

FILED
United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

September 9, 2026

Christopher M. Wolpert
Clerk of Court

ADRIANA VANCE, for deceased on
behalf of Raymond Green; TANYA
BEAL, for deceased on behalf of
Kelly Loving; JULIA RUMP, for
deceased on behalf of Derrick Rump;
JOHN ARCEDIANO; JANCARLOS
DEL VALLE; ASHTIN GAMBLIN;
JERECHO LOVEALL; ANTHONY
MALBURG; CHARLENE SLAUGH;
JAMES SLAUGH; BRIANNA
WINNINGHAM,

Plaintiffs - Appellants/Cross-
Appellees,

v.

No. 25-1326

ANDERSON LEE ALDRICH,

Consolidated Defendant -
Appellee,

and

EL PASO COUNTY BOARD OF
COMMISSIONERS; KENNETH
ROMINES; NICHOLAS GRZECKA,

Defendants - Appellees,

and

G.I.G, INC., d/b/a Club Q; CLUB Q,
LLC, d/b/a Club Q; 3430 N.
ACADEMY, LLC; ACADEMY3430,
LLC; MATTHEW HAYNES,

Defendants - Appellees/Cross-Appellants.

BARRETT HUDSON,

Consolidated Plaintiff -
Appellant/Cross-Appellee,

ADRIANA VANCE, for deceased on behalf of Raymond Green; TANYA BEAL, for deceased on behalf of Kelly Loving; JULIA RUMP, for deceased on behalf of Derrick Rump; JOHN ARCEDIANO; JANCARLOS DEL VALLE; ASHTIN GAMBLIN; JERECHO LOVEALL; ANTHONY MALBURG; CHARLENE SLAUGH; JAMES SLAUGH; BRIANNA WINNINGHAM,

Plaintiffs,

v.

No. 25-1328

EL PASO COUNTY BOARD OF COMMISSIONERS; BILL ELDER, Sheriff of El Paso County Sheriff's Office, in his official and individual capacities; G.I.G, INC., d/b/a Club Q; CLUB Q, LLC, d/b/a Club Q; 3430 N. ACADEMY, LLC; ACADEMY3430, LLC; MATTHEW HAYNES; KENNETH ROMINES; NICHOLAS GRZECKA,

Defendants - Appellees,

ANDERSON LEE ALDRICH,

Consolidated Defendant -

Appellee.

ADRIANA VANCE, for deceased on behalf of Raymond Green; TANYA BEAL, for deceased on behalf of Kelly Loving; JULIA RUMP, for deceased on behalf of Derrick Rump; JOHN ARCEDIANO; JANCARLOS DEL VALLE; ASHTIN GAMBLIN; JERECHO LOVEALL; ANTHONY MALBURG; CHARLENE SLAUGH; JAMES SLAUGH; BRIANNA WINNINGHAM,

Plaintiffs - Appellees,

and

BARRETT HUDSON,

Consolidated Plaintiff -
Appellee,

v.

No. 25-1329

G.I.G, INC., d/b/a Club Q; CLUB Q, LLC, d/b/a Club Q; 3430 N. ACADEMY, LLC; ACADEMY3430, LLC; MATTHEW HAYNES,

Defendants - Appellants,

and

ANDERSON LEE ALDRICH,

Consolidated Defendant,

and

EL PASO COUNTY BOARD OF

COMMISSIONERS; BILL ELDER,
Sheriff of El Paso County Sheriff's
Office, in his official and individual
capacities; KENNETH ROMINES;
NICHOLAS GRZECKA,

Defendants.

**Appeal from the United States District Court
for the District of Colorado
(D.C. Nos. 1:24-CV-03190-WJM-MDB & 1:24-CV-3193-WJM-MDB)**

Patrick A. Huber of Romanucci & Blandin, LLC, Chicago, Illinois (Sarah M. Raisch of Romanucci & Blandin, LLC, Chicago, Illinois; and Bradley T. Bufkin and Matthew L. Schneider of Bufkin & Schneider Law, LLC, Colorado Springs, Colorado, with him on the briefs), for Plaintiffs-Appellants/Cross-Appellees and Consolidated Plaintiff/Cross-Appellee.

Nathan J. Whitney, First Assistant County Attorney (Bryan E. Schmid, Senior County Attorney, with him on the brief), Colorado Springs, Colorado, for Defendants-Appellees El Paso County Board of County Commissioners and Sheriff Bill Elder.

Michael D. Kuhn of KLCS PC, Colorado Springs, Colorado (Paul D. Godec and Jonathan M. Abramson of SGR, LLC, Denver, Colorado, with him on the briefs), for Defendants-Appellees/Cross-Appellants.

Before **PHILLIPS**, **McHUGH**, and **EID**, Circuit Judges.

PHILLIPS, Circuit Judge.

In November 2022, Anderson Aldrich carried an AR-15-style rifle and a handgun into Club Q, an LGBTQIA+ nightclub in Colorado Springs. Aldrich then opened fire, murdering five people and injuring twenty-five others.

Plaintiffs are survivors of the shooting and the families of three people Aldrich murdered. They sued the El Paso County Board of County Commissioners, the El Paso County Sheriff, and individuals and entities associated with Club Q.

Against the County Defendants, Plaintiffs brought substantive due process claims through 42 U.S.C. § 1983 under a state-created-danger theory of liability, as well as related wrongful-death claims. Plaintiffs alleged that the County Defendants' policies prohibited law enforcement from seeking emergency protection orders, which would have kept dangerous individuals like Aldrich from accessing firearms. In other words, they asserted that these defendants denied them a state-granted protection, which increased their vulnerability to private violence.

Against the Club Q Defendants, Plaintiffs brought state-law claims under the Colorado Premises Liability Act, as well as related negligence and wrongful-death claims. Plaintiffs alleged that the Club Q Defendants contributed to their injuries by not taking adequate security and safety measures to protect patrons.

The County Defendants and the Club Q Defendants separately moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). The district court granted the County Defendants' motion in full and the Club Q Defendants' in part. The court dismissed the § 1983 and related wrongful-death claims because Plaintiffs didn't plausibly allege that the County Defendants engaged in

affirmative danger-creating conduct, as required by the state-created-danger theory. The court also dismissed the CPLA claims because Plaintiffs didn't plausibly allege causation. But the court declined to dismiss the negligence and wrongful-death claims against the Club Q Defendants. Those defendants had argued that the CPLA provided the exclusive remedy for Plaintiffs' claims against them. But the court ruled that deciding this issue involved a "fact-intensive inquiry" inappropriate at the pleading stage.

After these rulings, no federal claims remained. So on the parties' motions, the district court declined to exercise supplemental jurisdiction over the remaining state-law claims. The court then entered judgment.

Plaintiffs and the Club Q Defendants both appealed.¹ Plaintiffs argue that they sufficiently pleaded their § 1983 and CPLA claims. The Club Q Defendants argue that the district court lacked subject-matter jurisdiction over the state-law claims against them and, in the alternative, erred in denying their motion to dismiss Plaintiffs' negligence and wrongful-death claims.

Exercising jurisdiction under 28 U.S.C. § 1291, we affirm in part and reverse in part. For the § 1983 claims, Plaintiffs didn't allege that the County Defendants' conduct put Plaintiffs, specifically, at immediate risk of harm. So Plaintiffs' allegations didn't satisfy the state-created-danger theory's

¹ The Clerk's Office consolidated three appeals from the district court's judgment (two from different plaintiffs, one from a subset of the Club Q Defendants). This opinion addresses all three.

affirmative-conduct precondition, and the district court correctly dismissed the claims.

For the claims against the Club Q Defendants, the district court had subject-matter jurisdiction under 28 U.S.C. § 1367(a). And because Plaintiffs' allegations establish that Aldrich's actions were the predominant cause of Plaintiffs' injuries, the court correctly dismissed the CPLA claims. But the court erred by denying the Club Q Defendants' motion to dismiss the negligence and wrongful-death claims. The CPLA provides the exclusive legal remedy for Plaintiffs' injuries, which arose from Club Q's conditions. Because the CPLA precludes Plaintiffs' negligence and wrongful-death claims, the district court should have dismissed those claims, too.

BACKGROUND

I. Factual Background

This appeal arises from consolidated lawsuits.² Two groups of plaintiffs brought the first: (1) shooting survivors; and (2) the estates of Raymond Green, Kelly Loving, and Derrick Rump, three people killed in the shooting. Another shooting survivor, Barrett Hudson, brought the second.³

² Those cases are *Vance v. El Paso County Board of County Commissioners*, 24-cv-03190 (D. Colo. 2024), and *Hudson v. Board of County Commissioners of El Paso County*, 24-cv-3193 (D. Colo. 2024).

³ The lawsuits' complaints are substantially similar, except for Hudson's bringing assault and battery claims against Aldrich. Because Aldrich never answered Hudson's complaint, the district-court clerk entered default judgment
(footnote continued)

Plaintiffs sued the El Paso County Board of County Commissioners and Sheriff Bill Elder. The Board was the main policymaking body for El Paso County, and Sheriff Elder headed the El Paso County Sheriff's Office.

Plaintiffs also sued several parties affiliated with Club Q: G.I.G., Inc.; Club Q, LLC; 3430 N. Academy LLC; Academy3430, LLC; Matthew Haynes; Kenneth Romines; and Nicholas Grzecka.⁴ G.I.G., Inc. and Club Q, LLC operated Club Q. Matthew Haynes, Kenneth Romines, and Nicholas Grzecka were Club Q's co-owners. And Academy, LLC, and Academy3430 owned Club Q's building.

Plaintiffs allege that Aldrich, the County Defendants, and the Club Q Defendants all contributed to their injuries from the shooting.⁵

A. Aldrich's Conduct

Around midnight on November 19, 2022, 22-year-old Anderson Aldrich walked into Club Q, an LGBTQIA+ nightclub in Colorado Springs, Colorado. Aldrich carried an AR-15-style rifle, wore a tactical vest and ballistic plates,

against Aldrich. That default judgment isn't at issue on appeal. So we don't focus on the claims against Aldrich.

⁴ It's unclear whether Plaintiffs ever successfully served Romines. And because Grzecka filed for bankruptcy, the case against him was automatically stayed. Neither was active in the lawsuits or appeals.

⁵ Because both the district court and the parties rely on the complaint from the *Vance* lawsuit, we also rely on that complaint for the factual allegations.

and had a handgun strapped to the vest.⁶ After entering the nightclub “without restriction,” Aldrich started shooting, murdering five people and injuring twenty-five others. App. vol. I at 37. A few Club Q patrons heroically subdued Aldrich, and first responders arrived soon after.

Both the state and federal government prosecuted Aldrich. In state court, Aldrich pleaded guilty to five counts of first-degree murder and forty-six counts of attempted murder, while also pleading no contest to two hate crimes. In federal court, Aldrich pleaded guilty to seventy-four federal hate crimes and gun offenses. Aldrich received multiple life sentences.

B. The County Defendants’ Conduct

In 2019, Colorado adopted the Colorado Violence Prevention Act. That Act is Colorado’s version of a “Red Flag Law.” Red Flag Laws “provide[] a legal mechanism to restrict firearm access for individuals displaying a pattern of statements and behaviors indicating an intent to inflict violence.” *Id.* at 44.

The Act allows various people and institutions—including law enforcement—to request Extreme Risk Protection Orders (ERPOs). Colo. Rev. Stat. §§ 13-14.5-103, -104. An ERPO temporarily prevents a person who poses a significant risk of harm to self or others from possessing or buying firearms. *Id.* §§ 13-14.5-103(3), -105(2). The Act “does not require” law-enforcement

⁶ Aldrich identifies as non-binary and uses “they/them” pronouns. To avoid confusion with antecedents and enhance readability, we use Aldrich’s surname throughout this opinion.

officers to request ERPOs. *Id.* § 13-14.5-113(4); *see also id.* § 13-14.5-103(1)(a). Instead, whether to request an ERPO is discretionary. *See id.*

But the County Defendants never gave county law enforcement a chance to exercise that discretion. Before the governor even signed the bill that became the Act, the El Paso County Board of County Commissioners unanimously passed a resolution committing to “actively resist the bill in its current and subsequent forms.” App. vol. I at 115. The Board also pledged not to fund or support the bill. Following suit, the El Paso County Sheriff’s Office issued a formal statement saying that, absent exigent circumstances and probable cause of a crime, it wouldn’t seek ERPOs.⁷

By the 2022 Club Q shooting, the Sheriff’s Office hadn’t petitioned for a single ERPO. Yet according to Plaintiffs, Aldrich had given county law enforcement good reason to seek one. In June 2021, Aldrich held Aldrich’s grandparents at gunpoint, threatened to kill them, and showed them a homemade bomb. The grandparents escaped and called 911. Aldrich’s grandmother told officers that, in addition to “making a bomb,” Aldrich had collected weapons and aspired to be “the next mass killer.” *Id.* at 51 (citation

⁷ The Red Flag Law doesn’t require ERPO petitioners to show probable cause. Instead, a petitioner must “[a]llege that the respondent poses a significant risk of causing personal injury to self or others by having in the respondent’s custody or control a firearm or by purchasing, possessing, or receiving a firearm.” Colo. Rev. Stat. § 13-14.5-104(3)(a). The petitioner must also provide an affidavit identifying “specific statements, actions, or facts that give rise to a reasonable fear of future dangerous acts by the respondent.” *Id.*

omitted). While searching the grandparents' house, where Aldrich also stayed, the Sheriff's Office found bomb-making materials. Aldrich was charged with several felonies, including first-degree kidnapping.

But Aldrich soon posted bond. And just a few months later, some of Aldrich's family members told the state court that Aldrich was 3-D printing gun parts. Those family members also worried that Aldrich would "hurt or murder" the grandparents. *Id.* at 54. Then during a hearing, the state court expressed concern that Aldrich was also "planning for something" unrelated to the grandparents, emphasizing that Aldrich was "saving all th[o]se firearms and trying to make this bomb." *Id.* (citation omitted).

Despite these concerns, the charges were dismissed,⁸ and the state court sealed the case records. Soon after, Aldrich tried to retrieve "seized firearms" from the Sheriff's Office but was unsuccessful. *Id.* at 55. Still, because law enforcement never sought an ERPO, Aldrich could buy and possess firearms without restriction. And over the next few months, Aldrich did just that, gathering guns and ammunition to prepare for the Club Q shooting.

C. The Club Q Defendants' Conduct

According to Plaintiffs, the Club Q Defendants failed to provide adequate security for the nightclub. At one point, Club Q had over four security

⁸ Aldrich's grandparents had moved to Florida, and the district attorney had trouble serving them. Eventually, the state court refused to grant another continuance and dismissed the charges for failure to prosecute.

employees, including an armed guard. But during the Covid-19 pandemic, the club reduced security to only two staff members and dismissed the armed guard. At the time of the shooting, the club's head of security was unlicensed, overworked, and lacked formal active-shooter training. What's more, the nightclub had no screening process, such as pat downs or metal detectors. Nor was anyone stationed outside the entrance to monitor those entering the club.

On top of these security issues, the nightclub had only one exit: the front door. The back door was blocked and the patio was fenced in. As a result, Club Q patrons had no way to evacuate in an emergency, effectively creating “a death trap.” *Id.* at 59.

According to Plaintiffs, the Club Q Defendants intentionally prioritized profit over safety and security. And they did so despite knowing that, as an LGBTQIA+ space, Club Q faced “heightened risks” of violence. *See id.* at 63, 84. Plus, there had been a recent attempted stabbing at Club Q and a nearby shooting. Club Q had also received repeated threatening phone calls in the weeks before the shooting.

In fact, Aldrich visited Club Q at least seven times between August 2021 and October 2022. During those visits, Aldrich asked about evacuation procedures and security. Despite this suspicious questioning, Club Q took no precautions. And the night of the shooting, Aldrich entered Club Q's front door “without restriction.” *Id.* at 37.

II. Procedural History

A. The Complaints

Plaintiffs sued the County Defendants for substantive due process violations under 42 U.S.C. § 1983 and alleged liability under the state-created-danger theory. They alleged that the County Defendants refused to enforce the Red Flag Law, failed to prevent Aldrich from accessing firearms, and ignored warning signs about Aldrich's violent conduct. They also claimed that through the Board's resolution and the Sheriff's Office's statement, the County Defendants maintained policies that prevented law enforcement from seeking ERPOs. In Plaintiffs' view, these actions increased their risk of experiencing private violence. The Green, Loving, and Rump estates also raised related wrongful-death claims under § 1983.

Against the Club Q Defendants, Plaintiffs brought premises-liability and negligence claims. Plaintiffs alleged that the Club Q Defendants' inadequate security and safety measures contributed to their injuries. The Green, Loving, and Rump estates also brought related wrongful-death claims under state law.

B. Motions to Dismiss

The County Defendants and the Club Q Defendants separately moved under Rule 12(b)(6) to dismiss the claims against them.⁹ Relevant here, the

⁹ During summary-judgment briefing, the district court consolidated the *Vance* and *Hudson* lawsuits. But before the court did so, the County and Club Q Defendants had filed separate motions to dismiss in both cases.

County Defendants argued that Plaintiffs didn't allege facts supporting their state-created-danger theory. The Club Q Defendants argued that a recent amendment to the Colorado Premises Liability Act precluded Plaintiffs' premises-liability claims. They also argued that the CPLA provided the exclusive remedy for Plaintiffs' injuries, warranting dismissal of the negligence and wrongful-death claims.

Plaintiffs opposed both motions. They argued that they pleaded sufficient facts supporting their state-created-danger theory, including that the County Defendants' ERPO policies¹⁰ "affirmatively emboldened a known, imminent threat, ensuring that neither law enforcement nor concerned citizens could stop [Aldrich] before he struck." App. vol. II at 160. As for the Club Q Defendants' motion, Plaintiffs argued that they plausibly alleged their CPLA claims and that the motion inappropriately asked the district court to find facts at the pleading stage. Plaintiffs also argued that the CPLA didn't preempt their negligence and wrongful-death claims.

C. Orders on Motions to Dismiss

1. County Defendants' Motion

The district court granted the County Defendants' motion. *Vance v. El Paso Cnty. of Comm'rs*, 794 F. Supp. 3d 915, 917 (D. Colo. 2025). It held that Plaintiffs didn't allege affirmative conduct under the state-created-danger

¹⁰ We use "ERPO policies" as shorthand for the Board's resolution and the Sheriff's Office's formal statement.

theory. *Id.* at 919–20. It reasoned that the County Defendants’ ERPO policies “were commitments *to do nothing*” and “were not affirmative acts that created or enhanced a risk of private harm.” *Id.* at 921. Put differently, by not enforcing the Red Flag Law, the County Defendants “simply maintained the status quo.” *Id.* The court also ruled that the policies didn’t create an immediate threat of harm or target Plaintiffs. *Id.* at 922–23. It then held that, for similar reasons, none of the County Defendants’ other alleged actions counted as affirmative conduct, either. *Id.* at 924–25.

All that said, the court suggested that Plaintiffs had pleaded at least one of the state-created-danger theory’s requirements: conscience-shocking conduct. The court explained that, despite knowing that Aldrich had stockpiled weapons and “planned to be the next mass killer,” the County Defendants “defiantly did nothing . . . and refused to avail themselves of the critical tool the legislature had just equipped them with . . . to take Aldrich’s firearms.” *Id.* at 925–26. In the court’s view, “these allegations amount to much more than mere negligence—they represent a conscious and intentional disregard of a known and unjustifiable risk.” *Id.* at 926.

Even so, the court ruled that Plaintiffs’ allegations—“premised only on inaction”—weren’t enough to state a substantive due process claim. *Id.* So it dismissed all claims against the County Defendants. *Id.*

2. Club Q Defendants' Motion

In a second order, the district court granted in part and denied in part the Club Q Defendants' motion. *Vance v. El Paso Cnty. of Comm'rs*, 789 F. Supp. 3d 1051, 1053 (D. Colo. 2025). It dismissed the CPLA claims under “pertinent caselaw and legislative authority” supporting the Club Q Defendants' view that “as a matter of law, the mass shooting committed by Aldrich was the ‘predominant cause’ of Plaintiffs' injuries.” *Id.* at 1054. As for Plaintiffs' negligence and wrongful-death claims, the district court ruled that whether the CPLA preempted Plaintiffs' claims was a “fact-intensive inquiry” inappropriate at the motion-to-dismiss stage. *See id.* at 1061. The court highlighted that Plaintiffs' allegations weren't limited to the premises layout, but included “targeted corporate decisions, training, and staffing deficiencies.” *Id.* (citation modified). So it denied the motion to dismiss these claims. *Id.* at 1062.

D. Order on Supplemental Jurisdiction

Once the district court dismissed the § 1983 claims, no federal claims remained. So Plaintiffs moved under 28 U.S.C. § 1367(c) to dismiss the remaining state-law claims against the Club Q Defendants. That subsection allows district courts to “decline to exercise supplemental jurisdiction over a claim” if the court “dismissed all claims over which it ha[d] original jurisdiction.” *Id.* § 1367(c)(3).

That same day, the Club Q Defendants separately moved to dismiss under Rule 12(b)(1). They argued that the court lacked subject-matter jurisdiction

under § 1367(a), which gives federal courts supplemental jurisdiction over state-law claims forming “part of the same case or controversy” as a federal claim. According to the Club Q Defendants, the federal claims against the County Defendants and the state-law claims against the Club Q Defendants didn’t arise from a common nucleus of operative fact.

The Club Q Defendants also moved in the alternative to dismiss under § 1367(c). That said, in response to Plaintiffs’ motion, the Club Q Defendants argued that the court couldn’t decline jurisdiction under § 1367(c) if it never had jurisdiction under § 1367(a) to begin with. In other words, they argued that the court *had* to dismiss under Rule 12(b)(1) instead of § 1367(c).

The district court granted Plaintiffs’ motion in full and the Club Q Defendants’ motion in part. *Vance v. El Paso Cnty. of Comm’rs*, No. 24-cv-3190, 2025 WL 2171839, at *1–2 (D. Colo. July 31, 2025). Despite acknowledging that the Club Q Defendants’ position about § 1367(a) “may have merit,” the court dismissed under § 1367(c) because “[t]he parties agree that, even assuming that supplemental jurisdiction exists, the Court should nonetheless decline to exercise it given its dismissal of the federal claims.” *Id.* at *1. So the court assumed it had jurisdiction, declined to exercise it,

dismissed the state-law claims without prejudice, and entered final judgment.¹¹
Id. at *1–2.

E. Appeals

Plaintiffs¹² and the Club Q Defendants both appealed. We organize the issues into four challenges:

- (1) Did the district court err by concluding that Plaintiffs didn’t plausibly allege a due process claim against the County Defendants under a state-created-danger theory?
- (2) Did the district court err by declining to dismiss the state-law claims against the Club Q Defendants for lack of subject-matter jurisdiction?
- (3) Did the district court err by concluding that Plaintiffs didn’t plausibly allege a CPLA claim against the Club Q Defendants?
- (4) Did the district court err by denying the Club Q Defendants’ motion to dismiss Plaintiffs’ negligence and wrongful-death claims?

STANDARD OF REVIEW

We review de novo a district court’s decision on a motion to dismiss. *Johnson v. Smith*, 104 F.4th 153, 167 (10th Cir. 2024). We accept “all well-

¹¹ Plaintiffs then filed their remaining claims in state court. *Vance v. GIG, Inc. d/b/a Club Q*, Civ. No. 2025CV31959 (Colo. Dist. Ct. 2025). That case is stayed pending this appeal.

¹² The plaintiffs in the *Vance* and *Hudson* lawsuits separately appealed but filed consolidated briefing.

pleaded allegations [in] the complaint as true and consider[] them in the light most favorable to the nonmoving party.” *Id.* (citation omitted).

Typically, “[w]e review a denial of supplemental jurisdiction for abuse of discretion.” *Koch v. City of Del City*, 660 F.3d 1228, 1248 (10th Cir. 2011) (citation omitted). That’s because declining to exercise supplemental jurisdiction under § 1367(c) isn’t “a jurisdictional matter”; it’s a “discretionary choice not to hear the claims despite [the court’s] subject-matter jurisdiction over them.” *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 640 (2009) (citation omitted). But the Club Q Defendants argue that the district court never had supplemental jurisdiction in the first place. And that’s a threshold question that we review de novo.¹³ *See United States v. Hopson*, 150 F.4th 1290, 1297 (10th Cir. 2025).

DISCUSSION

We start with the federal claims before turning to the state-law claims and the district court’s jurisdiction over them.

I. Section 1983 Claims

Section 1983 allows plaintiffs to sue state- and local-government officials for violating their federal constitutional or statutory rights. *See Hernandez v. Mesa*, 589 U.S. 93, 109 (2020). Generally, a state actor’s “failure

¹³ The Club Q Defendants didn’t challenge jurisdiction until after the court had decided their original Rule 12(b) motion. But that doesn’t matter. “Objections to subject-matter jurisdiction . . . may be raised at any time.” *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011).

to protect an individual against private violence” doesn’t violate the Fourteenth Amendment’s Due Process Clause. *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 197 (1989). So plaintiffs usually can’t use § 1983 to hold state actors liable “for harm a private individual intentionally or recklessly inflicts upon a victim.” *Matthews v. Bergdorf*, 889 F.3d 1136, 1143 (10th Cir. 2018). But we recognize two exceptions to this rule:

Where a private party inflicts harm upon a victim, a state actor incurs an antecedent constitutional duty to protect the victim if the complainant demonstrates either (1) the existence of a special custodial relationship between the State and victim, or (2) the state actor intentionally or recklessly created the danger that precipitated the deprivation.

Id.

Plaintiffs’ due process claims against the County Defendants turn on the second exception: state-created danger. To state a claim under a state-created-danger theory, a plaintiff must plead two preconditions: (1) affirmative conduct by a state official and (2) private violence. *Est. of B.I.C. v. Gillen*, 761 F.3d 1099, 1105 (10th Cir. 2014). On top of that, the plaintiff must also allege that

(1) the state actor created the danger or increased the plaintiff’s vulnerability to the danger in some way, (2) plaintiff was a member of a limited and specifically definable group, (3) the state actor’s conduct put plaintiff at substantial risk of serious, immediate, and proximate harm, (4) the risk was obvious or known, (5) the state actor acted recklessly in conscious disregard of the risk, and (6) such conduct, when viewed in total, was conscience shocking.

Matthews, 889 F.3d at 1150.

Conduct is “affirmative” under the first precondition only if it surpasses “mere negligence or inaction.” *Est. of B.I.C. v. Gillen*, 710 F.3d 1168, 1173 (10th Cir. 2013). Affirmative conduct “typically involve[s] conduct that imposes an immediate threat of harm, which by its nature has a limited range and duration.” *Gray v. Univ. of Colo. Hosp. Auth.*, 672 F.3d 909, 920 (10th Cir. 2012) (citation omitted). The conduct also must be “directed at a discrete plaintiff rather than at the public at large.” *Id.* (citation omitted).

According to the district court, Plaintiffs premised their allegations “only on inaction.” *Vance*, 794 F. Supp. 3d at 926. Plaintiffs disagree. They say that by adopting and enforcing policies that prevented law enforcement from seeking ERPOs, the County Defendants interfered with protections otherwise available to Plaintiffs, which, in turn, increased their risk of experiencing private violence.

Plaintiffs’ allegations fall short. To start, most of their allegations concerned the County Defendants’ inaction. They alleged that the County Defendants refused to take advantage of the Red Flag Law, failed to prevent Aldrich from accessing firearms, and ignored warning signs about Aldrich. This conduct isn’t actionable because it’s not “affirmative.” Instead, it’s nothing more than “mere negligence or inaction.” *Est. of B.I.C.*, 710 F.3d at 1173. And that’s not enough to meet the affirmative-conduct requirement. *See id.*; *Robbins v. Oklahoma*, 519 F.3d 1242, 1251 (10th Cir. 2008) (holding that school’s failure to ensure student “was placed in a safe environment” was “insufficient

as a matter of law to result in liability” (citation omitted)); *Graham v. Indep. Sch. Dist. No. I-89*, 22 F.3d 991, 993, 995 (10th Cir. 1994) (holding that plaintiff didn’t allege affirmative conduct where officials knew of threats to student but “failed to take action to secure his safety”).

That said, Plaintiffs insist that they did more than “allege that the County simply failed to act.” Br. 1 at 35. Namely, they assert that through the ERPO policies, the County Defendants actively “used [their] authority to prohibit” officers from seeking ERPOS, which stripped Plaintiffs of a state-granted protection. *Id.*

We agree that the County Defendants’ adopting and maintaining the ERPO policies was more than “mere negligence or inaction.” *Est. of B.I.C.*, 710 F.3d at 1173; *see Robbins*, 519 F.3d at 1251 (suggesting that decision to license facility surpassed inaction). Still, to satisfy the affirmative-conduct precondition, the state actor’s conduct must “impose an immediate threat of harm.” *Gray*, 672 F.3d at 921 (citation omitted). Not only that, the threat must be “directed at a discrete plaintiff.” *Id.* at 920 (citation omitted).

Plaintiffs’ allegations about the ERPO policies don’t meet these requirements. For starters, the County Defendants’ policies didn’t create an *immediate* threat of harm. This requirement demands a “causal link” between the injury and the “danger created by” the defendant’s actions. *Id.* at 917 (emphasis omitted). An immediate threat of harm should also have “a limited

range and duration,” rather than creating an “indefinite risk.” *Id.* (citation omitted).

Under our precedent, generally applicable policies don’t meet the immediate-risk-of-harm requirement. For instance, in *Gray*, the plaintiffs sued a hospital under the state-created-danger theory after their family member died while in the hospital’s care. *Id.* at 911–12. The plaintiffs alleged that hospital policy allowed staff to leave patients unattended, and that this policy increased their family member’s risk of harm. *See id.* at 913–14. We held that “a State’s adoption of generally-applicable policies and customs does not foist upon anyone an immediate threat of harm having a limited range and duration.” *Id.* at 926 (citation modified).

Gray forecloses Plaintiffs’ ERPO-based theories. The County Defendants’ generally applicable ERPO policies didn’t create an immediate threat of harm; instead, they created an “indefinite risk” of increased gun violence within El Paso County. Indeed, the Club Q shooting didn’t happen until years after the County Defendants adopted their policies.

Consider, too, our opinion in *Ruiz v. McDonnell*, 299 F.3d 1173 (10th Cir. 2002). There, the plaintiff’s son died at a private daycare. *Id.* at 1178. The plaintiff alleged that the state improperly licensed the daycare facility, thus increasing the child’s risk of harm. *Id.* We held that “improper licensure did not impose an immediate threat of harm,” but instead presented “a threat of an

indefinite range and duration.” *Id.* at 1183; *see also Robbins*, 519 F.3d at 1251.

We can say the same about the policies here.

Plaintiffs cite *Armijo ex rel. Chavez v. Wagon Mound Public Schools*, 159 F.3d 1253 (10th Cir. 1998), and *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995), to show that the risk of harm “need not materialize instantaneously” to meet the affirmative-conduct requirement. Br. 1 at 43.

But *Armijo* and *Uhlrig* don’t sway us. In *Armijo*, the harm—a student’s death by suicide—occurred shortly after the state officials’ challenged conduct: “suspending [the student] from school, which caused him to become distraught and to threaten violence, and then taking him to his home and leaving him alone with access to firearms.” 159 F.3d at 1257, 1264. So there was no question that the state actors’ conduct put the student at “immediate” risk of harm.

As for *Uhlrig*, the plaintiff brought state-created-danger claims against mental-health administrators at a state hospital after a patient killed the plaintiff’s wife, one of the hospital’s therapists. 64 F.3d at 569, 571. The plaintiff alleged that the state increased the therapist’s risk of harm by eliminating a special unit at the hospital for “the criminally insane.” *Id.* at 569. Though *Uhlrig* considered the risk of harm posed by closing the unit, which occurred months before the therapist’s death, it didn’t discuss the immediacy of that risk. *Id.* at 570–71, 575. Instead, it concluded that the therapist hadn’t faced “a substantial risk of serious harm.” *Id.* at 575. So neither *Armijo* nor

Uhlrig convince us that the ERPO policies created an immediate risk of harm here.

Plaintiffs next emphasize that “the shooting occurred only *four months* after Aldrich’s release from custody.” Br. 1 at 42. But that argument misses the mark. The question is whether the County Defendants’ *policies*—not their refusal to seek ERPOs—created an immediate risk of harm.¹⁴ And for those policies to meet the affirmative-conduct requirement, they had to immediately increase Plaintiffs’ risk of experiencing private violence. Plaintiffs alleged no such thing.

Plaintiffs’ claims also don’t satisfy the affirmative-conduct precondition for a second reason: the County Defendants’ policies impacted the public, not Plaintiffs specifically. “Because many state activities have the potential to increase an individual’s risk of harm, we require plaintiffs alleging” a state-created-danger theory to show that “the state’s actions place[d] [them] specifically at risk, as distinguished from a risk that affects the public at large.” *See Gray*, 672 F.3d at 926 (citation modified).

Plaintiffs’ allegations don’t meet this requirement. Returning to *Ruiz*, there we held that “the mere licensure of [the daycare] was not an act directed at [the child] which, in and of itself, placed [the child] in danger.” 229 F.3d at 1183. And in *Gray*, we held that “[t]he act of establishing . . . policies and

¹⁴ Again, the County Defendants’ refusal to seek ERPOs was nothing more than inaction.

customs itself does not put any particular individual at substantial risk of serious, immediate, and proximate harm.” 672 F.3d at 926 (citation modified). Instead, it “affects a broader populace” and is “too remote to establish the necessary causal link between the danger to the victim and the resulting harm.” *Id.* Similarly, in *Hernandez v. Ridley*, we held that the plaintiffs didn’t allege affirmative conduct because they “were not identifiable victims” when the defendant adopted the at-issue policies. 734 F.3d 1254, 1260 (10th Cir. 2013) (citation modified).

As in *Ruiz*, *Gray*, and *Hernandez*, the County Defendants’ adopting and enforcing the ERPO policies wasn’t directed at Plaintiffs. Nor did Plaintiffs allege that the policies put them, specifically, at risk. Instead, the policies “affect[ed] a broader populace,” *i.e.*, everyone vulnerable to gun violence in El Paso County. *See Gray*, 672 F.3d at 926. So for this reason, too, Plaintiffs don’t meet the affirmative-conduct precondition.

Plaintiffs resist by pointing to our opinion in *Currier v. Doran*, 242 F.3d 905 (10th Cir. 2001). There, social workers removed two children from their mother’s custody and asked the court to give physical custody to the father. *Id.* at 909. Soon after, one social worker noticed bruises on the children. *Id.* at 919. The social worker also heard that the father and his fiancée were abusing them. *Id.* Yet the social worker advised the state court to give the father legal

custody.¹⁵ *Id.* Another social worker also instructed the children’s mother not to report the father’s abuse. *Id.* at 921.

Ultimately, the father killed one of the children and injured the other. *Id.* at 910. The children’s mother and estate sued the social workers under a state-created-danger theory, arguing that the social workers “affirmatively removed [the children] from the custody of their mother and then placed them in the custody of their abusive father.” *Id.* at 917.

We held that both social workers engaged in affirmative conduct. For the first social worker, we concluded that causing the children’s removal from their mother’s custody and placing them with their father satisfied the affirmative-conduct requirement. *Id.* at 919, 920 n.7. We explained that “[b]y failing to investigate the allegations of child abuse and by recommending that [the father] assume legal custody,” the social worker put the children at an “obvious risk of serious, immediate, and proximate harm.”¹⁶ *Id.* at 920.

As for the second social worker, we concluded that instructing the mother not to report abuse was also affirmative conduct. *Id.* at 921. We explained that

¹⁵ The plaintiffs alleged that “either through [the social worker’s] failure to investigate and report to the [court] or his affirmative recommendation to the [court],” the social worker was responsible for the court’s granting legal custody to the father. *Currier*, 242 F.3d at 909.

¹⁶ We noted that the social worker’s “failure to investigate allegations of abuse should be viewed” not as standalone conduct, but “in the general context of the state’s affirmative conduct in removing the children from their mother and placing the children with their father.” *Currier*, 242 F.3d at 920 n.7.

“the state can be liable when it affirmatively places private citizens in harm’s way by removing what would otherwise be safety valves” or “when it cuts off potential sources of private [or state] aid.” *Id.* at 922. And when the social worker told the mother to stop reporting, the social worker “increased the children’s vulnerability to [the father’s] abuse” by “foreclos[ing]” “potential aid.” *Id.*

Plaintiffs argue that, like in *Currier*, the County Defendants removed “a safety valve[]”: law enforcement’s ability to seek ERPOs. *See id.* But that’s where the similarities between *Currier* and Plaintiffs’ allegations end. The social workers’ actions in *Currier* (1) specifically affected the two children and (2) immediately increased the risk that their abusive father would harm them. *See id.* at 919–22. But here, removing the “safety valve[]” that the Red Flag Law provided didn’t create an *immediate* risk of harm to *Plaintiffs*. Instead, any increased risk was an “indefinite,” not “immediate,” one. *See Gray*, 672 F.3d at 927 (citation omitted). Nor was that risk particular to Plaintiffs.

Plaintiffs also rely on a slew of out-of-circuit cases to support their argument. But none of them changes our minds. First, Plaintiffs point to *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993), *overruled on other grounds by Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163 (1993). There, the plaintiff alleged that state actors “conspired with” a violent group to let the group attack demonstrators, “assur[ing]” the group that officers wouldn’t stop or arrest them. *Id.* at 99. That group then

attacked the plaintiff during a demonstration. *Id.* at 96. The Second Circuit held that these allegations of “a prearranged official sanction of privately inflicted injury” stated a viable due process claim under a state-created-danger theory. *See id.* at 99.

Plaintiffs argue that the County Defendants and the *Dwares* officials “sent the same message”: officers wouldn’t use the Red Flag Law “to disarm dangerous individuals, no matter how grave the threat.” Br. 1 at 38. But unlike the *Dwares* officials, who permitted the specific private actors’ conduct, the County Defendants adopted generally applicable policies. The County Defendants didn’t condone or allow Aldrich’s specific actions.¹⁷

Next, Plaintiffs contend that other circuits have “long recognized that a government policy or directive can satisfy the affirmative-act requirement.” *Id.* But again, where generally applicable policies are concerned, our precedent holds the opposite. *See Gray*, 672 F.3d at 926 (“[A] State’s adoption of generally-applicable policies and customs does not foist upon anyone an immediate threat of harm having a limited range and duration.” (citation

¹⁷ Plaintiffs rely on a similar Second Circuit case, *Pena v. Deprisco*, 432 F.3d 98 (2d Cir. 2005). It’s distinguishable for the same reason: state actors “implicitly but affirmatively condoned” a specific private actor’s dangerous conduct. *Id.* at 111.

modified)). Besides, these out-of-circuit cases all share a key fact missing from Plaintiffs’ allegations: state action directed at a discrete plaintiff.¹⁸

In *Kallstrom v. City of Columbus*, the city had a policy of “freely releasing” undercover officers’ personal information. 136 F.3d 1055, 1067 (6th Cir. 1998). The Sixth Circuit found that the city increased three officers’ vulnerability to private harm by releasing their information to defense counsel in a criminal case. *Id.* at 1059, 1067. But unlike the facts here, *Kallstrom* involved state action—releasing information to defense counsel—that increased *specific* plaintiffs’—the officers and their families—vulnerability to harm. *See id.*

Likewise, in *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990), the Eighth Circuit concluded that a plaintiff could potentially allege affirmative conduct where the police chief had prohibited officers from responding to the plaintiff’s requests for help. *See id.* at 54–55. But there, too, the state action targeted a specific plaintiff. We can say the same about the other cases Plaintiffs cite. *See Okin v. Vill. of Cornwall-on-Hudson Police Dep’t*, 577 F.3d 415, 430–31 (2d Cir. 2009) (finding a factual dispute about whether police officers acted affirmatively by implicitly “convey[ing]” to private actor “that he could continue to engage in domestic violence” against the plaintiff “with

¹⁸ Plus, there’s no universal test for the state-created-danger theory. *See Murguia v. Langdon*, 73 F.4th 1103, 1112–13 (9th Cir. 2023) (Bumatay, J., dissenting). So out-of-circuit caselaw is less persuasive here.

impunity”); *Pauluk v. Savage*, 836 F.3d 1117, 1125 (9th Cir. 2016) (concluding that transferring employee to a mold-infested workspace was affirmative conduct).

And so, because Plaintiffs’ allegations didn’t satisfy the affirmative-conduct precondition,¹⁹ we affirm the district court’s dismissal of Plaintiffs’ § 1983 claims.²⁰

II. Subject-Matter Jurisdiction

The Club Q Defendants argue that the district court lacked subject-matter jurisdiction over the state-law claims against them.²¹ Section 1367(a) gives

¹⁹ Though the parties contest the state-created-danger theory’s other elements, because Plaintiffs didn’t plausibly allege the affirmative-conduct precondition, we need not address the theory’s other requirements. What’s more, Defendants argue that the state-created-danger theory isn’t rooted in history and tradition, so after *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022), we should abandon it. But because they raise this argument for the first time on appeal, they waived it. *See Xlear, Inc. v. Focus Nutrition, LLC*, 893 F.3d 1227, 1234 (10th Cir. 2018) (“Generally, an issue is waived if it was not raised below in the district court.” (citation modified)).

²⁰ Because Plaintiffs’ wrongful-death claims against the County Defendants also rely on the state-created-danger theory, we need not consider them separately.

²¹ Plaintiffs argue that the Club Q Defendants lack standing for this challenge. They emphasize that the district court dismissed the state-law claims under 28 U.S.C. § 1367(c). *See Vance*, 2025 WL 2171839, at *1. And these defendants had sought, in the alternative, dismissal under that subsection. So Plaintiffs argue that because the Club Q Defendants “obtained the relief they sought,” they can’t appeal the court’s jurisdiction decision. Br. 3 at 1. We disagree. Parties can never forfeit or waive subject-matter jurisdiction. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). Plus, we “have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.” *Id.*

federal courts “subject-matter jurisdiction over specified state-law claims.” *Carlsbad Tech.*, 556 U.S. at 639. Under that subsection, courts “shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III.” 28 U.S.C. § 1367(a). And under § 1367(c)(3), a court can decline supplemental jurisdiction “over a claim under [§ 1367(a)] if” it “has dismissed all claims over which it has original jurisdiction.”

The Club Q Defendants moved under Rule 12(b)(1) for the district court to dismiss the state-law claims for lack of subject-matter jurisdiction under § 1367(a). They also moved in the alternative for the court to decline supplemental jurisdiction under § 1367(c). At the same time, Plaintiffs, too, asked the court to decline supplemental jurisdiction under § 1367(c).

The court took Plaintiffs’ preferred, and the Club Q Defendants’ alternative, route. Rather than deciding whether it had jurisdiction under § 1367(a), the court assumed that supplemental jurisdiction existed and dismissed under § 1367(c). *Vance*, 2025 WL 2171839, at *1.

The court erred by dismissing under § 1367(c) without first addressing its jurisdiction under § 1367(a). Courts may decline supplemental jurisdiction under § 1367(c) only if they have subject-matter jurisdiction under § 1367(a) to begin with. *See Royal Canin U.S.A., Inc. v. Wulfschleger*, 604 U.S. 22, 33–34 (2025) (“[T]here is no discretion to decline supplemental jurisdiction” where “there is no supplemental jurisdiction at all.”); *City of Albuquerque v. Soto*

Enters., Inc., 864 F.3d 1089, 1094 n.4 (10th Cir. 2017) (“To exercise supplemental jurisdiction, a district court must have subject-matter jurisdiction over the claims, and then choose to exercise that jurisdiction.”).

Even so, the court’s skipping over § 1367(a) makes no difference here. That’s because the district court had subject-matter jurisdiction under that subsection.

“A claim is part of the same case or controversy if it derives from a common nucleus of operative fact.” *Pettigrew v. Okla. ex rel. Okla. Dep’t of Pub. Safety*, 722 F.3d 1209, 1213 (10th Cir. 2013) (citation omitted). The relationship between the federal and state claims should “permit[] the conclusion that the entire action before the court comprises but one constitutional case.” *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 165 (1997) (citation modified). Or put differently, claims meet the common-nucleus requirement if, setting aside the claims’ “federal or state character,” one “would ordinarily be expected to try them all in one judicial proceeding.” *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).²²

According to the Club Q Defendants, Plaintiffs’ claims fall short of this standard. They emphasize that the federal and state-law claims “involve different defendants, different legal duties, different timeframes, different

²² Though Congress enacted § 1367 after *Gibbs*, the Supreme Court held that § 1367 “codified” *Gibbs*’s common-nucleus principle. *Int’l Coll. of Surgeons*, 522 U.S. at 165.

witnesses, and different evidence.” Br. 2 at 41. So they argue that the claims didn’t arise from the same factual nucleus.

True enough, the state-law claims involve different defendants, duties, and evidence than the § 1983 claims. But the federal and state claims both arise from the Club Q shooting and the events preceding it. That’s enough to satisfy § 1367(a).

Consider our opinion in *Estate of Harshman v. Jackson Hole Mountain Resort Corp.*, 379 F.3d 1161 (10th Cir. 2004). A man died in a skiing accident, and his family sued both the ski resort and the U.S. Forest Service. *Id.* at 1162–63. While the resort oversaw “daily safety decisions and management” for the ski area, the Forest Service “provided broad oversight” by administering a special-use permit for the resort. *Id.* at 1163. So the plaintiffs brought state-law claims against the ski resort and an FTCA claim against the Forest Service. *Id.* The district court dismissed the federal claims but retained supplemental jurisdiction over the state-law claims. *Id.*

We ultimately held that because the court lacked original jurisdiction over the FTCA claim, it lacked supplemental jurisdiction over the state-law claims. *Id.* at 1167–68. But in dicta, we concluded that the plaintiffs met the common-nucleus requirement for supplemental jurisdiction over the state-law claims. *See id.* at 1165. We said that “the relation between [the plaintiffs’] negligence and wrongful death claims against the United States and against [the ski resort] would clearly derive from a ‘common nucleus of operative fact’ such

that claims against both parties are part of the same case or controversy and thus would be best adjudicated together.” *Id.*

Here, too, Plaintiffs’ claims all arise from the same event: the Club Q shooting. In *Estate of Harshman*, facts surrounding the ski resort’s negligent actions and the Forest Service’s negligent actions weren’t identical. *See id.* at 1163. Yet we still thought that claims arising from the ski accident were part of the same case or controversy. As in *Harshman*, though the County Defendants and Club Q Defendants took different actions that allegedly contributed to Plaintiffs’ injuries, the claims against them still share a common nucleus of operative fact—the shooting itself.

The Club Q Defendants suggest that this result is possible only under a “loosely connected” common-nucleus test adopted by the Seventh Circuit. *See* Br. 2 at 39–40; *Baer v. First Options of Chi., Inc.*, 72 F.3d 1294, 1299 (7th Cir. 1995) (holding that claims need have only a loose factual connection to meet the common-nucleus requirement). They argue that this test “cannot be squared with *Gibbs*’s constitutional test and has been repeatedly rejected by courts.” Br. 2 at 39.

But we need not decide today whether to adopt a “loosely connected” test. That’s because Plaintiffs’ allegations satisfy *Gibbs*’s common-nucleus standard; Plaintiffs’ federal and state claims, which arose from a common event and injuries, are part of the same case or controversy. *See King Fisher Marine Serv., Inc. v. 21st Phx. Corp.*, 893 F.2d 1155, 1160 (10th Cir. 1990)

(concluding that different claims against different parties that all related to one construction project satisfied the common-nucleus requirement); *Sinclair v. Soniform, Inc.*, 935 F.2d 599, 603 (3d Cir. 1991) (holding that claims arising from same maritime accident and injuries shared a common nucleus of operative fact); *Feigler v. Tidex, Inc.*, 826 F.2d 1435, 1439 (5th Cir. 1987) (similar). Indeed, “to vindicate values of economy, convenience, fairness, and comity,” *Est. of Harshman*, 379 F.3d at 1164, one would reasonably expect Plaintiffs “to try [the federal and state claims] all in one judicial proceeding,” *Gibbs*, 383 U.S. at 725.

The Club Q Defendants cite *Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96 (3d Cir. 1998), and *Joyner v. Morrison & Foerster LLP*, 140 F.4th 523 (D.C. Cir. 2025), to argue that ““mere tangential overlap of facts is insufficient”” to meet the common-nucleus requirement. Br. 2 at 38 (quoting *Nanavati*, 857 F.2d at 105).

But *Nanavati* cuts against their argument. In that case, the Third Circuit *also* said that “total congruity between the operative facts of the two cases is unnecessary.” 857 F.2d at 105. In fact, the court held that the state-law (slander) and federal (antitrust) claims satisfied the common-nucleus requirement where they shared “a critical background fact”—“the enmity” between two of the parties—and where evidence on one claim “could [be] use[d]” as evidence or a defense for the other claim. *Id.* at 105–06. As in *Nanavati*, Plaintiffs’ claims share critical background facts: Aldrich’s pre-

shooting actions and the shooting itself. Plus, evidence on the federal claims might impact causation on the state-law claims, and vice versa.

As for *Joyner*, there the only factual overlap between the federal and state claims was the plaintiff's employment relationship with the defendants. 140 F.4th at 536–37. And again, Plaintiffs' claims here have more in common than that—their claims share common background facts and common injuries.

Thus, under 28 U.S.C. § 1367(a), the district court properly exercised supplemental jurisdiction over the state-law claims against the Club Q Defendants.²³

III. State-Law Claims

Plaintiffs challenge the district court's ruling on their CPLA claims, while the Club Q Defendants challenge its ruling on Plaintiffs' negligence and wrongful-death claims. On the CPLA claims, Plaintiffs argue that they plausibly alleged that the Club Q Defendants substantially contributed to their injuries by not providing adequate security or safe property conditions. And on the negligence and wrongful-death claims, the Club Q Defendants argue that because the CPLA provides the exclusive remedy for Plaintiffs' injuries, the court should have dismissed those claims, too.

We address each challenge in turn.

²³ Because no one argues that the district court abused its discretion by dismissing the remaining state-law claims under 28 U.S.C. § 1367(c), we do not address that ruling.

A. CPLA Claims

The CPLA, Colo. Rev. Stat. § 13-21-115, “limits a landowner’s potential liability for an injury occurring on [the landowner’s] real property . . . by reason of the condition of such property, [or] activities conducted or circumstances existing on such property.” *Jordan v. Panorama Orthopedics & Spine Ctr., PC*, 346 P.3d 1035, 1040 (Colo. 2015) (citation modified). But the CPLA doesn’t govern every tort occurring on someone else’s property; it applies only to injuries resulting from “conditions, activities, and circumstances on the property that the landowner is liable for in its legal capacity as a landowner.” *Id.* at 1041 (citation omitted).

A person’s ability to recover under the CPLA depends on his or her status as a trespasser, licensee, or invitee. *See* Colo. Rev. Stat. § 13-21-115(4). Invitees like Plaintiffs can “recover for damages caused by the landowner’s unreasonable failure to exercise reasonable care to protect against dangers the landowner actually knew about or should have known.”²⁴ *Id.* § 13-21-115(4)(c)(I).

²⁴ The district court concluded that “Defendants concede[d] at this stage in the litigation that they are landowners and that Plaintiffs are invitees under the CPLA.” *Vance*, 789 F. Supp. 3d at 1054. An “invitee” is “a person who enters or remains on the land of another to transact business in which the parties are mutually interested or who enters or remains on such land in response to the landowner’s express or implied representation that the public is requested, expected, or intended to enter or remain.” Colo. Rev. Stat. § 13-21-115(7)(a).

In 2022, the Colorado legislature amended the CPLA. *See* Colo. Rev. Stat. § 13-21-115(2)(e). That amendment addresses a Colorado Supreme Court opinion, *Rocky Mountain Planned Parenthood, Inc. v. Wagner*, 467 P.3d 287 (Colo. 2020). Because our analysis depends on *Wagner* and the 2022 amendment, we describe both in detail.

Wagner arose from a 2015 mass shooting at a Planned Parenthood facility in Colorado Springs. *Id.* at 288. The plaintiffs—people injured in the shooting—sued under the CPLA, alleging that Planned Parenthood breached its duty to provide a safe and secure environment for invitees. *Id.* at 289. The trial court granted summary judgment to Planned Parenthood, concluding that the shooter’s actions were the predominant cause of the plaintiffs’ injuries, and that the injuries weren’t foreseeable. *Id.* at 290. The Colorado Court of Appeals reversed, and the Colorado Supreme Court affirmed the Court of Appeals. *Id.* at 289–91.

On causation, the Colorado Supreme Court explained that plaintiffs must show that the defendant’s conduct was “a substantial factor in producing the harm.” *Id.* at 292 (citation modified). But “[s]ome other event which is a contributing factor in producing the harm may have such a predominant effect in bringing it about as to make the effect of the actor’s negligence insignificant and, therefore, to prevent it from being a substantial factor.” *Id.* (citation omitted). The Court held that Planned Parenthood hadn’t established that the shooter’s conduct was the predominant cause of the plaintiffs’ injuries. *Id.* at

293. It emphasized the plaintiffs’ evidence that Planned Parenthood knew “that there was a risk of violence against its facilities,” but neglected to take adequate safety precautions, such as having a full-time armed guard or a perimeter fence. *Id.*

The Court then distinguished other mass-shooting cases. *Id.* at 293–94. It explained that while those cases “involved random and extreme acts of violence committed without warning or foreseeable motive,” Planned Parenthood “had long been the subject of known threats of such violence, making the likelihood of an event like that which occurred less remote and arguably more foreseeable.” *Id.* at 294. So the court held that, “even given the magnitude of [the shooter’s] premeditated efforts to cause mass casualties without regard for his own survival or capture,” a reasonable jury could find that Planned Parenthood’s “insufficient security measures [were] a substantial factor in causing the plaintiffs’ injuries.” *Id.*

Three justices joined a partial dissent. First, the dissent faulted the majority’s causation analysis:

The proximate cause analysis requires a consideration of whether the actions of [Planned Parenthood], as a landowner, can be said to be a substantial factor in causing a mass shooting on its property. I would conclude that they cannot, and that[] . . . the premeditated and intentional actions of a mass shooter are the predominant cause of the injuries he inflicts such that any negligence on the part of a property owner simply is not a substantial factor in causing those injuries.

I would reach this conclusion because . . . any extra security measures pale in comparison to the conduct of actors bent on

inflicting mass casualties who do not employ a rational cost/benefit calculus. And for this reason, weighing what security measures a landowner might adopt to protect against mass shooters is not bounded by reasonableness. This, it seems to me, is precisely the type of circumstances in which one cause of the plaintiffs’ injuries—a mass shooter, not concerned about detection or death and intent upon causing as much damage as possible in the time he has—is the predominant cause such that any negligence by [Planned Parenthood] could not be a substantial factor in causing those injuries.

Id. at 300 (Hart, J., dissenting) (citation modified).

Second, the dissent faulted the majority’s reasoning that—because Planned Parenthood had received threats before—the mass shooting was foreseeable. *Id.* at 301. Under that approach, the dissent warned, “certain businesses and activities will face entirely different risks of liability than others will.” *Id.* And in the dissent’s view, the proximate-cause analysis shouldn’t “turn on how controversial the goods or services offered by a landowner are.” *Id.*

In conclusion, the dissent criticized the majority for “t[ying] the liability of the landowner to the nature of its business and ignor[ing] the reality that the overwhelming—the predominant—cause of harm to victims of mass shootings is the maniacal determination of the shooter himself.” *Id.*

Two years after *Wagner*, the Colorado legislature amended the CPLA by adding subsection (2)(e):

- (I) The *Rocky Mountain Planned Parenthood, Inc. v. Wagner*, 2020 CO 51, 467 P.3d 287, and *Wagner v. Planned Parenthood Federation of America, Inc.*, 2019 COA 26, 471 P.3d 1089, decisions do not accurately reflect the intent of the general

assembly regarding landowner liability and must not be relied upon in applying this section to the extent that the majority opinions determined:

- (A) The foreseeability of third-party criminal conduct based upon whether the goods or services offered by a landowner are controversial; and
 - (B) That a landowner could be held liable as a substantial factor in causing harm without considering whether a third-party criminal act was the predominant cause of that harm, as noted by the dissenting justices and judge.
- (II) In making this declaration, the general assembly does not intend to reject or otherwise disturb any judicial decision other than the *Wagner* decisions.

Colo. Rev. Stat. § 13-21-115(2)(e).

Here, the district court dismissed Plaintiffs’ CPLA claims after concluding that Plaintiffs hadn’t plausibly alleged causation. *See Vance*, 789 F. Supp. 3d at 1054–55. That’s because “as a matter of law, the mass shooting committed by Aldrich was the ‘predominant cause’ of Plaintiffs’ injuries.” *Id.* at 1054. Plaintiffs say the court was wrong for three reasons: (1) it misread the 2022 amendment to the CPLA, (2) it ignored that causation under the CPLA is a jury question, and (3) it relied on inapplicable caselaw. None of these arguments convinces us.

1. Misreading the 2022 Amendment

The district court held that because the 2022 amendment “appears to have adopted the *Wagner* dissent’s view on the predominant cause issue,” it was “constrained to conclude as a matter of law that Aldrich’s conduct was the

predominant cause of Plaintiffs’ injuries.” *Vance*, 789 F. Supp. 3d at 1056, 1058. So it dismissed Plaintiffs’ CPLA claims for failing to plausibly allege causation. *See id.* at 1061.

Plaintiffs disagree with the court’s reasoning, arguing that the amendment didn’t adopt the dissent—it merely rejected two parts of the majority opinion. They say that subsection (2)(e)(I)(B) “signaled agreement with the *policy concern* underlying the dissent—that the *Wagner* majority might invite expansive interpretations of landowner liability—but it did not adopt the dissent’s categorical rule that a shooter’s conduct must always be the predominant cause as a matter of law.” Br. 1 at 54. So in Plaintiffs’ view, the amendment clarifies only “that courts and factfinders must *consider* whether a third-party criminal act was the predominant cause”; it doesn’t “mandate . . . that it always is.” *Id.*

We agree with Plaintiffs that the amendment doesn’t “mandate” dismissing all CPLA claims involving mass shooters. But it *does* make it difficult to plausibly allege landowner liability in such situations. And here, the district court correctly held that under the 2022 amendment, Plaintiffs didn’t plausibly allege causation.

The amendment says that the *Wagner* majority “d[id] not accurately reflect the intent of the general assembly regarding landowner liability.” Colo. Rev. Stat. § 13-21-115(2)(e)(I). Then it rejects the majority’s decision not to resolve whether the shooter’s actions predominantly caused the

plaintiffs' injuries, "*as noted by the dissenting justices.*" *See id.* § 13-21-115(2)(e)(I)(B) (emphasis added). What the dissenting justices "noted" was that they would conclude, as a matter of law, that the shooter's "premeditated and intentional actions" were the predominant cause of the shooting victims' injuries. *Wagner*, 467 P.3d at 300 (Hart, J., dissenting). Indeed, under the dissent's predominant-cause approach, a shooter will almost always be the predominant cause of mass-shooting injuries. Thus, the amendment makes it hard, but perhaps not impossible, to plausibly allege CPLA causation when injuries arise from a mass shooting.

What dooms the plausibility of Plaintiffs' claims here are the factual similarities between *Wagner* and Plaintiffs' allegations. In *Wagner*, the plaintiffs established that (1) Planned Parenthood "knew for many years that there was a risk of violence against its facilities"; (2) the risk had increased before the shooting; (3) Planned Parenthood had only one armed guard, who was on duty only half the week for about four hours each day; and (4) Planned Parenthood had no perimeter fence or bullet-resistant doors. *Id.* at 293. The plaintiffs also offered expert testimony that Planned Parenthood's inadequate security increased their risk of harm, and that more security would have prevented the shooting. *Id.*

At the very least, the *Wagner* dissent and 2022 amendment disapproved of the *Wagner* majority's holding that these actions could be a substantial factor in causing the plaintiffs' injuries. Even accepting as true all of Plaintiffs'

allegations, the Club Q Defendants’ conduct—“dismantl[ing] security measures, eliminat[ing] weapons screening, allow[ing] only one untrained and unlicensed ‘head of security,’ fail[ing] to maintain safe egress routes, [and] ignor[ing] escalating threats” both to LGBTQIA+ venues and specifically to Club Q, Br. 1 at 57—didn’t play a more substantial role in causing Plaintiffs’ injuries than Planned Parenthood’s did in *Wagner*. In both cases, the mass shooter’s actions were undoubtedly the predominant cause of the invitees’ injuries. Thus, considering the 2022 amendment and *Wagner*’s facts, Plaintiffs did not plausibly allege causation.

2. Causation as a Jury Question

Plaintiffs argue that causation under the CPLA is a jury question. So they assert that the district court erred by dismissing their claims before discovery.

Plaintiffs are right that causation is typically a jury question. *City of Aurora v. Loveless*, 639 P.2d 1061, 1063 (Colo. 1981). Still, plaintiffs must allege plausible claims. *See* Fed. R. Civ. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). And a complaint that fails to do so doesn’t survive a motion to dismiss. *See Iqbal*, 556 U.S. at 679.

That’s just as true for CPLA claims. Indeed, the 2022 amendment endorses resolving CPLA causation as a matter of law in cases involving third-party criminal acts. Again, when deciding landowner liability under the CPLA, the amendment rejects the *Wagner* majority’s predominant-cause approach. Colo. Rev. Stat. § 13-21-115(2)(e)(I)(B). The majority had declined to answer

whether the shooter's actions were the predominant cause of the plaintiffs' injuries, finding it inappropriate to resolve as a matter of law at summary judgment. 467 P.3d at 294.

In response, the dissent emphasized that “[w]hile proximate cause is typically a question of fact reserved to the jury, the Court may conclude, as a matter of law, that such a predominant cause exists, and that there can be no other substantial factors.” *Wagner*, 467 P.3d at 299 (Hart, J., dissenting) (citation omitted). In fact, the dissent found it “irrational to ask . . . jurors . . . to engage in the cost/benefit analysis of determining what sorts of preventative measures are sufficient to prevent or mitigate the harm caused by a shooter's senseless acts of violence.” *Id.* at 301. By rejecting the majority's approach “as noted by the dissenting justices,” the 2022 amendment confirmed that courts may resolve the predominant-cause question as a matter of law in premises-liability cases involving mass shootings. *See* Colo. Rev. Stat. § 13-21-115(2)(e)(I)(B).

Plaintiffs counter that two Colorado Supreme Court cases support sending their claims to a jury: *Taco Bell, Inc. v. Lannon*, 744 P.2d 43 (Colo. 1987), and *Garcia v. Colorado Cab Co.*, 538 P.3d 328 (Colo. 2023). Plaintiffs say that *Taco Bell* and *Garcia* show that causation remains a jury question even when the case involves violent criminal acts.

But neither case controls here. In *Taco Bell*, a customer was injured during a shooting at a Taco Bell restaurant. 744 P.2d at 43–44. The Colorado

Supreme Court held that whether Taco Bell breached its duty by not providing armed security was a jury question. *Id.* at 50. But *Taco Bell* considered claims arising *before* Colorado enacted the CPLA, let alone the 2022 amendment.²⁵ So it says nothing about the 2022 amendment’s impact on the predominant-cause analysis.

As for *Garcia*, it didn’t consider the CPLA or premises liability at all. *See* 538 P.3d 328. Yet Plaintiffs rely on it to argue that “extreme, escalating criminal conduct does not automatically break the causal chain,” and that proximate cause is generally a jury question. Br. 1 at 57. Whether or not that’s true, it doesn’t change the similarities between the facts alleged here and those in *Wagner*, nor does it impact the district court’s ability to dismiss implausible claims.

3. Federal Caselaw

Finally, Plaintiffs fault the district court for concluding that “federal trial courts in this District have resolved the predominant cause issue as a matter of law in mass shooting cases for decades.” *Vance*, 789 F. Supp. 3d at 1059. To reach that conclusion, the district court relied on *Castaldo v. Stone*, 192 F. Supp. 2d 1124 (D. Colo. 2001); *Ireland v. Jefferson Cnty. Sheriff’s Dep’t*, 193 F. Supp. 2d 1201 (D. Colo. 2002); *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216 (D. Colo. 2015); and *Nowlan v. Cinemark Holdings, Inc.*, Nos. 12-cv-

²⁵ The injury in *Taco Bell* occurred in 1979. 744 P.2d at 43. The CPLA went into effect in 1986. *See* Colo. Rev. Stat. § 13-21-115 (“Credits” section).

02517, 12-cv-02687, 13-cv-00046, 13-cv-01995, 13-cv-02988, 13-cv-03316, 14-cv-01923, 14-cv-01976, 2016 WL 4092468 (D. Colo. June 24, 2016).

According to Plaintiffs, each case is distinguishable.

As the district court concluded, these cases all support the view that mass shooters predominantly cause their victims' injuries. *Vance*, 789 F. Supp. 3d at 1059. That said, Plaintiffs are correct that they're distinguishable in other ways. For starters, these cases all predate *Wagner* and the 2022 amendment to the CPLA. Plus, neither *Castaldo*, nor *Ireland*, nor *Phillips* considered premises-liability claims. And though *Nowlan* did consider CPLA claims, it decided the predominant-cause question on summary judgment, not on the pleadings. 2016 WL 4092468, at *3.

Even so, distinguishing these cases doesn't help Plaintiffs. The 2022 amendment alone supported the district court's concluding as a matter of law that Plaintiffs hadn't sufficiently alleged causation under the CPLA. Again, the complaint simply doesn't establish that the Club Q Defendants' conduct was a substantial factor in causing Plaintiffs' injuries. Indeed, as Plaintiffs alleged, though "enabled" by Defendants' conduct, "[t]he Club Q shooting was perpetrated by the violent actions of a single individual." App. vol. I at 25. So accepting as true the Club Q Defendants' security and safety failures and drawing all reasonable inferences in Plaintiffs' favor, we conclude that the complaint still establishes that Aldrich's "maniacal determination" was the

“overwhelming” and “predominant” cause of Plaintiffs’ injuries. *Wagner*, 467 P.3d at 301 (Hart, J., dissenting).

* * *

In sum, the district court got this right. After the 2022 amendment to the CPLA, courts must consider “whether a third-party criminal act was the predominant cause of . . . harm, as noted by [*Wagner*’s] dissenting justices.” Colo. Rev. Stat. § 13-21-115(2)(e)(I)(B). And by our reading of the dissent, a mass shooter’s “premeditated and intentional actions” are the predominant cause of shooting victims’ injuries. *Wagner*, 467 P.3d at 300 (Hart, J., dissenting). So the district court correctly dismissed Plaintiffs’ CPLA claims for failing to plausibly allege causation.

B. Negligence & Wrongful-Death Claims

The Club Q Defendants argue that the CPLA preempts Plaintiffs’ negligence and wrongful-death claims, so the district court should have dismissed them.²⁶

“In any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, or activities conducted or circumstances existing on such property, the landowner is liable only as provided [in the CPLA].” Colo. Rev. Stat. § 13-21-115(3). This means that “[w]hen it applies,” the CPLA

²⁶ The parties agree that the negligence and wrongful-death claims rise or fall together.

is “the sole and exclusive remedy against a landowner for injuries occurring on their property.” *Macomber v. Nations Roof, LLC*, 574 P.3d 757, 761 (Colo. App. 2025).

To decide whether the CPLA controls, we ask whether the plaintiff’s alleged injury occurred (1) “while on the landowner’s real property” and (2) “by reason of the property’s condition or as a result of activities conducted or circumstances existing on the property.” *Jordan*, 346 P.3d at 1041. This is “a fact-specific, case-by-case inquiry.” *Id.* (citation modified). Even so, the Colorado Supreme Court has held that courts need not reserve this question for a jury. *Larrieu v. Best Buy Stores, L.P.*, 303 P.3d 558, 560 (Colo. 2013). Instead, normal summary-judgment standards apply. *See id.* It follows that normal motion-to-dismiss standards apply, too.

Plaintiffs alleged that the Club Q Defendants were landowners and that Plaintiffs were injured at Club Q. So the only question for deciding whether the CPLA preempts Plaintiffs’ other claims is whether, based on their allegations, Plaintiffs’ injuries occurred because of the property’s conditions or because of activities or circumstances that occurred on the property. *Jordan*, 346 P.3d at 1041.

Plaintiffs’ alleged injuries fall within that broad bucket. *See Tancrede v. Freund*, 401 P.3d 132, 134 (Colo. App. 2017) (holding that the CPLA “was intended to cover a broad range of activities occurring on a landowner’s property”). As the district court noted, Plaintiffs’ negligence allegations

weren't focused on only Club Q's unsafe layout. Instead, they mainly focused on its security failures. But the CPLA covers injuries caused by safety and security conditions. *See Tolle v. Steeland, LLC*, 541 P.3d 24, 28 (Colo. App. 2023) (holding that lack of safety measures such as fire extinguishers and smoke detectors were "condition[s] of or circumstances existing on that property"); *Grizzell v. Hartman Enters.*, 68 P.3d 551, 552, 554 (Colo. App. 2003) (holding that criminal activity resulting from inadequate security was a "dangerous condition" existing on the property).

The district court indicated that Plaintiffs' allegations about Club Q's "targeted corporate decisions, training, and staffing deficiencies" might escape the CPLA's scope. *See Vance*, 789 F. Supp. 3d at 1061 (citation modified). Yet these allegations still relate to the Club Q Defendants' inadequate security and safety measures. So the CPLA preempts Plaintiffs' negligence and wrongful-death claims.

Besides, the CPLA exclusively applies "to actions against a landowner for personal injuries occurring on its property when the landowner breaches the duty of care it owes to a plaintiff." *Larrieu*, 303 P.3d at 561. In their complaint, Plaintiffs identify the duty of care for their negligence claim as "a duty of care to ensure their safety and well-being *while on the premises*." App. vol. I at 84 (emphasis added); *see also* App. vol. II at 80 (similar). We see no difference between that duty of care and the Club Q Defendants' duties as landowners. *See*

Colo. Rev. Stat. 13-21-115(3), (4) (identifying duties of care “while on the [landowner’s] real property”).

At bottom, the CPLA provides “the sole and exclusive remedy against a landowner for injuries occurring on their property.” *Macomber*, 574 P.3d at 761; *see also Vigil v. Franklin*, 103 P.3d 322, 329 (Colo. 2004). And “[i]t is well established that the [C]PLA abrogates common law negligence claims against landowners.” *Tolle*, 541 P.3d at 28 (citation modified); *see also Stone v. Life Time Fitness, Inc.*, 411 P.3d 225, 228 (Colo. App. 2016); *Sweeney v. United Artists Theater Cir., Inc.*, 119 P.3d 538, 539–41 (Colo. App. 2005). Because the CPLA provides the exclusive remedy for Plaintiffs’ alleged injuries from Club Q’s safety and security conditions, the district court should have granted the Club Q Defendants’ motion to dismiss the negligence and wrongful-death claims.

CONCLUSION

For these reasons, we affirm the district court’s dismissal of Plaintiffs’ § 1983 and CPLA claims. We reverse the court’s denial of the Club Q Defendants’ motion to dismiss the negligence and wrongful-death claims and remand for further proceedings consistent with this opinion.