HONORABLE JOHN C. COUGHENOUR
HON. J. RICHARD CREATURA

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

DONNITTA SINCLAIR, Mother of Deceased HORACE LORENZO ANDERSON, JR., individually, Plaintiff, v. CITY OF SEATTLE, a municipality Defendant.	Case No. 2:21-cv-00571-JCC-JRC MEMORANDUM *AMICUS CURIAE* IN OPPOSITION TO DEFENDANT CITY OF SEATTLE'S MOTION TO DISMISS

Preliminary Statement

The National Police Association ("NPA") a nonprofit entity formed to support law enforcement, is interested in this case because police officers across the country watched with horror as the City abandoned an entire precinct and actively supported the creation of a lawless "CHOP" zone (1st Am. Cmplt. ¶ 2-4, 16-20), and a decision holding the City accountable for this extraordinary decision—and thereby discouraging such decisions in the future—promotes the interests of police, law enforcement generally, and the public interest.

NPA has obtained leave to file this memorandum through this Court's Order of August 30, 2021. The NPA certifies that no party to this case contributed any funds to prepare or submit this memorandum.

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Summary of Argument

Civil unrest may sometimes reach levels that requires law enforcement to retreat and abandon a precinct, but this case is about a deliberate decision to foster, contrary to the most fundamental Constitutional guarantees of ordered liberty, a zone of anarchy within the City of Seattle. The City's abandonment of its most basic obligations under its own Charter, Washington state law, and the U.S. Constitution created extraordinary and foreseeable danger, and the false statements of City leaders concerning these dangers easily establish deliberate indifference to that danger for purposes of a Rule 12(b)(6) motion. Plaintiff has stated a claim under the well-established "state-created danger" exception to the general rule that government will not be liable for the criminal acts of private parties. Only a decision denying the motion to dismiss, and further proceedings leading to substantial liability for the wrongful death of Horace Anderson will ensure that local public officials never engage in conduct so destructive of the rule of law and law enforcement.

Argument

I. THE CITY'S MOTION TO DISMISS SHOULD BE DENIED.

A. The Facts Pleaded, and Inferences to be Made.

For purposes of reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), this Court is to accept plaintiff's allegations as true "and construe them in the light most favorable" to the plaintiff, *Zucco Partners, LLC v. Digimarc Corp*., 552 F.3d 981, 989 (9th Cir. 2009), dismissing the complaint only if it fails "to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). This involves "assuming all facts and inferences in favor of the nonmoving party" and dismissal is appropriate only "it appears beyond doubt that [plaintiff] can prove no set of facts to support [her] claims.'" *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (quoting *Libas Ltd. v. Carillo*, 329 F.3d 1128, 1130 (9th Cir. 2003)).

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The City's summary of the factual allegations might reasonably be seen as an attempt to draw inferences in favor of the moving party—itself. For purposes of this motion, the most important allegation is that the "City enabled CHOP by providing portable toilets, lighting and other support, including modifying protocols of SPD and SFD". (1st Am. Cmplt. ¶ 21.) This factual allegation, coupled with the allegation that the Mayor and a City Council member falsely asserted that what was going on in CHOP constituted a "summer of love," a "block party," or a "peaceful" occupation (*id.* ¶¶ 27-28), permit the inference that the creation of a very large dangerous and lawless zone was a deliberate and affirmative policy decision of the City. Indeed, this is the only reasonable inference.

Other allegations of extraordinary conduct on the part of City officials permit additional relevant inferences. The Police Chief and the Mayor now both deny giving the order to desert the East Precinct in the first place, yet as plaintiffs allege, "someone in City leadership gave the order and numerous City officials allowed, enabled, ratified and even encouraged CHOP to continue despite the foreseeable danger and resulting violence". (*Id.* ¶ 46.) The City has apparently destroyed all records that would review the actual decisionmaking (*id.* ¶¶ 49-50), permitting the important interference that such records would be supportive of liability for the City and those involved.

All this conduct takes place against a background in which the relevant officials were under legal duties to do precisely the opposite of what they did. It has long been the law in Washington that "[a] police officer not only has the specific duty to enforce the law, but is also charged with the general duty and power to maintain the peace and quiet of the city." *Mike v. Tharp*, 21 Wash. App. 1, 5, 583 P.2d 654, 656 (1978). More specifically, the Seattle City Charter, like similar provisions across the country, requires the Chief of Police to "maintain the peace and quiet of the City". (Charter, Art. VI, § 5.)

Seattle emphasizes that the primary purpose of the Due Process Clause invoked by plaintiff was "to protect the people from the State, not to ensure that the State protected them from each

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other". *Deshaney v. Winnebago Cty. Dep't of Soc. Servs.,* 489 U.S. 189, 196, 109 S. Ct. 998, 1003 (1989). The natural inference from plaintiff's complaint, however, is that the City was abusing State power to advance the bizarre and illegal preferences of its leadership for anarchism, willfully indifferent to serious and inherent dangers of anarchy.

The City's conduct should shock the conscience of this Court, sworn to uphold the rule of law against anarchy, as it interferes with rights implicit in the fundamental Constitutional guarantees of ordered liberty—the right to live in under constitutional government at least attempting to preserve public order. Accordingly, plaintiffs' effort to seek redress in the substantive context of the Due Process Clause is well within longstanding Constitutional precedent. *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952) ("Substantive Due Process" prevents the government from engaging in conduct that "shocks the conscience"); *Palko v. Connecticut*, 302 U.S. 319, 325-26, 58 S. Ct. 149, 82 L. Ed. 288 (1937) (substantive due process violation occurs where state interferes with rights "implicit in the concept of ordered liberty").

B. The "State-Created Danger" Doctrine Bars Dismissal.

Notwithstanding the general rule articulated in *DeShaney*, the City does not dispute that under the "state-created danger" exception, a three-part test applies to establish if plaintiff can state a claim. Plaintiff must allege (and later prove) that: (1) the City's conduct exposed plaintiff's son to "danger he would not have otherwise faced"; (2) the resulting harm was foreseeable; and (3) the City acted with "deliberate indifference" to "the known or obvious danger". (City Motion at 8.) At this juncture, the City challenges the sufficiency of the allegations of the First Amended Complaint with respect to the first and third elements only. (*See id*. at 8 n.1.)

This Court has already held that allegations indistinguishable from those presented by plaintiff state a claim for damages arising out of the City's decision to allow, and thereafter

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support, the CHOP: *Hunters Capital LLC v. City of Seattle*, 499 F. Supp. 3d 888, 898 (W.D. Wash. 2020).

1. The City acted with deliberate indifference to the danger.

It was obvious that allowing a hostile, lawless crowd attacking the East Precinct to take control of sixteen blocks of Seattle would create lawlessness and resulting crime. Plaintiff alleges that "crimes predictably proliferated in CHOP" (1st Am. Cmplt. ¶ 22), and as early as June 11th, only three days after the abandonment, the Police Chief expressed concern about crime and response times (*id.* ¶ 26). By the time of the visit plaintiff's son, on June 20th, the dangers posed by CHOP were no longer a predication—they were an established fact.

The City argues that plaintiff has not alleged a "concrete, immediate danger". (City Motion at 10.) That the City does not see the allegation of allowing a lawless and violent mob to seize territory within the City as showing a concrete, immediate danger" only proves that the City has learned nothing, and judgment in this case and others is required to educate the City as to its fundamental obligations under federal constitutional law.

The City cites *Hernandez v. City of San Jose*, 897 F.3d 1125, 1133 (9th Cir. 2018), which involved circumstances of more immediate state-created danger within the context of a single demonstration on a single day, but the opinion focuses upon the conduct of particular group of police officers. Here, a high-level municipal policy decision to abdicate its own territory to criminals obviously threatens a concrete and immediate danger to all those in the vicinity of the territory. *Hernandez* explains that the "critical distinction" for finding liability is not "between danger creation and enhancement, but . . . between state action and inaction in placing an individual at risk". *Id.* at 1135. Plaintiff does not merely allege inaction, but the affirmative support of the CHOP zone and affirmative adoption of policies to foster lawlessness.

The City also argues that plaintiff has not alleged "that the City acted with indifference regarding the dangers and risks that it did know about". (City Motion at 10.) That is simply not true; "deliberate indifference" is specifically and repeatedly alleged. (1st Am. Cmplt. ¶¶ 58, 64.)

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The factual allegations of extraordinary indifference to anarchy, and abandoning the most fundamental functions of civilized government, easily support an inference of deliberate indifference. Deliberate indifference may also be inferred from the fact that the wrongful death of plaintiff's son on June 21st did not result in any change in City policy. A second death had to occur on June 29th (*id.* ¶ 43) before the City finally reversed its policy and began to close down CHOP on July 1st (*id.* ¶ 48).

2. The City exposed plaintiff's son to a danger he would otherwise not have faced.

This Court in *Hunters Capital* reviewed allegations concerning the City's fostering of CHOP and easily concluded that "the City's actions—encouraging CHOP participants to wall off the area and agreeing to a 'no response' zone within and near CHOP's borders—foreseeably placed Plaintiffs in a worse position than they would have been in absent any City intervention whatsoever." *Hunters Capital*, 499 F. Supp.3d at 902. It is certainly true that Lorenzo Anderson might have encountered Marcel Long whether or not the City had created CHOP—though he may well have been attracted to it by the City's promotion of a "summer of love" at the site. But the City's decision to create "no cop" zone increased crime generally; encouraged Long to carry a handgun without consequence (*see* 1st Am. Cmplt. ¶¶ 24, 30); and its nonintervention policies killed Anderson by letting him bleed out rather than disturb the sanctity of CHOP (*id.* ¶¶ 33-38).

The City's attempt to complain distinguish *Hunters Capital* on the basis that it was only a "miscommunication" here that killed plaintiff's son is ignores the very specific allegation of increased response time (*id.* ¶ 26) this Court cited in *Hunters Capital* (*cf.* City Motion at 18). The question is not whether the son "would have been better off without City intervention (*id.* at 17); the question is whether plaintiff has alleged that the City created a danger that injured her son—and she has.

The City argues that the danger must be "particularized," but an increased risk of violent crime is sufficiently particular for purposes of the "state-created danger" doctrine. *Cf. Wood v.*

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Ostrander, 879 F.2d 583 (9th Cir. 1989) (general risk of stranding a woman in high crime area sufficed).

There is no support for the City's position that the doctrine applies only where the state creates a danger unique to the injured party. That most state-created danger cases involve conduct by single police officer or other state actor creating risk for an individual does not mean that the doctrine is limited to such circumstances. *Hunters Capital*, *Hernandez* and other cases all involve dangers to multiple victims. It is bizarre to suggest that the broader and more serious the danger created by the City, the less remedy may be available for it.

The City goes so far as to suggest that *Hunters Capital* should be distinguished on the basis that plaintiff's son—whose special needs may vitiate a presumption of ordinary voluntary conduct—chose to go to CHOP. No "state-created danger" case has made such a distinction, and it is inconsistent with the holdings in such cases. Under the City's view, for example, *Wood* was wrongly decided: the poor woman raped after being stranded when her male driver was arrested for driving while intoxicated (and the car seized) "volunteered" to go driving with him.

Finally, the City elevates protection of property rights over human life in an astounding fashion by suggesting that *Hunters Capital* should be distinguished, in substance, on the basis that the plaintiffs there were complaining about non-enforcement of laws resulting in harm to their property. Whether the City as a matter of policy refused to enforce laws protecting property, or refused as a matter of policy to enforce laws protecting life (other than intervening after the fact in "life-threatening" circumstances) is a distinction without a difference. The shocking conduct to create either danger is sufficient to create a Substantive Due Process Claim.

C. Allowing the Claim to Proceed will not Erase Any Important Limit on Governmental Liability.

The City ultimately retreats to the complaint that creating liability in this *sui generis* case "would erase the limits on government liability established by the Supreme Court in *DeShaney*. Those limits were created for governments that do not abdicate their most fundamental duties to

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preserve ordered liberty, and operate in a fashion that does not shock the conscience. The City's extraordinary and offensive policy choices challenged here are policies that the federal judiciary should not only feel no need to protect, but has an affirmative duty to eradicate.

Conclusion

For the foregoing reasons, the City of Seattle's Motion to Dismiss should be denied.

Dated this August 30, 2021.

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