**Nos. 23-1055/23-1075**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

Sarah Lieberenz, individually and as personal representative of the Estate of Jackson Maes, deceased,
*Plaintiff-Appellee/Cross-Appellant*,

v.

Kenneth Wilson, in his individual capacity,
*Defendant-Appellant/Cross-Appellee*,

and

Board of County Commissioners of the County of Saguache, Colorado, in its official capacity, et al.,
*Defendants-Cross-Appellees*.

On Appeal from U.S. District Court for the District of Colorado, No. 1:21-CV-00628-NYW-NRN
Hon. Nina Y. Wang

# BRIEF OF APPELLEE/CROSS-APPELLANT SARAH LIEBERENZ

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## STATEMENT OF RELATED CASES

Appellate Case No. 23-1055 is related to Appellate Case No. 23-1075 and both cases are subject to a combined briefing schedule as set forth in the Court's Order dated March 23, 2023.

## JURISDICTIONAL STATEMENT

Sarah Lieberenz, individually and as the administrator of the Estate of Jackson Maes, filed suit against, *inter alia*, Defendants Kenneth Wilson, Elke Wells, and Shelby Shields in their individual capacities under 42 U.S.C. § 1983 in the United States District Court for the District of Colorado. 1 App. 32.[1] The district court had jurisdiction under 28 U.S.C. § 1331.

All three defendants filed motions for summary judgment on the basis of qualified immunity. 1 App. 131, 226. On February 3, 2023, the district court denied qualified immunity to Wilson and granted qualified immunity to Wells and Shields. 3 App. 56. On February 28, 2023, Wilson filed an interlocutory appeal from that decision. 3 App. 123. On March 14, 2023, Ms. Lieberenz timely cross-appealed the district court's grant of qualified immunity to Wells and Shields. 3 App. 125-26; *see* Fed. R. App. P. 4(a)(3).[2]

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[1] Wilson's Appendix is cited as "[Volume #] App. [Page #]." Ms. Lieberenz's Supplemental Appendix is cited as "[Volume #] Supp. App. [Page #]."

[2] Ms. Lieberenz also cross-appealed the district court's order denying her motion for sanctions for spoliation of evidence. 3 App. 125-26. She is no longer pursuing that

Should this Court exercise jurisdiction over Wilson's interlocutory appeal seeking reversal of the denial of qualified immunity, it should also exercise pendent appellate jurisdiction over the cross-appeal challenging the grants of qualified immunity to Wells and Shields. Such jurisdiction is permissible where the otherwise non-appealable decisions present "issues [that] are inextricably intertwined" with the appealable one. *Malik v. Arapahoe Cnty. Dep't of Soc. Servs.*, 191 F.3d 1306, 1316 (10th Cir. 1999) (quotation marks and citation omitted). And issues are "inextricably intertwined" where the relevant "legal and factual claims are very closely related," that is, where the pendent claims are "coterminous with" the immediately appealable claims and "would not require the consideration of legal or factual matters distinct from those raised by the [immediately appealable] claims." *Id.* at 1316-17; *see also Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 968 F.3d 1156, 1167 (10th Cir. 2020) (exercising pendent appellate jurisdiction where interlocutory appeal and cross-appeal implicated "same legal standard and analysis"); 16 Wright & Miller, Fed. Prac. & Proc. § 3937 (3d ed. 2023) (explaining pendent appellate jurisdiction is permissible where additional matters are "somehow bound up with the appealable order").

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issue in this cross-appeal, though she reserves the right to appeal that issue at a later stage.

Where this commonality exists, pendent appellate jurisdiction is permissible even if the appeals concern different actors or different aspects of the relevant factual universe. *See Zen Magnets*, 968 F.3d at 1167 (exercising pendent appellate jurisdiction over cross-appeal claims concerning statements by two commissioners, based on interlocutory appeal concerning statement of third commissioner); *United Transp. Union Loc. 1745 v. City of Albuquerque*, 178 F.3d 1109, 1114-15 & n.6 (10th Cir. 1999) (expressly noting that resolution of the interlocutory appeal would not necessarily resolve the pendent cross-appeal, but "nonetheless" exercising pendent appellate jurisdiction because resolving the interlocutory appeal required analyzing the same set of facts and statutory scheme).

Here, the same set of facts and law that underpins the denial of qualified immunity to Wilson also underpins the grants of qualified immunity to Wells and Shields. Jackson Maes died by suicide in Saguache County Jail after he was arrested for failure to appear on a traffic ticket. All three Defendants were present at the Jail from the moment Jackson was brought there until he hanged himself. All three observed that Jackson was severely intoxicated. All three knew that Jackson repeatedly struck his head against the wall in his cell and either heard him state that he was trying to kill himself, or, in Shields's case, heard other officers express fear that he was suicidal. All three knew it was their responsibility to get help for an intoxicated and suicidal person. And all three failed to ensure that Jackson received

the treatment, protection, and supervision that he needed. Thus, the "factual claims are very closely related," such that they support the exercise of pendent appellate jurisdiction. *Malik*, 191 F.3d at 1317. Indeed, because of the considerable overlap of relevant facts and because the three Defendants were in close contact throughout the relevant period, the Court will necessarily have to review and consider the conduct of all three officials even if it were to decide only Wilson's entitlement to qualified immunity. *Cf. United Transp. Union Local 1745*, 178 F.3d at 1115 (noting that resolution of appeal regarding specific subperiods of the work day required analysis of entire work day and thus exercising pendent appellate jurisdiction over cross-appeal regarding entire work day).

The interlocutory appeal and the cross-appeal also implicate "the same legal standard and analysis." *Zen Magnets*, 968 F.3d at 1167. Ms. Lieberenz brought the same claim—deliberate indifference to a substantial risk of suicide in violation of the Fourteenth Amendment—against all three defendants, and all three defendants invoked the defense of qualified immunity. Adjudicating those claims of qualified immunity requires analyzing the same body of caselaw—namely, whether it was clearly established at the time of Jackson's death that jail officials violate the Fourteenth Amendment right against deliberate indifference if "they fail to take reasonable steps to protect a pre-trial detainee or an inmate from suicide when they

have subjective knowledge that person is a substantial suicide risk." *Crane v. Utah Dep't of Corr.*, 15 F.4th 1296, 1307, 1310 (10th Cir. 2021) (citations omitted).

Because resolution of Wells's and Shields's claims of qualified immunity "would not require the consideration of legal or factual matters distinct from those raised by the [immediately appealable] claims," they are "inextricably intertwined," permitting this Court's exercise of pendent appellate jurisdiction. *Malik*, 191 F.3d at 1316-17. And because dividing these overlapping issues between two separate appeals would frustrate rather than further judicial economy, this Court should exercise that pendent jurisdiction. *See Moore v. City of Wynnewood*, 57 F.3d 924, 929 (10th Cir. 1995) (noting that, where pendent appellate jurisdiction is permissible, this Court considers judicial economy); *Hill v. True*, No. 21-1139, 2021 WL 6112973, at *1 (10th Cir. Dec. 27, 2021) (exercising pendent jurisdiction to review an issue "closely related" to the immediately appealable issue and explaining that "addressing the issue promotes judicial economy" (citing *Moore*, 57 F.3d at 929)).

## STATEMENT OF THE ISSUES

Jackson Maes died by suicide in Saguache County Jail. While in his cell, he was intoxicated, acted erratically, and began to harm himself. He repeatedly and violently slammed his head into a metal divider and explained to officers that he was trying to kill himself. Yet none of the officers monitored him, connected him with medical or mental-health care, or otherwise protected him. Later that night, Jackson hanged himself with the privacy curtain in his cell. The district court denied qualified immunity to one of the officers in both his individual and supervisory roles, Officer Wilson, and granted qualified immunity to two others, Officer Shields and Officer Wells.

The issues in this appeal and cross-appeal are:

1. Whether the district court correctly denied qualified immunity to Officer Wilson in his individual role where he (a) knew Jackson was intoxicated, observed him repeatedly strike his head against a metal divider in his cell, heard Jackson explain that he was "trying to kill [him]self," and recognized Jackson's need for "detox" or "something more"; and (b) did not place Jackson on suicide watch, remove dangerous objects from his cell, ensure he was monitored, or connect him with any form of medical or mental-health treatment.

2. Whether the district court correctly denied qualified immunity to Officer Wilson in his supervisory role where he was the Captain and supervisor at

the Jail, knew Jackson was at substantial risk of suicide, and personally participated in withholding protection and treatment from Jackson.

3. Whether the district court erroneously granted qualified immunity to Officer Shields where she (a) knew Jackson was intoxicated, knew that he repeatedly struck his head against a metal divider in his cell, knew that other officers feared he was suicidal, and overheard discussion of obtaining mental-health care or sending him to detox; and (b) did not monitor Jackson via the camera feed at her desk, placed just one unanswered call to a mental-health provider, and then took no further action to provide treatment or protection.

4. Whether the district court erroneously granted qualified immunity to Officer Wells where she (a) knew Jackson was intoxicated, knew that he repeatedly struck his head against a metal divider in his cell, heard him say, "I'm trying to kill myself," and discussed the need for suicide watch and mental-health treatment with her supervisor; and (b) did not take any action to ensure Jackson received treatment or protection.

## STATEMENT OF THE CASE

### I. Factual Background

Jackson Maes died by suicide in Saguache County Jail after being arrested for failure to appear on a traffic ticket.[3] He was intoxicated and, once in his cell, called out for someone, asked odd questions, and kicked an object around the cell. Then he violently slammed his head on a metal divider more than 50 times and told officers, "I'm trying to kill myself." Yet none of the officers sent him to detox or to the hospital, none of them connected him with mental-health treatment or other stabilizing care, none of them put him on suicide watch, none of them removed objects that could be used as ligatures from his cell, and none of them monitored him through video or in-person checks. Soon thereafter, he hanged himself with the privacy curtain in his cell. All of this is captured on video—the same video officers were supposed to monitor.

#### A. Defendant Wells arrests Jackson Maes and takes him to the Jail.

On the night of November 16, 2019, Defendant Elke Wells initiated a "welfare check" with Jackson in response to an 8:43 p.m. call that he was "intoxicated," "asking people for [a] ride home," and "having a hard time walking without falling down." 1 Supp. App. 62, 146; 3 App. 59-60, 88. Though the encounter began as a welfare check, Wells arrested Jackson when she discovered that he had an

[3] This brief refers to Jackson Maes as "Jackson."

outstanding warrant for failure to appear on a traffic ticket. 1 Supp. App. 63-66; 2 App. 122; 3 App. 60, 88. She explained that Jackson was not "argumentative," "combative," or "non-compliant," but that she "could tell he had been drinking." 1 Supp. App. 67-68, 71, 79; *see also* 3 App. 59-60. After Jackson's death, Wells reported that "she was concerned due to his level of intoxication and by some of the things he said"; when asked to clarify, she stated that Jackson said that "he may as well just kill himself." 2 App. 20.[4]

Wells brought Jackson to the Saguache County Jail. 3 App. 60. When they arrived, three other officers were present at the Jail: Defendants Kenneth Wilson, Shelby Shields, and Miguel Macias.[5] Wilson was the Captain and supervisor at the Jail. 1 Supp. App. 43, 107-08; 3 App. 84. Before Wells and Jackson even arrived at the facility, Wilson used his personal cell phone to call another officer and inquire about taking Jackson—who he heard was intoxicated—to a detox facility. 1 Supp. App. 5-6. Shields was working as the dispatcher; in addition to handling dispatch, she was responsible for monitoring the camera feeds from the cells. 1 Supp. App. 14, 42, 103, 138; 3 App. 94-95, 100. Macias was working as the jailer. 1 Supp. App. 18, 107; 3 App. 60. Days beforehand, Macias had noticed his resignation to Wilson

[4] The district court did not consider this evidence because it believed it to be inadmissible hearsay. 3 App. 86-88. As explained below, the district court was wrong. *See infra* Section IV.

[5] Macias is not a party to this appeal. Accordingly, any reference to "Defendants" in this brief refers to Wilson, Wells, and Shields.

and the Sheriff, explaining that he had "receiv[ed] little to no training on many things [he] was expected to do/perform." 2 App. 140; *see also* 3 App. 60 n.5.

Although an intoxicated person is ordinarily placed in a holding tank with limited items, Wilson, Wells, and Macias placed Jackson in a cell by himself because the tank was occupied by someone else. 3 App. 60, 77, 83; 1 Supp. App. 13, 15-16, 44-45, 53-54, 70-73. As Wilson and Wells were taking Jackson's belongings, Wells searched Jackson's socks "to make sure you don't have nothing in here so you don't hurt yourself." 2 App. 101 at 21:46:10-21:46:20. Wilson, Wells, and Macias then changed Jackson into a uniform and left him alone. *Id.* at 21:46:00-21:47:06; 3 App. 60. Jackson's cell was immediately adjacent to the dispatch room; the rooms shared a wall and officers in dispatch could hear sounds from the cell. *Compare* 2 App. 120 (floorplan), *with* 1 Supp. App. 11-12, 17, 39-40, 80 (describing the location and features of the cell).

### B. Jackson repeatedly and violently strikes his head against the wall and says, "I'm trying to kill myself."

At roughly 9:50 p.m., Jackson's behavior became increasingly erratic. He yelled, called out for someone, said "f*** dude" and "cool I guess I'm just gonna get beat up," repeatedly asked "which way is north and which way is south?," and kicked an object around his cell. 2 App. 101 at 21:50:55, 21:51:50, 21:53:07-21:55:30.

Then, at 9:57 p.m., he slammed his head into a metal divider in his cell ten times. 2 App. 101 at 21:56:59, 21:57:01, 21:57:03, 21:57:04, 21:57:07, 21:57:09, 21:57:11, 21:57:20, 21:57:21, 21:57:24; *see also* 3 App. 60. After the first few hits, all four officers—Wilson, Wells, Shields, and Macias—turned toward the monitor showing live footage from the cells; then Wilson, Wells, and Macias walked to Jackson's cell. 2 App. 101 at 21:57:04-21:57:22; *see also* 1 Supp. App. 29, 50-51; 3 App. 43. Jackson rammed his head into the divider five more times as Wilson, Wells, and Macias entered the hallway adjoining Jackson's cell. 2 App. 101 at 21:57:26, 21:57:27, 21:57:29, 21:57:30, 21:57:32. As Jackson hit his head again, Wilson asked, "What are you doing?" *Id*. at 21:57:33. Jackson paused momentarily, but then continued hitting his head. *Id*. at 21:57:39, 21:57:41, 21:57:44, 21:57:46, 21:57:48. As Macias later explained, Jackson was "hitting his head pretty hard." 1 Supp. App. 142. At that point, Wilson entered the cell, grabbed Jackson's shoulders, and told him to lie down. 2 App. 101 at 21:57:50-21:57:54. He said, "You can do anything except standing here smacking your head on the wall." *Id*. at 21:57:58-21:58:02. Wells added, "You're going to hurt yourself if you don't lay down. You need to sleep the alcohol off." *Id*. at 21:58:02-21:58:08.

Jackson then told them, "I'm trying to kill myself right now." *Id*. at 21:58:19-21:58:22; 3 App. 61. Wilson asked, "You're trying to kill yourself right now?" *Id*. at 21:58:23-21:58:26; 3 App. 61. Before Jackson could respond, Wells interrupted

and directed Jackson to lie down. 2 App. 101 at 21:58:25. As Jackson muttered "no" several times, Wilson asked, "Is detox not accepting people or what?" *Id.* at 21:58:32-21:58:42. Wells responded, "I don't know," and Wilson and Wells exited Jackson's cell. *Id*. at 21:58:40. As they left, Wilson observed, "We've either got to take him to detox or do something more for him." *Id*. at 21:58:48-21:58:56; *see also* 1 Supp. App. 24-25; 3 App. 74-75, 77, 81. Jackson said, "she doesn't believe me, and I know she doesn't like me." 2 App. 101 at 21:58:56-21:59:00.

Seconds later, and with the outer door still open, Jackson resumed hitting his head against the metal divider. He hit his head roughly thirty more times while Macias repeatedly asked him to stop. *Id.* at 21:59:03, 21:59:12, 21:59:14, 21:59:16, 21:59:19, 21:59:21, 21:59:23, 21:59:26, 21:59:28, 21:59:32, 21:59:34, 21:59:36, 21:59:39, 21:59:44, 21:59:46, 21:59:49, 21:59:54, 22:00:02, 22:00:03, 22:00:05, 22:00:07, 22:00:22, 22:00:24, 22:00:26, 22:00:29, 22:00:32, 22:00:35, 22:00:37, 22:00:40, 22:00:43, 22:00:45; *see also* 3 App. 43-44. Wilson returned to the outer entrance to the cell as the hitting continued, then left again. 2 App. 101 at 21:59:57-22:00:07; *see also* 1 Supp. App. 57.

Around 10:00 p.m., Macias started a conversation with Jackson. Macias offered to bring Jackson some juice and a snack if he would promise not to hit his head again. 2 App. 101 at 22:03:30-22:03:54; 3 App. 44. Jackson said "I won't try to kill myself anymore . . . as long as you bring me some f****** s*** so that I don't

f****** want to," but mentioned that Macias would "have to f****** deal with a f****** dead person" if Macias broke the promise. 2 App. 101 at 22:03:50-22:04:25. After Macias left, Jackson tore down the privacy curtain in his cell. *Id.* at 22:05:22-22:05:35. Macias returned with juice and crackers, then left Jackson alone at 10:08 p.m. *Id*. at 22:06:48-22:08:47; 3 App. 44.

At some point between 9:57 p.m. and 10:08 p.m., the other officers told Shields—who had remained in the dispatch room and whose duties included monitoring the camera feed from the cell—that the banging sound she could hear was Jackson hitting his head. 1 Supp. App. 114; 2 App. 132-33; 3 App. 93. As she later explained, they also told her that "they may have feared that [Jackson], that he was suicidal." 2 App. 133-34; 2 App. 79 at 5:36-6:31; *see also* 3 App. 93. According to Shields, "there was a toss up between calling mental health and detox," but Wells "didn't want to call detox because she assumed that they wouldn't take" Jackson. 2 App. 133-34; 2 App. 79 at 6:01-6:31. Wells made a call to Corporal Hansen, her superior, at 10:02 p.m. 1 Supp. App. 145; 3 App. 78. She testified that she told Corporal Hansen "what the situation was" and that he told her to "make sure" Jackson was put on suicide watch. 1 Supp. App. 86; *see also* 3 App. 78. She further testified that she communicated this to Wilson. 1 Supp. App. 90-95; 3 App. 78. Although Shields reported making two calls to hospitals around the same time, 1 Supp. App. 118-119, call records show only one call to San Luis Valley Behavior

Health at 10:03 p.m., 1 Supp. App. 145; 3 App. 61 n.6. She did not receive an answer and did not leave a message. 1 Supp. App. 118-119; 3 App. 61 n.6. Shields testified that she told Wilson that the mental-health provider did not answer. 1 Supp. App. 123; 3 App. 78.[6]

### C. Defendants leave Jackson alone without implementing safety precautions, monitoring him, or obtaining treatment for suicidality and self-harming behavior.

By the time Macias left Jackson alone in his cell, each of the Defendants recognized that Jackson was intoxicated. 3 App. 59-60, 77 (Wilson, Wells, and Shields); *see also* 1 Supp. App. 7-8 (Wilson); 1 Supp. App. 71 (Wells); 1 Supp. App. 111 (Shields). Each of the Defendants heard Jackson say he wanted to kill himself or otherwise learned he was suicidal. 3 App. 81, 2 App. 101 at 21:58:19-21:58:22 (Wilson); 3 App. 90, 2 App. 101 at 21:58:19-21:58:22 (Wells); 3 App. 93, 2 App. 133-34, 1 Supp. App. 115 (Shields). Each of the Defendants observed Jackson engage in self-harm or, at the very least, were told about his self-harm. 3 App. 81 (Wilson); 3 App. 90 (Wells); 3 App. 93 (Shields); *see also* 2 App. 101 at 21:57:04-21:57:22 (Wilson, Wells, and Shields); *id.* at 21:57:26-21:58:40 (Wilson and Wells);

[6] Neither of these calls—Shields's call to San Luis Valley Behavioral Health and Wells's call to Corporal Hansen—were disclosed to Ms. Lieberenz, as they had been purged from the Jail's records. 1 Supp. App. 145. All calls made from the Jail are automatically recorded and retained for one year before being purged. 1 Supp. App. 140. The only way to prevent a recording from being purged is to download it to a USB drive or DVD. 1 Supp. App. 139. Although other calls from the date of Jackson's death were preserved, these two calls were not. 1 Supp. App. 143-46.

1 Supp. App. 114 (Shields). Wilson reported that Wells characterized Jackson as "combative" soon after she arrested him. 1 Supp. App. 7-8. But in subsequent testimony, each of the Defendants acknowledged that Jackson was not combative and that the nearest detox center accepted non-combative intoxicated people. 1 Supp. App. 23, 26-28 (Wilson); 1 Supp. App. 67-68, 74-75, 79, 97-98, 100 (Wells); 1 Supp. App. 102, 111-12, 129 (Shields). Finally, each of the Defendants knew it was their responsibility to get help for an intoxicated and suicidal person. 1 Supp. App. 22 (Wilson); 1 Supp. App. 60-61, 75-78, 97-99 (Wells); 1 Supp. App. 98, 104-07, 116 (Shields).

The Jail's Standard Operating Procedures instruct: "Please take any type of information about a party being suicidal serious and take the necessary precautions. It does not matter where the information may come from, via other inmates, jail staff or the inmate, take appropriate action." 2 App. 84. Yet none of the Defendants called the contract nurse or medical doctor. 1 Supp. App. 10. None of the Defendants successfully contacted a detox, mental-health, or other medical provider. None of the Defendants put Jackson on suicide watch or moved him to the holding tank. 1 Supp. App. 36, 56. None of the Defendants removed Jackson's bedding, privacy curtain, or clothing from the cell. *See generally* 2 App. 101; *see also* 1 Supp. App. 55-56. And after Macias left the cell area at 10:08 p.m., none of the Defendants checked on Jackson for the rest of the night—either physically or via the monitor in

the dispatch room.[7] Had Jackson been placed on suicide watch, policy would have required the officers to conduct camera checks every 10 minutes; conduct physical checks every 20 minutes; and leave the detainee with nothing but a mattress and a suicide suit. 1 Supp. App. 21-22, 46-47, 111; 2 App. 84.

**D. Jackson kills himself.**

At 10:19 p.m., Jackson tied the privacy curtain—which he had torn down before Macias left him alone—around his neck, stood on his bunk, and tied off the other end of the curtain using the bars of his cell. 2 App. 101 at 22:19:29-22:22:00. At 10:22 p.m., he began hanging himself. *Id.* at 22:22:00. All the Defendants remained at the Jail at this time. *E.g.*, *id.* at 22:24:11 (Wilson), 22:46:28 (Wells and Shields). But none of them checked on Jackson the rest of the night. An independent medical examiner opined that Jackson's time of death was not possible to determine. 1 Supp. App. 134-36. An officer found Jackson's body around 7:00 a.m. the next morning. 2 App. 20. His left hand was on the curtain and he was "gripping it at the neck line." *Id*.

[7] Camera feeds from the cells run continuously such that the dispatch officer (here, Shields) can see what is going on in the cells at all times. 1 Supp. App. 23, 49. However, the video recording of Jackson's cell has blank spots because the recording is motion-activated—though it appears that even some motion does not trigger recording, particularly when it is darker in the cell. 1 Supp. App. 23, 31-35. Officers watching the camera feeds in dispatch could turn the sound on and hear what was going on in the cells, and they could increase the size of particular cells on the screen as needed. 1 Supp. App. 39, 48-49.

Jackson was not the first person to die by suicide at Saguache County Jail. In 2013, William Starkey committed suicide by using his pants and a white sheet to hang himself from an electrical conduit pipe. 3 App. 59. In 2008, Felix Granados died by suicide in the same cell as Jackson and, like Jackson, used the privacy curtain to do so. *Id*. Wells was called to the Jail when Granados died by suicide and saw him lying on the floor with the curtain around his neck. 3 App. 59, 91.

## II. Procedural Background

Sarah Lieberenz, Jackson's mother and the administrator of his Estate, brought a 42 U.S.C. § 1983 action against the Saguache County Board of County Commissioners, the Saguache County Sheriff's Office, Sheriff Dan Warwick in his official capacity, and Defendants Wilson, Wells, Shields, and Macias in their individual capacities. As relevant on appeal, Ms. Lieberenz pleaded claims against Wilson (in both his individual and supervisory roles), Wells, and Shields for deliberate indifference to Jackson's substantial risk of suicide, in violation of the Fourteenth Amendment. 1 App. 32, 63-64. Wilson, Wells, and Shields each moved for summary judgment on the basis of qualified immunity. 1 App. 131, 226. The district court denied qualified immunity to Wilson (in both roles), and granted qualified immunity to Wells and Shields. 3 App. 74-96.

This appeal and cross-appeal followed.

## STANDARD OF REVIEW

This Court reviews *de novo* both grants and denials of summary judgment based on qualified immunity. *Est. of Ceballos v. Husk*, 919 F.3d 1204, 1212 (10th Cir. 2019); *Est. of B.I.C. v. Gillen*, 710 F.3d 1168, 1172 (10th Cir. 2013).

## SUMMARY OF ARGUMENT

**I.** The district court correctly denied qualified immunity to Wilson in his individual role. Wilson saw Jackson repeatedly and violently slam his head into a metal barrier and heard Jackson explain that he was trying to kill himself. He knew that Jackson was at risk of suicide and even told other officers that something more had to be done. Yet he did nothing. The district court correctly concluded that he violated clearly established law requiring prison officials to take "reasonable steps to protect a pretrial detainee or an inmate from suicide when they have subjective knowledge that person is a substantial suicide risk." 3 App. 82.

The district court is correct for many independent reasons. First, its articulation of Jackson's clearly established right mirrors this Court's decades-long recognition of that right. Second, that articulation of the right is consistent with the clearly established law of nearly every other federal appellate court. Third, qualified immunity is routinely denied in factually similar cases where officers knew detainees had made suicidal comments, saw detainees engage in self-harm, were warned of a risk by other observers, or some combination thereof, but still failed to

provide adequate treatment or protection. Finally, Wilson is not entitled to qualified immunity because he committed such an obvious and egregious violation: He walked away from a detainee who repeatedly slammed his head into a metal barrier and stated directly that he was trying to kill himself, without taking any measures to ensure that he was monitored or received access to medical care. Wilson's focus on the sliding scale is a distraction; sliding scale or not, Wilson is not entitled to immunity.

**II.** The district court correctly denied qualified immunity to Wilson in his supervisory role. Wilson personally participated in the violation of Jackson's constitutional right as both an individual officer and a supervisor exercising authority over other officers at the Jail. And he exhibited the same culpable state of mind—deliberate indifference—in both roles. As this Court has recognized, where a supervisor actively participates in a constitutional violation, the same caselaw may clearly establish the right that they violate in both their individual and supervisory role. Under that caselaw, the district court properly denied Wilson immunity.

**III.** The district court erred in granting Shields qualified immunity. Shields knew that Jackson was intoxicated, that he had repeatedly struck his head against the wall, that other officers feared he could be suicidal, and that these concerns were serious enough to call a mental-health provider. Instead of monitoring the live camera feed of Jackson's cell just above her desk or connecting Jackson with detox,

a mental-health provider, or any other medical care, Shields placed a single unanswered call and then proceeded to ignore Jackson for the rest of the night. In so doing, she acted with deliberate indifference and violated clearly established law.

**IV.** The district court erred in granting Wells qualified immunity. Wells also knew about Jackson's intoxication, his stated suicidal intent, his violent head-banging, and his need for suicide watch and mental-health care. She also remained at the Jail and participated in decisions about how to respond to Jackson's suicidality, but still took no steps to ensure that Jackson was monitored on suicide watch or received mental-health care. This conduct constitutes both deliberate indifference and a violation of clearly established law.

## ARGUMENT

### I. The district dourt correctly denied qualified immunity to Defendant Wilson in his individual role.

An official is not entitled to qualified immunity where (1) there is a genuine issue of material fact that his conduct violated the plaintiff's constitutional right; and (2) the right was clearly established at the time of the alleged misconduct. *Paugh v. Uintah Cnty.*, 47 F.4th 1139, 1153 (10th Cir. 2022), *cert. denied sub nom. Anderson v. Calder*, 143 S. Ct. 2658 (2023). There need not be "a case directly on point" to clearly establish the law as long as "existing precedent [has] placed the statutory or constitutional question beyond debate." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018).

Here, the district court properly concluded that Ms. Lieberenz satisfied both prongs of the qualified immunity analysis with respect to Wilson. 3 App. 76-83. As to prong one, the court concluded that a reasonable jury could find that Wilson "knew of and disregarded an excessive risk" to Jackson's safety in violation of the Fourteenth Amendment. 3 App. 74-79 (cleaned up). Wilson does not challenge this conclusion; he challenges only the district court's prong-two conclusion that the constitutional right was clearly established. But the district court was right about that too: "[I]t was clearly established as of November 2019 that prison officials are deliberately indifferent if they fail to take reasonable steps to protect a pretrial detainee or an inmate from suicide when they have subjective knowledge that person is a substantial suicide risk." 3 App. 82.

In urging this Court to reverse, Wilson asks this Court to find the district court's articulation of clearly established law too general and to overturn settled Circuit precedent along the way. This Court should not accept either invitation—for a multitude of reasons.

### A. The district court's statement of clearly established law correctly follows this Court's jurisprudence.

The district court's definition of Jackson's clearly established right mirrors this Court's definition of the right in *Crane*: "[P]rison officials are deliberately indifferent if they fail to take reasonable steps to protect a pretrial detainee or an inmate from suicide when they have subjective knowledge that person is a

substantial suicide risk." 3 App. 82 (citing *Crane v. Utah Dep't of Corr.*, 15 F.4th 1296, 1307, 1310 (10th Cir. 2021)). Although *Crane* was decided in 2021, the right had been clearly established for decades before that.

*Crane* relied on the 2015 case *Cox v. Glanz*, 800 F.3d 1231 (10th Cir. 2015), for its articulation of the right against deliberate indifference to a particular detainee's substantial risk of suicide. 15 F.4th at 1307 ("as we explained in *Cox v. Glanz*"); *id.* at 1310 ("the principle articulated in this court's decision in *Cox*"). And *Cox* identified as "settled since at least the mid-1990s" the clearly established right against deliberate indifference to the risk of suicide where an official has "actual knowledge . . . of an individual inmate's substantial risk of suicide." *Cox*, 800 F.3d at 1249. Indeed, as early as 1994, this Court set out the rule that "a plaintiff may establish deliberate indifference in a prison suicide case by showing that the detainee exhibited strong signs of suicidal tendencies, that the jail officials had actual knowledge of, or were willfully blind to, the *specific* risk that the detainee in question would commit suicide and that the jail officials then failed to take steps to address that known, specific risk." *Est. of Hocker ex rel. Hocker v. Walsh*, 22 F.3d 995, 1000 (10th Cir. 1994). Likewise, by 1997, it was clearly established that prison officials with "'gate keeping' authority over prisoner access to medical professionals" cannot "delay[] or den[y] . . . access to mental health care" for detainees with "serious suicidal and self-harm problems." *Blackmon v. Sutton*, 734 F.3d 1237, 1245 (10th

Cir. 2013) (Gorsuch, J.). The law is so well settled, in fact, that officer-defendants have conceded that the law "was clearly established" by 2002 "that a jailer violates the Fourteenth Amendment if he is deliberately indifferent to a known risk that a pre-trial detainee will commit suicide." *Gaston v. Ploeger*, 229 F. App'x 702, 708 (10th Cir. 2007).

These cases put Wilson on notice that he would violate Jackson's clearly established rights by knowingly disregarding Jackson's substantial risk of suicide. Wilson argues that *Cox* is "of little value to the current case" because the *Cox* Court ultimately granted qualified immunity, Wilson Br. 44, but the reasoning in a binding case—and certainly several binding cases spanning decades—provides notice to officials even absent a denial of qualified immunity. *Hope v. Pelzer*, 536 U.S. 730, 743 (2002) (relying on the "reasoning, though not the holding," of a prior case to deny qualified immunity). Accordingly, courts in this Circuit have denied qualified immunity in prison suicide cases by relying on the above-mentioned cases. *See, e.g.*, *Est. of Blodgett v. Correct Care Sols., LLC*, No. 17-CV-2690-WJM-NRN, 2018 WL 6528109, at *12 (D. Colo. Dec. 12, 2018) (finding law clearly established and denying qualified immunity based on binding reasoning in *Cox* and *Hocker*).

Moreover, the right to be free from deliberate indifference to a substantial risk of suicide is rooted in decades of precedent regarding deliberate indifference to serious medical needs. *Cox*, 800 F.3d at 1248 (noting jail suicide claims "must be

judged against the deliberate indifference to serious medical needs test" (internal citations and quotation marks omitted)). Review of that precedent further underscores that Wilson is not entitled to qualified immunity: Tenth Circuit caselaw provided Wilson ample notice that his knowledge and conduct met each component of deliberate indifference—the objective seriousness of the risk to Jackson, Wilson's subjective knowledge of that risk, and his disregard by declining to provide Jackson with protection or treatment—to constitute a clearly established violation of the Fourteenth Amendment.

First, this Court has repeatedly acknowledged that death, including death by suicide, "without doubt, is sufficiently serious to meet the objective component" of deliberate indifference. *Id.* at 1240 n.3 (internal quotation marks and citations omitted); *see also, e.g.*, *Est. of Vallina v. Cnty. of Teller Sheriff's Off.*, 757 F. App'x 643, 646 (10th Cir. 2018) ("The risk of suicide plainly qualifies as sufficiently serious."). That is more concrete notice of the objective seriousness of suicide—and, consequently, the duty to protect against that risk—than this Court has required for other medical needs. *E.g.*, *Lance v. Morris*, 985 F.3d 787, 798-800 (10th Cir. 2021) (denying qualified immunity on claim of deliberate indifference to painful priapism without citation to prior case regarding priapism); *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1315-17 (10th Cir. 2002) (denying qualified immunity on claim of

deliberate indifference to OCD-induced panic attacks without citation to prior case regarding OCD).

Second, it was "clearly established by August 2015" that an officer is subjectively aware of a risk of harm where a detainee voices "subjective complaints" and his complaints are corroborated by physical symptoms. *McCowan v. Morales*, 945 F.3d 1276, 1292-93 & n.14 (10th Cir. 2019); *see also Sealock v. Colorado*, 218 F.3d 1205, 1210-11 (10th Cir. 2000) (reversing grant of summary judgment to correctional sergeant who refused to take prisoner to hospital after prisoner and his cellmate told sergeant that prisoner "might be having a heart attack" and sergeant observed symptoms consistent with heart attack). This includes self-reports of psychological or internal conditions. *E.g.*, *Olsen*, 312 F.3d at 1317 (reversing grant of qualified immunity where detainee informed officer of panic attack). Jail "protocols" or "published requirements for health care" constitute further evidence of subjective awareness of "a substantial risk of serious harm." *Mata v. Saiz*, 427 F.3d 745, 757 (10th Cir. 2005). Here, the Jail's own Standard Operating Procedures, with which Wilson was familiar, required "any" information about suicide to be taken seriously. 1 Supp. App. 19-20; 2 App. 84.

Indeed, the facts underlying Wilson's knowledge of Jackson's substantial risk of suicide, and the facts demonstrating that he actually drew this inference, exceed those that this Court has relied on to deny qualified immunity in deliberate

indifference cases. Foremost, Wilson heard Jackson express active, present suicidal intent: "I'm trying to kill myself." 3 App. 77. The context corroborated this report of suicidality, as Wilson had just observed Jackson engaging in self-harm by repeatedly "striking his head against the cell wall." *Id*. Beyond Wilson's observations, his own statements that the Jail officials needed to take Jackson to detox or do "something more" for him show that he actually inferred Jackson's substantial suicide risk. *Id*. In addition, Shields reported that Wilson and Wells "told" her that they "feared that [Jackson], that he was suicidal." 2 App. 133. And Wells testified that after a conversation with her supervisor, she communicated to Wilson her supervisor's instruction that Jackson needed to be put on suicide watch and that a mental-health provider needed to be notified. 3 App. 78. All of this surpasses the knowledge threshold clearly established by this Court's deliberate-indifference caselaw.

Third, Wilson's complete denial of treatment *and* protection makes this an easy case. Despite his knowledge of a substantial risk of suicide and his recognition that Jackson needed additional care, Wilson did not connect Jackson with any mental-health care or arrange for Jackson to go to detox. When an officer is aware of "serious suicide and self-harm problems," and nevertheless "delay[s] or denie[s] . . . access to mental health care by qualified professionals," he violates "clearly established law." *Blackmon*, 734 F.3d at 1245-46; *see also Lopez v. LeMaster*, 172

F.3d 756, 764 (10th Cir. 1999) (reversing summary judgment to sheriff who directed jailer to give plaintiff with serious injuries aspirin instead of taking him to the hospital). Not only that, but Wilson failed to even put Jackson on suicide watch, despite the Jail's own Standard Operating Procedures requiring "any" information about suicide to be taken seriously. 1 Supp. App. 19-20, 36; 2 App. 84. This decision is quintessential, and clearly established, deliberate indifference. *Farmer v. Brennan*, 511 U.S. 825, 843 n.8 (1994) (explaining prison official "would not escape liability if the evidence showed that he . . . declined to confirm inferences of risk that he strongly suspected to exist"); *Quintana v. Santa Fe Bd. of Comm'rs*, 973 F.3d 1022, 1033 (10th Cir. 2020) ("[P]rior to January 2016, it was clearly established that when a detainee has obvious and serious medical needs, *ignoring* those needs necessarily violates the detainee's constitutional rights." (emphasis added)).

This Court's jurisprudence thus clearly established by November 2019 that detainees like Jackson have a Fourteenth Amendment right against deliberate indifference to their substantial risk of suicide, just as much as they have a Fourteenth Amendment right against deliberate indifference to other serious medical needs. That clearly established right is sufficiently specific, and applies with sufficient clarity to Wilson's knowledge and conduct in this case, to put Wilson on notice that he violated that right.

### B. The district court's definition of clearly established law comports with the law of nearly all other circuits.

The weight of circuit authority is in accord, both that this Fourteenth Amendment right existed by November 2019 and that the district court and this Court have defined it at an appropriate level of specificity to provide fair notice to officials in Wilson's position.

For instance, the Seventh Circuit has held that the relevant "clearly established" right is the "right to be free from deliberate indifference to suicide." *Est. of Miller, ex rel. Bertram v. Tobiasz*, 680 F.3d 984, 991 (7th Cir. 2012) (quoting *Cavalieri v. Shepard*, 321 F.3d 616, 623 (7th Cir. 2003)). In so holding, the Seventh Circuit expressly rejected the contention that clearly established law in this context had to be more "specific." *Id.*; *see also Est. of Clark v. Walker*, 865 F.3d 544, 551-53 (7th Cir. 2017) (same). Likewise, the Sixth Circuit faulted a district court for "erroneously honing in on [a] *specific act*" in assessing clearly established law, and proceeded to rely on the clearly established right to be free from "deliberate indifference toward a detainee's suicidal tendencies" in denying qualified immunity. *Linden v. Washtenaw Cnty.*, 167 F. App'x 410, 425 (6th Cir. 2006) (emphasis in original); *see also Moderwell v. Cuyahoga Cnty.*, 997 F.3d 653, 665 (6th Cir. 2021) (recognizing the same clearly established right). The Eleventh Circuit, too, denied qualified immunity in the jail suicide context, based on the "clearly established" rule "that an officer's deliberate indifference to the risk of serious harm to a detainee is

a violation of the Fourteenth Amendment," without searching for a prior case with similar facts. *Snow v. City of Citronelle*, 420 F.3d 1262, 1270 (11th Cir. 2005); *see also Rogers v. Santa Rosa Cnty. Sheriff's Off.*, 856 F. App'x 251, 255 (11th Cir. 2021) (denying qualified immunity to officers based on rule that prison personnel who "have knowledge that an inmate has threatened suicide" and "fail[] to take steps to prevent that inmate from committing suicide" are deliberately indifferent (ellipses omitted) (quoting *Greason v. Kemp*, 891 F.2d 829, 835-36 (11th Cir. 1990)).

Nearly all other circuits define the clearly established right the same way. *See, e.g.*, *Elliott v. Cheshire Cnty.*, 940 F.2d 7, 11 n.3 (1st Cir. 1991) ("Qualified immunity should be denied if the officials were or should have been aware that the prisoner presented a substantial risk of suicide."); *Gordon v. Kidd*, 971 F.2d 1087, 1097 (4th Cir. 1992) (explaining prior cases "clearly establish the constitutional duty of a jailer to take reasonable measures to protect a prisoner from self-destruction when the jailer knows that the prisoner has suicidal tendencies"); *Converse v. City of Kemah*, 961 F.3d 771, 775 (5th Cir. 2020) ("Since at least 1989, it has been clearly established that officials may be held liable for their acts or omissions that result in a detainee's suicide if they had subjective knowledge of a substantial risk of harm to a pretrial detainee but responded with deliberate indifference to that risk." (quotation

marks and citation omitted));[8] *Yellow Horse v. Pennington Cnty.*, 225 F.3d 923, 927 (8th Cir. 2000) (setting out "clearly established constitutional right to be protected from the known risks of suicide"); *Conn v. City of Reno*, 572 F.3d 1047, 1062 (9th Cir. 2009) (finding it "clearly established" that the Constitution "protects against deliberate indifference to a detainee's serious risk of suicide" and that "attempts or threat[s]" of suicide "must [be] report[ed] . . . to those who will next be responsible for [the detainee's] custody and safety"), *amended by* 591 F.3d 1081 (9th Cir. 2010), *vacated on other grounds*, 563 U.S. 915 (2011), *reinstated in relevant part*, 658 F.3d 897 (9th Cir. 2011).[9]

In fact, the law applicable to suicides in jail custody is so well settled that officer-defendants in multiple circuits often concede that prong of the analysis. *Penn v. Escorsio*, 764 F.3d 102, 105 (1st Cir. 2014) ("Defendants concede clearly

[8] "This court has recognized that a case decided after the incident underlying a § 1983 action can state clearly established law when that case ruled that the relevant law was clearly established as of an earlier date preceding the events in the later § 1983 action." *Soza v. Demsich*, 13 F.4th 1094, 1100 n.3 (10th Cir. 2021). So, even though *Converse* was decided in 2020, it states the clearly established law relevant here.

[9] Additionally, the Third Circuit, outside the qualified-immunity context, has recognized that a detainee has a Fourteenth Amendment right against deliberate indifference to their "particular vulnerability to suicide." *Palakovic v. Wetzel*, 854 F.3d 209, 223-24 (3d Cir. 2017); *see also Colburn v. Upper Darby Twp.*, 946 F.2d 1017, 1025 n.1 (3d Cir. 1991) ("Custodians have been found to 'know' of a particular vulnerability to suicide when they have actual knowledge of an obviously serious suicide threat, a history of suicide attempts, or a psychiatric diagnosis identifying suicidal propensities.").

established law at the time [decedent] attempted suicide dictated officers must take *some* reasonable measures to thwart a known, substantial risk that a pre-trial detainee will attempt suicide."); *Schultz v. Sillman*, 148 F. App'x 396, 404 (6th Cir. 2005) (defendant "d[id] not contest that there is clearly established law that would hold a corrections officer liable for deliberate indifference to the risk of suicide if an inmate demonstrates a strong likelihood that he would commit suicide"); *Turney v. Waterbury*, 375 F.3d 756, 760 (8th Cir. 2004) (defendants "agree[ing] that [the plaintiff] enjoyed a clearly established constitutional right to be protected from the risk of suicide"); *Coleman v. Parkman*, 349 F.3d 534, 538-39 & n.2 (8th Cir. 2003) (noting defendant officers did not contest clearly established prong on appeal).

Even if this Court's precedent did not settle the matter, the "weight of authority from other circuits may clearly establish the law," and it does so here. *Irizarry v. Yehia*, 38 F.4th 1282, 1294 (10th Cir. 2022).[10] Nearly every other

[10] Wilson asserts that *Irizarry* established a "relatively new" rule that a minimum of six circuits are required to constitute the weight of circuit authority. Wilson Br. 45-46 & n.4. But that misreads the case. While *Irizarry* held that the law of six other circuits was sufficient to clearly establish the law in that case, it did not purport to establish a minimum requirement; indeed, one of the cases *Irizarry* relied on for the proposition that out-of-circuit precedent may clearly establish the law relied on fewer than six other circuits. 38 F.4th at 1294 (relying on *Robbins v. Wilkie*, 433 F.3d 755, 770 (10th Cir. 2006)). That makes sense because there is no single standard of notice. *See infra* Section I.D.2. Indeed, this Court has often relied on fewer than six other circuits to find the law clearly established. *See, e.g.*, *Est. of Booker v. Gomez*, 745 F.3d 405, 428 & n.29 (10th Cir. 2014) (holding that two circuit decisions and two district court decisions constituted "the weight of authority from other

appellate court confirms that the district court correctly defined Jackson's clearly established Fourteenth Amendment right against deliberate indifference to his substantial risk of suicide and correctly denied Wilson qualified immunity.[11]

### C. Factually similar cases further support the denial of qualified immunity to Defendant Wilson.

The clearly established law of this Circuit and nearly every other circuit defeats Wilson's claim to qualified immunity. *See supra* Sections I.A, I.B. This Court can affirm on that basis alone. *Kisela*, 138 S. Ct. at 1152 (explaining there is no need for "a case directly on point" as long as "existing precedent [has] placed the statutory or constitutional question beyond debate") (internal quotation marks and citation omitted). But here the need to deny qualified immunity finds even more

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jurisdictions" and clearly established the law, in conjunction with an unpublished Tenth Circuit opinion).

[11] In fact, many circuits go even further, recognizing that an officer who acts with the subjective intent required to establish deliberate indifference cannot obtain qualified immunity. In those circumstances, "the two inquiries"—the constitutional violation and the clearly established analysis—"effectively collapse into one." *Thorpe v. Clarke*, 37 F.4th 926, 934 (4th Cir. 2022) (cleaned up); *see also Walker v. Benjamin*, 293 F.3d 1030, 1037 (7th Cir. 2002) (same); *Beers-Capitol v. Whetzel*, 256 F.3d 120, 142 n.15 (3d Cir. 2001) ("Because deliberate indifference under *Farmer* requires actual knowledge or awareness on the part of the defendant, a defendant cannot have qualified immunity if she was deliberately indifferent[.]"); *Patel v. Lanier Cnty.*, 969 F.3d 1173, 1190 (11th Cir. 2020) (holding qualified immunity not available to law-enforcement officers who "actually know about a condition that poses a substantial risk of serious harm and yet do *nothing* to address it" even if there is no case with analogous facts). This Court need not reach this question because here there is clearly established law specifically concerning deliberate indifference to suicide.

support in a number of factually similar cases. In case after case, officers who heard detainees threaten self-harm, saw them engage in self-harm, were warned of a risk and the need for certain precautions by other observers, or all three—just like Wilson—have been denied qualified immunity.

The district court rightly focused on *Elliott*, a case involving markedly similar facts. There, a corrections officer knew that the decedent had been banging his head on the bars of the cell and heard from two detainees that the decedent wanted to take his own life, but determined their warnings were "not to be taken seriously." 940 F.2d at 10-11. The officer was denied immunity. *Id*. at 11-12. Wilson also knew Jackson was banging his head on the wall and also knew that he wanted to take his own life—in fact, unlike the officer in *Elliott* who only heard the statement of suicidal intent secondhand, Wilson heard it directly from Jackson himself. 3 App. 77.

Wilson nonetheless argues that *Elliott* is "too dissimilar" because the decedent in that case had schizophrenia, made multiple statements consistent with suicidal ideation, and spent longer in jail before committing suicide. Wilson Br. 46. These are differences without a distinction, if they are even differences at all. First, there is no indication the officer in *Elliott* knew about the decedent's schizophrenia. Second, while the two detainees reported multiple statements consistent with suicidal ideation, the First Circuit's analysis focused exclusively on one "suicide threat," 940

F.2d at 9, 11-12, consistent with Jackson's statement to Wilson, point blank, that he was trying to kill himself, 3 App. 77. Finally, the week that the decedent in *Elliott* spent in custody before his suicide—a fact that the First Circuit did not reference in its analysis—does not reduce the decision's notice to Wilson that an official acts with unconstitutional deliberate indifference by disregarding a suicidal statement corroborated by head-banging. *See Al-Turki v. Robinson*, 762 F.3d 1188, 1194-95 (10th Cir. 2014) (rejecting defendant's argument in deliberate-indifference case that law was not clearly established because prior cases "all involved longer periods of pain"); *Est. of Booker*, 745 F.3d at 433-34 (rejecting defendants' argument in deliberate-indifference case that they lacked notice that three-minute delay to obtain medical care was unconstitutional).[12]

*Elliott* is not alone. There are a host of cases in which officers were denied immunity in highly similar factual circumstances. In *Conn*, for instance, two officers transporting a woman to jail "witnessed her wrap a seatbelt around her neck in an apparent attempt to choke herself" and heard her say "she would kill herself." 572 F.3d at 1050-51. Yet they did not obtain medical care or otherwise inform those who

[12] More fundamentally, Wilson's insistence on perfectly mirrored facts repackages an argument that this Court has regularly rejected in the deliberate-indifference context. *See Paugh*, 47 F.4th at 1169-70 (rejecting argument that cases arising in different factual contexts could not provide notice); *Lance*, 985 F.3d at 799-800 (rejecting argument that cases involving "more serious" conditions or medical professionals could not provide notice to corrections officers).

could help, and the woman died by suicide in custody. *Id*. at 1051. The Ninth Circuit denied them qualified immunity. *Id*. at 1062.

In *Cavalieri v. Shepard*, the Seventh Circuit held that a reasonable jury could find that an officer knew that a detainee was "on the verge of committing suicide," where the officer was told that the detainee was a suicide risk, knew the detainee had previously been on suicide watch, and knew the detainee had mental-health problems. 321 F.3d at 620-21. The court rejected the officer's assertion of qualified immunity where the officer never informed jail officials of the detainee's suicide risk. *Id.* at 621-23.

In *Gordon*, the Fourth Circuit denied immunity to an officer who failed to summon the jail nurse after being warned by a fellow officer that the detainee "may try to hang himself." 971 F.2d at 1095. Notwithstanding the officer's testimony that he did not believe the warning was "meant seriously," the warning was "sufficient notice that a suicide attempt might be imminent," and the officer acted with deliberate indifference by ignoring this information. *Id.*

In *Snow*, the Eleventh Circuit denied immunity to an officer who was told that a detainee had tried to cut her wrist within the last month and then himself told the detainee's parents that she was suicidal, but did not tell other jail officials or take any action to protect the detainee. 420 F.3d at 1270. He did not move her to the drunk

tank, connect her with a medical provider, remove items that could be used for self-harm, or place her on increased monitoring. *Id*.

In *Coleman*, the Eighth Circuit denied immunity to two officers, one who had been told that the detainee "needed mental help" and "had threatened suicide," and another who knew about the suicide threat. 349 F.3d at 536. The holding cell was occupied, so instead the detainee was placed in a cell with exposed bars. *Id*. Despite their knowledge of his suicide risk, "they issued [the detainee] a bed sheet and placed him in a cell where they could not easily observe him." *Id*. at 539. The detainee hung himself by tying his bedsheet to the bars. *Id*. at 536.

Finally, in *Converse*, the Fifth Circuit denied immunity to four officers who observed an individual threaten suicide while out of custody and later heard him yelling, banging his hand on his cell, and stating that he "should have jumped," but nonetheless left him in a cell with a blanket. 961 F.3d at 776-80. The court rejected the officers' attempts to disclaim knowledge of a substantial risk based on the purportedly mitigating facts that no detainee had previously died by suicide in the same cell and that one officer testified that he had believed the decedent was "not serious" about suicide. *Id.* at 776-80 & n.7.

Prior cases involving "materially similar" facts, even if they are from other jurisdictions, add to the weight of authority that may clearly establish the law. *Irizarry*, 38 F.4th at 1294 (relying on four out-of-circuit decisions with "materially

similar" facts and two other out-of-circuit decisions discussing the right to conclude it was clearly established). In each of the cases discussed here, officers were denied immunity under "materially similar" circumstances: They either saw a detainee engage in self-harm or exhibit odd behavior, were told the detainee had suicidal tendencies, or both. And in each case, the officers failed in one or more respects by not connecting the detainee with mental-health treatment, ensuring adequate monitoring, removing dangerous objects from the cell, or taking other reasonable precautions. Wilson fits this mold exactly: He saw Jackson striking his head against the wall and heard Jackson say he was trying to kill himself. 3 App. 77. What's more, Wilson correctly understood the risk of suicide here—after seeing Jackson's condition, he inquired about detox and said "something more" had to be done, though he never did that something more. *Id*. These cases are sufficiently similar to put Wilson on notice that his deliberate indifference was unconstitutional. So, just like the officers before him in *Elliott*, *Conn*, *Cavalieri*, *Gordon*, *Snow*, *Coleman*, and *Converse*, Wilson is not entitled to immunity.

**D. Defendant Wilson's sliding scale arguments fail.**

Wilson dedicates the bulk of his brief to arguing that this Court should retire the "sliding scale" approach to qualified immunity. Wilson Br. 24-39. His exegesis on the sliding scale is misplaced, for several reasons. First, there is little reason to conclude that the district court relied exclusively on a sliding scale in denying

immunity to Wilson. Second, to the extent the district court did rely on it, the sliding scale is settled Tenth Circuit law and entirely consistent with Supreme Court jurisprudence. Finally, even if Wilson is correct about the sliding scale and correct that *Hope* only "created a narrow exception" for "obvious" cases, Wilson Br. 27, this *is* such an obvious case.

**1. The sliding scale makes little difference.**

Wilson argues that the district court "relied upon the sliding scale approach" and, in so doing, "applied a relaxed standard of qualified immunity." Wilson Br. 23. But if Wilson were correct that the lower court applied an unduly "relaxed" standard, its decision would conflict with the clearly established law of other courts. Instead, as previously stated, the district court's articulation of Jackson's clearly established right is consistent with the clearly established law recognized by nearly every other circuit. *See supra* Sections I.A, I.B.

The above state of the law notwithstanding, Wilson asserts that the district court must have incorrectly relied on the sliding scale, and must have defined clearly established law with impermissible generality, because it considered factors "in the aggregate." Wilson Br. 19, 23, 47-48. That is, Wilson argues that the district court erred by considering together the facts that Wilson (1) knew Jackson was intoxicated, (2) heard Jackson's suicidal remark, (3) observed Jackson's self-harming behavior, and (4) expressed an understanding of the need to do "something

more" for Jackson in ultimately concluding that Wilson's failure to take any protective measures constituted clearly established deliberate indifference. *See* 3 App. 81-82. Wilson's attack on this standard mode of analysis is inapt—and has little to do with the sliding scale. This Court regularly considers the aggregation of facts known to an official in determining whether that officer violated a clearly established right. *Quintana*, 973 F.3d at 1032-33 (relying on combination of symptoms known to particular officer to conclude he violated clearly established law); *Paugh*, 47 F.4th at 1157 & n.18 (observing that one symptom "alone" did not present obvious risk, but that "there was more" present to establish the "obvious need for medical treatment").

In short, nothing about the district court's analysis was contingent on the sliding scale approach, and Wilson's focus on it is inapposite.

**2. The sliding scale analysis is settled Tenth Circuit law and consistent with *Hope*.**

Even if the district court's analysis relied on the sliding scale approach, this Court cannot "retire its application," *see* Wilson Br. 24, because it is settled Tenth Circuit law. *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000) ("Under the doctrine of *stare decisis,* this panel cannot overturn the decision of another panel of this court."). Nor is there any reason to do so: The doctrine makes good sense and is entirely consistent with Supreme Court jurisprudence.

In 2015, then-Judge Gorsuch embraced this Court's sliding scale approach "under which the more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015) (cleaned up). "After all," he explained, "some things are so obviously unlawful that they don't require detailed explanation," and "it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt." *Id*. at 1082-83.

This is consistent with Supreme Court precedent. In *Hope v. Pelzer*, the Court explained that "a single level of specificity" does *not* apply across the board. 536 U.S. 730, 740 (2002) (internal citation omitted). Rather, "a very high degree of prior factual particularity may be necessary" in some cases, while "general statements of the law" will suffice in others. *Id*. at 741 (internal citation omitted). Consistent with this pronouncement, this Court recognized that "*Hope* thus shifted the qualified immunity analysis," and that the "degree of specificity required from prior case law depends in part on the character of the challenged conduct." *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004).

Wilson takes issue with this reading of *Hope* and argues that "more recent jurisprudence" from the Supreme Court prohibits lower courts from defining clearly

established law "at a high level of generality." Wilson Br. 29. But Wilson's canvass of "modern" Supreme Court jurisprudence, Wilson Br. 30, is incomplete. All but one of Wilson's post-*Hope* Supreme Court citations arose in the Fourth Amendment context, where the Court has stated that there is a special need for specificity. *E.g.*, *Mullenix v. Luna*, 577 U.S. 7, 12 (2015). The one decision implicating another constitutional right, cited by Wilson in passing, actually reversed this Court for requiring too *much* factual specificity in its analysis of clearly established law. *Compare Sause v. Bauer*, 859 F.3d 1270, 1275-76 (10th Cir. 2017) (affirming grants of qualified immunity on First Amendment claim because right to pray in the home absent legitimate law enforcement interest was too general to provide notice in novel factual scenario), *with Sause v. Bauer*, 138 S. Ct. 2561, 2562-63 (2018) (reversing and remanding because "[t]here can be no doubt that the First Amendment protects the right to pray" and further factual development was required to resolve officers' assertions of qualified immunity).

Notably, Wilson's survey omits two recent decisions arising in the detention context, like this case. In 2020, the Supreme Court relied on *Hope* to summarily reverse a grant of qualified immunity by the Fifth Circuit in a deliberate-indifference case. *See Taylor v. Riojas*, 141 S. Ct. 52 (2020) (per curiam). In so holding, the Supreme Court repeated *Hope*'s direction that "a general constitutional rule already identified in the decisional law may apply with obvious clarity" in some cases. *Id.*

at 53-54 (quoting *Hope*, 536 U.S. at 741). In 2021, the Supreme Court relied on *Taylor* to vacate and remand *another* grant of qualified immunity, that time in the Fourth Amendment context. *McCoy v. Alamu*, 141 S. Ct. 1364 (2021). The appellate court's error in *McCoy*, just as in *Taylor*, was looking for a prior case with nearly identical facts. *McCoy v. Alamu*, 950 F.3d 226, 234 (5th Cir. 2020) (rejecting the idea that "general standards can clearly establish the law"), *cert. granted, judgment vacated*, 141 S. Ct. 1364 (2021). *Taylor* and *McCoy* reiterate that *Hope*—the case on which this Court's sliding scale analysis is based—is good, settled law.

### 3. Defendant Wilson is not entitled to immunity even if *Hope* authorizes only a "narrow" exception for "obvious" cases.

As a final matter, even if this Court could overturn its binding sliding scale precedent, it makes no difference. Even Wilson's unduly cramped reading of *Hope* acknowledges that it, at the very least, "created a narrow exception" where general statements of law can suffice in "obvious" cases. Wilson Br. 27. This is such a case.[13]

Suicidality obviously presents a grave concern. As this Court has recognized, the severity of the harm that results from suicide is beyond doubt. *E.g.*, *Cox*, 800 F.3d at 1240 n.3. Reasonable officials know that they must take suicidality seriously and respond with appropriate measures. *Howard v. Waide*, 534 F.3d 1227, 1237

[13] Wilson states "Ms. Lieberenz did not argue that this case presents an egregious constitutional violation such that *Hope*'s exception would apply." Wilson Br. 31. Not so: Ms. Lieberenz *expressly* made the argument. *See* 2 App. 67-68 (discussing "obviousness sufficient to defeat qualified immunity").

(10th Cir. 2008) (explaining Constitution "requires" officials "to respond reasonably" when they "become subjectively aware of a substantial risk of serious harm to an inmate"). The Jail's own Standard Operating Procedures acknowledge this: "Suic[i]dal parties are to be taken very serious in the Saguache County Jail. . . . Please take any type of information about a party being suicidal serious and take the necessary precautions. It does not matter where the information may come from, via other inmates, jail staff or the inmate, take appropriate action." 2 App. 84; *cf. Hope*, 536 U.S. at 743-44 (citing prison regulation in support of "fair warning" to officials "that their conduct violated the Constitution"); *Mata*, 427 F.3d at 757 ("While published requirements for health care do not create constitutional rights, such protocols certainly provide circumstantial evidence that a prison health care gatekeeper knew of a substantial risk of serious harm.").

Against this backdrop, Jackson's particular need for help and protection was obvious. Jackson repeatedly rammed his head into a metal wall and explained this behavior by telling Wilson that he was "trying to kill [him]self." 3 App. 77. Directly observing this behavior, Wilson actually inferred that Jackson needed "detox" or "something more," and another official told Wilson that Jackson required suicide watch and that a mental-health provider needed to be notified. 3 App. 77-78. Jackson could not obtain this help for himself; as a detainee, he was dependent on Jail officials to act as "gate keepers" to any treatment or protection. *Blackmon*, 734 F.3d

at 1245-46. No reasonable official could believe that the Constitution permitted him to simply walk away from a detainee in Jackson's obviously distressed state and leave the situation to resolve itself however it might. *See Farmer*, 511 U.S. at 833 ("[H]aving stripped [prisoners] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course."). Yet Wilson did exactly that. His decision to withhold protection and treatment falls within the heartland of deliberate indifference. *See supra* Sections I.A, I.B, I.C. Even if this Court were to conclude that the right has not been defined with sufficient particularity or that prior cases were insufficiently similar, the core principles apply obviously in this case.

## II. The district court correctly denied qualified immunity to Defendant Wilson in his supervisory role.

Supervisory liability attaches where "an 'affirmative link' exists between the supervisor's personal participation, his exercise of control or direction, or his failure to supervise, and the constitutional deprivation." *Arnold v. City of Olathe, Kansas*, 35 F.4th 778, 793 (10th Cir. 2022). As the district court properly recognized, this affirmative link requires showing "(1) personal involvement; (2) causation; and (3) state of mind." *Est. of Booker*, 745 F.3d at 435 (internal quotation marks and citations omitted). There is no dispute that a reasonable jury could find that Wilson committed a constitutional violation in his supervisory capacity; Wilson argues only that no clearly established law provided the requisite notice that his conduct was

unconstitutional. *See* Wilson Br. 49-51. He's wrong: The district court correctly concluded that Wilson's supervisory conduct violated clearly established law.

Wilson is wrong to argue that a supervisory-liability claim necessarily requires an analysis of clearly established law that is separate from the analysis that supports an individual-liability claim. Rather, this Court has explained that because "a supervisory official may be held liable under § 1983 only for his or her unconstitutional conduct, there is no longer any need to contemplate whether qualified immunity as applied to supervisory officials requires special or separate consideration." *Est. of Booker*, 745 F.3d at 436 (quoting Martin A. Schwartz, *Section 1983 Litig. Claims & Defenses*, § 7.19[E] (2014)). Thus, where a defendant's individual conduct and supervisory conduct violate the same constitutional right, as the district court held a reasonable jury could find here, the same caselaw that clearly establishes the individual violation *does* preclude qualified immunity on the supervisory claim. *Id*. (holding that this Court's "conclusion regarding clearly established law" on direct claim "also precludes summary judgment" on supervisory claim against same officer).

Wilson relies on *Perry v. Durborow*, 892 F.3d 1116 (10th Cir. 2018), to suggest an alternate rule. *See* Wilson Br. 50. But *Perry* does not displace *Booker*'s rule. Nor could it, as *Perry* post-dated *Booker* and was therefore bound by it. *See Hiller v. Oklahoma ex rel. Used Motor Vehicle & Parts Comm'n*, 327 F.3d 1247,

1251 (10th Cir. 2003) ("To the extent that [two cases] are in conflict . . . we are obligated to follow the earlier panel decision over the later one"); *Meyers*, 200 F.3d at 720 (explaining "this court must follow" the "reasoning underlying" prior holdings). In *Perry*, the plaintiff brought a supervisory claim against the sheriff, arguing that the sheriff failed to prevent a subordinate officer from raping her—there was no suggestion that the sheriff was himself present during the rape or otherwise personally involved in its commission. 892 F.3d at 1118. In that context, this Court explained that caselaw clearly establishing that an individual officer would commit a constitutional violation by raping a detainee would not clearly establish that a supervisor would commit a constitutional violation through deliberate indifference to conditions that increased the risk of rape. *Id*. at 1123.

In contrast, in *Booker*, this Court addressed the situation in which "a reasonable jury could find [the supervisory defendant] actively participated in" the constitutional violations. 745 F.3d at 435 & n.34. Because the defendant's direct participation in the underlying constitutional violation formed the basis of both the individual-liability and supervisory-liability claims, the same law that clearly established the right underlying the individual-liability claim also "preclude[d] summary judgment" on the supervisory-liability claim. *Id.* at 436.

This case is like *Booker*, not *Perry*. Wilson was at the Jail overseeing his subordinates both before and during Jackson's suicide, just as the supervisory officer

in *Booker* was present and involved throughout the encounter in that case. As both an officer and a supervisor, Wilson actively participated in the decisions regarding Jackson's placement and treatment that culminated in Jackson's death by suicide. As Macias testified, Wilson—"the chain of command"—"pretty much took over and decided" what to do with Jackson. 1 Supp. App. 52; *see also* 2 App. 84 (Standard Operating Procedure directing officers who observe a detainee exhibit suicidal tendencies to "notify a supervisor ASAP"). And, as the district court held, a reasonable jury could find that Wilson acted with the deliberate indifference to Jackson's known substantial risk of suicide required by both claims against him. 3 App. 79, 84-85. So, just as in *Booker*, there is no need to conduct a separate clearly-established analysis as to Wilson's supervisory conduct. The district court thus committed no error in referring back to its previous analysis of clearly established law in denying qualified immunity on the supervisory claim.

Even if clearly established law in the supervisory context is required, it exists here. *Cox* specifically discussed whether an official "could be held liable for his conduct under a supervisory-liability theory" in a jail suicide case. 800 F.3d at 1247; *see also id.* ("[W]e have surveyed the then-extant caselaw [as of 2009] that *would* have guided the Sheriff's endeavors to conform his supervisory conduct to constitutional norms."); *id*. at 1249 ("For purposes of demonstrating the violation of a clearly established constitutional (i.e., Eighth Amendment) right in a jail-suicide

case, our state-of-mind requirement has been settled[.]"). And subsequent decisions of this Court have looked to *Cox* for this very standard, stating that "*Cox* is clear: § 1983 jail-suicide supervisory-liability claims require the supervisor to have known that the specific inmate at issue presented a substantial risk of suicide." *George ex rel. Bradshaw v. Beaver Cnty.*, 32 F.4th 1246, 1257 (10th Cir. 2022).

To be sure, after explaining the clearly-established law, the *Cox* Court found that the supervising official in that case was entitled to immunity. But what was lacking in *Cox* is present here. In *Cox*, the supervisory official "had no personal interaction" or "direct and contemporaneous knowledge of [the decedent's] treatment." 800 F.3d at 1254. Here, Wilson heard Jackson say he was suicidal, saw him banging his head against the wall, and recognized the need to obtain help. 3 App. 81. In *Cox*, the supervisor's subordinates saw the decedent "alert and confident," "exhibit[ing] a panoply of normal vital signs," and stating that he was not suicidal. 800 F.3d at 1251-52. Here, Wilson was told by Wells that Jackson needed to be put on suicide watch or sent to mental-health, was told by Shields that she had tried (and failed) to reach mental-health, and was told by Macias that he had "little or no training on certain aspects of his job." 3 App. 60, 78, 85. Despite both his own observations of Jackson and the communications from his subordinates and colleagues, Wilson *still* failed to ensure that Jackson was placed on suicide watch or sent to the hospital.

The same caselaw that put Wilson on notice that he could not ignore Jackson's substantial risk of suicide as an individual officer also put him on notice that he could not ignore that substantial risk as a supervisor exercising authority over other officers in the Jail. *Booker* establishes this principle generally, and *Cox* confirms the rule as applied in the context of deliberate indifference to a detainee's suicidality. For these reasons, and in light of the analysis in Section I, the district court's articulation of clearly established law applies with obvious clarity to Wilson's knowledge and conduct as a supervisor. Its denial of qualified immunity should be affirmed.

## III. The district court erroneously granted qualified immunity to Defendant Shields.

The district court accepted as true for purposes of its qualified immunity analysis that Shields saw Jackson "intoxicated and high" and was told he "had been banging his head on his cell wall and could be suicidal," but nevertheless "failed to observe the camera feeds" from Jackson's cell, "took no further action" when her single call to a mental-health facility went unanswered, and "fail[ed] to ensure that certain standard operating procedures for suicidal inmates were followed." 3 App. 93-95.[14] The district court erred in granting Shields qualified immunity on these facts.

[14] In fact, she may have even seen Jackson banging his head on the wall. The video shows all four officers turn toward the monitor in response to the sound of Jackson striking his head, 2 App. 101 at 21:56:59-21:57:24, consistent with Wilson's and Macias's testimony, 1 Supp. App. 29 (Wilson); 1 Supp. App. 50-51 (Macias). At the

Turning first to the prong one inquiry, the Fourteenth Amendment deliberate indifference analysis includes both an objective and a subjective component. *Sealock*, 218 F.3d at 1209. The objective component is met if the deprivation is "sufficiently serious." *Id*. Here, the district court had no trouble concluding that the risk of suicide satisfied the objective component. 3 App. 76.[15] And the Tenth Circuit agrees. *Cox*, 800 F.3d at 1240 n.3. "The subjective component is met if a prison official knows of and disregards an excessive risk to inmate health or safety." *Sealock*, 218 F.3d at 1209 (internal quotation marks omitted). Shields's knowledge that Jackson was intoxicated and high, that he had been striking his head on the wall, that he could be suicidal, and that her more experienced coworkers were worried enough for her to seek help from a mental-health facility would surely permit a jury to conclude that she knew Jackson was at substantial risk of suicide. Next, a jury could conclude she disregarded that risk. She did not monitor the camera feed from Jackson's cell, instead choosing to have a conversation with Wells about dispatch procedures. 3 App. 95; 2 App. 132-33. And she made no attempt to reach any medical provider after her single call went unanswered, despite an immediately

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very least, as the district court noted, and as Shields admits, she was told before Jackson died by suicide that he was banging his head on the wall. 1 Supp. App. 114; 3 App. 93.

[15] The district court made this determination in analyzing the claim against Wilson, but of course the objective prong concerns the seriousness of Jackson's risk of harm, and is not tied to any particular defendant.

accessible list of options and their contact information. 1 Supp. App. 9, 125. She did not even place him on suicide watch, even though her "duties [we]re still the same" as those of any other jailer. 1 Supp. App. 138.

As for clearly established law, Shields violated the clearly established law of this Court and nearly every other circuit. *See supra* Sections I.A, I.B, I.C. The district court found otherwise, noting that Shields did not directly interact with Jackson or hear him express suicidal ideation herself, and citing a "lack of precedent" in such circumstances. 3 App. 94. But "[r]egardless of *how* prison officials become subjectively aware of a substantial risk of serious harm," they must "respond reasonably." *Howard*, 534 F.3d at 1237 (emphasis added). In any event, there are factually similar contexts where officers who learned about self-harming behavior and suicidal statements secondhand have been held to have violated clearly established law. *See Cavalieri*, 321 F.3d at 621 (family members of detainee told defendant about detainee's suicide risk); *Gordon*, 971 F.2d at 1095 (another officer warned defendant that decedent "may try to hang himself"); *Elliott*, 940 F.2d at 11-12 (two detainees told defendant about suicidal statements). Shields knew about the self-harm and suicidal remarks, and that was enough.

Next, the district court concluded that Shields's three failures—her failure to monitor the camera feed, her failure to follow up or inquire into other resources when her call was unanswered, and her failure to ensure Jackson was put on suicide

watch—were merely "negligent" rather than deliberate indifference. 3 App. 95. That was incorrect. First, with respect to monitoring, Shields, Wilson, and Macias all testified that monitoring the cell camera feeds above the dispatch station was one of Shields's duties. 1 Supp. App. 103-04, 127 (Shields); 1 Supp. App. 14 (Wilson); 1 Supp. App. 42 (Macias). Though Shields knew Macias was not conducting in-person checks as he remained "in the same room" with her, 2 App. 135, 137, she failed to check on Jackson via the monitor at her station, enabling Jackson to prepare for and commit suicide undetected. 3 App. 94. Second, Shields did not ensure Jackson was receiving the protections required by suicide watch. And finally, though Shields recognized that detainees with serious mental-health needs at the Jail are dependent on officials like her to "dispatch the medical help for them," 1 Supp. App. 105-06, she made no effort to connect Jackson with treatment after her single unanswered call. She did not leave a message. 1 Supp. App. 119-20. She did not call an ambulance. 1 Supp. App. 121. She did not reach out to other detox or mental-health facilities whose contact information was available to her. 1 Supp. App. 125. Once she hung up the phone, Shields left Jackson in the same distress and danger as she found him—with no possibility of treatment.

These three failures, contrary to the district court's conclusion, violate clearly established law. They reflect the very head-in-the-sand approach to Jackson's safety that the Supreme Court prohibited in *Farmer* when it held that a prison official may

"not escape liability" by declining "to confirm inferences of risk that he strongly suspected to exist." *Farmer*, 511 U.S. at 843 n.8. That is, because Shields had "subjective knowledge that [Jackson was] a substantial suicide risk," clearly established law required her to take "reasonable steps" to protect him. *Crane*, 15 F.4th at 1307, 1310. Monitoring Jackson, putting him on suicide watch, and ensuring he obtained medical or mental-health treatment were three such reasonable steps. *Blackmon*, 734 F.3d at 1245 (denying qualified immunity to prison officials who "denied [plaintiff] access to mental health care by qualified professionals" despite knowing about "serious suicide and self-harm problems"); *Converse*, 961 F.3d 778 (denying qualified immunity to officer who did not monitor video feed of cell as "he was just asked to move his eyes from one television screen to another"); *Gordon*, 971 F.2d at 1095 (denying immunity to defendant who "simply ignored" another officer's warning that decedent "may try to hang himself" and did not summon jail nurse); *Snow*, 420 F.3d at 1270 (denying immunity to defendant who did not ensure that decedent was checked every fifteen minutes or send decedent to the emergency room for treatment and observation); *see also Quintana*, 973 F.3d at 1033 ("[P]rior to January 2016, it was clearly established that when a detainee has obvious and serious medical needs, *ignoring* those needs necessarily violates the detainee's constitutional rights." (emphasis added)).

Finally, it is worth noting that Shields's failures amount to a constitutional violation that is so "obvious" as to defeat any entitlement to qualified immunity. *See supra* Section I.D.3; *Taylor*, 141 S. Ct. at 53-54. No reasonable official who knew a detainee had engaged in self-harm and who knew that fellow officers feared he was suicidal would think it passed constitutional muster to ignore live video footage from the detainee's cell just above her desk and to take no other action after trying, and failing, to contact one mental-health facility.

## IV. The district court erroneously granted qualified immunity to Defendant Wells.

As the district court recognized in its qualified immunity analysis, Wells saw Jackson "heavily intoxicated" when she arrested him, she heard Jackson say "I'm trying to kill myself right now," she "observed him striking his head," she was present at the Jail from the time Jackson arrived until after he hanged himself, her supervising officer specifically told her that Jackson "needed to be put on suicide watch" and "mental health needed to be notified," and she knew about a prior suicide at the Jail "involving substantially similar circumstances." 3 App. 78, 88, 90-91; *see also* 2 App. 101 at 21:57:04-21:58:40. Yet Wells did nothing. She did not ensure Jackson was placed on suicide watch or connect him with medical or mental-health care, or take any other action to protect him. The district court erred in granting Wells qualified immunity on these facts.

As to the prong one inquiry, as discussed *supra* in Section III, the district court properly concluded that the risk of suicide satisfied the objective component of the Fourteenth Amendment deliberate indifference analysis. 3 App. 76. With respect to the subjective component, a jury could easily conclude that Wells understood Jackson's substantial risk of harm from the fact that she saw him heavily intoxicated, heard him say he was trying to kill himself, knew he was striking his head against a metal divider, and was told by her supervisor to put him on suicide watch. And her complete inaction, despite having personally responded when another detainee had committed suicide in the same cell using the privacy curtain, would permit a jury to conclude that she disregarded that risk.

Turning next to the prong two inquiry, Wells violated the clearly established law of this Court and nearly every other circuit. *See supra* Sections I.A, I.B, I.C. The district court found otherwise, stating that no authority "indicates that a single suicidal remark gives rise to deliberate indifference." 3 App. 90-91. Not so. Officers who knew of only a "single" suicidal remark *have* been denied qualified immunity time and again, especially where, as here, they also knew about self-harm or intoxication. *See, e.g.*, *Gordon,* 971 F.2d at 1092 (denying qualified immunity to defendant who was told just once by fellow officer that decedent was suicide risk); *Elliott*, 940 F.2d at 11-12 (focusing analysis on single suicidal statement and denying qualified immunity to defendant who was told about statement and knew decedent

had been hitting his head); *Conn*, 572 F.3d at 1050-51 (denying qualified immunity to defendants who heard single suicidal remark and witnessed decedent wrap seatbelt around her neck).

In fact, Wells's knowledge went beyond the level courts have held sufficient to deny qualified immunity in two respects. First, she knew that a suicidal detainee had previously committed suicide in the very same Jail cell where Jackson was being held, using the very same method that Jackson ultimately used—tearing down the privacy curtain and using it to hang himself. 3 App. 91; 2 App. 109, 119. To be sure, as the district court recognized, this knowledge does not go to whether Wells knew that Jackson, specifically, posed a suicide risk. 3 App. 92. But the district court failed to recognize that where, as here, a defendant has independent knowledge that a detainee poses a suicide risk, her knowledge that someone else "had previously committed suicide in that same cell under similar circumstances" makes the defendant's willingness to leave the detainee in that same dangerous cell all the more "unreasonable." *Converse*, 961 F.3d at 777 (emphasis omitted); *see also Jacobs v. W. Feliciana Sheriff's Dep't*, 228 F.3d 388, 395 (5th Cir. 2000) (affirming denial of qualified immunity to officer who gave suicidal detainee a blanket and placed her in a particular cell even though officer knew another detainee "had committed suicide in the same cell by hanging himself [with a blanket] from one of the tie-off points").

Second, in addition to the undisputed evidence that Jackson told Wells at the Jail that he was suicidal, there is evidence that Jackson made a similar suicidal remark to Wells before they even arrived at the Jail. A report investigating Jackson's suicide noted that Wells returned to the Jail the day after the suicide because "she was concerned due to [Jackson's] level of intoxication and by some of the *things* he said." 2 App. 20 (emphasis added). In particular, she reported that Jackson "had made the statement that he may as well just kill himself." *Id.* The district court refused to consider the investigating officer's report about Wells's statements because it believed the report to contain inadmissible hearsay. 3 App. 87-88 (citing Fed. R. Evid. 805). This was an abuse of discretion that this Court can properly reach on interlocutory review. *See Pahls v. Thomas*, 718 F.3d 1210, 1232 (10th Cir. 2013) (noting that requirement to "accept as true district court's factual determinations" on interlocutory appeal does not apply where district court commits "*legal error* en route to a *factual* determination").

Each layer of statements was either not hearsay at all or an admissible hearsay exception. Jackson's statement to Wells that he "may as well just kill himself," is not hearsay because it is only offered to prove the "effect on the listener," namely, Wells's subjective awareness of Jackson's suicide risk. *E.g.*, *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1434-35 (10th Cir. 1993); *Jones v. McHugh*, 604 F. App'x 669, 672 n.2 (10th Cir. 2015). Wells's comments to the investigating officer are not

hearsay because they are statements by an opposing party. *Janny v. Gamez*, 8 F.4th 883, 900 (10th Cir. 2021) (citing Fed. R. Evid. 801(d)(2)). And the report prepared by the investigating officer of the Saguache County Sheriff's Office in the course of his investigation into Jackson's suicide falls into a hearsay exception because it sets out "a matter observed while under a legal duty to report" and "factual findings from a legally authorized investigation." Fed. R. Evid. 803(8)(A)(ii)-(iii). As the district court acknowledged, reports of law-enforcement officers generally fall within this rule. *E.g.*, *United States ex rel. Barrick v. Parker-Migliorini Int'l, LLC*, --- F.4th ---, No. 22-4049, 2023 WL 5371048, at *6-7 (10th Cir. Aug. 22, 2023) (collecting cases holding that "law enforcement reports are admissible as public records" and holding law-enforcement officer's report was "properly admitted" where "inner layer of hearsay" was admissible).[16]

If this fact is properly considered, then it is all the more certain that Wells violated clearly established law. *See Conn*, 572 F.3d at 1052, 1062 (denying immunity to officers who observed suicidal conduct and did not "report the incident to those who [would] next be responsible for her custody and safety"); *Cavalieri*,

[16] Wells argued to the district court that because she testified that she never spoke with the author of the report, the "circumstances of [the report's] preparation . . . indicate a lack of trustworthiness." 2 App. 250. But Wells's "denial of having made some of the statements in the Report goes to the credibility of the evidence, not admissibility." *Parker-Migliorini Int'l*, 2023 WL 5371048, at *7. Moreover, a jury could instead find that the discrepancy goes to Wells's credibility.

321 F.3d at 622-23 (denying immunity to officer who "passed by the opportunity to mention that he had been informed that [detainee] was a suicide risk"); *Gordon*, 971 F.2d at 1092, 1095 (denying immunity to officer who did not "transmit information" of suicide risk to others); *Snow*, 420 F.3d at 1270 (denying immunity to officer who did not tell other jail staff about suicide risk). But even if this Court does not consider the additional statement, everything Wells observed at the Jail—the intoxication, the self-harm, and the suicidal statement—put her on notice of Jackson's substantial suicide risk. At that point, as the district court recognized, she spoke with her supervising officer who told her that Jackson "needed to be put on suicide watch" and "mental health needed to be notified." 3 App. 78. Yet, as the district court recognized, Wilson testified that Wells never communicated this to him. 3 App. 77-78. Her failure to communicate this information to those at the Jail violates the same clearly established law just discussed.

Finally, the district court found the law not clearly established with respect to Wells because she may not have had "the responsibility or authority to place [Jackson] on suicide watch." 3 App. 91. But the court also recognized that she was present at the Jail from the time Jackson arrived until after he hanged himself; that she discussed the situation with her supervising officer, who gave her specific instructions about what should happen at the Jail; and that she knew about a prior suicide at the Jail. 3 App. 78, 88, 91; *see also* 1 Supp. App. 3 (custody form reflecting

transfer from Wells to Jail at 11:07 p.m.). That is, even at the Jail, Wells "remained personally involved with the case" and is therefore not entitled to immunity for her failures. *Cavalieri*, 321 F.3d at 619 (denying immunity to police officer where detainee died by suicide after "official transfer" to jail staff).

As a final matter, whatever this Court makes of the clearly established analysis discussed above, Wells committed such an "obvious" constitutional violation that she is not entitled to qualified immunity. *See supra* Section I.D.3. No reasonable official faced with a "heavily intoxicated" man threatening suicide and hitting his head against his cell wall, with the knowledge that another person had previously committed suicide in the very same cell by means that remained available, could believe that the Constitution permitted her to do nothing.

## CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of qualified immunity to Wilson in both his direct and supervisory roles, and should reverse the district court's grant of qualified immunity to Shields and Wells.

Date: September 11, 2023

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## STATEMENT REGARDING ORAL ARGUMENT

Ms. Lieberenz respectfully requests oral argument because this appeal raises important questions about the doctrine of qualified immunity and has a substantial record.

## CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to this Court's guidelines on the use of the CM/ECF system, I hereby certify that:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, the ECF submission is an exact copy of those documents; and

(3) the ECF submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Sophos Endpoint Advanced, version 10.8.10.3, last updated September 10, 2023, and according to the program is free of viruses.

Dated: September 11, 2023

*s/Megha Ram*
Megha Ram

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32, I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e) because this brief contains 15,054 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Time New Roman 14-point font.

*/s/ Megha Ram*
Megha Ram

**CERTIFICATE OF SERVICE**

I, Megha Ram, hereby certify that on September 11, 2023, I caused the foregoing *Brief Of Appellee/Cross-Appellant Sarah Lieberenz* to be electronically filed with the Clerk of the Court for the United States Court Of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

*/s/ Megha Ram*
Megha Ram