No. 20-4032

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JANET CRANE, as Administrator of the Estate of BROCK TUCKER,

Plaintiff-Appellant,

v.

UTAH DEPARTMENT OF CORRECTIONS, ALFRED BIGELOW, RICHARD GARDEN, DON TAYLOR, OFFICER COX, BRENT PLATT, SUSAN BURKE, FUTURES THROUGH CHOICES, INC., UNIVERSAL HEALTH SERVICES, INC., and JEREMY COTTLE,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Utah
2:16-CV-1103-DN
Hon. David Nuffer

APPELLANT'S REPLY BRIEF

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I. The District Court Erred in Granting Qualified Immunity to Defendants at the Rule 12 Stage.

Defendants make several fundamental errors in arguing for affirmance of the district court's grant of qualified immunity on Crane's Eighth Amendment claims. First, they ignore the procedural posture, treating the case as if it were before this Court on summary judgment rather than on a Rule 12 dismissal. Second, they repeatedly ignore the allegations of the complaint regarding Defendants' knowledge of—and deliberate indifference to—Tucker's suicide risk, and then proceed to invoke qualified immunity on the grounds that Crane failed to plead these allegations. This Court cannot ignore Crane's well-pleaded allegations, particularly at a posture before discovery and therefore before they can be confirmed with other forms of evidence. These errors, taken in tandem, would force Crane into an entirely unworkable pleading standard: to provide substantiated evidence to her allegations prior to discovery, where the only non-defendant able to provide these details is dead.

Defendants also err in their interpretation and analysis of the clearly established right articulated by Crane in her opening brief. Opening Br. 16–17. They mischaracterize the constitutional right at issue too narrowly and fail to acknowledge this Court's sliding scale mode of analysis, wherein rights deprived by particularly egregious conduct can be more easily established and require less specific factual parallels to existing case law. Defendants are simply not in a position to point to

nuanced discrepancies between sister circuit precedent and the complaint's allegations in a case involving particularly egregious conduct on a forgiving Rule 12 standard.

Finally, Defendants proffer the argument that this Court may affirm on the alternative basis that Crane has failed to state plausible Eighth Amendment violations for each individual Defendant, opting instead to rely on collective allegations against Defendants as a whole. To prevail on this alternative basis, Defendants once again ask this Court to overlook key allegations articulated in the complaint that must be taken as true at this stage of the proceedings. This Court should decline the invitation to do so.

a) Grants of qualified immunity on Rule 12 motions are disfavored.

"[Q]ualified immunity defenses are typically resolved at the summary judgment stage." *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014). Asserting qualified immunity on a motion to dismiss "subjects the defendant to a more challenging standard of review than would apply on summary judgment" because a "motion to dismiss for failure to state a claim is viewed with disfavor, and is rarely granted." *Peterson v. Jensen*, 371 F.3d 1199, 1201 (10th Cir. 2004) (quoting *Lone Star Indus., Inc. v. Horman Family Trust*, 960 F.2d 917, 920 (10th Cir. 1992)). "In reviewing a Rule 12(b)(6) motion in the context of qualified immunity, a district court should not dismiss a complaint for failure to state a claim unless it appears

beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quoting *Currier v. Doran*, 242 F.3d 905, 917 (10th Cir. 2001)). Empirics bear this out: In the "largest and most comprehensive study to date" of qualified immunity decisions, only 0.6% of cases with qualified immunity as a potential defense were dismissed on this ground prior to discovery. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 45 (2017).

Defendants simply ignore the procedural posture and cite almost exclusively cases that were resolved on summary judgment. *See* Answering Br. 17–20, 27–30 (citing *Mullenix v. Luna*, 577 U.S. 7 (2015); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182 (10th Cir. 2010); *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018); *Riggins v. Goodman*, 572 F.3d 1101 (10th Cir. 2009); *Henderson v. Glanz*, 813 F.3d 938 (10th Cir. 2015); *Albright v. Rodriguez*, 51 F.3d 1531 (10th Cir. 1995); *J.H. v. Williamson Cty.,* 951 F.3d 709 (6th Cir. 2020); *Latson v. Clarke*, 794 F. App'x 266 (4th Cir. 2019) (unpublished); *Hunt v. Bd. of Regents of Univ. of N.M.*, 792 F. App'x 595 (10th Cir. 2019) (unpublished); *Taylor v. Barkes*, 575 U.S. 822 (2015); *Cox v. Glanz*, 800 F.3d 1231 (10th Cir. 2015); *Silverstein v. Fed. Bureau of Prisons*, 559 F. App'x 739 (10th Cir. 2014)). Unlike the case at issue, the cases cited by Defendants rely in large part on findings from discovery, as is to be expected from a court tasked with deciding the subjective knowledge component of deliberate indifference and other fact-specific

inquiries at the summary judgment stage. It is premature at this stage in the proceedings to hold Crane's complaint to the same standard as a motion in opposition to summary judgment without any factual record to rely upon.

b) The district court and Defendants ignore plausible allegations from Crane's complaint.

In granting Defendants' motion for judgment on the pleadings, the district court wrote that even according to Crane's allegations, Defendants "never had any notice of mentally [sic] illness or suicidal inclination." R. 137. This is blatantly incorrect and ignores many allegations in the complaint that all the Defendants were aware of Tucker's mental illnesses and suicidality. *See, e.g.*, R. 36–37 (alleging that all Defendants knew putting Tucker in solitary confinement would exacerbate his mental illness and suicidality); R. 39 (alleging that all Defendants knew placing Tucker in solitary confinement created a risk of suicide); R. 43 (alleging that Defendant Taylor knew "that holding Brock [Tucker] in punitive isolation was likely to, and did, cause or exacerbate Brock [Tucker]'s severe mental illness, mental anguish, helplessness, depression, anxiety, insanity, and risk of suicide"); R. 45 (alleging that Defendant Cox knew that Tucker was an elevated suicide risk).

Defendants make the same error before this Court, repeatedly disregarding the complaint's well-pleaded allegations. Defendants argue that the complaint does not "allege that Officer Cox noticed or ignored that Tucker's cell-door window was covered," Answering Br. 24 n.5, when the complaint specifically alleges that

Defendant Cox was "put on notice of the possibility of a suicide attempt when Brock [Tucker] hung a towel over the window of his cell prior to his suicide." R. 45. Defendants argue that "Crane does not allege actual knowledge that Tucker was suicidal," Answering Br. 25 n.7, when the complaint alleges that the four individual Defendants "knew" that their "acts and omissions" would "cause or exacerbate" Tucker's "suicidal tendencies." R. 36–37, 43, 45. They argue that "Crane does not sufficiently allege that any of the individual State Defendants knew that Tucker was suicidal or that he presented an imminent and substantial risk of suicide or self-harm," Answering Br. 26 n.9, when the complaint alleges that the combination of mental illness, brain damage, and unusually harsh solitary confinement meant that "Defendants knew that, as a result of being placed in isolation, there was a strong likelihood that Brock [Tucker] was in danger of serious personal harm, including self-harm and suicide." R. 39. Taking Crane's plausible allegations as true, as this Court must, she has successfully pleaded that Defendants knew of and were deliberately indifferent to a substantial risk to Tucker.

c) *Defendants mischaracterize the right alleged by Crane in an effort to prove it was not clearly established at the time of Tucker's death.*

Both Defendants and the court below misconstrued the clearly established right asserted. Defendants describe the right espoused by Crane to be a prohibition against "placing an inmate with mental illness in solitary confinement for misconduct or prison rule violations." Answering Br. 21. Defendants later

characterize the right as entitlement to "adequate[] screen[ing] ... for suicide ... or establish[ment] or following [of] sufficient suicide prevention protocols...." Answering Br. 29. The court below summarized the right as "an inmate's right to not be argued with, or disciplined with occasional periods of administrative segregation, due to the possibility that he may be suicidal." R. 137–38.

None of these are apt descriptions of the clearly established right asserted by Crane in her complaint below and described in her opening brief. It is not the right to receive suicide risk screening or to avoid discipline; rather, it is the well-recognized and clearly established right of seriously mentally ill prisoners at risk of suicide not to be confined in excessively punitive solitary confinement—particularly in conditions that facilitate suicide, such as cells that contain hanging implements and a tie-off point. *See* Opening Br. 16–17. Rather than refute the chorus of circuit courts that have recognized this right, Defendants instead try to distinguish these rulings by asserting that Crane, unlike the plaintiffs in *Sanville*, *Jacobs*, *Snow*, and *Coleman*, failed to allege that the prison officials had "actual knowledge of" Tucker's mental illness and suicide risk. Answering Br. 21. As discussed above, this argument disregards numerous allegations in the complaint that Defendants knew of Tucker's mental illness, intellectual disability, and suicide risk.

Because they improperly define the Eighth Amendment right at issue, both Defendants and the court below mistakenly apply the holdings in *Taylor v. Barkes*,

575 U.S. 822 (2015), and *Cox v. Glanz*, 800 F.3d 1231 (10th Cir. 2015). Both *Taylor* and *Cox* involve a purported right to adequate suicide screening procedures at entry into a prison or jail. *Taylor*, 575 U.S. at 822; *Cox*, 800 F.3d at 1247 ("[A]n inmate's right to proper prison suicide screening procedures during booking—was not clearly established in July 2009."). In both cases, an individual had committed suicide within just a few days of entering the facility, and the plaintiffs claimed the defendants should have apprised themselves of the deceased individuals' respective mental states in that short window. Both courts held that there was no constitutional requirement that officials glean specific knowledge of prisoners' mental states upon entering their facilities. But these holdings have no bearing on this case, where Tucker had entered the facility more than two years prior to his suicide and the complaint expressly alleged that Defendants knew of his intellectual disability, mental illnesses, and suicidality.

d) Defendants fail to address this Court's precedent in applying a sliding scale approach to determining whether a right is clearly established.

Officials "can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). The "salient question" is not whether there exist cases with identical factual circumstances, but "whether the state of the law ... gave [the defendants] fair warning that their alleged treatment of [the plaintiff] was unconstitutional." *Id.* In concluding that the defendants had fair warning that their conduct was unconstitutional in *Hope*,

the Supreme Court looked to the reasoning and holdings of its prior cases, the reasoning and holdings of prior circuit cases, prison regulations, federal studies on point, and the "obvious cruelty inherent in the practice." *Id.* at 742–46 (2002). In accordance with this precedent, this Court evaluates the specificity of precedent required to clearly establish law on a "sliding scale" for egregiousness, where "[t]he 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." *Davis v. Clifford*, 825 F.3d 1131, 1136 (10th Cir. 2016); *see* Opening Br. 10, 12–13.

Disregarding this analytical framework, Defendants argue that Crane must instead point to authority where an IDHO officer, prison warden, and medical staff violated the same right on identical facts in order for that right to be clearly established. Answering Br. 30. In doing so, Defendants attempt to distinguish on-point cases with such granularity that they fall perilously close to arguing that cases with fundamentally similar facts is the only method of providing defendants fair notice. The Supreme Court and this Court have foreclosed this line of argument.

Here, Defendants continuously flouted longstanding precedent and prison policy by placing Tucker in punitive isolation without contacting mental health staff to determine whether his alleged behavior was attributable to mental illness. Opening Br. 4–5. And they ultimately placed Tucker, a mentally ill and suicidal individual, in an unusually harsh form of solitary confinement in a cell with a tie-off

point and hanging implement. Because Defendants cannot dispute the obvious cruelty of their conduct, Defendants simply ignore this Court's sliding scale approach to evaluating whether a right is clearly established.

e) Crane pleaded adequate allegations against each individual defendant.

A complaint governed by Rule 8, such as the instant case, need only plead factual allegations that are plausible or "raise a [plaintiff's] right to relief above the speculative level in order to escape dismissal." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *accord Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While Crane must provide more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action," *Iqbal*, 556 U.S. at 681, she need not make "detailed factual allegations." *Id.* at 678. A complaint withstands dismissal so long as it contains enough factual matter "to raise a reasonable expectation that discovery will reveal evidence" to support a plaintiff's claims. *Twombly*, 550 U.S. at 556.

Spanning 43 pages and containing myriad factual allegations, Crane's complaint adequately pleads a clearly established constitutional violation by four individual employees of Central Utah Correctional Facility. The complaint alleges that Warden Bigelow and Director Garden both were aware of Tucker's heightened risk of suicidality and were responsible for the policies that led to his suicide. R. 20–21, 36–37, 39. It alleges that Defendant Taylor ignored prison policy requiring him to consult mental health staff before sentencing Tucker—whom he knew was

psychotic, mentally disabled, and brain damaged—to a particularly harsh form of solitary confinement, disregarding the known fact that it would exacerbate his severe mental illness and increase his risk of suicide, R. 43. And it alleges that Officer Cox, who entered Tucker's cell in violation of prison policy and doled out further punishment just hours before his death, failed to monitor Tucker to prevent his suicide even when put on notice of the possibility of a suicide attempt when Tucker hung a towel over the window after their altercation. R. 34; 45.

Defendants argue for an alternative affirmance on the grounds that Crane did not plead a constitutional violation as to any of the individual defendants. Answering Br. 31. As to Warden Bigelow and Director Garden, Defendants argue that the complaint is deficient in its allegations of supervisory liability to the extent that it did not point to any policy "that *caused* the complained of constitutional harm." Answering Br. 38 (emphasis in original). The only policy the complaint mentioned, Defendants argue, is the policy Defendant Taylor ignored by failing to confer with mental health staff before sending Tucker to solitary confinement and his death. *Id.*

Not so. The complaint mentioned several policies that contributed to Tucker's death related to punitive solitary confinement, including that a prisoner put in punitive solitary confinement is "only permitted out of his cell, at most, one hour every other day, which was the only opportunity to take a shower; denied access to recreation, exercise equipment, and the library; denied any visitation; denied any

phone calls; and denied commissary, which prevented him from being able to purchase materials needed to send letters to family and friends." R. 28–29. Crane also alleges the mentally damaging policy or practice of placing individuals in a "revolving door" of solitary confinement for extended periods of time in response to nonviolent disciplinary infractions. R. 32. "There is not a single study of solitary confinement wherein non-voluntary confinement that lasted for longer than 10 days failed to result in negative psychological effects." *Williams v. Sec'y Pa. Dep't of Corrs*., 848 F.3d 549, 566 (3d Cir. 2017); s*ee id.* at 179–81 (holding a reasonable factfinder could conclude a detainee's lengthy placement in solitary confinement "because of a single incident of unrealized and unrepeated threats" was excessive). These policies, mistakenly characterized by the district court as administrative segregation, R. 137, go far beyond garden variety solitary confinement and, as the complaint alleges, have contributed to Utah being the nation's leader in prison suicides in recent years, R. 20.

Defendants point to this Court's unpublished decision in *Vega v. Davis*, where this Court held that a bare allegation that a supervisor was aware of a prisoner's suicidality was sufficient to defeat qualified immunity. 572 F. App'x 611, 612 (10th Cir. 2014). Here, however, Crane's assertion is not bare—it is plausible that supervisory staff were aware that Tucker, who had brain damage, an IQ of 70, and psychosis, was not an appropriate person to repeatedly place in a particularly harsh

form of solitary confinement. R. 41–42. Discovery will reveal further details of what Bigelow and Garden knew and when, but Crane's plausible allegations successfully state a claim.

Moreover, the complaint does not merely point to supervisors' awareness of the risks posed to Tucker but articulates specific policies supervisors implemented related to punitive solitary confinement that contributed to Tucker's death. Warden Bigelow nonetheless insists that he is entitled to qualified immunity because "Crane does not allege any interaction at any time between Warden Bigelow and Tucker[,] [n]or does the complaint allege any interaction between Warden Bigelow and Dr. Burnham, social worker Brian Doubray, IDHO Taylor, or Officer Cox." Answering Br. 37–38. But this burdens Crane with an unworkable pleading standard, as this information is simply impossible to obtain before discovery with Tucker dead. Defendant Garden makes the identical argument, Answering Br. 40, which suffers from the same problem: Defendants have invoked qualified immunity at a stage when it is virtually never appropriate and then allege that there is insufficient evidence when the allegations that clearly state a claim are not meticulously supported. *See* Section I(a), *supra*. "Because Defendant raised the qualified immunity defense in a Fed.R.Civ.P. 12(c) motion, the record in this case contains no evidence" and as such, this Court should "express no view as to Plaintiffs' ability to prove their allegations" prior to discovery. *Ramirez v. Dep't of Corr.*, Colo., 222

F.3d 1238, 1244 (10th Cir. 2000). "Defendant[s] remain[] free to raise the issue of qualified immunity on a motion for summary judgment once discovery is completed." *Id.*

The same is true of the claims against Defendants Taylor and Cox. Crane alleges that when Taylor ignored prison policy requiring him to consult mental health staff before sentencing Tucker—who was psychotic, mentally disabled, and brain damaged—to solitary confinement, he knew and disregarded the exacerbation of severe mental illness and risk of suicide. R. 43. Despite these clear allegations, Defendants write, "There is no allegation that []Taylor had reason to suspect that Tucker was receiving outpatient treatment." Answering Br. 44. This is simply not the case. And again, Defendants argue that the allegations should be dismissed because they do not contain information that is impossible to obtain before discovery when the other party to the case is dead. *See* Answering Br. 43–44 ("[T]he complaint does not allege that Tucker informed []Taylor that he was suicidal during any of his disciplinary hearings....").

Similarly, Crane avers that Officer Cox knew, after entering his cell to argue with Tucker, and with Tucker placing the towel over the window of his cell shortly thereafter, that Tucker was at a heightened risk for suicide. R. 45. Rather than refute or accept the allegations as stated, Defendants merely point to a dearth of evidence that they know cannot be conceivably obtained prior to discovery. They argue that

Crane must provide further proof that Cox was "both [] aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and [he] must also draw the inference." Answering Br. 49 (quoting *Mata v Saiz*, 427 F.3d 745, 751 (10th Cir. 2005)). Once again, Defendants improperly rely on prior holdings that have reached the summary judgment stage, after a significant factual record had been developed to allow this Court to properly rule on a fact-specific inquiry. A plaintiff "need not prove his case on the pleadings." *Speaker v. U.S. Dep't of Health & Human Servs. Ctrs. for Disease Control & Prevention*, 623 F.3d 1371, 1386 (11th Cir. 2010); *see also Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011) (on motion to dismiss, question is "not whether [the plaintiff] will ultimately prevail."). Rather, it is enough that, construing inferences in her favor, Crane's allegations against Defendants set forth a plausible claim to relief.

II. The District Court Erred in Holding that Crane's ADA Claim Did Not Survive Death.

a) This Court should apply a uniform rule that ADA claims survive death.

The district court held that ADA claims do not survive death. R. 138. In so doing, it adopted the District of Utah's holding in *Allred v. Solaray*, 971 F. Supp. 1394, 1398 (D. Utah 1997), which applied state law regarding survival pursuant to 42 U.S.C. § 1988. *See also Rosenblum v. Colo. Dep't of Health*, 878 F. Supp. 1404, 1408 (D. Colo. 1994) (relied on by *Allred*, stating that "pursuant to 42 U.S.C. § 1988, the court must look to state law"). As Crane explained at length, importing the state

law rule of survival to an ADA claim ignores the plain text of § 1988, which expressly applies to a designated list of statutes of which the ADA is not a part. Opening Br. 19–23. It would also create a circuit split from several other federal appellate courts. *See Wheeler v. City of Santa Clara*, 894 F.3d 1046, 1054 (9th Cir. 2018); *Guenther v. Griffin Constr. Co., Inc.*, 846 F.3d 979, 982 (8th Cir. 2017); *Fleming v. U.S. Postal Serv. AMF O'Hare*, 27 F.3d 259, 262 (7th Cir. 1994). As these decisions have held, under the applicable federal common law rule of survival, ADA claims like Crane's survive death. Opening Br. 22–25.

On appeal, Defendants abandon their previous argument that this Court should adopt the holding of *Allred* and instead argue for the first time that another district court case taking a completely different approach "addresses and resolves these issues." Answering Br. 54 (citing *Nordwall v. PHC-LAS Cruces, Inc.*, 960 F. Supp. 2d 1200 (D.N.M. 2013)). *Nordwall* held that, contra *Allred*, the court should not adopt state law pursuant to 42 U.S.C. § 1988 but instead should create a uniform federal common law rule. 960 F. Supp. 2d at 1241. The content of this "federal common law rule," however, should be to look to state law, resulting in the same outcome. *Id.* Defendants' new argument on appeal would also create a circuit split from *Wheeler*, *Guenther*, and *Fleming*, all of which not only applied a uniform federal common law rule to govern survivability but also held that the content of the rule was that ADA claims survive death, without reference to state law. 894 F.3d at

1054; 846 F.3d at 982; 27 F.3d at 262. This argument is also forfeited, because Defendants have raised it for the first time on appeal. *See United States v. Miller*, 868 F.3d 1182, 1185 (10th Cir. 2017) ("The government has forfeited this argument by failing to raise it ... at any point during the proceedings below.").

Defendants argue that holding that ADA claims do not survive death would not frustrate the purposes of the statutes, Answering Br. 55, but they do not explain how. Answering Br. 57. Despite the broad remedial mandate of the ADA to stamp out disability discrimination, Defendants argue for a rule in which all disability discrimination that either resulted in death or was against the dying—no matter how severe the discrimination prohibited by the ADA—would become non-justiciable in jurisdictions where such causes of action abate upon death of a party. This would result in patchworked enforcement of the ADA, which Congress had designed as a "comprehensive national mandate" of "consistent" nationwide standards proscribing disability discrimination. 42 U.S.C. § 12101(b)(1), (3); Opening Br. 24–25. Defendants' proposed rule, if adopted, would lead to a sizeable number of plaintiffs dying without a remedy because "the path to trial for an ADA claim is often measured in years, not months." *Guenther*, 846 F.3d at 984 n.8. Future defendants may respond in kind by prolonging litigation with the hopes that a gravely ill plaintiff's claim will soon abate. *Id*.

Defendants also ignore this Court's three-step framework from *Smith v. Dep't of Human Servs.*, 876 F.2d 832, 835 (10th Cir. 1989), for determining which claims survive because they are remedial and which abate because they are penal. 876 F.2d at 835. They do so despite conceding that *Smith* remains good law.[1] This Court should follow the lead of its sister circuits and effectuate the explicit purpose of the ADA by applying a federal common law rule that claims under the ADA survive death.

b) Even if this Court were to incorporate state law, Crane's claim survives under Utah's survival statute.

If this Court incorporates state law, by adopting either Defendants' district court *Allred* argument or their appellate *Nordwall* argument, Crane's claim nonetheless survives. Utah's survival statute states, "A cause of action arising out of personal injury to the person, or death caused by the wrongful act or negligence of a wrongdoer, does not abate upon the death of the wrongdoer or the injured individual." Utah Code § 78B-3-107. Crane's claim arises out of the death of Tucker caused by alleged disability discrimination and is therefore clearly within the ambit of Utah's survival statute.

[1] Defendants write that this Court does not "need to resolve what Crane describes as 'tension' between this Court's more recent pronouncements in *Slade* and *Marks* and its earlier decision in *Smith*." Answering Br. 53.

Defendants, citing no authority, contest this obvious result on two grounds. First, they argue that "Crane's claims do not *arise out of a* wrongful death because her statutory claims, as pleaded, arise out of the alleged treatment of Tucker prior to his death." Answering Br. 60. But by definition, every claim alleging the death of a plaintiff as the result of legal liability will arise out of alleged treatment prior to the plaintiff's death; treatment after a plaintiff's death will not have caused her death. Second, Defendants argue that a plaintiff "could have made the same claims regardless of whether Tucker died." Opp. Br. 60. But this is true for a wide variety of torts that can cause either injury or death, including negligence, which is explicitly cited in the statute as not abating at death. According to Defendants' argument, a negligence claim related to, for example, exposure to toxic chemicals—despite the plain text of the statute—would abate upon death because the exposure was "prior to the plaintiff's death" and "could have" been brought regardless of whether the plaintiff died from the exposure or was merely injured. Crane's ADA claims therefore survive Tucker's death regardless of this Court's analytical approach.

III. Crane Plausibly Stated an ADA Claim.

a) Defendants abandoned any argument that Crane failed to plausibly state an ADA claim.

Defendants ignore Crane's authority holding that arguments abandoned on reply are forfeited, Opening Br. 29–30, and instead rely on the sole authority that a reply brief is optional, even though reply briefs are always optional, Answering Br.

65–66. But Defendants' ADA merits argument was truly abandoned in their reply brief before the district court: Defendants did not merely fail to restate the argument, but instead explicitly encouraged the court to make its decision solely on the basis of survivability, which it did. Their argument on the ADA, in its entirety, was:

> In researching for this Reply, the State Defendants discovered the following holding from a District of Utah case: "ADA claims do not survive a plaintiff's death under Utah's survival statute." Tucker's ADA claim does not survive his death. This ends the ADA matter.

R. 128. The district court agreed that this new and incorrect argument "end[ed] the ADA matter" and did not analyze Crane's ADA claim. R. 138. After Defendants abandoned their earlier arguments before the district court to spring a new and incorrect argument on the court on reply, this Court should not analyze the merits of Crane's ADA claim for the first time on appeal.

b) Tucker had a qualifying disability.

Even if this Court analyzes the merits of Crane's ADA claim for the first time, Crane clearly pleaded a qualifying disability. Her complaint described limitations—brain damage, intellectual disability, psychosis, and major depressive disorder—that qualify as physical or mental impairments by definition. See 28 C.F.R. § 35.108(b)(1)(ii) ("Physical or mental impairment means … [a]ny mental or psychological disorder such as intellectual disability … emotional or mental illness, and specific learning disability."). And the major life activities for which Crane alleged substantial impairment—caring for oneself, learning, concentrating,

working, and thinking—are explicitly listed as "major life activities" under the regulations implementing the ADA. 28 C.F.R. § 35.108(c)(1).

Defendants do not squarely address any of Crane's arguments or authority from her opening brief and instead suggest that the bar for establishing a qualifying disability is high. Answering Br. 62. They do so, however, by relying exclusively on authority that was explicitly abrogated by Congress in the ADA Amendments Act of 2008. Opening Br. 31–32 (explaining that Congress explicitly abrogated the Supreme Court's decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), which directly or indirectly is Defendants' only source of authority). Applying the correct legal standard as articulated in Crane's opening brief, Tucker clearly had a qualifying disability.

c) Crane plausibly alleged that Tucker's need for an accommodation was obvious.

Defendants fault Tucker for not attempting to obtain ADA accommodations through the prison. Answering Br. 63. But Defendants were aware of Tucker's serious disabilities, which were well-documented in the prison's records, and nevertheless refused to make reasonable modifications on the basis of those disabilities. Defendants simply ignore Crane's argument, at 36, that people with disabilities do not have to request accommodations if the need for an accommodation is obvious, *see* Answering Br. 63. This foundational aspect of ADA law is particularly compelling in the case of prison suicides, where prisoners who wish to

commit suicide are unlikely to request the sort of accommodations needed—such as a cell without a tie-off point or a hanging implement—to prevent their own death.

d) Crane plausibly alleged deliberate indifference.

Defendants fault Crane for not "alleg[ing] that any prison official responded to or treated Tucker differently than other non-mentally ill inmates." Answering Br. 64. This was precisely the problem. Defendants did nothing to accommodate Tucker's disabilities, even though his need for accommodations was obvious. Defendants argue that Crane advocates for a "free pass" for anyone with mental illness to act out without discipline, but this is of course not the case. The ADA only requires defendants to make reasonable accommodations for people with disabilities, not unreasonable ones. Here, Defendants do not argue that they made *any* accommodations at all in response to Tucker's mental illness and suicidality. Regardless, the reasonableness of an accommodation is a mixed question of law and fact and therefore inappropriate to be resolved on a motion to dismiss. *See Mason v. Avaya Commc'ns, Inc.,* 357 F.3d 1114, 1122 (10th Cir. 2004).

e) Crane plausibly alleged disability discrimination, not merely poor medical treatment.

Crane pleaded numerous failures to accommodate that cannot possibly be characterized as "purely medical" decisions: locking Tucker in a cell with a tie-off point and a hanging implement; failing to adequately monitor him; repeatedly placing him in long-term solitary confinement; designing solitary confinement units

without windows; and denying exercise and visitation and granting just one hour out of his cell every other day. Opening Br. 39–40 ("Purely medical decisions ordinarily do not fall within the ambit of the ADA" (quoting *Fitzgerald v. Corrs. Corp. of Am.*, 403 F.3d 1134, 1144 (10th Cir. 2005))). These are failures to accommodate a disability, not a failure of medical care.

Defendants ignore these arguments and instead point to a single quotation from this Court that "[c]laims based on a jail suicide are considered and treated as claims based on the failure of jail officials to provide medical care for those in their custody." Answering Br. 65 (quoting *Cox*, 800 F.3d at 1265). But *Cox* was evaluating an Eighth Amendment deliberate indifference claim, not an ADA claim, and this Court thus was not stating that the failure to accommodate a suicidal prisoner's disability was somehow carved out of the ADA's protections. Instead, in context it is clear that this Court was stating only that an Eighth Amendment claim for failure to prevent suicide is evaluated under the same deliberate indifference test as an Eighth Amendment claim for failure to provide medical care. *See Cox*, 800 F.3d at 1265; *see also Barrie v. Grand Cty.*, 119 F.3d 862, 866 (10th Cir. 1997) ("Because jail suicides are analogous to the failure to provide medical care, deliberate indifference has become the barometer by which suicide cases involving convicted prisoners as well as pretrial detainees are tested."). This uncontroversial statement about constitutional mens rea standards is irrelevant to the dispositive

issue for this ADA claim—that the failures to accommodate Tucker were not "purely medical" decisions that failed to treat his illnesses. Removing tie-off points and a hanging implement do not treat depression any more than a wheelchair ramp treats paralysis.

If this Court adopts Defendants' argument that all failures to prevent suicide are medical decisions, it would remove all claims involving incarcerated people dying by suicide from the ambit of the ADA. This would break from other appellate courts which have considered ADA claims after suicides by disabled plaintiffs, finding no such categorical bar. *See, e.g.*, *Smith v. Harris Cty.*, 956 F.3d 311 (5th Cir. 2020); *Vasquez v. Cty. of Santa Clara*, 803 F. App'x 100 (9th Cir. 2020).

CONCLUSION

Crane respectfully requests this Court to reverse the trial court's dismissal of her claims and remand to the district court.

Respectfully submitted this 26th day of October 2020.

/s/ Samuel Weiss

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Date: October 26, 2020

/s/ Samuel Weiss
Samuel Weiss

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I hereby certify that on October 26, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

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