MONICA TENNANT, Administratrix Ad Prosequendum for the ESTATE OF MICAH SAMUEL TENNANT-DUNMORE, ANGELA TENNANT, M.T., a minor, by her Parent and Guardian Ad Litem, ANGELA TENNANT, Plaintiffs-Respondents, v. PLEASANTVILLE BOARD OF EDUCATION, DENNIS ANDERSON, HOWARD JOHNSON, STEPHEN TOWNSEND, DANNY ADCOCK, NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION, JOHN DOE (1-10) fictitious names, JOHN DOE, INC. (1-10) fictitious names, Defendant-Appellant, v. ALVIN WYATT and JOHN DOE (1-10), fictitious names, Third-Party Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Civil Action APPELLATE DIVISION DOCKET NO. A-001177-25 T2 On Appeal From: Superior Court of New Jersey Law Division – Atlantic County Docket No. ATL-L-002985-21 CIVIL ACTION Sat Below: Hon. Sarah Beth Johnson, J.S.C.

DEFENDANT-APPELLANT PLEASANTVILLE BOARD OF EDUCATION'S AMENDED MERITS BRIEF

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PRELIMINARY STATEMENT

In an example of overreach of the highest order, the trial court concluded that Plaintiffs—non-student, voluntary attendees at a high school football game—had a constitutional right to be protected by Defendant-Appellant Pleasantville Board of Education ("PBOE") from the criminal conduct of a murderer, Alvin Wyatt, who opened fire at that game. The trial court's decision ran afoul of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) where the United States Supreme Court held that the Fourteenth Amendment does not impose a duty on the state to protect individuals from private violence, and a myriad of factually analogous shooting cases that have followed *DeShaney* and refused to allow such claims against public schools. This Court should reverse to correct the trial court's overreach, spare the parties from the unwarranted burden of a trial over an invented constitutional right, and to reaffirm the boundaries of substantive due process.

First, following dispositive motion practice, Plaintiffs' sole remaining claim against the PBOE arises under *Monell*, which hinges entirely on Plaintiffs' ability to show that a school official violated their substantive due process rights in the first instance. However, as a matter of settled law, Plaintiffs did not have a constitutional right to have a school official protect them from Wyatt's criminal misconduct. Further, Plaintiffs failed to establish the elements of the "state-created danger"

theory of liability, which is a narrow exception to the general rule established in *DeShaney*. So, the *Monell* claim against the PBOE should have been dismissed.

Second, the trial court misapplied *Gormley v. Wood-El*, 218 N.J. 72 (2014), to circumvent *DeShaney*, thereby disrupting constitutional law. In *Gormley*, our Supreme Court allowed a public defender to pursue a state-created danger claim because she was required to meet her client in a locked, dangerous environment, and state hospital officials knowingly exposed her to a dangerous inmate. In contrast, Plaintiffs in this case voluntarily attended a football game, with the freedom to come and go and choose their seating. By detaching *Gormley* from its custodial and institutional context and relying on New Jersey cases concerning negligence and common law duties of care to conjure a constitutional claim, the trial court overreached significantly, rendering a decision that directly conflicts with *DeShaney* and disrupts settled constitutional law.

Finally, the trial court's flawed analysis and misapplication of *Gormley* affected its evaluation of the derivative *Monell* claim. Since there was no underlying constitutional violation, the *Monell* claim should have been dismissed. Further, even if a constitutional violation had been established, the record lacked evidence that a PBOE custom or policy was the moving force behind any constitutional deprivation. The trial court's contrary finding was unsupported and erroneous as a matter of law.

For these reasons, and as set forth below, this Court should reverse the trial court's order to the extent it denied the PBOE's motion for summary judgment and remand with instructions for the trial court to dismiss all NJCRA claims against the PBOE with prejudice.

FACTUAL BACKGROUND

On November 15, 2019, Plaintiff Angela Tennant initially attended a high school football game at Holy Spirit High School in Absecon with her brother and her three children (Micah, M.T., and M.T.'s twin brother). (*Compare* Da15, ¶32 *with* Da276, ¶32).[1] Angela decided to leave the Holy Spirit game at halftime for a football game at Pleasantville High School ("Pleasantville game"). (*Compare* Da15, ¶36 *with* Da277, ¶36).

Angela drove herself, Micah, and M.T. from the Holy Spirit game to the Pleasantville game. (*Compare* Da16, ¶38 *with* Da277, ¶38). Angela voluntarily chose to attend the Pleasantville game. (*Compare* Da16, ¶39 *with* Da277, ¶39). It was Angela's decision to attend the Pleasantville game. (*Compare* Da16, ¶40 *with* Da277-78, ¶40). It was Angela's decision whether M.T. would be allowed to attend. (*Compare* Da16, ¶41 *with* Da278, ¶41). Angela bought tickets for herself, M.T., and Micah. (*Compare* Da16, ¶44 *with* Da278, ¶44). Angela, M.T., and Micah arrived at the beginning of the third quarter. (*Compare* Da16, ¶45 *with* Da278, ¶45). Angela,

[1] "Da" refers to Defendant-Appellant Pleasantville Board of Education's Appendix.

Micah, and M.T. did not attend schools within the Pleasantville Public School District. (*Compare* Da16-17, ¶¶46-48 *with* Da278-79, ¶¶46-48).

On October 28, 2019 (18 days before the Pleasantville game), Ibn Abdullah ("Abdullah") fired shots at Alvin Wyatt ("Wyatt") around Hummock Avenue in Atlantic City, New Jersey. (*Compare* Da19, ¶70 *with* Da283, ¶70). Wyatt's cousin died in connection with that shooting. (*Compare* Da19, ¶71 *with* Da283, ¶71). Abdullah also fired shots at Wyatt in connection with that shooting. (*Compare* Da19, ¶72 *with* Da283, ¶72).

On November 15, 2019, Wyatt arrived at the Pleasantville game sometime after halftime armed with an illegal firearm. (*Compare* Da19-22, ¶¶74-77, 95-96 *with* Da283-87, ¶¶75-76, 95-96). Wyatt fired 6 or 7 shots at Abdullah, who was seated in the bleachers. (*Compare* Da21, ¶¶85-86 *with* Da285, ¶¶85-86). Micah (who was also seated in the bleachers) was struck by one of Wyatt's bullets and died five (5) days later. (Da37, ¶¶42, 46). Wyatt was convicted on weapons and murder charges. (*Compare* Da22, ¶¶94-96 *with* Da286-87, ¶¶94-96).

Director of School Safety Danny Adcock created an operational plan for the Pleasantville game. (*Compare* Da12, ¶13 *with* Da272, ¶13). Pursuant to the plan, "the normal assignment of three (3) police officers assigned to football games [was] increased to six (6) Pleasantville Police Officers, with the assistance of K-9 … ." (*Compare* Da12, ¶14 *with* Da272, ¶14). Business Administrator Elisha Thompkins

also authorized and approved additional police officers for the Pleasantville game. (*Compare* Da14, ¶¶25-26 *with* Da275, ¶¶25-26).

Seven (7) "event staff [were] scheduled to work the game" and were "positioned at the parking lot, at the entrance, in the end zone, and at the concession stand." (*Compare* Da13, ¶16 *with* Da273, ¶16). Adcock attended the Pleasantville game, as did "the Pleasantville Police Chief [Sean Riggin] and Class III Officer Jose Ruiz." (*Compare* Da13, ¶19 *with* Da273, ¶19).

Armed police officers attended the Pleasantville game "from the PPD [Pleasantville Police Department] and the Camden Police Department." (*Compare* Da13, ¶20 *with* Da273, ¶20). A minimum of ten police officers were present at the game and stationed at each corner of the field. (*Compare* Da13-14, ¶¶21, 24 *with* Da274-75, ¶¶21, 24). Chief Riggin provided input on the security plan for the Pleasantville game. (*Compare* Da14, ¶27 *with* Da275, ¶27).

PROCEDURAL HISTORY

On September 21, 2021, Plaintiffs the Estate of Micah Samuel Tennant-Dunmore, Angela Tennant, and M.T. filed a four-count complaint against Defendants/Third-Party Plaintiffs the Pleasantville Board of Education ("PBOE"), Dennis Anderson, Howard Johnson (deceased), Stephen Townsend, Danny Adcock

(collectively "the PBOE Defendants"),[2] and the New Jersey State Interscholastic Athletic Association ("NJSIAA") asserting the following claims:

- Count I: Dangerous Condition of Property Claim (against PBOE and NJSIAA);
- Count II: Dangerous Condition of Property/Bystander Liability (against PBOE and NJSIAA);
- Count III: State Created Danger Claim Under the NJCRA (against the PBOE Officials); and
- Count IV: Derivative NJCRA Claim (against the PBOE Defendants).

(Da38-45, ¶¶47-75). Plaintiffs complain, *inter alia*, that "[t]here was no fixed or handheld metal detector" at the entrance to the Pleasantville game and that the PBOE failed "to take appropriate safety measures." (Da36, Da44, ¶¶35, 71).

On February 22, 2022, the PBOE Defendants filed an Answer and Third-Party Complaint against Wyatt. (Da49-81). The PBOE Defendants filed a motion for summary judgment on March 28, 2025. (Da7-9).

On August 12, 2025, the Honorable Sarah Beth Johnson, J.S.C. held oral argument on the PBOE Defendants' motion. (*See* T).[3] That same day, the trial court entered an Order granting in part and denying in part the PBOE Defendants' motion. (Da5-6). The trial court dismissed the tort claims in Counts I and II with prejudice

[2] Anderson, Johnson, Townsend and Adcock are referred to herein collectively as "the PBOE Officials."

[3] "T" refers to the transcript of the August 12, 2025 motion argument and summary judgment decision. NJSIAA's motion for summary judgment was unopposed and granted by the trial court.

and dismissed with prejudice the NJCRA claims in Counts III and IV as to the PBOE Officials only. (*Id*.) The trial court denied summary judgment as to the NJCRA claim against the PBOE in Count IV. The sole remaining claim in the Complaint is Plaintiffs' direct entity/*Monell* claim against the PBOE in Count IV.

On September 2, 2025, the PBOE filed a motion for leave to appeal to this Court, which Plaintiffs opposed ten days later. On September 18, 2025, this Court denied the PBOE's motion for leave to appeal. (Da3-4).

On October 8, 2025, the PBOE filed a motion for leave to appeal with the Supreme Court of New Jersey requesting that it review the trial court's rulings of law *de novo*, or, alternatively, remand the matter to this Court to hear the PBOE's appeal on the merits.

On December 5, 2025, the Supreme Court of New Jersey granted the PBOE's motion and remanded the matter to this Court for consideration of the appeal on the merits. (Da1-2).

LEGAL ARGUMENT

The issues on appeal arise from the trial court's erroneous rulings of law. This Court should review the trial court's rulings of law *de novo*. Indeed, it is recognized that the *de novo* standard of review applies to rulings on motions for summary judgment. *See Branch v. Cream-O-Land Dairy*, 244 N.J. 567, 582 (2021). Further, "[a] trial court's interpretation of the law and the legal consequences that

flow from established facts are not entitled to any special deference." *Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan*, 140 N.J. 366, 378 (1995).

I. The Trial Court Erroneously Held That Plaintiffs Established A *Monell* Claim Because The PBOE Did Not Violate Their Constitutional Rights (T62:11-75:14).

The trial court erred in finding that Plaintiffs had established a triable *Monell* claim against the PBOE. As explained further below, a threshold question in analyzing a *Monell* claim is whether there is a constitutional violation by a state actor. Here, Plaintiffs cannot make that showing as a matter of law because they did not have a constitutional right to have the PBOE Officials protect them from Wyatt's criminal misconduct. And while courts have recognized a narrow exception to this rule—the state-created danger theory—Plaintiffs' reliance on that doctrine fails for a myriad of reasons.

A. *Monell* Liability Under The NJCRA.

"The legal principles governing the liability of a municipality under the [NJ]CRA and § 1983 are essentially the same." *Winberry Realty P'ship v. Borough of Rutherford*, 247 N.J. 165, 190 (2021). "[A] municipality generally cannot be held liable in a § 1983 action for the acts of employees under the principle of respondeat superior." *Stomel v. City of Camden*, 192 N.J. 137, 145 (2007). "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the

injury that the government as an entity is responsible under § 1983." *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694 (1978); *see also Winberry*, 247 N.J. at 190-91 ("[A] municipality can be held liable only if it causes harm through the implementation of official municipal policy.").

The United States Supreme Court has emphasized "the separate character of the inquiry into the question of municipal responsibility and the question whether a constitutional violation occurred." *Collins v. City of Harker Heights*, 503 U.S. 115, 122 (1992). Thus, "in a *Monell* case, the 'proper analysis requires [a court] to separate two different issues when a § 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the [municipality] is responsible for that violation.'" *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1149-50 (3d Cir. 1995) (quoting *Collins*, 503 U.S. at 120). Thus, "if there is no violation in the first place, there can be no derivative municipal claim." *Mulholland v. Gov't Cnty. of Berks*, 706 F.3d 227, 239 n.15 (3d Cir. 2013).

Here, the *Monell* claim against the PBOE in Count IV, like the state-created danger claim in Count III, was grounded in Plaintiffs' claim that the PBOE Defendants violated Plaintiffs' "right to substantive due process" (Da43-44, ¶69), a doctrine rooted in both the Fourteenth Amendment of the United States Constitution and in Article 1, ¶ 1 of the New Jersey Constitution. But, as explained below, the

Plaintiffs did not have a constitutional right to have the PBOE Officials protect them from third-party violence. Thus, the *Monell* claim should have been dismissed.

B. Plaintiffs Did Not Have A Constitutional Right To Have The PBOE Officials Protect Them From Wyatt's Criminal Misconduct.

Plaintiffs' substantive due process claim against the PBOE is squarely foreclosed by the United States Supreme Court's landmark decision in *DeShaney v. Winnebago County Department of Social Services*. There, the highest court in the land explained that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors" and that "[t]he Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." 489 U.S. 189, 195 (1989).

As here, the facts of *DeShaney* were "undeniably tragic." *Id*. at 191. Social workers in Wisconsin removed four-year-old Joshua DeShaney from his father's custody based on suspected child abuse but then returned him to his father's custody a few days later. *See id*. at 192. Throughout the next year, the social workers "took no action" to address several observations and emergency room reports suggesting that someone was still abusing Joshua – that is, until they learned that Joshua's father had beaten him "so severely that he fell into a life-threatening coma." *Id*. at 192-93.

Joshua (through his mother) sued the caseworkers and their employers under § 1983 and alleged they "had deprived [him] of his liberty without due process of

law, in violation of his rights under the Fourteenth Amendment, by failing to intervene to protect him against a risk of violence at his father's hands of which they knew or should have known." *Id*. Joshua claimed the State had "deprived [him] of his liberty interest in 'free[dom] from . . . unjustified intrusions on personal security,' by failing to provide him with adequate protection against his father's violence," and "was categorically obligated to protect him in these circumstances." *Id*. at 195.

In rejecting Joshua's substantive due process claim, the Court explained that the Due Process Clause "forbids the State itself [from] depriv[ing] individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means," including by "private actors" like Joshua's father. 489 U.S. at 195. "Its purpose was to protect the people from the State, not to ensure that the State protected them from each other." *Id*. at 196. That means the Clause "generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Id*. So, "[i]f the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them." *Id*. at 196-97. Stated differently, "a State's failure to protect an individual against private violence simply

does not constitute a violation of the Due Process Clause." *Id*. at 197. Thus, since "the State had no constitutional duty to protect Joshua against his father's violence, its failure to do so – though calamitous in hindsight – simply [did] not constitute a violation of the Due Process Clause." *Id*. at 202.

The court reached the same result in *LaGuardia v. Ross Township*, 2016 WL 4502443 (M.D. Pa. Aug. 29, 2016), *aff'd*, 705 Fed. Appx. 130 (3d Cir. 2017), a case materially indistinguishable from this matter and discussed at length in the PBOE's moving papers and at oral argument below (T31:11-32:12), yet ignored by the trial court.[4] There, a man named Rockne Newell "opened fire during the monthly meeting of the Ross Township Supervisors, resulting in the death and serious injury of several attendees," including James LaGuardia. *Id*. at *1. LaGuardia's estate sued Ross Township, several township officials, and the county sheriff under § 1983, claiming, *inter alia*, that defendants violated his rights to substantive due process because they "*failed to provide security at the meeting* despite their alleged knowledge of Newell's propensity for violence." *Id*. (emphasis added). The court granted *with prejudice* the defendants' motion to dismiss the estate's substantive due process claim and denied as futile the estate's motion to file an amended complaint. *Id*. at *11. As the court explained: "under *DeShaney*, the defendants' failure to protect the decedent from Newell's attack is not a due process violation." *Id*. at *6. "The Due

[4]The *LaGuardia* decision is included in the PBOE's Appendix (Da28, ¶23, Da253-62).

Process Clause was intended to 'protect the people from the State, not to ensure that the State protected them from each other.'" *Id*. (quoting *DeShaney*, 489 U.S. at 196).

The result should be the same here. As in *DeShaney* and *LaGuardia*, Plaintiffs did not have a constitutional right to have the PBOE Officials protect them from Wyatt's criminal misconduct. The PBOE Officials' failure to protect Plaintiffs from Wyatt simply did not amount to a substantive due process violation. Since Plaintiffs' harm was not caused by any constitutional violation, the *Monell* claim in Count IV should have been dismissed. While Plaintiffs also invoked the state-created danger theory of liability to show a due process violation, there are several reasons why that claim fails as a matter of law, too. We turn now to a discussion of the deficiencies in Plaintiffs' state-created danger claim.

C. As A Matter Of Law, Plaintiffs Cannot Show A Substantive Due Process Violation Through The "State-Created Danger" Theory of Liability.

The United States Supreme Court has never recognized the state-created danger theory of liability, which "does not stem from the text of the Constitution or any other positive law." *Johnson v. City of Philadelphia*, 975 F.3d 394, 399-400 (3d Cir. 2020). Rather, the theory is the byproduct of efforts by lower federal courts to ascribe significance to the Supreme Court's observation in *DeShaney* 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." *DeShaney*, 489 U.S. at 201. Reading this language as

suggesting that "the result may have been different had the State played a role in creating or enhancing the danger to which Joshua was exposed," *L.R. v. Sch. Dist. of Philadelphia*, 836 F.3d 235, 242 (3d Cir. 2016), the Third Circuit has held that "the state-created danger theory is a viable mechanism for establishing a constitutional claim under 42 U.S.C. § 1983." *Kneipp v. Tedder*, 95 F.3d 1199, 1211 (3d Cir. 1996); *see also Sanford v. Stiles*, 456 F.3d 298, 304 (3d Cir. 2006) (explaining that "the state has a duty to protect or care for individuals . . . when a 'state-created danger' is involved").

The state-created danger theory is "a *narrow* exception to the general rule that the state has no duty to protect its citizens from private harms." *Henry v. City of Erie*, 728 F.3d 275, 286 (3d Cir. 2013) (emphasis added); *see also Estate of Strumph v. Ventura*, 369 N.J. Super. 516, 525 (App. Div.), *certif. denied*, 181 N.J. 546 (2004) (noting that the theory permits recovery "in certain limited circumstances"). Indeed, "[c]ourts often treat the 'state-created danger' doctrine 'as if it were a rule of common law.' But it is not, and [courts] must guard against reasoning that, especially with the best intentions, deviates from the Constitution's careful balance of authority recognized in *DeShaney*." *Johnson*, 975 F.3d at 399 n.5 (citation omitted); *see also Spady v. Bethlehem Area Sch. Dist.*, 800 F.3d 633, 642 (3d Cir. 2015) (discussing "the traditional limits of the Fourteenth Amendment . . . observed in *DeShaney*" to conclude, in a state-created danger case, that "'hard as our sympathies may pull us,

our duty to maintain the integrity of substantive law pulls harder'") (citation omitted).

Distilled to its essence, the theory embodies the idea that "state actors may not disclaim liability when they themselves throw others to the lions." *L.R.*, 836 F.3d at 250 n.89 (citation omitted). In other words, "[i]f the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." *Kneipp*, 95 F.3d at 1207 (citation omitted). And in a passage that hits close to home considering the tragic events giving rise to this case, one court has observed that state-created danger liability depends not on "whether the state actor 'pulled the trigger,' but whether the state actor placed the plaintiff in a bullet's likely path." *Sciotto ex rel. Sciotto v. Marple Newtown Sch. Dist.*, 81 F. Supp. 2d 559, 565 n.8 (E.D. Pa. 1999).

These are the elements of a state-created danger claim: (1) the harm ultimately caused was foreseeable and fairly direct; (2) a state actor acted with a degree of culpability that shocks the conscience; (3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and (4) a state actor affirmatively used 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. *See Bright v. Westmoreland Cnty.*, 443 F.3d 276, 281 (3d Cir. 2006), *cert. denied*, 549 U.S. 1264 (2007) (citations omitted).

"It is important to stress . . . that under the fourth element of a state-created danger claim, 'liability under the state-created danger theory is predicated upon the states' *affirmative acts* which work to the plaintiffs' detriments in terms of exposure to danger,'" which means it is only "misuse of state authority, rather than a failure to use it, that can violate the Due Process Clause." *Bright*, 443 F.3d at 282 (quoting *D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1374 (3d Cir. 1992), *cert. denied*, 506 U.S. 1079 (1993)) (emphasis in original). In other words, this element "serves . . . to distinguish cases where . . . officials might have done more . . . [from] cases where . . . officials created or increased the risk itself.'" *Morrow v. Balaski*, 719 F.3d 160, 178-79 (3d Cir.), *cert. denied*, 571 U.S. 1110 (2013) (alterations in original, citation omitted).

"But a specific and deliberate exercise of state authority, while necessary to satisfy the fourth element of the test, is not sufficient. There must [also] be a direct causal relationship between the affirmative act of the state and plaintiff's harm." *Kaucher v. Cnty. of Bucks*, 455 F.3d 418, 432 (3d Cir. 2006); *see also Bright*, 443 F.3d at 283 n.7 (same). In other words, "a defendant's actions must be the 'but for cause' that put the plaintiff in a position of danger that otherwise would not have

existed." *Id*. at 433 n.10. "Only then will the affirmative act render the plaintiff 'more vulnerable to danger than had the state not acted at all.'" *Id*. (quoting *Bright*, 443 F.3d at 281).

As we explain below, Plaintiffs' state-created danger claim fails under prongs one, two and four as a matter of law.

1. The PBOE Officials Did Not Act To Place Plaintiffs In Harms Way And Plaintiffs Voluntarily Chose To Attend The Game.

Courts across the country have rejected state-created danger claims premised on random gun violence perpetrated on school property when, as here, there was no allegation or evidence that a school official affirmatively placed the plaintiff *directly* in harm's way. In fact, several courts have explicitly held that a plaintiff cannot satisfy the "affirmative act" element of a state-created danger claim when, as here, it is undisputed that they *voluntarily* attended a public event or *voluntarily* participated in the activity where the injury occurred. This body of case law conclusively demonstrates that Plaintiffs cannot proceed with their state-created danger claim.

One of the most devastating cases on point is *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198 (5th Cir. 1994), *cert. denied*, 514 U.S. 1017 (1995). There, a student and innocent bystander named Andrew Gaston was killed by a "stray bullet" fired by a non-student during an argument in a school hallway during school hours. *Id*. at 199. The shooter instigated the ruckus, and he was able to bring "a concealed

handgun" into the school "because the metal detectors . . . at the school were not being used." *Id*. In affirming the order dismissing the state-created danger claim against the school district, the Fifth Circuit explained that "[t]he key to the state-created danger cases . . . lies in the state actors' 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 private aid.'" *Id*. at 201 (citation omitted). But the complaint did not allege that anyone had ever placed Gaston in proximity to the shooter:

> There is no pleading that school officials placed Gaston in a dangerous environment stripped of means to defend himself and cut off from sources of aid. There is no sufficiently culpable affirmative conduct. Andrew went to school. No state actor placed Andrew in a "unique, confrontational encounter" with a violent criminal. No official in the performance of her duties abandoned him in a crack house or released a known criminal in front of his locker. . . . [T]he facts here pleaded suggest only that Andrew was the tragic victim of random criminal conduct rather than of school officials' deliberate, callous decisions to interpose him in the midst of a criminally dangerous environment. Appellant's complaint, in short, does not suffice to plead that Andrew was the victim of state-created danger.
>
> [*Id*. at 202 (quoting *Cornelius v. Town of Highland Lake*, 880 F.2d 348, 359 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990)).]

Similar pleading deficiencies were fatal to the state-created danger claim in *Mitchell v. Duval Cnty. Sch. Bd.*, 107 F.3d 837 (11th Cir. 1997). There, a student

named Richard Jefferson Mitchell "was shot and killed by non-student, third party assailants attempting to rob him" while he was "standing on the edge of a [school] parking lot." *Id*. at 838. "Mitchell had attended a school-sponsored function earlier that evening," and he "had attempted to telephone his father from the school administration office, but was denied entry to the office by school officials." *Id*. "Mitchell used an outside pay phone to call his father, and then waited for his father outdoors on a driveway near the school parking lot." *Id*. The Eleventh Circuit affirmed the order dismissing the state-created danger claim against the school because Mitchell's father could not "show that the state affirmatively placed [Mitchell] in a position of danger." *Id*. at 839. Indeed, the school never "required Mitchell to wait where he did." *Id*. "Even if . . . Mitchell was not allowed to wait inside the administration office, Mitchell had the option of waiting either inside the building or immediately outside." *Id*. "Instead of waiting there, Mitchell stood a considerable distance away on the edge of the school's parking lot." *Id*. Thus, nothing in the record indicated that the school had ever "required Mitchell to wait in an inherently dangerous location." *Id*. at 839-40.

In *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902 (3d Cir. 1997), the Third Circuit relied on *Johnson* and *Mitchell* to reject a state-created danger claim based on a "random" school shooting. There, a woman "with a history of mental illness" entered a school "through an unlocked rear entrance" and murdered a teacher named

Diane Morse "in front of a classroom of children." *Id*. at 904. The only possible affirmative act alleged "was the assertion that [school staff] unlocked the door to facilitate the work of the various contractors at the high school." *Id*. at 914 . But the court found that the decision to allow the rear door to remain open was not an "affirmative act." *See id*. at 915. After summarizing *Mitchell* (as well as *D.R.*, where the court had dismissed a state-created danger claim based on a school's alleged failure to address student-on-student sexual abuse), the court wrote: "In neither case was it the act or omission of the state actor that directly placed the victim in harm's way. The same can be said of the case before us. Plaintiff does not allege, nor can he prove, that defendants placed Diane Morse in 'a dangerous environment stripped of means to defend [herself] and cut off from sources of aid.' Nor does plaintiff allege that defendants placed her in a 'unique confrontational encounter' with [the shooter]." *Id*. at 915 (quoting *Johnson*, 38 F.3d at 202; *Cornelius*, 880 F.2d at 359). "Plaintiff, therefore, can prove no set of facts that will demonstrate that defendants placed Diane Morse in harm's way, and consequently has not satisfied the fourth prong of the *Kneipp* test." *Id*. at 916.

And in *McQueen v. Beecher Cmty. Sch.*, 433 F.3d 460 (6th Cir. 2006), the Sixth Circuit affirmed the dismissal of a state-created danger claim where a first grader, who had a history of attacking other students with his hands and with pencils, brought a gun to school and fatally shot one of his female classmates. *See id*. at 462-

63. Moments earlier, the teacher had taken most of her students to a computer class, but she left behind in her classroom six students (including the shooter and his soon-to-be victim) "as punishment for not doing their work." *Id*. at 463. The court found that the teacher did not affirmatively act by leaving those students unsupervised in her classroom because the victim would have faced the same danger even if the teacher had stayed behind. *See id*. at 466. The court also found that "[s]imply walking out of the room without any inkling that [the shooter] had a gun [was] different both in degree and in kind" from conduct that might have been actionable – namely, "plac[ing the shooter], with a gun, and [the plaintiff] together, on suspicion of his having shot at her before, in order to see if he would do it again." *Id*. at 467.

Since the opposite of a person being "placed" by a state actor into harm's way is for a person to put *themselves* in that position, it's no surprise that several courts have held that a plaintiff cannot satisfy the "affirmative act" element of a state-created danger claim if they *voluntarily* attended the event or *voluntarily* participated in the activity where the injury occurred.

For instance, in *Jones v. Reynolds*, 438 F.3d 685 (6th Cir. 2006), two people were drag racing "on a public street on the outskirts of Detroit" when one of the drivers lost control of his vehicle, veered into a crowd of "at least 150 people," and "struck several spectators, including Denise Jones, who died from injuries suffered from the collision." *Id*. at 688-89, 697. Four police officers had arrived before the

race began, but instead of stopping the race, they "expressly allowed the participants to proceed." *Id*. at 688. The court affirmed the dismissal of Jones's state-created danger claim because she could not show that the officers affirmatively acted to "create" the risk she faced or that they "aggravated the risk of harm . . . beyond the perils she already faced by voluntarily choosing to watch a drag race on city streets at 1:45 in the morning." *Id*. at 691, 693. The court then elaborated on the plaintiff's voluntary choice to attend the race: "Further breaking the link between the officers' actions and Jones' death is the uncontested fact that the officers played no role in Jones' decision to attend the drag race. . . . [N]o one has offered any evidence as to why she could not have looked after herself in choosing whether to be a spectator at a dangerous event. When a victim bears some responsibility for the risks she has incurred, it is even more difficult to say that the 'state' has 'created' the 'danger' to her by its affirmative acts." *Id*. at 694.

See also Monahan v. Dorchester Counseling Ctr., Inc., 961 F.2d 987, 993 (1st Cir. 1992) (rejecting state-created danger claim where mentally ill man "voluntarily committed himself" into a group home and was later struck by a car after jumping out of the facility's vehicle because, "[a]lthough the [state] may have played some causal role in the harm, it did so only because [the man] voluntarily availed himself of a [state] service. The [state] did not force [the man], against his will, to become dependent upon it."); *Slaughter v. Mayor of Baltimore*, 757 F. Supp. 2d 548, 553 (D.

Md. 2010) (dismissing state-created danger claim of firefighter recruit who died in training exercise because he "voluntarily participated in the exercise" and had the "option of declining to participate"); *Keitz v. Unnamed Sponsors of Cocaine Research Study*, 829 F. Supp. 2d 374, 384 (W.D. Va. 2011) (relying on *Slaughter* to dismiss a state-created danger claim premised on harms plaintiff allegedly suffered while participating in a government drug study because he "participated voluntarily" in that study "after willfully applying for and gaining admission to the program").

Here, as in *Johnson*, *Mitchell*, *Morse*, and *McQueen*, Plaintiffs did not establish (much less allege) that any of the PBOE Officials affirmatively placed them *directly* in harm's way. For example, there is no evidence that the PBOE Officials brought Plaintiffs and Wyatt together, within range of one another, or even to the places in the stadium where they were located when the shooting started. Stated differently, Plaintiffs do not – because they cannot – point to any actions by the PBOE Officials that were "the 'but for cause' that put [them] in a position of danger that otherwise would not have existed," *Kaucher*, 455 F.3d at 433 n.10, or that "exposed [them] to a danger [they] would not have otherwise encountered." *L.R.*, 836 F.3d at 243. There is simply no indication that anyone threw Plaintiffs "to the lions," tossed them "into a snake pit," or placed them "in a bullet's likely path."

Rather, like the plaintiffs in *Johnson*, *Mitchell*, *Morse*, and *McQueen*, Plaintiffs were the unfortunate victims of a random act of gun violence. (*Compare*

Da19-22, ¶¶70-98 *with* Da283-87, ¶¶70-98). If anything, Plaintiffs' claim boils down to an assertion that the PBOE Officials *failed* to act by *failing* to install a metal detector at the stadium entrance. But state actors simply cannot "create an opportunity that would not otherwise have existed for injury to the plaintiff . . . by failing to act." *Bright*, 443 F.3d at 276. The futility of Plaintiffs' state-created danger claim becomes even more apparent considering Plaintiffs voluntarily chose to attend the Pleasantville game (*Compare* Da15-16, ¶¶36-44 *with* Da277-78, ¶¶36-44), just like the plaintiffs in *Jones*, *Monahan*, *Slaughter*, and *Keitz*. It was that choice – to leave the other football game at halftime and travel to the one in Pleasantville – that was the "but for cause" of the danger Plaintiffs eventually faced, not any conduct by the PBOE Officials.[5]

These kinds of claims are certainly tragic, but the case law overwhelmingly holds that they do not give rise to a viable state-created danger claim. That case law must carry the day. *See Spady*, 800 F.3d at 642 ("Hard as our sympathies may pull us, our duty to maintain the integrity of substantive law pulls harder.") (citation omitted).

[5] *See Kaucher*, 455 F.3d at 432 ("But a specific and deliberate exercise of state authority, while necessary to satisfy the fourth element of the [state-created danger] test, is not sufficient. There must [also] be a direct causal relationship between the affirmative act of the state and plaintiff's harm."); *id*. at n.10 ("[U]nder the state created danger doctrine, a defendant's actions must be the 'but for cause' that put the plaintiff in a position of danger that otherwise would not have existed.").

2. As Victims of Random Gun Violence, Plaintiffs Cannot Satisfy The "Foreseeable And Fairly Direct" Element.

The fourth element of a state-created danger claim overlaps with the first element, which requires the harm to have been both "foreseeable and fairly direct." *Bright*, 443 F.3d at 281. For harm to be a "foreseeable . . . result of the state's actions," a plaintiff must show "an awareness on the part of the state actors that rises to the level of actual knowledge or an awareness of risk that is sufficiently concrete to put the actors on notice of the harm." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 239 (3d Cir. 2008). For instance, in *Morse*, the court found that the murder was not "foreseeable" because "the complaint did not allege that defendants were aware of [the shooter's] violent propensities," that she "had made threats against Diane Morse or any other persons at the [school], or even that she had a history of violent behavior." *Id*. Nor did the complaint allege that the officials were "aware of anyone posing a credible threat of violence to persons inside the school building" or were "aware of the likelihood that a mentally deranged person would enter the school in search of a victim." *Id*. At best, the teacher was a victim of a "random attack." *Id*. at 909.

As for the "fairly direct" component, "a distinction exists between harm that occurs to an identifiable or discrete individual under the circumstances and harm that occurs to a 'random' individual with no connection to the harm-causing party . . . who 'happened' to be in the path of danger." *Phillips*, 515 F.3d at 239-40. For

example, a young man shot and killed by his girlfriend's jealous ex-boyfriend can satisfy the "fairly direct" component by alleging that various 911 call center employees provided the ex-boyfriend (himself a former employee at the same call center) with information regarding the young man's whereabouts that the employees knew the ex-boyfriend would use to find him. *See id*. at 240. But victims of "random" gun violence who happen to find themselves in harm's way cannot satisfy the "fairly direct" component. *See Morse*, 132 F.3d at 909; *see also LaGuardia*, 705 Fed. Appx. at 133-34 (holding that victims of a random shooting at a town council meeting could not satisfy the "fairly direct" element of their claim against the officials who allegedly antagonized the shooter by condemning and selling his property because, "as attendees of the township meeting open to the public, [they were] more akin to 'random individual[s]' who 'happened to be in the path of danger'") (quoting *Phillips*, 515 F.3d at 240).

Here, Plaintiffs cannot show their harm was "foreseeable." There is no record evidence that the PBOE Officials knew that Wyatt wanted to exact revenge on Abdullah, *let alone* that they ever thought Wyatt would try to do so if they invited the public to an event at a stadium that was not equipped with a metal detector. If anything, the shooting here is *at least* as unforeseeable as the "random" shooting in *Morse*, since there is no indication that the PBOE Officials "were aware of [Wyatt's] violent propensities," "were aware of anyone [like Wyatt] posing a credible threat of

violence to persons inside the [stadium]," or "were aware of the likelihood that [Wyatt] would enter the stadium in search of [his] victim." *Morse*, 132 F.3d at 908. Thus, "no legitimate inference can be drawn that [the PBOE Officials] might have been actually aware of a high risk that an armed non-student invader would enter the [stadium] and fire a pistol randomly during [a football game]." *Johnson*, 38 F.3d at 201-02.

Nor can Plaintiffs satisfy the "fairly direct" aspect of the first element. Far from being "an identifiable or discrete individual," Plaintiffs were instead "'random' individual[s] with no connection to" the PBOE Officials. *Phillips*, 515 F.3d at 239. In *Phillips*, the shooting victim was both "identifiable" and "discrete" because he was the very subject of the information that the 911 call center operators provided to the killer (who then used that information to hunt him down). *Id*. at 240. But here, the PBOE Officials did not have any idea who Plaintiffs were, let alone that they would attend the game. (*Compare* Da17-19, ¶¶54-69 *with* Da280-83, ¶¶54-69). Rather, this case is more akin to *LaGuardia*, where several victims of a random shooting at a town council meeting could not satisfy the "fairly direct" element of their claim because, "as attendees of the township meeting open to the public, [they were] more akin to 'random individual[s]' who 'happened to be in the path of danger.'" *LaGuardia*, 705 Fed. Appx. at 133-34 (quoting *Phillips*, 515 F.3d at 240).

3. The PBOE Officials Did Not Engage In Conduct That Shocks The Conscience.

Lastly, the second element of a state-created danger claim overlaps with the fourth element by requiring a plaintiff to show that the government officials "acted with a degree of culpability that shocks the conscience." *Bright*, 443 F.3d at 281. "For behavior by a government officer to shock the conscience, it must be more egregious than 'negligently inflicted harm,' as mere negligence 'is categorically beneath the threshold of constitutional due process.'" *Haberle v. Troxell*, 885 F.3d 171, 177 (3d Cir. 2018) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)). "The exact level of culpability required to shock the conscience, however, depends on the circumstances of each case, and the threshold for liability varies with the state actor's opportunity to deliberate before taking action." *Kedra v. Schroeter*, 876 F.3d 424, 437 (3d Cir. 2017). "[W]here the [state] actor has time to make an 'unhurried judgment[],' a plaintiff need only allege facts supporting an inference that the official acted with a mental state of 'deliberate indifference,'" which means "a 'conscious disregard of a substantial risk of serious harm'" *Id*. (citations omitted).

Any charge of deliberate indifference to the risk of random gun violence at a voluntary event on school property is squarely foreclosed by *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521 (5th Cir. 1994). There, a teenager named Dameon Steadham "was killed by random gunfire in the parking lot of a public high school after a school dance." *Id*. at 522. Steadham's mother, Marsha Leffall, alleged that it was "well-

known that students attending . . . Lincoln High School . . . often carried and fired dangerous weapons on school property" and that the school "took inadequate measures to prevent the events leading to Steadham's death, assigning only two unarmed security guards to the Lincoln High School dance that night." *Id*. She also alleged that "[t]he frequency of gunfire during and after school functions at Lincoln High School was so well-known that officials of the Dallas Police Department had previously asked Lincoln High School officials to refrain from sponsoring school functions until adequate police security could be provided." *Id*. Leffall thus claimed the school "violated Steadham's constitutional rights by affirmatively creating the hazardous environment that Steadham encountered the night of his death." *Id*. at 530.

The Fifth Circuit framed the issue as "whether the decision of the public school district and the high school principal to sponsor the dance despite their knowledge of the danger of such an occurrence violated Steadham's constitutional rights." *Leffall*, 28 F.3d at 522. The court held that "even assuming that substantive due process imposed some duty on the state to protect Steadham from dangers arising out of sponsorship of the dance at Lincoln High School, [the complaint] failed to allege a violation of Steadham's due process rights . . . because [it] did not allege facts that demonstrated deliberate indifference to those dangers on the part of the state actors." *Id*. at 532.

> This was not a case in which the state knowingly brought the victim into close proximity with a specific individual

> known to be likely to commit violence . . . or abandoned the victim in a highly dangerous environment . . . or conspired with the private actor who inflicted the deprivation[.] Nor did the defendants decide to sponsor the dance with an utter lack of regard for the safety of the attendees. [Plaintiff] admits in her complaint that the school officials provided two security guards, albeit unarmed guards, on the night in question, which refutes any contention that the school officials deliberately ignored the risk to persons attending the dance. . . . [W]e conclude that [the] complaint affirmatively discloses that the state actors in the instant case were not deliberately indifferent to Steadham's constitutional rights.
>
> [*Id*. at 531-32 (internal citations omitted).]

Here, as in *Leffall*, Plaintiffs cannot establish that the PBOE Officials exhibited a conscious disregard of a substantial risk of serious harm. That's because it's undisputed that several armed security guards were present for the football game. (*Compare* Da12-14, ¶¶13-26 *with* Da272-75, ¶¶13-26). This conclusively refutes any contention that the PBOE Officials were "deliberately indifferent" to any risk of harm to persons who chose to attend, including Plaintiffs. There is also no evidence that the PBOE Officials had any idea that Wyatt was armed and dangerous. *See McQueen*, 433 F.3d at 469-70 (holding that teacher was not deliberately indifferent to the risk of harm because there was no evidence that the teacher "knew or even suspected that [the shooter] had a gun, knife, or other similarly dangerous weapon with him on the day of the shooting," and because the shooter's "history of

behavioral problems [did not] suggest that he would escalate from hitting with fists, feet, and pencils to such weapons").

For all the foregoing reasons, Plaintiffs cannot establish a violation of substantive due process through the state-created danger theory. And the absence of a viable state-created danger claim precludes derivative *Monell* liability. *See Brown v. Pa. Dep't of Health Emergency Med. Servs. Training Inst.*, 318 F.3d 473, 483 (3d Cir. 2003) (dismissing § 1983 state-created danger claim against EMTs who failed to rescue a boy choking on grape and concluding that because there was no underlying constitutional harm, there can be no municipal liability to the City of Philadelphia). The trial court's conclusion to the contrary was erroneous as a matter of law.

II. The Trial Court Erred By Misapplying *Gormley* To Evade *DeShaney* And Find A Constitutional Claim Against The PBOE (T62:11-75:14).

The trial court also held that under *Gormley v. Wood-El*, 218 N.J. 72 (2014), Plaintiffs "stated a prima facie case." (T73:11-12). But *Gormley*, a non-shooting case involving a physical assault at a custodial psychiatric facility, is distinguishable from this case for a variety of reasons. Before turning to *Gormley*, however, it is necessary to briefly discuss the parameters of the "special relationship" theory of substantive due process liability.

Once again, *DeShaney* is instructive. Joshua argued in the alternative that "even if the Due Process Clause imposes no affirmative obligation on the State to

provide the general public with adequate protective services, such a duty may arise out of certain 'special relationships' created or assumed by the State with respect to particular individuals." *DeShaney*, 489 U.S. at 197. According to Joshua, "such a 'special relationship' existed [in his case] because the State knew that [he] faced a special danger of abuse at his father's hands, and specifically proclaimed, by word and by deed, its intention to protect him against that danger." *Id*. "Having actually undertaken to protect [him] from this danger," Joshua claimed, "the State acquired an affirmative 'duty,' enforceable through the Due Process Clause, to do so in a reasonably competent fashion," and its "failure to discharge that duty . . . was an abuse of governmental power that so 'shocks the conscience,' as to constitute a substantive due process violation." *Id*. (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952)).

The Supreme Court was not convinced. "It is true that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals," including "incarcerated prisoners" and "involuntarily committed mental patients." *DeShaney*, 489 U.S. at 198-99 (citing *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Estelle v. Gamble*, 429 U.S. 97 (1976)). But *Youngberg* and *Estelle* "stand only for the proposition that when the State takes a person into its 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." *Id*. at 199-200. "The 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." *Id*. at 200. "In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means." *Id*. Thus, Joshua's claim failed since he was injured "not while he was in the State's custody, but while he was in the custody of his natural father, who was in no sense a state actor." *Id*. at 201.[6]

A. The Holding in *Gormley*.

With that background in mind, we now turn to *Gormley*, in which a slim majority of our Supreme Court created a hybrid theory of constitutional liability by combining the "state-created danger" theory with the "special relationship" theory. *See Gormley*, 218 N.J. at 110 n.11 ("We do not address Gormley's argument that her 'special-relationship' with Ancora is a separate basis for liability because, in the

[6] *See also Ye v. United States*, 484 F.3d 634, 637 n.1 (3d Cir. 2007) ("This Court 'has read *DeShaney* primarily as setting out a test of physical custody' for purposes of determining whether there is a 'special relationship' between the state and the plaintiff."); *Horton v. Flenory*, 889 F.2d 454, 458 (3d Cir. 1989) (explaining that "*DeShaney* requires that the state have imposed some kind of limitation on a victim's ability to act in his own interests").

context of the facts before us, that relationship is subsumed within state-created-danger liability. . . . [W]e do not have to decide whether those doctrines are different."); *see also Gormley*, 218 N.J. at 120-21 (LaVecchia, J., dissenting) (faulting the majority for "meld[ing] the two theories into a single – and novel – cause of action" and explaining that "[t]he two theories are distinct and should be considered separately") (citing *Gormley*, 218 N.J. at 110 n.11).

In *Gormley*, a public defender named Lorraine Gormley was visiting Ancora Psychiatric Hospital to meet for the first time with B.R., an involuntarily committed client whom she had been appointed to represent in an upcoming civil commitment hearing, when B.R. "suddenly and brutally attacked" her "in the hospital's unsupervised day room." *Gormley*, 218 N.J. at 83. "The day rooms were the scene of frequent fights and violence," but when Gormley arrived, "Ancora offered no option of a separate interview room, did not post security guards, did not use an electronic camera to monitor the day room, and did not provide Gormley with access to an emergency call device." *Id*. at 87, 89. That was because "Ancora had a policy that provided for family members to meet with patients in quiet, private rooms, supervised by a staff member, [while] lawyers were relegated to the noisy, violent, and combustible day rooms to conduct client interviews." *Id*. at 87-88. In fact, "[n]o security guards were posted to provide protection in the day rooms or anywhere at Ancora other than the entranceway to the hospital." *Id*. at 87. As a result, lawyers

(and other visiting professionals) were "[o]ften . . . the victims of assaults by patients." *Id*. The lack of supervision was especially risky in Gormley's case because "B.R. was suffering from a 'psychotic disorder due to medical condition with hallucination'" and had been "assigned Continuous Visual Observation (CVO) status." *Id*. at 89. "CVO status is conferred on 'patients who demonstrate a safety risk to self, others, and property,'" and "B.R.'s CVO status required an assigned staff member to keep her under 'continual visual observation' at all times." *Id*.

Against that backdrop, "Gormley entered the ward's day room and sat at a small table awaiting her client." *Gormley*, 218 N.J. at 89. "As a precaution, she placed her back against the wall so that no one could attack her from behind." *Id*. "A staff member located and brought B.R. to the day room." *Id*. at 90. "But no one informed Gormley that B.R. was on CVO status based on a safety-risk assessment." *Id*. "B.R. sat at the table where she was to be interviewed," while "Gormley positioned herself catty-corner to B.R. because the noise in the day room made it impossible to hear B.R. from across the table while conducting a confidential interview." *Id*. "With the two in close proximity to each other, the interview began. As Gormley turned her head to write some notes, B.R., suddenly and without warning, struck Gormley about the head and face several times." *Id*. The attack continued for an indeterminate period until "Gormley freed herself without anyone coming to her aid." *Id*. "Staff then escorted B.R. out of the day room." *Id*.

In allowing Gormley's "state-created danger" claim under the Fourteenth Amendment[7] to go to trial, the majority placed *significant emphasis* on the liberty restrictions she faced while she was visiting Ancora. *See Gormley*, 218 N.J. at 107-11. The majority began by quoting *DeShaney* for the idea that "substantive due process is implicated when the State acts affirmatively to 'restrain[] the individual's freedom to act on his own behalf – through incarceration, institutionalization, or *other similar restraint of personal liberty*.'" *Id*. at 107 (quoting *DeShaney*, 489 U.S. at 200) (emphasis in original). The majority then indicated that such a "similar restraint of personal liberty" was present there because "[w]ithin the confines of Ancora – a locked facility – hospital officials controlled and restrained the movements of residents and visitors." *Id*. Indeed, "[t]he violence occurred in a hospital where defendants controlled every aspect of life, including the physical movements of both patients and professionals, and where and how they met. Gormley had no right to move freely at Ancora; she was not an agent in the free world." *Id*. at 111. For these reasons, the majority observed that "Gormley was totally dependent on Ancora to provide for her safety while she was in the facility." *Id*. at 109 (citing *Youngberg*, 457 U.S. at 324).

[7]"Gormley did not advance or develop her claim that defendants violated the substantive-due-process guarantee of the New Jersey Constitution," so the majority "consider[ed] the state-constitutional claim to have lapsed" and thus "resolve[d] only the federal constitutional claim." *Gormley*, 218 N.J. at 95 n.8.

These restraints on Gormley's liberty figured prominently when the majority held that the hospital officials, "particularly [the Chief Executive Officer of Ancora], affirmatively used their authority to create the danger that made Gormley more vulnerable to the assault." *Gormley*, 218 N.J. at 108. "Gormley was not acting in the 'free world' but rather in a locked institutional environment over which defendants exercised total control, including control over where Gormley met with her client, B.R." *Id*. (citing *DeShaney*, 489 U.S. at 201). "B.R. had a constitutional right to assigned counsel, and Gormley was designated by the Office of the Public Advocate to be her counsel." *Id*. But "Gormley could not meet with B.R. off-site in her own office. She had to see B.R. at Ancora and submit to its regulations." *Id*. Under those regulations, "[m]eetings between family members and patients were conducted in quiet, private rooms supervised by staff." *Id*. "Attorneys interviewing their clients for constitutionally required commitment hearings, however, were relegated to the explosive day rooms, where no security guards were posted." *Id*. Thus, the majority found that the hospital officials "were not just passive observers but . . . the architects of an environment in which anarchy reigned in the day rooms of Ancora." *Id*. at 111.

Not only did the majority find that the hospital officials "controlled and restrained Gormley's physical movements" in a manner giving rise to a duty to protect, but it also found that the officials affirmatively acted when they brought Gormley into contact with a known dangerous person without warning her. *See*

Gormley, 218 N.J. at 108 (explaining that defendants "possessed knowledge of the special dangers that B.R. might pose to the unsuspecting attorney, who was meeting her client for the first time"). Indeed, "[t]he institution assigned B.R. Continuous Visual Observation status because of the particular safety risk the patient posed to herself and others," and "[a] staff member, who presumably knew of B.R.'s CVO status, brought her to the day room – brought her in contact with Gormley." *Id*. "But no one told Gormley of the heightened-risk assessment." *Id*. "When Gormley sat catty-corner to B.R. because the din in the day room made a confidential, lawyer-client conversation impossible – that was the environment defendants had created, an environment conducive to the many assaults that frequently occurred in the day room." *Id*. at 108-09. "Having brought the dangerous patient together with the attorney in an unsecured setting, Gormley literally was left to fend for herself when she was viciously attacked." *Id*. at 109. Thus, the official who brought B.R. and Gormley together was "as much an active tortfeasor as if [they] had thrown [Gormley] into a snake pit." *Id*. (quoting *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982)).

Lastly, the majority found that Gormley had "presented sufficient evidence to go forward on her claim that defendants acted with deliberate indifference to the foreseeable dangers threatening the physical safety of attorneys constitutionally assigned to represent committed patients." *Gormley*, 218 N.J. at 109. "In the two

years before B.R.'s assaultive conduct, defendants kept records of . . . hundreds of assaults committed against staff and visitors, such as Gormley." *Id*. Nevertheless, the hospital maintained a policy for attorney/patient visits "over the course of years, in complete disregard of the known danger that mentally disturbed patients were attacking professionals, such as Gormley, in the ward's day room." *Id*. Again, that policy required attorneys to meet with their clients in day rooms "where no security guards were posted." *Id*. at 108.

B. *Gormley* is Distinguishable And Therefore Irrelevant.

This case is nothing like *Gormley*. The PBOE Officials did not force Plaintiffs to attend the Pleasantville game. (*Compare* Da16-19, ¶¶46-69 *with* Da278-83, ¶¶46-69). Whereas Gormley had no choice but to meet with her client in a dangerous day room at Ancora, Micah was injured at an event that he (through his mother, Angela) *voluntarily* chose to attend. (*Compare* Da15-16, ¶¶36-44 *with* Da277-78, ¶¶36-44). That fact alone is fatal to Plaintiffs' claim. *See Fialkowski v. Greenwich Home for Children, Inc.*, 921 F.2d 459, 465-66 (3d Cir. 1990) (affirming dismissal of substantive due process claim brought by the estate of a mental patient who died while living in a group home because "[h]is parents voluntarily placed him" there, meaning that his "personal liberty was not substantially curtailed by the state in any way").

Dispositive on this point is *Leffall*, 28 F.3d 521, where Dameon Steadham "was killed by random gunfire in the parking lot of a public high school after a school dance." *Id*. at 522. The dance was "held upon the grounds of Lincoln High School in Dallas, Texas," and Steadham was accidentally shot in the head by one of several students who had congregated in the parking lot after the dance and "began to fire handguns randomly and recklessly into the air." *Id*. at 523, 525. Steadham's mother claimed the school had "an affirmative constitutional duty to protect her son from his injury and death, even though his death was most directly the result of actions by a private actor." *Id*. at 525. She claimed that "a 'special relationship' existed between the [school] and her son, giving rise to a constitutional duty on the part of the state to protect her son from danger during a school-sponsored, albeit voluntary, activity." *Id*. at 525. Not so, said the Fifth Circuit:

> Lincoln High School is not a school for the disabled, nor is it a boarding school with twenty-four hour custody of its students. Even assuming that Steadham was required by Texas law to attend school at his age, Leffall has not alleged that he was compelled to attend the dance on the night in question. Thus, we need not go so far as have some of our sister circuits and conclude that no special relationship can ever exist between an ordinary public school district and its students; we conclude only that no such relationship exists during a school-sponsored dance held outside of the time during which students are required to attend school for non-voluntary activities.
>
> [*Id*. at 529.]

The similarities between this case and *Leffall* leap from the page. Both shootings occurred on school property during events where participation by the victims was voluntary. *Leffall* found that no "special relationship" existed precisely because attendance at the dance was not required. The same logic applies here. That, in turn, means that Plaintiffs cannot satisfy the "special relationship" aspect of the hybrid theory that the majority in *Gormley* adopted.[8]

Moreover, the stadium where Micah was injured was *clearly* not akin to a state-run psychiatric hospital. Micah was not injured in "a locked facility" where the PBOE Officials controlled or restricted his freedom to move about, let alone to the

[8]In fact, if this Court were to affirm the trial court's conclusion that the Plaintiffs had a constitutional right to be protected from Wyatt by the PBOE Officials despite the fact that Plaintiffs voluntarily chose to attend a football game that was open to the public, it stands to reason that other claimants could seek to impose constitutional liability on public officials and entities for failing to ensure safety in other areas open to the public as well, such as public transportation. Fortunately, courts have repeatedly rejected those kinds of claims on the same basis that Plaintiffs' claim fails here – namely, that the injured party was not deprived of liberty because they *voluntarily* chose to take advantage of the public transportation at issue. *See*, *e.g.*, *Searles v. SEPTA*, 990 F.2d 789, 792 (3d Cir. 1993) (affirming dismissal of substantive due process claim arising out of a SEPTA elevated train derailment because the plaintiff "was not deprived of liberty when he voluntarily chose to ride" the train and holding that the constitution does not impose a duty on SEPTA to provide a "safe passenger environment"); *Lord v. Town of Lincolnville*, 111 F.3d 122, 1997 U.S. App. LEXIS 15085, at *3 (1st Cir. 1997) (relying on *Searles* to affirm dismissal of substantive due process claim arising out of a motor vehicle collision at an intersection that was alleged to have been "inherently dangerous" because the driver "voluntarily chose to drive his car" on the road in question); *see also Stover v. Camp*, 181 Fed. Appx. 305, 308 (3d Cir. 2006) (holding that plaintiffs injured in a car accident at an intersection where several prior accidents had occurred could not satisfy the "affirmative act" element of their state-created danger claim by alleging that "the Township did nothing to make the intersection safer" because "[m]ere inaction by the state cannot, standing alone, form the basis for a constitutional claim"). These holdings are not surprising because the Due Process Clause "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, 474 U.S. 327, 332 (1986).

same extent that Ancora "controlled and restrained Gormley's physical movements." *Gormley*, 218 N.J. at 108. Rather, Micah was injured in a recreational venue that was open to the public, and he was free to move about the stadium wherever and whenever he wanted. (*Compare* Da16-19, ¶¶46-69 *with* Da278-83, ¶¶46-69). Plaintiffs simply were not in the "physical custody" of the PBOE Officials when they attended the game. *Ye*, 484 F.3d at 637 n.1. It is pure folly for them to even *suggest* otherwise. *See Morrow*, 719 F.3d at 181 (Smith, J., concurring) ("In [*D.R.*], we interpreted 'other similar restraint of personal liberty' to require total and involuntary state custody with no access to private assistance.").

Next, *Gormley* is distinguishable in terms of the steps leading to the injuries. In *Gormley*, a hospital staff member "who presumably knew of B.R.'s CVO status" *literally* "brought the dangerous patient together with the attorney in an unsecured setting" and without telling Gormley about "the heightened-risk assessment." *Gormley*, 218 N.J. at 108-09.

But here, Plaintiffs did not establish (nor even allege) that anyone affirmatively acted to place them *directly* in harm's way, such as by bringing them and Wyatt together, bringing them within range of one another, or even bringing them to the places in the stadium where they were located when the shooting started. *See* Point I (C)(1), *infra*. No one "placed [Micah] in a 'unique confrontational encounter'" with Wyatt in the same way that the staff member placed Gormley in a

"unique confrontational encounter" with B.R. *Morse*, 132 F.3d at 915 (citation omitted).

Further, *Gormley* is distinguishable on the issue of culpability. In *Gormley*, the majority found that the defendant officials had "acted with deliberate indifference to the foreseeable dangers threatening the physical safety of attorneys constitutionally assigned to represent committed patients" because they still required those attorneys to meet with their clients in day rooms "where no security guards were posted," even though they knew that "hundreds of assaults [had been] committed against staff and visitors, such as Gormley." *Gormley*, 218 N.J. at 108-09.

Here, however, and for the reasons explained in Point I (C)(3), *infra*, Plaintiffs did not show that the PBOE Officials were deliberately indifferent to any dangers. Plaintiffs claimed that *other* people had been shot by *other* assailants at *other* football games in Pleasantville many years earlier. (Da35, ¶27; Da23, ¶102). But those events do not suggest "a substantial risk of serious harm" to the people who decided to attend *this* football game, so there was nothing for the PBOE Officials to have "conscious[ly] disregard[ed]" in the first place. *Kedra*, 876 F.3d at 437. In any event, it is undisputed that several armed police officers and security guards present for this football game (*compare* Da12-14, ¶¶13-26 *with* Da272-75, ¶¶13-26), which conclusively refutes any claim of deliberate indifference. *See Leffall*, 28 F.3d at 531-

32 (holding that school officials were not deliberately indifferent to the risk of gun violence at a school dance because they "provided two security guards, albeit unarmed guards, on the night in question").

Finally, this case does not implicate the kinds of important policy considerations that animated *Gormley*. Evident throughout that opinion was the majority's concern that an indigent, involuntarily committed person's constitutional right to consult with appointed counsel could be frustrated or rendered hollow if hospitals like Ancora could make it so dangerous for lawyers like Gormley to meet with their clients that they would be discouraged from showing up at all. Seven times, including in the very first sentence of the opinion, the majority referred to B.R.'s right to assigned counsel, to the fact that Gormley had been assigned to fulfill that legal mandate for B.R. and others, or both. *See Gormley*, 218 N.J. at 83-84, 89, 108-09. The majority even made two such references when it was explaining why it thought Gormley had satisfied the elements of her constitutional claim. *See id*. at 108-09. The majority may not have said it explicitly, but it was obviously concerned about collateral damage to a third-party's constitutional right to assigned counsel and wanted to deter hospitals like Ancora from establishing and maintaining custodial environments that could cause such damage. And the need for such deterrence was obvious: "Even after the assault on Gormley, [Ancora's CEO] stated that she was

not required to make any changes in the manner in which 'attorney/patient visits were handled.'" *Id*. at 110-11.

This case does not implicate such lofty considerations. For one thing, there is no similar need for deterrence here because the PBOE has since taken steps to increase security at sporting events like the one giving rise to this case. (*Compare* Da23, ¶¶99-101*with* Da287-88, ¶¶99-101). Regardless, Plaintiffs cannot credibly claim that if the PBOE Officials are not deterred from establishing and maintaining dangerous recreational sporting environments in the future, then spectators like them would refuse to show up, and the athletes' "rights" – to play before a crowd? – would be frustrated. An indigent, incarcerated individual's constitutional *right* to assigned counsel is clearly not the same as a public-school student's *privilege* of participating in a competitive school athletic program.

By severing *Gormley* from the custodial and institutional context in which it was decided, the trial court rendered a decision that collided directly with *DeShaney.* If left to stand, the trial court's decision would establish a new rule of constitutional law where any time a government entity hosts a public event or opens an area to the public at large, it must take affirmative steps to protect attendees from private acts of violence—or else face constitutional liability.

That holding is squarely at odds with binding precedent and threatens to expose public entities to constitutional claims whenever harm occurs at a town hall,

a parade, a public park, a playground, a municipal building, a courthouse, a library, a transit hub, a community fair, a street festival, or any other area that the state has opened to the public—regardless of whether a state actor affirmatively placed the injured person directly in harm's way.[9]

The trial court's misapplication of *Gormley* turns *DeShaney* on its head. It defies the Third Circuit's admonition that the state-created danger theory is "a narrow exception to the general rule that the state has no duty to protect its citizens from private harms." *Henry*, 728 F.3d at 286. And it runs afoul of the Supreme Court and this Court's warnings against overreach and the need for judicial restraint in the "uncharted area" of substantive due process. *Collins*, 503 U.S. at 125; *Filgueiras v. Newark Pub. Schs.*, 426 N.J. Super. 449, 474-75 (App. Div.), *certif. denied*, 212 N.J. 460 (2012). If left unchecked, the trial court's holding would convert every public tragedy into a potential constitutional tort, even though the Fourteenth Amendment "is not a font of tort law." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998).

Rather than relying on *DeShaney* and its progeny or the multiple decisions from inside and outside the Third Circuit cited above that *uniformly* reject constitutional liability in the precise context at issue here (shootings by private actors

[9] The Third Circuit has already declined to expose public entities to such liability. *See Searles v. SEPTA*, 990 F.2d 789, 792 (3d Cir. 1993) (affirming dismissal of substantive due process claim arising from SEPTA elevated train derailment because the plaintiff "was not deprived of liberty when he voluntarily chose to ride" the train and holding that the constitution does not impose a duty on SEPTA to provide a "safe passenger environment").

on school property), the trial court looked to a series of cases from our Supreme Court ending with *J.S. v. R.T.H.*, 155 N.J. 330 (1998), that addressed the common law duty of care in the negligence context. (T63:25-67:11; T73:7-8). Not one of those cases addressed substantive due process or the NJCRA. Worse still, in relying on those authorities to conjure a constitutional duty, the trial court failed to appreciate that mere negligence "'is categorically beneath the threshold of constitutional due process.'" *Haberle*, 885 F.3d at 177 (quoting *Lewis*, 523 U.S. at 849). Thus, the trial court's decision should be reversed.

III. Even If A Constitutional Violation Had Been Shown, The Trial Court Still Erred Because Plaintiffs Did Not Show That A PBOE Policy Or Custom Was The Moving Force Behind Any Constitutional Deprivation (T62:11-75:14).

Under § 1983, "plaintiffs may not rely on a theory of respondeat superior to impose liability on municipalities." *Brown v. City of Pittsburgh*, 586 F.3d 263, 292 (3d Cir. 2009).[10] "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell*, 436 U.S. at 694. In other words, a municipal "policy" or "custom" must have been the "moving force behind the [constitutional] injury alleged." *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 404

[10] A public school district is considered a municipal entity for § 1983 purposes. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737-38 (1989).

(1997); *see also Stomel*, 192 N.J. at 145 ("The 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible.") (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986)) (emphasis in original). The same is true for municipal liability claims brought under the NJCRA. *See Janowski v. City of N. Wildwood*, 259 F. Supp. 3d 113, 128 & n.5 (D.N.J. 2017); *Ingram v. Twp. of Deptford*, 911 F. Supp. 2d 289, 298 (D.N.J. 2012).

"Policy is made when a decisionmaker possess[ing] final authority to establish a municipal policy with respect to the action issues an official proclamation, policy, or edict." *McTernan v. City of York*, 564 F.3d 636, 658 (3d Cir. 2009) (citation omitted). "A course of conduct is considered to be a custom when, though not authorized by law, such practices of state officials [are] so permanently and well-settled as to virtually constitute law." *Id*. (citation omitted). "[C]ustom may be established by proving knowledge of, and acquiescence to, a practice." *Watson v. Abington Twp.*, 478 F.3d 144, 156 (3d Cir. 2007) (citation omitted).

"There are three situations where acts of a government employee may be deemed to be the result of a policy or custom of the governmental entity for whom the employee works, thereby rendering the entity liable under § 1983." *Natale v. Camden Cnty. Corr. Facility*, 318 F.3d 575, 584 (3d Cir. 2003). "The first is where

the appropriate officer or entity promulgates a generally applicable statement of policy and the subsequent act complained of is simply an implementation of that policy." *Id*. "The second occurs where no rule has been announced as policy but federal law has been violated by an act of the policymaker itself." *Id*. In this scenario, "[m]unicipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." *Pembaur*, 475 U.S. at 481. "Finally, a policy or custom may also exist where the policymaker has failed to act affirmatively at all, [though] the need to take some action to control the agents of the government is so obvious, and the inadequacy of existing practice so likely to result in the violation of constitutional rights, that the policymaker can reasonably be said to have been deliberately indifferent to the need." *Natale*, 318 F.3d at 584.

None of those situations are present here. Plaintiffs did not claim that the PBOE had a policy of not using a metal detector to screen for weapons. In fact, Plaintiffs claimed the absence of metal detectors was the result of indifference, not a policy. (Da294, ¶¶21-24). It was only after this unfortunate incident that the PBOE affirmatively implemented a policy to use metal detectors at sporting events. (Da23, ¶¶99-102). Further, there was no claim that any of the PBOE Officials violated federal law, that Wyatt was an agent of the PBOE, that the PBOE failed to act to control its agents, or that the PBOE was deliberately indifferent to a need to control

its agents.

In short, even if Plaintiffs had established a viable constitutional claim against the PBOE Officials (which they did not), the record was devoid of evidence necessary to establish a triable *Monell* claim against the PBOE. The trial court's finding to the contrary was erroneous as a matter of law.

CONCLUSION

For the reasons set forth herein, the PBOE respectfully requests that this Court reverse the trial court's order to the extent it denied the PBOE's motion for summary judgment and remand with instructions for the trial court to dismiss all NJCRA claims against the PBOE with prejudice.

Respectfully submitted,

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Date: January 12, 2026.

IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001177-25
Civil Action: On Appeal From August 12, 2025 Order Of The Superior Court Of New Jersey, Law Division, Atlantic County

Superior Court, Law Division, Court Docket: ATL-L-2985-21
Superior Court, Law Division Judge:
Hon. Sarah Beth Johnson, J.S.C.

MONICA TENNANT, ADMINISTRATRIX AD PROSEQUENDUM FOR THE ESTATE OF MICAH SAMUEL TENNANT-DUNMORE, ANGELA TENNANT, M.T., A MINOR, BY HER PARENT AND GUARDIAN AD LITEM, ANGELA TENNANT,
Plaintiff-Respondent
v.

PLEASANTVILLE BOARD OF EDUCATION, DENNIS ANDERSON, HOWARD JOHNSON, STEPHEN TOWNSEND, DANNY ADCOCK, NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION, JOHN DOE (1-10) FICTITIOUS NAMES, JOHN DOE, INC. (1-10) FICTITIOUS NAMES,
Defendants-Appellants
v.
ALVIN WYATT and JOHN DOE (1-10), fictitious Names
Third-Party Defendants-Respondent

PLAINTIFFS-RESPONDENTS ESTATE OF MICAH TENNANT DUNMORE, ANGELA TENNANT, M.T.S' APPELLATE BRIEF

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I. PRELIMINARY STATEMENT

The instant matter arises from the November 15, 2019 shooting death of 10-year-old Micah Tennant Dunmore while attending a football game at Pleasantville High School located in Atlantic County, New Jersey. After completing discovery and proceeding with dispositive motion practice, on August 12, 2025 the trial court granted Defendant's Motion for Summary Judgment with respect to Plaintiffs' common law claims, but denied it with respect to Plaintiffs' state created danger constitutional claim against the Pleasantville Board of Education. Pa55.

The trial court's determination was correct. The instant matter is brought pursuant to the New Jersey Constitution. Defendant's arguments that Plaintiff cannot establish a state created danger claim must be rejected because they attempt to inject additional requirements not contained in the elements of a state created danger claim articulated by the New Jersey Supreme Court in Gormley v. Wood-El, 218 N.J. 72, 101 (2014) and ignore the proofs adduced below demonstrating that the shooting that occurred on November 15, 2019 was foreseeable and that the affirmative actions by Defendant-Appellants created a dangerous environment that resulted in the death of 10-year-old Micah Tennant Samual Dunmore.

Defendants rely almost entirely on decades old cases from the federal district and circuit courts, ignoring that those cases are not controlling for state constitutional claims and that the factual underpinnings of those cases, that gun violence in schools

is not foreseeable, is tragically out of step with the present day reality.

The trial court correctly determined that Plaintiff-Respondents had demonstrated viable claims for state created danger. This Court should therefore reject the arguments advanced by Defendant-Appellants and affirm the August 12, 2025 Order of the trial court.

II. COUNTER STATEMENT OF FACTUAL HISTORY

For the purposes of clarity and economy, this statement of facts summarizes the undisputed parts of the record below. See R. 2:8-1(a).

On November 15, 2019, 10-year-old Micah Tennant Dunmore was shot and killed while attending a football game at Pleasantville High School with his mother Angela Tennant and sister M.T. Micah was struck in the neck and ultimately succumbed to his injuries on November 20, 2019.

Micah's mother Angela Tennant and minor sister M.T. were also present at the game with him and bore witness to the shooting, terror and chaos that ensued, and to the suffering and death of young Micah.

The record demonstrates that Defendants planned, created, and controlled the subject environment where the football game and subject shooting occured. Pa135. The school district knew that the school was located in a high crime area, a 139, that there had been frequent police responses to criminal and/or violent incidents at the school, Pa337-390, and that there had been a prior shooting at or around another

football event in Pleasantville in the years prior to the instant tragedy. Pa172, 197. Despite this, the district created consciously disregarded this and/or through their polices, practices, and planning and control of the subject event, created a dangerous environment that failed to take into account basic preventative safety protocols such as barriers, metal detectors, screening, etc. Pa269-336.

III.COUNTER STATEMENT OF PROCEDURAL HISTORY

Plaintiffs filed suit against Defendant Pleasantville Board of Education ("PBOE") and individual school administrators on September 21, 2021. Pa1. Plaintiffs asserted claims for dangerous condition of property and for state created danger under Art. I, ¶1 of the New Jersey Constitution. Pa-1-18. The parties proceeded through discovery, exchanging voluminous paper materials and conducting numerous depositions.

On August 12, 2025, the trial court granted Defendant-Appellants' Motion for Summary Judgment with respect to Plaintiff-Respondents' common law claims but denied them with respect to their state created danger claim against the Pleasantville Board of Education. Pa55. More specifically, the trial court found that Plaintiff-Respondents had adduced sufficient facts to support a state created danger claim under the New Jersey Constitution against the individual defendants and that, while those defendants were entitled to qualified immunity, Plaintiffs had adequately

supported a direct entity claim against the PBOE and could proceed on said claim. This appeal follows.

IV. ARGUMENT

A. PLAINTIFF DEMONSTRATED A STATE CONSTITUTIONAL CLAIM FOR STATE CREATED DANGER PURSUANT TO NEW JERSEY PRECEDENT

The trial court correctly determined that Plaintiffs had adequately stated and supported state created danger claims for violation of the right to substantive due process protected by Article I, Paragraph I of the New Jersey Constitution through the New Jersey Civil Rights Act ("NJCRA"), N.J.S.A. 10:6-2 and directly through the New Jersey Constitution.

The NJCRA provides an individual cause of action where a person acting under color of state law deprives or interferes with a state of federal constitutional or statutory right. N.J.S.A. 10:6-2(e). Additionally, state constitutional claims may be brought directly under the state constitution. King v. South Jersey Nat'l Bank, 66 N.J. 161, 177 (1974)("The power of the Court to enforce rights recognized by the New Jersey Constitution, even in the absence of implementing legislation, is clear."), see also Harvard v. State of New Jersey, 2016 N.J. Super. Unpub. LEXIS 1559 (L. Div. June 29, 2016), aff'd 2018 N.J. Super. Unpub. LEXIS 207 (2018)(evaluating claims brought directly under the state constitution).

Appellant-Respondents rely entirely on non-precedential federal precedent

that, in addition to being distinguishable from the instant matter, are decades old and rest upon a foundational assumption that is incompatible with our current reality; that gun violence in schools is neither foreseeable or preventable. The trial court correctly determined that pursuant to the framework elucidated by the New Jersey Supreme Court in Gormley v. Wood-El, 218 N.J. 72, 101 (2014), Plaintiffs have demonstrated a state-created danger claim requiring resolution by the trier of fact. The trial court also correctly determined that, while the individual defendants were entitled to qualified immunity given the absence of pre-existing caselaw involving state created danger in school shootings, Plaintiff had demonstrated a direct entity constitutional claim against the Pleasantville Board of Education.

Defendant-Appellants repeatedly argue that there is no constitutional duty to protect against third-parties. Winnebago Ctny. Dep't of Soc. Services, 489 U.S. 189, 195 (1989). While correct, this argument is a red herring and irrelevant to the instant matter.

Plaintiff-Respondents did not assert a claim based on violation of any constitution of duty to protect. Rather, Plaintiffs asserted claims sounding in state created danger in violation of the right to substantive due process.

State created danger is a theory of constitutional liability that falls under the penumbra of the right to substantive due process protected by Article I. Paragraph I of the New Jersey Constitution.2 See Greenberg v. Kimmelman, 99 N.J. 552, 568

(1985).[1] The New Jersey Supreme Court has set forth the elements of a state created danger claim:

1. the harm caused was foreseeable and fairly direct;
2. the state actor acted with a degree of culpability that shocked the conscience;
3. a relationship between the state and the plaintiff existed such that "the plaintiff was a foreseeable victim of the defendant's acts," or "a member of a discrete class of persons subjected to the potential harm brought about by the state's actions," as opposed to a member of the public in general; and
4. A state actor affirmatively used his or her authority in a way that created a danger to the citizen or rendered the citizen more vulnerable to danger than had the state not acted at all.

Gormley v. Wood-El, 218 N.J. 72, 101 (2014)(citing Bright v. Westmoreland, 43 F.3d 276, 281 (3d. Cir. 2006)).3 These elements overlap somewhat and should be considered collectively. See Gormley, 218 N.J. at 101-102.

It is also important to recognize that the instant matter involves claims under the New Jersey Constitution. "[S]tate constitutions exist as a cognate source of individual freedoms and that state constitutional guarantees of these rights may indeed surpass the individual constitution." State v. Hunt, 91 N.J. 338, 360 (1979). And while our courts may look to federal constitutional jurisprudence for guidance, state constitutional jurisprudence is not bound by it. State v. Hunt, 91 N.J. 338, 362 (1979)(stating that while federal precedent may provide guidance on the

[1] Substantive due process protects, among other fundamental rights, the right to bodily integrity. See, e.g. Rochin v. California, 342 U.S. 165 (1952). Accordingly, a protected liberty interest is implicated herein based on the tragic death of 10-year-old Micah Samual Tennant Dunmore.

interpretation of state constitutional law, it is not controlling).

The trial court based its decision on the holdings of the New Jersey Supreme Court in Gormley v. Wood-El, 218 N.J. 72, 101 (2014) and therefore did not need to separately consider whether the state constitution provided additional protections in the instant matter. However, review of the relevant factors for such analysis supports the viability of the claim asserted by Plaintiffs in the instant matter.

In consideration of whether the state constitution provides protection above its federal counterpart, courts should consider: (1) textual language in terms of distinctive provisions or phrasing of particular provisions; (2) legislative history; (3) preexisting state law; (4) structural differences; (5) matters of particular state interest; (6) state traditions; and (7) public attitudes. State v. Hunt, 91 N.J. 338, 366-67 (1979)(Handler, J., concurring).

Distinct from its federal counterpart, the New Jersey Constitution provides the right to a thorough and efficient system of free public education. N.J. Const. Art. VIII, Sec. 4, Par. 1. That such a right encompasses, or at a minimum is relevant to the consideration of, whether a dangerous school environment constitutes a violation of individual state constitutional rights.[2] Furthermore, both school safety and gun

[2] Plaintiff-Respondents note for the sake of clarity that the subject shooting occurred at an extra-curricular event at the school rather than regular school hours. However, this distinction is not relevant given that extra-curricular activities are part and parcel of public education and, the fact that the victim here who attended the subject event was a student at another school is not germane to consideration of

violence, generally and as it more specifically pertains to school shootings, are matters of dire state interest. And lastly, public attitudes towards the gun violence and school shootings have shifted dramatically over the last thirty years from the reasoning expressed in the cases cited by Defendant-Appellants that such tragedies are neither foreseeable or preventable.

Finally, Plaintiff-Respondents must briefly note the claim asserted by Defendant-Appellants in their submission that the instant matter does not implicate important policy considerations as did Gormley. They argue that at issue there was the constitutional right to consult with appointed counsel and that here the only important policy consideration is deterrence from attendance at recreational sporting activities.

Defendant-Respondents miss the point entirely. Rather, the point is 2,069. That is the number of shootings at K through 12 schools in the United States since 1970.[3] Pa281. Squires Narrative Report, at P011435. Pa269. Of those, 300 have occurred at school athletic facilities. Ibid. And of those, 103 have occurred

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whether Art. VII, Sec. 4, Par. 1 supports that thorough and efficient education implicates not creating dangerous conditions at schools. Especially given that, like the victim herein whose family paid to attend the event, it is commonplace that other children and members of the public will be present on school grounds either as students, visitors, or other employees/vendors serving educational intersets.

[3] For the sake of clarity, the statistics noted herein regarding school shootings are compiled from data spanning 1970 through 2022. Accordingly, the actual number of school shootings is unfortunately larger still.

specifically on football track and fields. Ibid.

Plaintiff-Respondents readily recognize that tragic facts do not in and of themselves warrant a particular result. However, the contextual foundation of this existential blight upon our nation and its children, and access to a meaningful civil remedy for the same, cannot be disregarded when considering the facts as they relate to state created danger.

B. DEFENDANT-APPELLANTS AFFIRMATIVELY ACTED TO CREATED A DANGEROUS SITUATION BY VIRTUE OF CREATING THE ENVIRONMENT AND CONDITIONS THAT LED TO THE TRAGIC DEATH OF 10-YEAR-OLD MICAH SAMUEL TENNANT DUNMORE

The starting point of a state-created danger claim is that a state actor rendered the plaintiff more vulnerable or created a dangerous situation. Gormley, 218 N.J. at 103 (citing Estate of Smith v. Marasco, 318 F.3d 497, 507-10 (3d Cir. 2003). Defendant-Appellants ignore the 'or' language and argue both must be proven. While there is not a consensus among federal circuits regarding the precise elements of state created danger claims as a general matter, Gormley explicitly provides these elements are alternative pathways to demonstrate a state created danger claim.

Defendant-Appellants were the school administrators responsible for hosting, supervising, and controlling the environment of the athletic event at issue. Pa135. Like the administrators in Gormley, Defendant-Appellants affirmatively used their authority to create the danger by establishing the regulations and the environment to

which Plaintiffs had to submit while there. Id. at 109 ("Gormley's injuries were not a result of defendants' inaction, but the result of their protocols, the affirmative steps that created an institutional environment in which patients could freely attack their attorneys and psychiatrists.").

Gormley is instructive. Therein, the New Jersey Supreme Court found that the record supported a state created danger claim where the claimant was attacked by a patient at the Ancora psychiatric facility. Id. at 105-106. The Court noted a documented history of violent incidents at the Ancora facility. Id. at 106 ("Despite the control defendants exercised over Ancora, between October 2003 and December 2005, patients committed 3846 assaults."). The Court further found that because the plaintiff was part of a group that travelled to and was present at the subject facility, she was a member of a discrete class of foreseeable victims. Id. at 107.

In the instant matter, the proofs herein show a history of criminal activity at Pleasantville High School. Defendants themselves admitted that it was a high crime area. Pa139. Defendants had actual knowledge of a prior shooting at a football practice in the city. Pa172, 197.

It is undoubtable that all wish that adequate safety measures were not necessary at schools and school events. However, the horrifying reality of years of school shootings have put the lie to such idealistic aspirations. Between 1970 and 2022, there have been 2,069 shootings at K through 12 schools in the United States.

Pa281. Of those, 300 have occurred at school athletic facilities. Ibid. And another 103 have occurred specifically on football track and fields. Ibid.

PBOE defendants argue that Gormley does not apply because the Court combined the state-created danger theory with the special relationship theory of constitutional liability. Nowhere in Gormley did the New Jersey Supreme Court so hold. Nothing in Gormley nor an other constitutional authority cited by Defendants stands for the proposition that a correctional or institutional setting is necessary for liability to attach. Indeed, it is clear that state-created danger does not require a custodial relationship. See generally Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 200 (5th Cir. 1994)("When state actors knowingly place a person in danger, the due process clause of the constitution has been held to render them accountable for the foreseeable injuries that result from their conduct, whether or not the victim was in formal state 'custody.'").

C. THE NOVEMBER 19, 2019 SHOOTING WAS A FORESEEABLE HARM GIVEN THE DOCUMENTED HISTORY OF CRIMINAL ACTIVITY AT THE SCHOOL AND SURROUNDING AREA AND PRIOR SHOOTING AT A FOOTBALL FIELD NEARBY

PBOE Defendants next argue that the harm suffered by Plaintiffs was not foreseeable and direct. See Bright, 443 F.3d at 281. This argument has two problems. First, it relies upon a line of reasoning that underpins the thirty-year-old federal cases cited by Defendant-Appellant that gun violence in schools is not foreseeable or preventable. Second, it rests on the erroneous position that defendants

needed knowledge of the dangerous propensities of the tortfeasor Alvin Wyatt specifically.

PBOE Defendants had actual knowledge of prior criminal and violent incidents at the school, that the city was a high crime area, and of a prior shooting at a football field nearby. Pa139. From 2017 through 2019, police records demonstrate 868 responses to incidents associated with 701 Mill Road, Pleasantville, New Jersey. Pa337-390. Additionally, there had been a previous shooting at a nearby football field prior to the tragic events at issue here. Pa139, 197.

The gravamen of Plaintiffs' claim is that defendants created a dangerous environment by their policies and practices of not securing the event and not screening for weapons, despite actual knowledge of prior incidents of violence and shootings. The nature of the harm at issue, of which defendants had actual knowledge, is the exact harm that occurred on November 15, 2019. It strains credulity to argue that liability may only attach under such circumstances where actual knowledge of the specific third-party tortfeasor exists. And nowhere in Gormley did the New Jersey Supreme Court impart such a requirement.

Defendant-Appellants attempt to extricate the foreseeability element from the facts of the claim asserted by Plaintiffs herein. The cases relied upon by Defendants suffer from three flaws. None are precedential for the state constitutional claim at issue here. They are distinguishable. And, perhaps most importantly, rest upon an

assumption that gun violence in schools is neither common place nor foreseeable.

We may wish this was true. But such wishful thinking cannot make it so. This argument is just not compatible with reality; that gun violence in schools has become a sickness that has blighted our society with frightening regularity for years.

In Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 200 (5th Cir. 1994), the basis for the Fifth Circuit's affirming the dismissal of the state created danger claim therein was that, contrary to the proofs in the instant matter, there were no specific allegations that the school was dangerous or that defendants knew it was dangerous to students. Johnson, 38 F.3d at 201 (stating that "[t]here would have to be allegations at least of previous criminal conduct at Smith High School from which a trier of fact could conclude it was tantamount to a "high crime area."). Accordingly, that matter is distinguishable.

PBOE Defendants further rely upon the case of Mitchell v. Duval Cnty. Sch. Bd., 107 F.3d 837 (11th Cir. 1997). Critical to the 11th Circuit's rejection of the state created danger claim at issue there is that after a school event, the claimant left and waited a considerable distance away from the school, of his own volition, where the shooting later occurred. Id. at 839-40 (stating that the school did not place the victim in the dangerous location where the shooting occurred). Thus, there was not a sufficient causal connection to any affirmative action by a state actor. Unlike the case in Mitchell, the shooting in the instant matter occurred during the school event

organized by the state actors that the Plaintiffs were encouraged to attend. Clearly distinguishable from the case sub judice.

PBOE Defendants also rely upon Morse v. Lower Merion Sch. Dist., 132 F.3d 902 (3d Cir. 1997). Therein, a third-party gained access to a school through an area undergoing construction. Id. at 908. Importantly, there were no allegations of prior criminal or violent activity of which the defendants were aware. Ibid. ("[T]here is no allegation that defendants were aware of anyone posing a credible threat of violence to persons inside the school building."). The most that was asserted therein was that the shooter had been seen loitering in the school previously. Ibid.

D. AS ATTENDEES AT THE SUBJECT EVENT PLAINTIFFS WERE PART OF A DISCRETE GROUP DISTINCT FROM THE GENERAL PUBLIC AS A WHOLE

Defendant-Appellants argue that Plaintiffs were not foreseeable victims as distinct from the public. However, where the dangerous situation at issue threatens a group, which includes the claimant, this element is satisfied. See McQueen v. Beecher Cmty. Schs., 433 F.3d 460, 468-69 (6th Cir. 2006)(finding the existence of a special danger where the victim was a member of a group of children left in a classroom with an armed classmate); Waller v. Trippett, 49 F. App'x 45, 50 (6th Cir. 2002)(finding a special danger where the victim was a member of a group), see also Reed v. Gardner, 986 F.2d 1122 (7th Cir.), cert. den., 510 U.S. 947 (1993)(holding that state created danger involving a drunk driver created a danger to and/or rendered

others on the road more vulnerable).

Plaintiff-Respondents Angela Tennant, M.T., and Estate of Micah Samuel Tennant Dunmore were attendees at the subject football game. Defendant-Appellants attempt to characterize them as members of the public such that they were not foreseeable victims. However, the dangerous situation at issue herein is an event hosted by the school district. Plaintiff-Respondents were among those who paid for tickets and attended said event at the invitation. Thus, Plaintiffs were members of a group attending the event and distinct from the general public as a whole.

It was foreseeable that those who purchased tickets and attended the football game might be harmed by violent or criminal activities at the game. Accordingly, a relationship existed between the Defendant-Appellants and the Plaintiff-Respondents and all other attendees such that they were a discrete class of persons subjected to potential harm. As conceded by Defendant-Appellants, a state created danger claim turns not on whether "the state actor 'pulled the trigger', but whether the state actor placed the plaintiff in a bullet's likely path." Sciotto ex rel. Sciotto v. Marple Newton Sch. Dist., 81 F. Supp. 2d 559, 565 n.8 (E.D. Pa. 1999).

The subject school had a significant history of criminal and violent incidents. Pa139, 197.

It is disingenuous for the Defendant-Appellants to deny knowledge of same

given that they were so concerned with their own safety that they required persons entering board of education meetings to be screened by a metal detector. The board of education members were so worried about violence that since 2019, meetings were held in the high school building so that attendees would pass through the metal detectors. Pa201.

There was even a prior shooting incident at a football field in the town a scant few years prior to the tragedy at issue here. Pa172, 197. The risk of gun violence was of harm of a foreseeable nature. See generally S.H. v. K&H Transport, Inc., 465 N.J. Super. 201, 215 (App. Div. 2020)(noting that foreseeability as it relates to causation refers to whether the specific act or omission at issue was such that the ultimate injury to plaintiff reasonably flowed from said act or omission). Accordingly, the trial court correctly determined that a genuine issue of material fact as to foreseeability existed. See Gormley, 218 N.J. at 107 ("Assaults in the day room were not unexpected but fairly foreseeable.").

Defendant-Appellants' argument that Plaintiffs cannot assert a state created danger claim because they voluntarily attended the football game misinterprets state created danger jurisprudence. While the actions of the claimant may be relevant to the elements of a state created danger claim, there is no support for the contention that Plaintiffs' attendance at the event hosted and controlled by Defendants bars a state created danger claim.

Defendants rely on the Monahan v. Dorchester Counseling Center, Inc., 961 F.2d 987 (1992). In Monahan, the claimant voluntarily committed himself before becoming injured after attempting to escape and then being struck by a car. Id. at 988-89. The dangerous situation alleged, even if assumed to be legitimate, had no causal connection to the harm that ultimately resulted from the claimant's own mental infirmity.

Defendants also rely upon the case of Jones v. Reynolds, 438 F.3d 685 (6th Cir. (2006). But this case does not stand for the proposition that voluntary attendance at an event or location precludes a state-created danger claim.

In Jones, the decedent bystander was struck and killed when an illegal drag racer lost control of his car on the outskirts of Detroit and careened into the crowd. Id. at 688. The defendant officers were present at the scene and gave the racers permission to proceed. Ibid.

Initially, the court reasoned that the officers' failure to stop the race was not an affirmative act that exposed the decedent to any more danger than she was already exposed. Id. at 691. The court continued that such acts must either increase the vulnerability of a citizen to danger ***or*** place them in harm's way. Ibid. Because the officers there had not created the dangerous situation or taken any affirmative action to either placed the decedent there or increased the risk, the court concluded that the claimant had not demonstrated a state created danger claim. Ibid.

The court further elucidated that "[n]o evidence indicates that the drag race would not have proceeded had the officers never arrived." Id. at 692. And "plaintiff cannot show that they aggravated the risk of harm to [decedent] beyond the perils she already faced by voluntarily choosing to watch a drag race on the city streets at 1:45 in the morning." Id. at 693.

The court in Jones noted that the defendants played no role in the decedent's decision to attend the drag race. Id. at 694. However, the actions of the claimant therein involve voluntary attendance at an inherently dangerous and illegal event. Though not explicitly couched as such by the Sixth Circuit, it is more akin to an assumption of risk argument going to causation.

Distinct from the facts of Jones, Plaintiff-Respondents' voluntary attendance at the game where the shooting occured did not involve any knowing assumption of risk by the claimant rather than a dangerous situation created by any state actor. Compare Summar v. Bennett, 157 F.3d 1054, 1059 n.2 (6th Cir. 1998)(rejecting claim because decedent's "voluntary decision to become a confidential informant with all the dangers it presented, not to mention his poor decision to fraternize with criminals in the first place, played a much greater role in his unfortunate demise"); Peach v. Smith County, 93 Fed. Appx. 688 ("It was [the decedent] who independently and voluntarily chose to visit, camp with and stay with Carr after the County issued the order of protection… [t]his undisputed fact also serves to break

any alleged link between the murder and the actions of the Smith County defendants."). Herein, the dangerous situation at issue was created, controlled, and supervised by Defendants. Pa135. Then Defendants invited Plaintiffs to attend the dangerous situation at issue.

It is also worth noting the observations of the dissent in Jones. Therein, Judge Karen Nelson Moore, U.S.D.J. noted that the majority accepted a version of the events that foreclosed liability from the outset rather than consider the entirety of the facts and the elements of a state created danger claim collectively. In framing the matter as one where the officers did not increase the danger and that the race would have gone ahead if the officers never arrived, she noted "[b]oth strands of the majority's reasoning depend on partitioning the officers' conduct into two phases -- (1) arrival at the scene and (2) everything else – and then considering only the first." Id. At 701. She continued that if the officers truly had done nothing, indeed there would have been no affirmative act, "[b]ut that those are not the facts of this case, because that is not all the officers did" and that the officers took many actions after arrival including announcing over a loudspeaker that the race could go ahead. Ibid. Recognizing that a selective view of the facts is not appropriate, either in the context of summary judgment or in consideration of the elements of a state created danger claim, Judge Moore concluded "I cannot help but wonder whether there is any post-arrival conduct that the majority wouldn't ignore." Ibid.

As recognized by Judge Moore, it is inappropriate to view any of the *prima facie* elements or underlying facts in isolation or make factual determinations on those same facts at the summary judgment phase. The trial court here correctly determined that the proofs adduced in the instant matter created a genuine issue of fact upon which the trier of fact could find Plaintiffs had met their burden of proof with respect to their claim for state created danger in violation of their right to substantive due process.

E. THE TRIAL COURT CORRECTLY DETERMINED THAT SUFFICIENT PROOFS EXISTED TO CREATE A FACTUAL ISSUE AS TO WHETHER DEFENDANT-APPELLANTS' CONDUCT SHOCKED THE CONSCIENCE

Defendant-Appellants also argue that Plaintiffs cannot demonstrate that their conduct shocks the conscience. As the trial court determined, this argument ignores the history of violent and criminal activity at the subject school akin to the scenario at issue in Gormley. Additionally, even if the culpability of the individual defendants did not rise to such a level to shock the conscience and/or were entitled to qualified immunity, that does not foreclose the state-created danger claim against the Pleasantville Board of Education.

Where a state actor has time to make an unhurried judgment, facts that demonstrate conscious disregard of a known risk will suffice to shock the conscience. Kedra v. Schroeter, 876 F.3d 424, 437 (3d Cir. 2017). The circumstances here involve the planning and oversight of an event that did not

implicate any split-second decisions or hurried judgments. Accordingly, a conscious disregard of a known risk standard applies. And the facts demonstrate a conscious disregard of a known risk, for many reasons, but striking among them is the shooting that occurred at another football field only a few miles away prior to the tragic events of this matter.

As in Gormley, there was a documented history of violent and criminal activity at the subject school. Pa139. There was actual knowledge of a prior shooting. Pa172, 197. The subject event was planned, hosted, and controlled by Defendants. Pa135. The Defendants hosted the event and invited individuals to attend, which group Plaintiffs were a part of. Pa165.

PBOE Defendants rely on the case of Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521 (5th Cir. 1994). This thirty (30) year old case found that the existence of some security meant that an event where a shooting occurred equated to an absence of conduct that shocked the conscience. However, a more thorough review of Leffall demonstrates it hinges on the mistaken assumption that the foreseeability element requires knowledge of the dangerous propensities of the specific tortfeasor at issue. As demonstrated in Gormley and elucidated more fully above, state created danger contain no such requirement.

The trial court correctly determined that the affirmative actions of Defendant-Appellants in creating and governing the subject environment, and the failure to

secure the perimeter, screen for weapons, and to implement other preventative security measures, when every reasonable inference is drawn in favor of Plaintiffs, the proofs are sufficient to create a genuine issue of material fact as to the shock the conscience element.

F. THE TRIAL COURT CORRECTLY DETERMINED THAT PLAINTIFFS HAD ADEQUATELY DEMONSTRATED A DIRECT ENTITY CLAIM AGAINST THE PLEASANTVILLE BOARD OF EDUCATION

The trial court held that the evidence adduced in this matter adequately demonstrated a state created danger claim based on the elements and reasoning of Gormley. Because there was a dearth of authority regarding analogous holdings in school shooting situations, the court determined that the individual defendants were entitled to qualified immunity. The Court correctly reasoned that, nevertheless, Plaintiff-Respondents had demonstrated a viable direct entity claim against the Pleasantville Board of Education.

Qualified immunity does not apply to government entities. Owens v. City of Independence, 445 U.S. 622, 654 (1980), see also Moore v. City of Wynnewood, 57 F.3d 924, 929 n.4 (10th Cir. 1995)(stating the qualified immunity defense is only available to parties sued in their individual capacities). And even where individual defendants are entitled to qualified immunity, or are not direct defendants, a direct claim against the governmental entity defendant is viable. See Forrest v. Parry, 930 F.3d 93 (3d. Cir. 2019)(involving a direct entity claim where the individual

tortfeasors were not direct defendants).

Government entities may be directly liable for constitutional violations based on the policy or practice of the defendant and/or based on a failure or inadequacy reflected a deliberate or conscious choice that resulted in the underlying violation. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978); Forrest v. Parry, 930 F.3d 93, 105 (3d Cir. 2019) (involving a direct entity claim where the individual tortfeasors were not direct defendants); Fagan v. City of Vineland, 22 F.3d 1283, 1294 (1994)(holding that an entity may be liable for a unconstitutional policy that results in a constitutional violation even where the individual officer is not liable).

Plaintiffs asserted direct entity claims against the Pleasantville Board of Education in Count 4 of their Complaint from the outset. Pa14-16. And the trial court correctly determined that the same proofs regarding Defendant-Appellants affirmative actions in planning, controlling, and overseeing the subject event coupled with its prior knowledge of criminal activity in the area and specific knowledge of a prior shooting at a nearby football field created a genuine issue of fact as to these claims requiring resolution by the trier of fact. The trial court also correctly reasoned that its determination that the individual defendants were entitled to qualified immunity did not foreclose the direct entity claim. See Fagan v. City of Vineland, 22 F.3d 1283, 1294 (1994)(holding that an entity may be liable for a unconstitutional policy or failure to train that results in a constitutional violation

even where the individual officer is not liable); Forrest v. Parry, 930 F.3d 93, 105 (3d Cir. 2019) (evaluating a direct entity constitutional claim against the City of Camden where the individual tortfeasor officers were not defendants)[4].

Defendant-Appellants argue on appeal that there is no practice or policy identified to support Plaintiffs' direct entity claim. However, Defendant-Appellants did not raise this issue below. Rather, at the trial court level they argued instead that Plaintiffs' direct entity claim should be dismissed because there was no viable underlying state created danger claim to support entity responsibility.

Issues not raised below will not be considered on appeal unless they are jurisdictional in nature or substantially implicate the public interest. N.J. Div. Of Youth & Fam. Servs. V. M.C. III, 201 N.J. 328, 339 (2010). Given that this is the first time Defendant-Appellant raises this argument, it should not be considered by this Court on appeal.

Additionally and in the alternative, this argument fails as a substantive matter. Defendant-Appellants were the school administrators responsible for planning, supervising, and controlling the environment of the athletic event at issue. Pa135. As the case in Gormley, the written polices and unwritten practices of the board and

[4] For the sake of clarity, the individual officers in Forrest who had planted evidence and falsified testimony, and were criminally indicted accordingly, were initially named as defendants but were dismissed prior to trial with the sole claim being pursued the direct constitutional claim against the city.

the school administrators created the environment at issue. The determinations about how to setup the physical layout of the defense, what security measures or lack thereof, and the absence of screening or barriers were all causal factors that resulted in the underlying constitutional violation and resulting harm. Indeed, there was a written operation plan governing the event setting forth what steps defendants were to take, and by extension what steps defendants failed to take. Pa192,198. Additionally, the proofs demonstrating actual knowledge about the past history of criminal activity at the school, the area being a high crime vicinity generally, and the prior shooting coupled with the failure to enact preventative layout, screening, or other safety measures to prevent gun violence is sufficient to create a fact question as to whether this constituted a conscious disregard of a known risk.

In the instant matter, the proofs herein show a history of criminal activity at Pleasantville High School. Pa337-390.. Defendants themselves admitted that it was a high crime area. Pa139. . Defendants had actual knowledge of a prior shooting at a football practice in the city. Pa172, 197.

Accordingly, the Court should reject the arguments raised by Defendant-Appellants and affirm the August 12, 2025 decision by the trial court.

V. CONCLUSION

The trial court correctly determined that Plaintiff-Respondents had demonstrated viable state created danger claims as well as a direct claim based on

the same against the Pleasantville Board of Education. Defendant-Appellants ignore the record below in the instant appeal and attempt to inject requirements into the elements of a state created danger claim that are not supported by New Jersey law. Accordingly, this Court should affirm the August 12, 2025 Order of the trial court.

Respectfully submitted,
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Dated: February 18, 2026

MONICA TENNANT, Administratrix Ad Prosequendum for the ESTATE OF MICAH SAMUEL TENNANT-DUNMORE, ANGELA TENNANT, M.T., a minor, by her Parent and Guardian Ad Litem, ANGELA TENNANT, Plaintiffs-Respondents, v. PLEASANTVILLE BOARD OF EDUCATION, DENNIS ANDERSON, HOWARD JOHNSON, STEPHEN TOWNSEND, DANNY ADCOCK, NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION, JOHN DOE (1-10) fictitious names, JOHN DOE, INC. (1-10) fictitious names, Defendant-Appellant, v. ALVIN WYATT and JOHN DOE (1-10), fictitious names, Third-Party Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Civil Action APPELLATE DIVISION DOCKET NO. A-1177-25 T2 On Appeal From: Superior Court of New Jersey Law Division – Atlantic County Docket No. ATL-L-002985-21 CIVIL ACTION Sat Below: Hon. Sarah Beth Johnson, J.S.C.

DEFENDANT-APPELLANT PLEASANTVILLE BOARD OF EDUCATION'S REPLY BRIEF

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ARGUMENT

I. Plaintiffs Ignore The Strict Requirements That *Monell* Imposes Upon Them.

The parties agree: after summary judgment, there is only one remaining claim in this case: a substantive due process claim under the New Jersey Civil Rights Act ("NJCRA"), N.J.S.A. § 10:6-2, against the Defendant-Appellant Pleasantville Board of Education ("PBOE"). (*Compare* Db7 *with* Pb5). "The legal principles governing the liability of a municipality under the CRA and § 1983 are essentially the same." *Winberry Realty P'ship v. Borough of Rutherford*, 247 N.J. 165, 190 (2021). These principles preclude an entity from being liable under a *respondeat superior* theory. *Id.*

Instead, under the NJCRA, a public entity "can be held liable only if it causes harm through the implementation of official municipal policy," *Winberry Realty P'ship*, 247 N.J. at 190-91, or an unconstitutional custom. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978). As the PBOE pointed out in its moving brief, plaintiffs have wholly failed to meet this exacting standard. (Db47-50[1]). They can't point to anything in the record to show the PBOE adopted an unconstitutional official policy, or an unconstitutional custom—*i.e.*, acquiesced in similar alleged substantive due process violations.

[1] "Db" refers to the PBOE's merits brief.

In response, plaintiffs argue: 1) the PBOE waived this argument by failing to raise it below; and 2) they satisfied *Monell*'s requirements because "Defendant-Appellants were the school administrators responsible for planning, supervising, and controlling the environment of the athletic event at issue." (Pb24-25[2]). Both of these arguments are without merit.

A. Plaintiffs Are Asking This Court To Ignore The Supreme Court's Remand Order.

When we moved the New Jersey Supreme Court for leave to appeal, the plaintiffs argued that the PBOE had failed to raise the argument about an unconstitutional policy or custom in the trial court and, thus, it shouldn't be considered. (DRA23[3]). The Court implicitly rejected that argument when it granted the PBOE's motion for leave to appeal and remanded the matter back to this Court to determine whether plaintiffs had a viable *Monell* claim. (Da1-2[4]). Plaintiffs are effectively inviting this Court to ignore the Supreme Court and remand the matter without deciding it. This Court should decline the invitation.

B. Plaintiffs Ignore What A Policymaker Is Under *Monell*.

As noted, only where the public entity adopts an unconstitutional policy or custom may it be liable under the NJCRA. *See Winberry Realty P'ship*, 247 N.J. at

[2] "Pb" refers to the plaintiffs' merits brief.
[3] "DRA" refers to the PBOE's reply brief appendix, which is being submitted herewith.
[4] "Da" refers to the PBOE's merits brief appendix.

190–91. Plaintiffs do not contend the PBOE adopted any formal policy that would violate their substantive due process rights.

Instead, and even though it's not exactly clear, plaintiffs are seemingly arguing that a policymaker took an unconstitutional action, or that an unconstitutional custom existed. (Pb24-25). But neither of these theories works.

Under *Pembaur v. Cincinnati*, "municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." 475 U.S. 469, 480 (1986). The key word is "policymaker."

"In order to ascertain who is a policymaker, a court must determine which official has final, unreviewable discretion to make a decision or take action." *Kneipp v. Tedder*, 95 F.3d 1199, 1213 (3d Cir. 1996) (citations and internal quotations omitted). "[W]hether an official had final policymaking authority is a question of state law." *Pembaur*, 475 U.S. at 483. "[C]ases on the liability of local governments under § 1983 instruct us to ask whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue." *McMillian v. Monroe County*, 520 U.S. 781, 785 (1997). "[I]f a municipal employee's decision is subject to review, even discretionary review, it is not final and that employee is therefore not a policymaker for purposes of imposing municipal liability under § 1983." *Brennan v. Norton*, 350 F.3d 399, 428 (3d Cir. 2003).

Under New Jersey law, final policymaking authority in the area of "management of the public schools and ***public school property*** of the district" resides with the board of education. N.J.S.A. § 18A:11-1 (emphasis added). None of the individually-named defendants—and putting aside the fact that they didn't commit any constitutional tort anyway—are board members. Dennis Anderson was the Interim Superintendent; Howard Johnson was the high school principal; Stephen Townsend was the Athletic Director; and Danny Adcock was the Director of School Safety. (Pa3). Plaintiffs don't even bother to point to any state law or regulation to suggest these individuals have "final policymaking authority," *McMillian*, 520 U.S. at 785, in the area of school safety. Thus, the *Pembaur* avenue towards *Monell* liability is closed.

Plaintiffs also can't show an unconstitutional custom. "A custom is an act 'that has not been formally approved by an appropriate decision maker,' but that is 'so widespread as to have the force of law.'" *Natale v. Camden County Corr. Facility*, 318 F.3d 575, 584 (3d Cir. 2003) (citing *Bd. of the Cty. Comm'rs v. Brown*, 520 U.S. 397, 410 (1997)). A single incident is not sufficient to establish a custom. *Oklahoma v. Tuttle*, 471 U.S. 808, 823-24 (1985). "'[I]t is incumbent upon a plaintiff to show that a ***policymaker*** is responsible . . . through acquiescence, for the custom.'" *B.S. v. Somerset Cty.*, 704 F.3d 250, 275 (3d Cir. 2013) (emphasis added) (citing *Andrews*, 895 F.2d at 1480). "Where 'municipal liability is

predicated upon a failure to act, the requisite degree of fault must be shown by proof of a background of events and circumstances which establish that the policy of inaction is the functional equivalent of a decision by the [municipality] itself to violate the Constitution.'" *Thomas v. Bd. of Educ.*, 759 F. Supp. 2d 477, 490 (D. Del. 2010) (citing *City of Canton v. Harris*, 489 U.S. 378, 394-95 (1989) (O'Connor, J. concurring)). "In *Canton*, the Court termed this 'deliberate indifference.'" *Id.*

"'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Brown*, 520 U.S. at 410. A "showing of simple or even heightened negligence will not suffice." *Id.*

Plaintiffs, again, ignore this legal standard. Instead, they argue that, because "[d]efendants" acknowledged the school is located in a "high crime area" and a prior shooting in another part of town occurred, it shows there was a "conscious disregard of a known risk." (Pb25). Plaintiffs rely upon *Gormley v. Wood-El,* 218 N.J. 72 (2014) and *Forrest v. Parry*, 930 F.3d 93 (3d Cir. 2019), in support. Plaintiffs are wrong for five reasons.

First, plaintiffs ignore the requirement that they show a "policymaker" acquiesced in an unconstitutional custom—that is, a policymaker acted with deliberate indifference towards a known risk. *See B.S.*, 704 F.3d at 275. Anderson,

Johnson, Townsend and Adcock were not policymakers. Thus, their alleged action or inaction is insufficient to establish a *Monell* claim under a custom theory. Plaintiffs have failed to point to the actions or inactions of any board member—*i.e.*, those with actual policymaking authority.

Second, plaintiffs fail to acknowledge that the PBOE actually took steps to address safety at the football game on November 15, 2019. Adcock created an operational plan for the game, whereby "the normal assignment of three (3) police officers assigned to football games [was] increased to six (6) Pleasantville Police Officers, with the assistance of K-9[.]" (*Compare* Da12, ¶¶ 13, 14 *with* Da272, ¶¶ 13, 14). Event staff was "positioned at the parking lot, at the entrance, in the end zone, and at the concession stand." (*Compare* Da13, ¶16 *with* Da273, ¶16). Thus, plaintiffs can't demonstrate the PBOE consciously disregarded any security risk under a deliberate indifference standard.

Rather, it appears plaintiffs' actual gripe is that the PBOE should have done more. (*See* Pb25 (complaining about the "failure to enact preventative layout, screening, or other safety measures to prevent gun violence")). But deliberate indifference requires a much higher showing than negligence. *Gonzales v. City of Camden*, 357 N.J. Super. 339, 350 (App. Div. 2003) (citing *County of Sacramento v. Lewis,* 523 U.S. 833, 849 (1998)). Plaintiffs fail to appreciate this precedent.

Third, plaintiffs can't show acquiescence by the PBOE's policymakers—or even their subordinates—in any unconstitutional custom. While we maintain (as set forth in Point II, *infra*), that the Constitution doesn't impose an obligation to protect individuals from private violence outside of a special relationship situation, even if the Court finds otherwise, plaintiffs' claim fails. That's because they can't show the PBOE's policymakers (or any PBOE employee for that matter) had knowledge of any prior shootings on campus and acquiesced in their occurrence.

Plaintiffs' contention that there is a "history of criminal activity at Pleasantville High School," (Pb25), is nothing more than a smear. It's patently incorrect to suggest to this Court that there were prior shootings at Pleasantville High School. Their own cited evidence doesn't support that. (*See* Pa337-90). Indeed, the sheer fact that the surrounding area has higher rates of crime, and yet no prior incident of gun violence took place at the school, speaks to the sufficiency of the safeguards in place, not deliberate indifference.

Fourth, there is nothing in *Gormley* that supports a *Monell* theory here. *Gormley* didn't even deal with the liability of the entity at issue—the State of New Jersey. *Gormley*, 218 N.J. at 83. The State can't be liable under the NJCRA because it's not a "person." *Brown v. State*, 442 N.J. Super. 406, 426 (App. Div.) *rev'd on other grounds* 230 N.J. 84 (2017). Thus, *Gormley* didn't touch upon any principles pertaining to entity liability under the NJCRA.

Finally, plaintiffs' reliance upon *Forrest* is puzzling. In *Forrest*, the court found that plaintiffs had asserted a viable *Monell* claim because the "record would support a finding that Camden's ***policymakers*** knew that their officers would require supervision, that there was a history of officer supervision being mishandled, and that, in the absence of such supervision, constitutional violations were likely to result." *Forrest*, 930 F.3d at 108. (emphasis added). There are no facts remotely analogous to show a history of mishandled security on campus leading to shootings. Plaintiffs effectively point to a single incident. That is insufficient to establish a custom. *Tuttle*, 471 U.S. at 823-24.

For these reasons alone, plaintiffs' substantive due process claim against the PBOE fails.

II. Plaintiffs Have Failed To Demonstrate Any Underlying Substantive Due Process Violation.

In its moving brief, the PBOE also pointed out that it did not have a *constitutional* duty to protect plaintiffs from private violence and that plaintiffs could not establish the elements of a state-created danger theory of liability. (Db10-30).

In response, plaintiffs ask this Court to dispense with the plethora of case law cited that openly rejects their theory, calling it "decades old" and arguing it "rest[s] upon a foundational assumption that is incompatible with our current reality; that

gun violence in schools is neither foreseeable or preventable." (Pb5)[5]. They then go on to argue that they can show a state-created danger theory. (Pb5-19). Plaintiffs are wrong.

At the outset, and as a general matter, our courts don't dispense with authority simply because it's "old." Rather, cases that have withstood the test of time—that is, not been overruled—deserve respect under principles of *stare decisis*. *See State v. Witt*, 223 N.J. 409, 439 (2015) ("[a]dherence to *stare decisis* serves a number of salutary purposes, including promoting certainty and stability in our law"); *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478–79 (1987) ("[t]he rule of law depends in large part on adherence to the doctrine of *stare decisis*"). We acknowledge that federal cases interpreting substantive due process are not binding on this Court. However, the New Jersey Supreme Court has recognized that, "[i]n cases raising substantive due process claims under our state constitution, this Court uses the standards developed by the United States Supreme Court under the federal Constitution." *Roman Check Cashing, Inc. v. N.J. Dep't of Banking & Ins.*, 169 N.J. 105, 110 (2001) (citations omitted). Thus, plaintiffs are incorrect in suggesting the authority the PBOE cited is meaningless because it emanates from our federal courts.

[5] Even "modern" precedent rejects plaintiffs' substantive due process theory. *Aracena v. Gruler*, 347 F.Supp.3d 1107, 1121 (M.D. Fla. 2018) (rejecting substantive due process theory against City of Orlando and its officers after the Pulse nightclub shooting); *Rohrbough v. Stone*, 189 F.Supp.2d 1088, 1105 (D. Colo. 2001) (same after Columbine High School shooting).

And the fact that their argument requires overlooking the abundance of precedent should give this Court pause. *See Knick v. Twp. of Scott*, 588 U.S. 180, 218 (2019) ("[w]hen a theory requires declaring precedent after precedent after precedent wrong, that's a sign the theory itself may be wrong." (Kagan, J., dissenting)).

Plaintiffs fare no better when arguing they can establish a state-created danger theory. To reiterate, such a theory requires plaintiff to show: "1) the harm ultimately caused was foreseeable and fairly direct; 2) a state actor acted with a degree of culpability that shocks the conscience; 3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, as opposed to a member of the public in general; and 4) a state actor affirmatively used 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." *Bright v. Westmoreland Cnty.*, 443 F.3d 276, 281 (3d Cir. 2006), *cert. denied*, 549 U.S. 1264 (2007). None of these elements are present here.

A. Plaintiffs Misconstrue What "Foreseeable And Fairly Direct" Means.

Plaintiffs argue they can satisfy the first element because there was general knowledge of high crime in the area and prior police calls to the school. (Pb12). They claim "it strains credulity to argue that liability may only attach under such circumstances where actual knowledge of the specific third-party tortfeasor exists." (*Id.*). But it's plaintiffs who are stretching constitutional jurisprudence past its

breaking point. In the state-created danger context, "foreseeability" means "an awareness on the part of the state actors that rises to level of *actual knowledge* or an awareness of risk that is sufficiently *concrete* to put the actors on notice of the harm." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 239 (3d Cir. 2008) (emphasis added). For instance, in *Morse v. Lower Merion Sch. Dist.*, the court found that the murder was not foreseeable because "the complaint did not allege that defendants were aware of [the shooter's] violent propensities," that she "had made threats against Diane Morse or any other persons at the [school], or even that she had a history of violent behavior." 132 F.3d 902, 908 (3d Cir. 1997).

The same is true here: there's no evidence that anyone knew of Wyatt's violent propensities, let alone that he would act on them. Nor does it matter that another shooting happened near a different football field years earlier. *Phillips* holds that foreseeability requires a concrete and specific awareness of risk to the plaintiffs themselves. That simply doesn't exist here. Plaintiffs' claim fails on the first element.

B. Plaintiffs Cannot Show Any Conscience-Shocking Conduct.

Substantive due process claims are not actionable unless the government's deprivation of a protected interest "shocks the conscience," which is a high standard that encompasses "only the most egregious official conduct." *Chainey v. Street*, 523 F.3d 200, 219 (3d Cir. 2008) (citation omitted). "Whether an incident 'shocks the conscience' is a matter of law for the courts to decide." *Benn v. Universal Health*

Sys., 371 F.3d 165, 174 (3d Cir. 2004) (Alito, J.). Conduct that "offend[s] some fastidious squeamishness or private sentimentalism" is not actionable. *Johnson v. Glick*, 481 F.2d 1028, 1033 n.6 (2d Cir. 1973) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952), *cert. denied*, 414 U.S. 1033 (1973)). Rather, the conduct at issue must "offend even hardened sensibilities" such that it can fairly be viewed as "brutal" or "offensive to human dignity." *Id*. (quoting *Rochin*, 342 U.S. at 172-74).

Plaintiffs can't come close to showing this. As they acknowledge, their theory is that the PBOE didn't adequately "secur[e] the event" or screen for weapons. (Pb12). That is far removed from *Gormley*, where state actors compelled the plaintiff to enter a locked room to meet with her client, and where an official—who knew the client-patient posed a danger—affirmatively "brought the dangerous patient together with the attorney in an unsecured setting," making the official "as much an active tortfeasor as if [they] had thrown [the plaintiff] into a snake pit." 218 N.J. at 108 (citations omitted).

That bears no resemblance to the facts here. There is nothing to show that PBOE policymakers[6] compelled plaintiffs to attend the football game and then armed Wyatt and brought him there. Instead, the evidence shows the PBOE took steps to increase security at the game, including by creating an operational plan that

[6] As noted above, in *Gormley*, there was no *Monell* claim and, thus, plaintiffs did not have to show the tortfeasors were policymakers.

doubled the number of police officers present, and positioning staff at locations where patrons would be. (*Compare* Da12-13, ¶¶ 13, 14, 16 *with* Da272-72, ¶¶ 13, 14, 16). Tragically, it wasn't enough. But that's a far cry from conduct that could be viewed as "brutal" or "offensive to human dignity." *Johnson*, 481 F.2d at 1033 (citations omitted)). Thus, the claim fails on this element also.

C. The PBOE Had No Relationship With Plaintiffs, Who Were Undoubtedly No Different Than Any Other Member Of The General Public.

Plaintiffs' reliance upon *McQueen v. Beecher Cmty. Sch.*, 433 F.3d 460 (6th Cir. 2006), to satisfy this element is misplaced. There, a teacher left Doe and five other students unsupervised in a classroom where a classmate pulled out a gun and shot Doe, killing her. *Id* at 462. The court found that Doe was in a distinct group because the shooter "was much more likely to shoot the students in his immediate physical presence than a member of the general public." *Id.* at 468. There are two problems for plaintiffs here.

First, this finding was *dicta*. *McQueen* affirmed summary judgment in favor of the defendants because plaintiffs could not show an affirmative act or any deliberate indifference—even though the teacher left six students unsupervised with a student (the shooter) who had a history of violent behavioral problems. *Id.* at 470.

Second, plaintiffs here were not part of a distinct group of five or six who the PBOE left in the line of fire. Plaintiffs attended a publicly-hosted football game. They were three people in the midst of hundreds. Under substantive due process

jurisprudence, "a distinction exists between harm that occurs to an identifiable or discrete individual under the circumstances and harm that occurs to a 'random' individual with no connection to the harm-causing party . . . who 'happened' to be in the path of danger." *Phillips*, 515 F.3d at 239. Plaintiffs fall into the latter category and, thus, their claim fails.

D. Plaintiffs Concede The "Gravamen" Of Their Claim Is A Failure To Act.

A state-created danger theory "require[s] an affirmative act, rather than inaction." *Ye v. United States*, 484 F.3d 634, 638 (3d Cir. 2007); *accord Bright*, 443 F.3d at 284 ("we know from *DeShaney* that no affirmative duty to protect arises 'from the State's knowledge of the individual's predicament'"). Plaintiff "must allege affirmative acts that were the 'but for cause' of the risks they faced." *Bennett v. Philadelphia*, 499 F.3d 281, 287 (3d Cir. 2007). The Third Circuit has "never found a state-created danger claim to be meritorious without an allegation and subsequent showing that state authority was affirmatively exercised[.]" *Bright*, 443 F.3d at 282.

Plaintiffs concede that they can't meet this element. They write: "[t]he gravamen of Plaintiffs' claim is that defendants created a dangerous environment by their policies and practices of ***not securing the event and not screening for weapons***, despite actual knowledge of prior incidents of violence and shootings." (Pb12 (emphasis added)).

But inaction is not action. Substantive due process precedent confirms that. For example, in *Bright*, the officers promised the plaintiff, John Bright, they would "immediate[ly]" arrest Charles Koschalk, a paroled felon who had previously been convicted of abusing Bright's 12-year-old daughter. *Bright*, 443 F.3d at 279. Based on that assurance, Bright didn't take defensive precautions. *Id.* at 284. Weeks later, having not been arrested, Koschalk murdered Bright's eight-year-old daughter. *Id.*

The Third Circuit Court of Appeals affirmed dismissal of the substantive due process claim, finding that "what is alleged to have created a danger was the failure of the defendants to utilize their state authority, not their utilization of it." *Id.*

The same is true here. As plaintiffs admit, the alleged "dangerous environment" of which they complain came about due to the PBOE "not securing the event and not screening for weapons[.]" (Pb12). That admission is fatal to their substantive due process claim.

For these reasons, the trial court's decision denying summary judgment on plaintiffs' substantive due process claim against the PBOE should be reversed.

III. The Court Should Reject Plaintiffs' Invitation To Play The Role Of The Legislature.

Throughout their brief, plaintiffs beckon for this Court to find a substantive due process claim and dispense with precedent because of the gun violence epidemic. (Pb5-9). While the PBOE shares plaintiffs' concerns about gun violence, their arguments are pitched to the wrong side of Market Street.

Substantive due process rights are found in Article I, paragraph one of our Constitution. *Kravitz v. Murphy*, 468 N.J. Super. 592, 630 (App. Div. 2021). "The object of construction of a written constitution is to give effect to the intent of the people in adopting it." *Gangemi v. Berry*, 25 N.J. 1, 10 (1957). The constitutional provision's plain language is the starting point and, where it's unambiguous or unequivocal, the ending point. *Atlantic City Racing Assoc. v. Attorney General,* 98 N.J. 535, 545 (1985). Where the provision is unclear, the court may look to the provision's legislative history, statute's enacted contemporaneously, and historical commentary. *Id.* at 548; *In re Forsythe et al. Application,* 91 N.J. 141, 148 (1982).

None of this appears in plaintiffs' brief. They offer no analysis of Article I, paragraph one's plain text; any excerpts from the 1947 Constitutional Convention; any contemporaneous legislation from the relevant time period; or any historical commentary. Instead, their arguments are merely aimed at getting this Court to play the role of the Legislature, but without any of the hearings, policy briefings, budget analysis, or other materials that the Legislature considers before adopting legislation. They don't even explain how their proposed interpretation would work in the context of municipalities. Are municipalities *constitutionally* responsible for every shooting that occurs within their borders or in high crime areas? What is the constitutional threshold for "high crime?" Higher than the state average? The county average? Plaintiffs offer no explanation. Their proposed constitutional interpretation is

unworkable because it's nothing more than a policy argument masquerading as legal analysis. Respectfully, "policy decision[s] [are] the exclusive responsibility of the other branches of government." *Avant v. Clifford*, 67 N.J. 496, 517 (1975). The Court should decline to invade the legislative domain.

CONCLUSION

For these reasons, the Court should reverse the trial court's order denying summary judgment to the PBOE on plaintiffs' substantive due process claim and direct the trial court to enter judgment in favor of the PBOE.

Respectfully submitted,

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