value of *Kuyper* in this case in light of the Tenth Circuit's decision in *Gray*. In *Gray*, the Tenth Circuit held that misrepresentations regarding the provision of government services, *even when made as a matter of policy*, do not violate the Constitution. 672 F.3d at 925 (finding "no constitutional implications" and no affirmative conduct where state actors are "aware of the risk, expressly promise[] to eliminate the risk, and fail[] to do so..."); *see also Thornton v. City of Pittsburgh*, 777 F. Supp. 2d 946, 954 (W.D. Pa. 2011) (citing *Ye v. United States*, 484 F.3d 634, 641 (3d Cir. 2007) (finding no danger creation claim where plaintiff relied on 911 operator's assurances that help was coming because "assurances of help cannot satisfy the affirmative act element."). In the Court's view, *Gray* undermines Passenger Plaintiffs' argument that Mr. Rodriguez's promises to dispatch police, even if false, constitute affirmative conduct on his part. However, because Passenger Plaintiffs have alleged other acts of affirmative conduct (Mr. Rodriguez's instructions), the Court proceeds to consider the remaining elements of their danger creation claim.

Mr. Rodriguez also disputes, to varying degrees, five other elements of Passenger Plaintiffs' danger creation claim: (1) Passenger Plaintiffs' membership in a limited and specifically definable group; (2) whether his conduct created a substantial risk of serious, immediate, and proximate harm; (3) whether the risk was known or obvious; (4) the recklessness of his conduct in light of the risk; and (5) whether his conduct is conscience-shocking. The Court will consider the elements in sequence.

Beginning with the first element, Mr. Rodriguez contends that the Passenger Plaintiffs were not members of a specific and definable group because, with the exception of Ran Pal, their identities were not known to Mr. Rodriguez. The Court finds this argument unconvincing. Even if Mr. Rodriguez did not know the names of Ran Pal's passengers, he knew that the vehicle in which Ran Pal was traveling contained other persons. Logically, then, Mr. Rodriguez knew or should have known that his instructions would impact each person in the vehicle

and only those persons in the vehicle. By virtue of the fact that the Passenger Plaintiffs were occupants of the vehicle which Mr. Rodriguez directed into Denver, the Court finds that they have plausibly established membership in a limited and definable group as required by the first danger creation element.

With respect to the second element, Mr. Rodriguez denies that he put the Passenger Plaintiffs at risk of serious, immediate, and proximate harm. Mr. Rodriguez posits that the assailants could have just as easily located the Passenger Plaintiffs at their apartment and, thus, his instructions did not affect their risk of being attacked. In the Court's view, this hypothetical ignores the facts alleged in the First Amended Complaint and the procedural posture of his Motion to Dismiss. At this stage, the Court is tasked with determining whether the facts alleged by Plaintiffs plausibly demonstrate that Mr. Rodriguez increased the risk of harm. As noted above, Plaintiffs allege that Mr. Rodriguez instructed Passenger Plaintiffs to drive back to Denver, turn on their hazard lights, park along a major thoroughfare and wait for the police to arrive. Taken together, the Court finds that Mr. Rodriguez's conduct during the 911 call plausibly placed the Passenger Plaintiffs at risk of serious, immediate, and proximate harm in satisfaction of the second element.

The third element, Mr. Rodriguez's knowledge of the risk, is complicated by the evolving nature of the information he received. At the time Mr. Rodriguez refused to send police outside of Denver, he knew that bottles were thrown at the vehicle, that Ran Pal had been hit with shards, and that Ran Pal was in shock and did not want to drive. In the Court's view, this was not enough information plausibly apprise Mr.

Rodriguez of the risk that Passenger Plaintiffs would encounter gunfire upon returning to Denver. Mr. Rodriguez learned of the gun approximately eight minutes into the call, at which time he also knew that the assailants had temporarily exited the vehicle while it was parked, thrown bottles and bottle rockets, flashed a gun at Passenger Plaintiffs, and were possibly under the influence of alcohol. These alleged facts indicate highly aggressive behavior on the part of the assailants, rendering more obvious the risk that the assailants would continue their assault and potentially escalate their use of force. But Passenger Plaintiffs need not rely only the appearance of the risk, as Mr. Rodriguez's statements demonstrate his knowledge of it. Shortly after Mr. Rodriguez instructed Ran Pal to park at 29th and Sheridan and turn his hazard lights on, Mr. Rodriguez verbally recognized that the assailants might return. (Docket #59-1 at 12.) (Rodriguez: "if you see them come back, I need you to call us right away at 911.") In the Court's view, Passenger Plaintiffs have plausibly alleged that the risk of harm was both obvious and known at the time Mr. Rodriguez instructed Ran Pal to wait in the parking lot and activate his hazard lights.

With respect to the fourth element, Mr. Rodriguez argues that his conduct was not reckless, because he was not duly informed of the risk and, in fact, had reason to question the extent of it. Pointing to the Transcript, Mr. Rodriguez notes that Ran Pal claimed he tried to "catch up with them and get their ... license plate" but that the assailants "were just trying to escape ...[.]" (*Id.* at 5-6.) Though Passenger Plaintiffs do not (and cannot) dispute Ran Pal's admission that he briefly pursued his assailants to obtain their license plate information, his statement

does not undermine his repeated expressions of shock or the information he conveyed regarding his assailants' aggressive conduct and their display of a firearm. As explained above, the aggregate facts allegedly known to Mr. Rodriguez approximately eight minutes into the phone call plausibly demonstrate a serious risk that Passenger Plaintiffs could be identified and attacked by the assailants. Mr. Rodriguez acknowledged this precise risk during the phone call, and nonetheless instructed Ran Pal to stop, park, and wait on a major thoroughfare, and to illuminate the hazard lights of his damaged vehicle. In the Court's view, Passenger Plaintiffs have plausibly alleged that Mr. Rodriguez acted in reckless disregard of the obvious and known risk that Passenger Plaintiffs would encounter further violence as a result of his instructions.

Lastly, the Court considers whether Mr. Rodriguez's alleged conduct during the 911 call, when viewed in its totality, is conscious-shocking. In evaluating this element of the danger creation theory, the Court must remain mindful of three guiding principles of substantive due process jurisprudence: (1) "the need for restraint" in defining the scope of substantive due process claims; (2) "the concern that § 1983 not replace state tort law;" and (3) "the need for deference to local policymaking bodies in making decisions impacting public safety." *Schwartz v. Booker*, 702 F.3d 573, 583 (10th Cir. 2012) (quoting *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995)). While "conscious-shocking behavior evades precise definition" and "evolves over time, " *id.*, the Tenth Circuit has made clear that "the 'shock the conscious' standard requires a high level of

outrageousness ...." *Armijo*, 159 F.3d at 1262 (quoting *Uhlrig*, 64 F.3d at 574).

In the absence of more explicit Tenth Circuit guidance, courts in this district have derived a test for conscious-shocking conduct from the Supreme Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). *See Sanders v. Bd. of Jefferson Cnty. Comm'r of the Cnty. of Jefferson Colo.*, 192 F. Supp. 2d 1094, 1113 (D. Colo. 2001). As described in *Sanders*, "*Lewis* can be read to translate the *Uhlrig* principles into a sound framework ... for analyzing those myriad situations involving law enforcement and governmental workers deployed in emergency situations." *Id. Lewis* established a "culpability spectrum" along which conscious- shocking behavior is more likely to be found where "there is an intent to do harm that is not justified by any government interest." *Id.* (quoting *Lewis*, 523 U.S. at 849). In the middle range of the spectrum, "where the conduct is more than negligent but less than intentional," some conduct may be "egregious enough to state a substantive due process claim." *Id.* At the far end of the spectrum lies negligent conduct, which will never support a cause of action under Section 1983. *See id.*

Importing a concept from Eighth Amendment jurisprudence, the *Lewis* Court characterized the mid-level intent of substantive due process as something akin to deliberate indifference. *Lewis*, 523 U.S. at 849-50. Given the need for greater fluidity in the substantive due process realm, the Court added this important caveat: "As the very term 'deliberate indifference' implies, the standard is sensibly employed only when actual deliberation is practical." *Id.* at 851. As Judge Babcock noted in *Sanders*, the opportunity for such deliberation is considerably

diminished in emergency situations where state officials are forced to make "split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving." 192 F. Supp. 2d at 1114 (citing *Lewis*, 532 U.S. at 853).

As reasoned in *Sanders*, emergency situations are more aptly characterized by circumstances rather than timing. *See id.* at 1114-15; *see also Schnurr v. Bd. of Jefferson Cnty. Comm'rs of Jefferson Cnty.*, 189 F. Supp. 2d 1105, 1132 (D. Colo. 2001) (court "[did] not measure 'conscious shocking' by use of a clock."). Where law enforcement officials are gathering information and have not yet ascertained the nature or extent of the risk, "unless an intent to harm a victim is alleged, there can be no liability under the Fourteenth Amendment redressible by an action under § 1983." *Sanders*, 192 F. Supp. 2d at 1114-15. Thus, the *Sanders* court found that officials were not capable of meaningful deliberation in the hour and fifteen minutes before they learned that the shooters had committed suicide. *Id.* Though officials gained the ability to deliberate "at some point" in the three hours and thirty minutes that followed, Judge Babcock declined to "say precisely at what moment" such culpability attached. *Id.*

Passenger Plaintiffs invite the Court to "sit[] quietly for 11 minutes" in order to see that the duration of the phone call "provided a substantial amount of time affording much opportunity to think and deliberate." (Docket #172 at 25 n.24.) The Court finds this characterization inaccurate and misleading. In the eleven minutes leading up to the shooting, there was hardly one second of silence. For the first eight minutes of the call, Mr. Rodriguez continued to receive critical information regarding the nature of

the events that had transpired. By the time he had been fully informed of the risk, he had only three minutes in which to properly instruct Ran Pal as to the safest course of action. In the Court's view, instructing Ran Pal to park, wait, and activate his hazard lights plausibly amounts to recklessness. But the Court cannot say that three minutes, under these circumstances, provided Mr. Rodriguez with a meaningful opportunity to deliberate regarding the wisdom of this particular course of action. *Cf. Sanders*, 192 F. Supp. 2d at 1115; *see also Schnurr*, 189 F. Supp. 2d at 1132 (finding that "mere minutes" in rapidly evolving situation did not afford sufficient time to deliberate). Considering, as it must, the circumstances in which Mr. Rodriguez acted, the Court finds Passenger Plaintiffs have failed to plausibly demonstrate that his decisions, though perhaps unwise, meet the "high level of outrageousness" required to shock the conscious of a federal court. *See Armijo*, 159 F.3d at 1262.

Though Passenger Plaintiffs have plausibly established affirmative conduct and five of the six required elements, in the absence of conscious-shocking behavior, they cannot sustain a due process claim under a danger creation theory. *See Gillen*, 702 F.3d at 1189 ("In order to succeed on a danger creation claim a plaintiff must meet all elements of [the] six-part test."); *see also Schnurr*, 189 F. Supp. 2d at 1132 (dismissing danger creation claim under *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) where plaintiffs' allegations "fail[ed] to shock the conscience of [the] court in the constitutional substantive due process sense."). To the extent Passenger Plaintiffs have asserted such a claim, the Court recommends it be dismissed.

2. *Special Relationship Theory*

As articulated in *Armijo*, "if the state restrains an individual's freedom to act to protect himself or herself through restraint on that individual's personal liberty, the state may thereby enter into a 'special relationship' during such restraint to protect that individual from violent acts inflicted by others." 159 F.3d at 1261. Under this theory, due process protections arise from "the State's affirmative act of restraining the individual's freedom to act on his own behalf through incarceration, institutionalization, or other similar restraint of personal liberty – which is the 'deprivation of liberty' triggering the protections of the Due Process Clause ...." *Id.* A plaintiff proceeding on a special relationship claim must show "state action involving force, the threat of force, or a show of authority, with the intent of exercising dominion and control over the person." *Gray*, 672 F.3d at 924. As the *Gray* court explained, this is a "demanding standard." *Id.*

No special relationship exists where a person is "free to do whatever he want[s]." *See Armijo*, 159 F.3d at 1261. Even where state officials make assurances of safety upon which a person relies, there can be no special relationship where the officials "did not force [the person] against his will to become dependent on them." *Gray*, 672 F.3d at 924. In such circumstances, although the state actors may have played "some causal role" in the ultimate injury, "they did so only because the person 'voluntarily availed himself' of their services." *Id.* (quoting *Monahan v. Dorchester Counseling Ctr.*, 961 F.2d 987, 993 (1st Cir. 1992)). The State's false assurances "even if in some way responsible for the tragic result" do not

create a special relationship giving rise to liability under the Due Process Clause. *Id.*

In support of their special relationship theory, Passenger Plaintiffs contend that Mr. Rodriguez exerted control over them by giving them instructions throughout the 911 call on what to do if they wanted to file a police report. Citing *Sanders*, Passenger Plaintiffs characterize this as "impos[ing] limitations upon [Plaintiffs'] freedom to act on [their] own behalf." *Sanders*, 192 F. Supp. 2d at 1118. Plaintiffs also emphasize Mr. Rodriguez's false assurances that help was coming even though the police had not been dispatched.

Passenger Plaintiffs' reliance on *Sanders* invites the same challenges as *Kuyper*. Like *Kuyper*, Plaintiffs may not rely on the district court's decision in *Sanders* to establish the parameters of the special relationship doctrine for purposes of overcoming qualified immunity. *See Christensen*, 554 F.3d at 1278. Additionally, the Tenth Circuit's decision in *Gray* provides a more recent and authoritative expression of the law in this area. Arguably, *Gray*'s holding alters *Sanders*' emphasis on the defendants' false assurances that help was coming. *Compare Gray*, 672 F.3d at 924, *with Sanders*, 192 F. Supp. 2d at 1117.

These deficiencies aside, *Sanders* lacks persuasive value here because its facts are widely distinguishable from those presented to the Court in this case. Notably, the defendants in *Sanders* explicitly prohibited the students and teachers from leaving the classroom or evacuating Mr. Sanders to safety. *Sanders*, 192 F. Supp. 2d at 1117-18. On one occasion, someone attempting to seek outside help was physically restrained from doing so. *Id.* at 1117.

In this case, however, Mr. Rodriguez indicated that Ran Pal could either return to Denver immediately or come back at a later time. Moreover, the consequence of disregarding Mr. Rodriguez's instructions was relatively minor compared to *Sanders*. In *Sanders*, defendants threatened that if the students broke the window to move Mr. Sanders, the shooters (whom the defendants knew were deceased) would see or hear the glass breaking and come find them. *Id.* Comparing this consequence to Plaintiffs' inability to immediately file a police report, the Court is not convinced that Mr. Rodriguez's instructions rose to the level of commands or that the circumstances were sufficiently severe to undermine the voluntariness of Ran Pal's decision to return to Denver. The Court's finding is underscored by disparity of information between Passenger Plaintiffs and Mr. Rodriguez. Unlike *Sanders* wherein defendants had a wealth of information and the students had none, Passenger Plaintiffs knew far more about the situation than Mr. Rodriguez. In this way, Mr. Rodriguez was not able to exert the same degree of control over Passenger Plaintiffs as the defendants in *Sanders*. Most importantly, the Court cannot overlook that Passenger Plaintiffs voluntarily availed themselves of Mr. Rodriguez's services by dialing 911 that evening. *See Gray*, 672 F.3d at 924. Though the Passenger Plaintiffs' interest in immediate assistance was compelling enough to translate Mr. Rodriguez's refusal and instructions into affirmative conduct for purposes of danger creation, it is not enough, in the Court's view, to restrain their liberty. Because the Court is not persuaded that Mr. Rodriguez restrained Passenger Plaintiffs' liberty or prevented them from pursuing a safer alternative (i.e., coming back in the

morning, calling a different police department, etc.), the Court does not find that Passenger Plaintiffs have plausibly alleged the existence of a special relationship sufficient to support a due process claim. Therefore, the Court recommends dismissing the Passenger Plaintiffs' first claim to the extent it is premised on this theory of recovery.

B. Equal Protection Claim

In order to state a claim under the Equal Protection Clause for discrimination on the basis of race, "[a] plaintiff must sufficiently allege that defendants were motivated by racial animus." *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1269 (10th Cir. 1989) (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977)). "Mere differences in race do not, by themselves, support an inference of racial animus." *Green v. Corr. Corp. of Am.*, 401 F. App'x 371, 376 (10th Cir. 2010). Nor are conclusory allegations of racial motivation sufficient to state a claim upon which relief can be granted. *Id.*

The selective enforcement of police policies, without more, does not violate the equal protection clause. *See United States v. Borrego*, 66 F. App'x 797, 800-01 (10th Cir. 2003) ("As a matter of law, long-standing equal protection jurisprudence has recognized that some measure of selectivity in the law enforcement arena is constitutionally permissible."). In *Borrengo*, the Tenth Circuit rejected an equal protection argument premised on race discrimination where the officer testified that, although the stop was somewhat random, he did not know race of the person when he decided to pull him over. *Id.* Other courts have also recognized that knowledge of a

person's race is a necessary element of an equal protection claim premised on race discrimination. *See Phillips v. City of Los Angeles*, 171 F. App'x 54 (9th Cir. 2006) (affirming summary judgment on equal protection claim where defendant had no knowledge of plaintiff's race); *see also Kelly v. Rice*, 375 F. Supp. 2d 203, 210 (plaintiff failed to adequately allege equal protection claim where officer issued a parking ticket to black motorist before knowing her race).

Mr. Rodriguez argues that Passenger Plaintiffs have failed to plead sufficient facts demonstrating that he even knew their race during the phone call, much less that his decisions were motivated by racial animus. Passenger Plaintiffs respond that their status as racial minorities was evident in several ways: (1) Ran Pal's accent; (2) Ran Pal's name; and (3) the use of the term "dog" during the conversation. Additionally, they contend that Mr. Rodriguez's questions regarding whether they had done drugs or were involved with a gang, as well as his decision to categorize the call as pertaining to property destruction, reveal that he considered Passenger Plaintiffs to be black gang members unworthy of police protection.

Having read the Transcript and listened to the Recording of the call, the Court agrees with Mr. Rodriguez that there is little to identify the Passenger Plaintiffs as members of any particular race. Ran Pal's name is phonetically similar to Caucasian presidential candidate Ron Paul, and as such, does not plausibly reveal his identity as a person of African decent. Similarly, Ran Pal's use of the slang terms "dog" and "boy" are by no means distinctively African American.

The Court is likewise unconvinced that Mr. Rodriguez's questions regarding drug use or gang affiliation reflect a bias of any sort. In reality, gang affiliation is a common motive for acts of violence between groups of young men. Drugs or alcohol are similarly likely to contribute to unruly behavior amongst individuals out at such an early hour in the morning. Though there is nothing in the record to suggest any wrongdoing by Passenger Plaintiffs, Mr. Rodriguez's attempt to gather facts does not plausibly demonstrate preconceived racial stereotypes, but rather a reasonable attempt to rule out common causes of the conduct described to him over the phone. Moreover, even if Mr. Rodriguez did believe the Passenger Plaintiffs were members of a gang, gang membership is not limited to any particular race and is certainly not a suspect class of its own. *See David K. v. Lane*, 839 F.2d 1265, 1271-72 (7th Cir. 1988) (upholding policy targeting gang activity where plaintiffs failed to establish policy was implemented "*because of* the effect it would have on the allegedly suspect class" of white inmates) (emphasis in original).

In the Court's view, Passenger Plaintiffs have failed to plausibly allege that Mr. Rodriguez even knew their race during the phone call. Such knowledge is a logical precondition to racial animus, and without it, Passenger Plaintiffs cannot plausibly demonstrate that Mr. Rodriguez acted because of their race. To the extent Passenger Plaintiffs' first claim seeks recovery under the Equal Protection Clause, the Court recommends the claim be dismissed.

Finding that Passenger Plaintiffs have failed to plausibly allege a constitutional violation under either the Due Process or Equal Protection Clauses of the Fourteenth Amendment, the Court believes that Mr.

Rodriguez is entitled to qualified immunity with respect to Claim One. Thus, the Court need not determine whether the law was clearly established at the time of the alleged injury. In the absence of a viable theory of recovery against Mr. Rodriguez, the Court recommends Claim One be dismissed in its entirety.

II. State Law Claims

As noted above, the First Amended Complaint asserts three causes of action under state law: (1) wrongful death on behalf of James Pal Reat and Rebecca Awok Diag; (2) negligent infliction of emotional distress on behalf of the Passenger Plaintiffs; and (3) outrageous conduct on behalf of the Passenger Plaintiffs. Mr. Rodriguez's Motion does not address whether these claims are plausibly stated, but instead asserts immunity under the CGIA. Plaintiffs' First Amended Complaint alleges that immunity is unavailable to Mr. Rodriguez because his actions were willful and wanton within the meaning of Colo. Rev. Stat. §§ 24-10-105(1) and 24-10-118.

The Colorado Supreme Court has not adopted a controlling interpretation of the phrase "willful and wanton" for purposes of the GGIA. *See Gray v. Univ. of Colo. Hosp. Auth.*, 284 P.3d 191, 198 (Colo. App. 2012). However, the most recent case from the Colorado Court of Appeals holds a plaintiff alleging willful and wanton conduct must show that the defendant was (1) consciously aware that his acts or omissions created a danger or risk to the safety of others; and (2) then acted or failed to act without regard to that danger or risk. *Id.* Ordinarily, willful and wanton conduct is treated as a question of fact

which is not appropriately dismissed early in the litigation. *Id.* ("'[T]he willful and wanton standard'...mandates a fact-based determination... [which] is not susceptible to resolution at an early stage in the litigation process before significant discovery has been undertaken *unless there are no disputed issues of fact*.") (emphasis in original).

This case is somewhat unique in that Plaintiffs' First Amended Complaint and the Transcript attached thereto contain a tremendous amount of detail. In this sense, it is difficult to find disputed issues of fact that would preclude the early resolution of this claim, were it lacking in plausibility. However, as the Court noted above, Plaintiffs have alleged ample facts to support a finding that Mr. Rodriguez acted recklessly under the circumstances. During the 911 call, Mr. Rodriguez verbally acknowledged the risk that the assailants might return to harm the Passenger Plaintiffs. Despite his awareness of this risk, Mr. Rodriguez directed Ran Pal to park next to a major thoroughfare, illuminate his hazard lights, and wait for police to arrive. In the Court's view, Plaintiffs have plausibly satisfied the requirements of willful and wanton conduct with regard to each of their state law claims. The Court recommends the District Court deny Mr. Rodriguez's request for immunity under the CGIA.

III. Municipal Liability

As its first line of defense, the City contends that in the absence of a plausible constitutional claim against Mr. Rodriguez, there is no basis for municipal liability. Plaintiffs' response assumes the Court will find an underlying constitutional violation on the part of Mr. Rodriguez, and thus, provides little argument

concerning the viability of a stand-alone § 1983 claim against the City. Though the parties' subsequent contentions raise a number of interesting questions regarding the applicability of danger creation analysis to claims against an entity, it is unnecessary to explore this territory in the case at hand.

The Tenth Circuit has consistently found that "[a] municipality may not be held liable where there was no underlying constitutional violation by any of its officers." *Wilson v. Meeks*, 98 F.3d 1247, 1255 (10th Cir. 1996) (citing *Hinton v. City of Elwood, Kan.*, 997 F.2d 774, 782 (10th Cir. 1993)). During oral argument, Plaintiffs correctly asserted that qualified immunity does not preclude municipal liability where it is premised on the murky state of the law. *See Hinton*, 997 F.2d at 783. However, where an officer is entitled to qualified immunity because the officer's conduct did not violate the law, "such a finding is equivalent to a decision on the merits of the plaintiff's claim," and thus, "may preclude the imposition of municipal liability." *Id.*

As described above, the Court has found that the facts alleged in Plaintiffs' First Amended Complaint, taken as true, do not support a plausible claim under the Fourteenth Amendment against Mr. Rodriguez. Because Plaintiffs have not established a constitutional injury caused by Mr. Rodriguez or identified any other government official who is independently liable, the Court need not further consider adequacy of the City's customs, polices, practices, training, or supervision. The Court recommends the District Court dismiss Plaintiffs' claim against the City, accordingly.

CONCLUSION

The events that befell Plaintiffs on April 1, 2012, are nothing short of tragic. There is no doubt that Mr. Rodriguez played a role in that tragedy through his affirmative conduct; however, his conduct does not render him constitutionally culpable in light of the circumstances he confronted during the 911 call.[6] The Court recommends the District Court find Mr. Rodriguez is entitled to qualified immunity for all theories of liability advanced in Claim One. In the absence of a valid constitutional claim, the Court likewise recommends the dismissal of Claim Two against the City. With respect to the remaining claims, the Court finds that Plaintiffs' assertions of willful and wanton conduct are well supported by the facts alleged in the First Amended Complaint. The Court recommends the District Court decline to dismiss such claims under the CGIA. Accordingly, the Court respectfully **RECOMMENDS** the City's Motion to Dismiss [filed December 24, 2012; docket #62] be **GRANTED** and Mr. Rodriguez's Motion to Dismiss Substituted Amended Complaint [filed January 3, 2013; docket #66] be **GRANTED IN PART** and **DENIED IN PART** as stated herein. In the event the District Court accepts this Court's recommendation, this Court takes no position on whether the District Court should retain supplemental

[6] In so finding, the Court echoes the sentiment expressed in *Beck v. Calvillo*, 671 F. Supp. 1555, 1563 (D. Kan. 1987) by recognizing that "nothing will compensate [P]laintiffs for their loss and grief." It is likewise "unfortunate the law does not lessen the pain by providing a [constitutional] remedy for the [P]laintiffs' claims." *See id.* Yet "this [C]ourt is without the power to create a remedy where none exists." *See id.*

jurisdiction over Plaintiffs' state law claims as permitted by 28 U.S.C. § 1367(c)(3).

Dated and entered this 9th day of April, 2013, in Denver, Colorado.

BY THE COURT:

Michael E. Hegarty
United States Magistrate Judge

No. 15-1001.

ESTATE OF JIMMA PAL REAT; JAMES PAL REAT; REBECCA AWOK DIAG; RAN PAL; CHANGKUOTH PAL; and JOSEPH KOLONG,
Plaintiffs-Appellees,

v.

JUAN JESUS RODRIGUEZ, individually, Defendant-Appellant.

United States Court of Appeals, Tenth Circuit.

Filed August 12, 2016.

Before **TYMKOVICH**, Chief Judge, **KELLY**, **BRISCOE**, **LUCERO**, **HARTZ**, **GORSUCH**, **HOLMES**, **MATHESON**, **BACHARACH**, **PHILLIPS**, **McHUGH**, and **MORITZ**, Circuit Judges.

ORDER

This matter is before the court on the appellees' *Petition for Panel Rehearing or Rehearing En Banc.* We also have a response from the appellant.

Upon consideration, the request for panel rehearing is granted in part and to the extent of the changes made in the attached amended decision. The request for panel rehearing is otherwise denied.

Both the appellees' petition and the amended panel decision were also circulated to all the active judges of the court. A poll was called and a majority voted to

deny the request for en banc reconsideration. *See* Fed. R. App. P. 35(a). Consequently, the en banc petition is denied. Judges Lucero, Hartz, Phillips and Moritz would grant the petition for en banc rehearing.

The clerk of court is directed to file the amended panel decision effective the date of this order.