No. 20-3879

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Marie Moderwell,
Plaintiff-Appellee,

v.

Cuyahoga County, Ohio et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, DISTRICT COURT CASE NO. 1:19-CV-00613

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff-Appellee Marie Moderwell respectfully requests oral argument because it will aid the Court in considering the legal issues implicated in this case, which involves the serious misconduct of high-level municipal executives and their subordinates.

INTRODUCTION

On June 20, 2018, Larry Johnson arrived at the Cuyahoga County Corrections Center ("CCCC") to await trial on allegations of petty theft. The conditions he encountered were grim. The CCCC was overcrowded and underserved. Inmates and detainees slept on mattresses on the floor. The facility was short nearly 100 correctional officers and a dozen medical personnel, depriving residents of supervision and medical care. Even food was in short supply: The CCCC had begun to ration food, and deliberately withheld food from individuals as punishment.

On June 29, 2018, four correctional officers—Defendants-Appellants Anter Miller, Ronald Channel, Joseph Johnston, and Kurt Emerson (the "Correction Defendants")—placed Mr. Johnson in solitary confinement for allegedly stealing food from the commissary. Each man knew that Mr. Johnson was suicidal. Each knew the conditions Mr. Johnson would experience in lockdown: confinement inside a small cell for 27 or more hours at a time; no access to necessities such as toilet paper and toothpaste; and isolation lasting up to 30 days without a hearing. They soon found Mr. Johnson hanging in his cell. He died two days later, at the age of 51.

This lawsuit followed. Shortly after Mr. Johnson's death by suicide, Marie Moderwell ("Plaintiff"), the administrator of Mr. Johnson's estate, brought claims

under 42 U.S.C. § 1983 against the various Cuyahoga County executives and officials involved in Mr. Johnson's death. The District Court dismissed some of her claims but found that several were plausibly pleaded and not barred by qualified immunity, allowing them to proceed to discovery.

That ruling was correct. The Correction Defendants' decision to place Mr. Johnson in solitary confinement for a minor infraction violated clearly established law. The Supreme Court has long held that, under the Due Process Clause, a pretrial detainee "may not be punished prior to an adjudication of guilt," which means that jail officials cannot impose disciplinary measures that are "excessive" relative to their "legitimate [] objective." *Bell v. Wolfish*, 441 U.S. 520, 535, 538-39 (1979)). This Court has squarely held that solitary confinement is an excessive punishment for non-violent infractions, especially for a mentally ill inmate like Mr. Johnson. *See J.H. v. Williamson Cnty.*, 951 F.3d 709, 717 (6th Cir. 2020), *cert denied*, --- S.Ct. ---, 2020 WL 6701106 (Nov. 16, 2020). That law was well settled by June 29, 2018, as this Court and others had made clear the risks of confining a suicidal detainee in disciplinary isolation. *See, e.g.*, *Linden v. Washtenaw Cnty.*, 167 F. App'x 410, 423-26 (6th Cir. 2006). The District Court properly allowed Plaintiff to proceed against those officials.

But the Correction Defendants were not the only actors at fault. Mr. Johnson's suicide stemmed from a broader crisis at the CCCC, which reached the

facility's top executives, including Defendants Armond Budish, Clifford Pinkney, George Taylor, and Brandy Carney (the "Executive Defendants"). Just six weeks before Mr. Johnson's death, the Cuyahoga County Council penned a letter to Budish describing the CCCC's conditions as a "life-or-death issue." Amended Complaint, RE55, Page ID #296 ¶ 59. That letter followed years of warnings about the conditions described above, including from the CCCC's nursing director, the correctional officers' union, and a medical supervisor who testified before the County Council. The year Mr. Johnson died, nearly one in 40 inmates and detainees in the facility attempted suicide—55 attempts at a facility housing 2400 individuals.

The Executive Defendants were well aware of the CCCC's crumbling conditions, yet they not only failed to take action (as their jobs required) but also made conditions worse: They pushed policies designed to overcrowd jails, and when those policies resulted in severe staff shortages, they encouraged liberally placing individuals like Mr. Johnson in solitary confinement. They fired the medical supervisor who drew the County Council's attention to the CCCC's nursing shortage. They knowingly acquiesced in the CCCC's policy of using food as punishment. And they failed to adequately train their subordinates, establishing a training curriculum with no provision for suicide prevention in a facility where suicide attempts were rampant. Those policies and practices, too, violated

established law. Indeed, the Ohio Attorney General has launched a criminal investigation into the conditions at CCCC, and several of the CCCC's most senior officials have already been indicted or pleaded guilty in connection with that probe.

In all, Plaintiff has far exceeded the threshold needed to survive Defendants' motion to dismiss. This Court has continually warned against granting qualified immunity at the motion-to-dismiss stage. *Marvaso v. Sanchez*, 971 F.3d 599, 605 (6th Cir. 2020). That warning applies with special force in this case, because Plaintiff's most relevant witness—Mr. Johnson—died by suicide and Defendants have otherwise obstructed Plaintiff's ability to obtain critical information. As the Ohio Attorney General continues to unearth damning facts about the criminal dysfunction at CCCC and the Executive Defendants' role in its crisis, Plaintiff too should have the benefit of discovery in support of her well-pleaded allegations.

For those reasons and more, the judgment of the District Court should be affirmed.

STATEMENT OF ISSUES

I. Whether the Correction Defendants violated clearly established law when they placed Mr. Johnson in solitary confinement as punishment for a minor infraction during his pretrial detention, without monitoring and without considering his suicidal tendencies.

II. Whether the Executive Defendants violated clearly established law when they implemented and maintained policies that created an unreasonable risk of inmate suicide, while acting with deliberate indifference to inmate safety.

STATEMENT OF THE CASE

I. Factual Background

On June 29, 2018, Mr. Johnson was found hanging in his cell at the CCCC. RE55 Page ID #298 ¶ 66. He died two days later. *Id.* #290 ¶ 38. Drawing all reasonable inferences in Plaintiff's favor, *Marvaso*, 971 F.3d at 605, the relevant facts leading to Mr. Johnson's death are as follows:

A. The Executive Defendants Establish Policies and Practices that Degrade CCCC Conditions

The CCCC is a correctional facility located in downtown Cleveland, Ohio. RE55 Page ID #278 ¶ 2; DOJ Report 5.[1] During all relevant periods, Armond Budish served as the Cuyahoga County Executive, where he exercised "final policymaking authority" over the operations at the CCCC. RE55 Page ID #279

[1] On November 21, 2018, the Department of Justice's U.S. Marshal's Office published the results of an investigation into the conditions at the CCCC. *See* Dep't of Justice, U.S. Marshal, *Quality Assurance Review: Cuyahoga County Correctional Center* (Oct. 30-Nov. 1, 2018), https://tinyurl.com/y7gcmzc4. Because the complaint incorporated the Department of Justice's Report by reference, RE55 Page ID #299-301 ¶ 72(a)-(x), this Court may properly consider its contents, *Ouwinga v. Beinstar 419 Plan Servs. Inc.*, 694 F.3d 783, 797 (6th Cir. 2012).

¶ 5. Brandy Carney, the Cuyahoga County Chief Safety and Protection Officer, was the member of Budish's staff with "responsibilit[y] for the [CCCC]." *Id.* #282 ¶ 10. The Cuyahoga County Sheriff's Department, meanwhile, directly "operate[d]" the CCCC, *see* DOJ Report 5, under the supervision of Clifford Pinkney, the Cuyahoga County Sheriff, and George Taylor, the Assistant County Sheriff, RE55 Page ID #273, #279-80 ¶¶ 6-7.

Throughout their tenure, the Executive Defendants implemented policies and practices that pushed the CCCC into a state of crisis. Beginning in 2015, the Executive Defendants began developing a policy referred to as "regionalization." RE55 Page ID #294-95 ¶¶ 52, 55. Under this policy, the County agreed to house inmates from surrounding communities in the CCCC, charging money to the various cities that sent the inmates. *Id.* #294 ¶ 52. In March 2018, the Executive Defendants oversaw the transfer of the City of Cleveland's inmates and detainees to the CCCC, *id.* #295 ¶ 56, raising capacity to nearly 140% its rated bed capacity. *See* DOJ Report 5 (noting facility had a rated bed capacity of 1,765 but it counted 2,420 inmates and detainees during its review); *see also* RE55 Page ID #299 ¶ 72(e).

With that influx of inmates, the already overwhelmed CCCC reached a breaking point. *Id.* #295-86 ¶¶ 57-61, #299-301 ¶ 72. The facility lacked adequate healthcare, staffing, and sanitation:

- The facility was short 96 correctional officers and 13 medical staff, *id.* #299 ¶ 72(f)-(g);

- Multiple healthcare personnel lacked proper licenses: four members of the medical staff had expired licenses, one had an expired CPR certification, one "Licensed Practical Nurse" had no license on file, and one medical technical assistant had no diploma, *id.* #300 ¶ 72(k);

- The facility employed no mental health nurse practitioner, *id.*;

- Comprehensive medical and mental health appraisals were not conducted within two weeks of an inmates' arrival, *id.* #301 ¶ 72(t);

- Detainees/inmates were regularly forced to sleep on mattresses on the floor, DOJ Report 4; and

- Detainee/inmate meals were found stored in an unused office area which "reeked of dead vermin," and rodents were observed running throughout the foodservice areas, DOJ Report 4, 36.

In all, 80% of detainees and inmates reported to investigators that there was inadequate food, healthcare, and sanitation at the facility. DOJ Report 2; RE55 Page ID #300 ¶ 72(m).

To compensate for staffing shortages, the Executive Defendants allowed CCCC officials to abuse solitary confinement. *See id.* #296 ¶ 60, #300 ¶ 72(p); DOJ Report 3. Under the facility's "Red Zone" lockdown system, RE55 Page ID #300 ¶ 72(p), inmates or detainees were placed in solitary confinement (called the "Restrictive Housing Unit" or the "Red Zone") for such minor infractions as "refusing a direct order from staff [or] … stealing or possession of stolen property," and would remain on lockdown for "up to 30 days" without a

disciplinary hearing. DOJ Report 39. While on lockdown, inmates/detainees were confined to their cells for periods of 27 or more hours consecutively, with no access to dayrooms, showers, telephones, or outside recreation areas. RE55 Page ID #300 ¶ 72(p). The cells lacked basic necessities, like toothbrushes, toothpaste, and toilet paper, DOJ Report 4, and no mental health treatment was provided to inmates so confined, RE55 Page ID #301 ¶ 72(w). The Executive Defendants knowingly acquiesced in this abusive policy. *Id.* #296 ¶ 60.

The Executive Defendants also oversaw other draconian policies at the CCCC. The warden of CCCC in 2018, Eric Ivey, implemented a policy of deliberately and intentionally "denying inmates food as punishment." *Id.*; *see also id.* #291 ¶ 42, #297 ¶ 65, #300 ¶ 72(*o*). Ivey and Kenneth Mills, the Director of Cuyahoga County Corrections, also enforced a practice of disregarding the complaints of inmates or detainees who alleged that they were suicidal, and regularly denied those inmates adequate medical care. *Id.* #302-303 ¶ 75. Again, the Executive Defendants knowingly acquiesced in those policies. *See id.* #293 ¶ 48, #302-315 ¶¶ 73, 75, 77, 87-88, 101.

Finally, the Executive Defendants failed to provide adequate training to CCCC employees in critical areas. *Id.* #300 ¶ 72(j), #303 ¶ 77. Correctional officers received only eight hours of training annually, instead of the 40 hours recommended by the Federal Performance-Based Detention Standards ("FPBDS").

DOJ Report 27. As a result, officers did not receive any annual training on medical emergencies or supervision of offenders. *Id.* Professional staff and support employees, meanwhile, received only two hours of training annually, instead of the 40 hours recommended by the FPBDS. *Id.* at 28. All of these staff lacked training on "supervision of detainees/inmates; signs of suicide risks; [and] suicide precautions." *Id.*

B. The Executive Defendants Understood the Risk Their Actions Posed

The Executive Defendants promoted those policies even as they appreciated that the CCCC "was already overcrowded and over[]capacity." RE55 Page ID #294 ¶ 53. In 2017, then-CCCC nursing director Marcus Harris complained to County officials about inmate health issues stemming from dangerously low staffing levels. *Id.* Mr. Harris stated that inmates were not being given critical healthcare, as a single nurse was conducting 100 intake assessments per day. *Id.* When the County failed to address his complaints, Mr. Harris resigned in protest. *Id.* That same year, the union representing the CCCC's guards and staff complained that there were serious health and safety problems at the facility. *Id.* #294-95 ¶ 54. The Executive Defendants knew about those complaints. *Id.* #295 ¶¶ 55-56.

In May 22, 2018, the Cuyahoga County Council held a meeting where they described the problems at the CCCC as "mission critical" and acknowledged that

the CCCC had been understaffed for "awhile." *Id.* #295 ¶ 57. During that meeting, a medical supervisor at the CCCC, Gary Brack, testified that the facility was experiencing a "nursing crisis," and that he had long requested additional nurses. *Id.* #295-96 ¶ 58. In response, "Budish … had Brack fired." *Id.*

On June 7, 2018, the County Council members sent a letter directly to Budish, in which they called the conditions at the CCCC a "life-or-death issue." *Id.* #296 ¶ 59. Budish responded to the letter the next day, but neither he nor any of the other Executive Defendants reconsidered their harmful policies or took any action to rectify the growing crisis, instead choosing to "deliberately ignore[] the issues." *Id.* #296 ¶¶ 59, 60.

The Executive Defendants were also aware of a pattern of inmate/detainee deaths in the years preceding Mr. Johnson's suicide. *Id.* #295-96 ¶¶ 56, 61. Between June and October 2016, six inmates died. DOJ Report 32. One was a confirmed suicide, but the cause of the remaining deaths are unknown, as Defendants failed to conduct mortality reviews. *Id.*; *see* RE55 Page ID # 300 ¶ 72(*l*), #312 ¶ 91(e). In the weeks before Mr. Johnson's death, at least one other CCCC inmate died from lack of medical care at the CCCC. RE55 Page ID #296 ¶ 61. The CCCC failed to conduct any post mortem review of that death, too. *Id.* From November 2017 to November 2018, at least 55 inmates attempted suicide and three died by suicide. DOJ Report 24.

The fallout from the CCCC's mismanagement has been historic. Since 2018, at least eleven current and former jail employees have been criminally charged as part of the Ohio Attorney General's Office's probe into the CCCC.[2] Ivey has pleaded guilty to obstructing an investigation into an inmate's death by deleting video surveillance. RE55 Page ID #291-92 ¶ 42. Since the Complaint was filed, an Ohio grand jury has indicted Mills for his role in creating "unsafe" conditions in the prison. *See* Opinion & Order, RE94, Page ID #697. The indictment included (i) one count of tampering with records; (ii) two counts of falsification for lying to the Cuyahoga City Council during the May 22, 2018, meeting[3]; and (iii) two counts of dereliction of duty for negligently failing to provide "adequate food" and "medical attention, thereby making the jail unsafe" from January 1, 2017 to November 14, 2018. Motion to Stay, RE73-4, Page ID #548-50 (October 23, 2019 Indictment).

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[2] Adam Ferrise, *Ex-Cuyahoga County Jail Director Indicted on New Charges that Accuse Him of Making Jail Unsafe During String of Inmate Deaths*, Cleveland.com (Oct. 23, 2019), https://tinyurl.com/ya7b9xf4.

[3] In a recent filing, prosecutors explained that Mills had lied "about his interactions with Budish in an attempt to protect Budish from taking the fall over [the] failed" regionalization policy. *See* Danielle Serino, *Former Cuyahoga County Jail Director Accused Of Hiding Safety Problems*, WKYC (June 15, 2020), https://tinyurl.com/ya297d2d.

C. The Correction Defendants Confine Mr. Johnson in Solitary Confinement and Fail to Monitor Him

On June 20, 2018, Mr. Johnson was placed in the CCCC while awaiting trial on allegations of petty theft. RE55 Page ID #297 ¶ 62. During his intake assessment, a nurse noted that Mr. Johnson was "likely a suicide risk because he had attempted to harm himself in the past." *Id.* ¶ 63. Neither that nurse nor any other CCCC staff provided any further treatment or took any protective action. *Id.*

Defendants Miller, Channel, Johnston, and Emerson were the guards and staff "directly responsible for [Mr. Johnson's] custody, supervision, and care." RE55 Page ID #296 ¶ 25. In that capacity, each of the Correction Defendants "had direct contact with [Mr. Johnson]," and each therefore understood he was at serious risk of suicide. *Id.*; *see also* RE55 Page ID #290 ¶ 39. Indeed, Mr. Johnson displayed "numerous signs and symptoms of an individual contemplating suicide" while incarcerated, which were "so obvious that even a lay person would easily recognize the necessity for a doctor's attention and/or further assessment and treatment." *Id.* #289 ¶ 36. Mr. Johnson also specifically stated he was suicidal to "nurses, staff, [and] guards" on June 23, 2018, and sought additional medical treatment. *Id.* 289-90 ¶¶ 37, 38 (noting Mr. Johnson was "reaching out for help"). Nothing was done.

Instead, Mr. Johnson was consigned to the CCCC's "horrific conditions," *see supra* at 6-9, where he was denied "access to adequate medical and mental

health care, hygienic conditions [and] movement." RE55 Page ID #292 ¶ 43; *see also id.* #293 ¶ 49 (noting Mr. Johnson faced "overcrowding, unhygienic conditions, movement restrictions, … and inadequate medical and mental health care"). Mr. Johnson also lacked sufficient access to "edible food," *id.* #292-93 ¶¶ 43, 49, and the food he was given was not properly stored or served in sanitary conditions, *id.* #297 ¶ 65; *see supra* at 7-8.

On June 29, 2018, Mr. Johnson allegedly tried to steal food from the commissary. RE55 Page ID #297 ¶ 65. To punish Mr. Johnson for that infraction, the Correction Defendants placed Mr. Johnson in "lock-up," i.e., the Restrictive Housing Unit. *See id.* Although the Defendants knew Mr. Johnson was a suicide risk, they imposed that punishment without providing any assessment, treatment, or referral to a doctor. *Id.* The Correction Defendants then left Mr. Johnson "alone and isolated for hours," failing "to check on him at regular intervals." *Id.* #290 ¶ 39.

The Correction Defendants found Mr. Johnson hanging in his cell at 10:00 p.m. that night. *Id.* #298 ¶ 66. Mr. Johnson died two days later, on July 1, 2018, at MetroHealth hospital. *Id.* ¶ 67.

II. Procedural History

On March 19, 2019, Plaintiff Marie Moderwell filed suit under 42 U.S.C. § 1983, which provides a cause of action against any "person who, under color of

any [state law], subjects or causes to be subjected" any person to a constitutional violation. *Id.* Plaintiff brought claims against two groups of defendants relevant to this appeal: (i) the Correction Defendants; and (ii) the Executive Defendants.[4]

A. The Correction Defendants

Ms. Moderwell brought three relevant claims against the Correction Defendants: First, she alleged that they acted with deliberate indifference to Mr. Johnson's serious medical needs, as they left him unsupervised in solitary confinement while aware that he was suicidal. *See, e,g.*, RE55 Page ID #290 ¶ 39, #305-306 ¶¶ 81-83. Second, she brought claims premised on supervisory liability. *See, e.g.*, *id.* #303-305 ¶¶ 76, 83. Third, she alleged that the Correction Defendants imposed "excessive force"—i.e. excessive punishment—as they placed him in solitary confinement for a minor infraction despite knowing he was suicidal. *See, e.g.*, *id.* #291 ¶ 41, #302 ¶ 74.

On January 14, 2020, the Correction Defendants moved for partial judgment on the pleadings. Motion for Partial Judgment, RE76, Page ID #580. In their supporting brief, Defendants did not challenge whether "they were deliberately indifferent to Plaintiff's medical needs or should be held liable on a supervisory

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[4] Plaintiff brought claims against other Cuyahoga County officials—including Kenneth Mills—which are not subject to this appeal. *See* Br. 4 n.1. Plaintiff also named Eric Ivey as a defendant, but later stipulated to his dismissal. Stipulated Dismissal, RE93 Page ID #694-95.

liability theory." Brief, RE76-1, Page ID #582. Instead, they moved to dismiss Plaintiff's other claims, including the claim for excessive punishment, on qualified immunity grounds. *Id.*

The District Court (Boyko, J.) denied the motion in relevant part. The Court first explained that established Supreme Court precedent held that "pretrial detainees cannot be subject to excessive force that amounts to punishment because they 'cannot be punished at all.'" Opinion & Order, RE97, Page ID #722-23 (quoting *Kingsley v. Hendrickson*, 576 U.S. 389, 400 (2015)). Drawing all reasonable inferences in Plaintiff's favor, the Court noted that Mr. Johnson had "communicated that he was suicidal to staff, guards and medical personnel," but that "the Correction Defendants placed [Mr. Johnson] in an isolated cell without regular monitoring as punishment." *Id.* at 720, 723. The District Court held that those allegations plausibly suggested that the Correction Defendants had imposed "excessive" punishment on a pretrial detainee, in violation of Mr. Johnson's rights under the Fourteenth Amendment. *Id.* at 722-23.

The Court also declined to grant qualified immunity. The doctrine of qualified immunity, it explained, protects "government officials performing discretionary functions," entitling such officers to immunity if their conduct does not violate "clearly established" law. *Id.* at 723 (quotations omitted). The question turns on what a "reasonable" official would have known, *id.* (quotations omitted),

but in this case, resolving Plaintiff's excessive punishment claim would require the Court to engage in a "fact-intensive inquiry," including weighing the punishment imposed against the Defendants' "need to manage the facility, to preserve internal order and discipline and to maintain institutional security." *Id.* at 722. The Court found it "inappropriate" to dismiss this claim on qualified immunity grounds at this stage of the proceeding. *Id.* at 724 (quoting *Courtright v. City of Battle Creek*, 839 F.3d 513, 518 (6th Cir. 2016)).

B. The Executive Defendants

Plaintiff also brought suit against the Executive Defendants, *see* RE55 Page ID #279-282 ¶¶ 5-7, 10, alleging that each of those defendants had propagated the policies leading to Mr. Johnson's inadequate mental healthcare (Count III), unconstitutional punishment in solitary confinement (Count II), and suicide (Count I). On January 14, 2020, Defendants moved to dismiss all counts based on qualified immunity. Motion, RE75 Page ID #562.

The District Court denied the motion to dismiss in relevant part. The Executive Defendants, the Court explained, played "key roles in implementing and maintaining the policies under which the [CCCC] operated, including the provision of medical services, the hiring of appropriate staff, and the maintenance of minimum sanitary and living conditions." Opinion & Order, RE96 Page ID #713. In that capacity, the Defendants promoted "plans to regionalize the County Jail,

which only exacerbated [extant] problems of overcrowding and understaffing and led to the neglect of inmates' health and safety needs." *Id.* The Defendants were also "each personally responsible for failing or refusing to initiate and maintain adequate training, supervision, and staffing; failing to maintain proper and adequate policies, procedures and protocols; and for ratifying the unlawful actions of [their subordinates] at the County Jail." *Id.* at #713-14.

The District Court held that the Executive Defendants pursued those policies with deliberate indifference. "An official is deliberately indifferent," it explained, "if he or she knows of and disregards an excessive risk to inmate health or safety." *Id.* at #712 (quoting *Bishop v. Hackel*, 636 F.3d 757, 766-67 (6th Cir. 2011)). That was the case here, as, among other things, the "May 2018 minutes from County Council meetings near in time to Larry Johnson's detention evidence[d] awareness by Defendant Budish and others of issues with staff, safety, and healthcare at the Cuyahoga County Corrections Center from 2017-2018 and years prior, including conditions that led to inmate suicides." *Id.* at #713.

In light of those holdings, the Court denied qualified immunity to the Executive Defendants. The Court held that if "the facts in the Amended Complaint are accepted as true, reasonable County and prison officials would have understood that overcrowding, combined with the failure to monitor and assess the physical and mental condition of detainees, could pose a risk to the detainees' health and

safety." *Id.* at #712. The Court thus deemed it inappropriate to "to dismiss on the basis of qualified immunity." *Id.* at #714 (quotations omitted).

SUMMARY OF ARGUMENT

"In order to overcome a defendant's qualified immunity defense at the motion to dismiss stage, a plaintiff must plausibly allege facts showing '(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct.'" *Marvaso*, 971 F.3d at 605 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). Plaintiff easily clears each requirement.

I. Plaintiff has plausibly alleged that the Correction Defendants violated clearly established Fourteenth Amendment law by imposing solitary confinement on a suicidal pretrial detainee.

A. The Supreme Court has long held that prison officials cannot punish a pretrial detainee for a disciplinary infraction in a manner that is "excessive" relative to the government's legitimate purpose. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). This Court recently applied that settled law, holding that prison officials violated the Fourteenth Amendment by imposing solitary confinement on a juvenile detainee with mental health issues, even where that detainee had threatened to physically attack other inmates. *J.H.*, 951 F.3d at 717. This case is even easier: prison officials imposed solitary confinement on a suicidal detainee

for allegedly stealing food, a punishment that was patently excessive relative to any legitimate purpose.

B. Mr. Johnson's constitutional rights were clearly established by the date of his death. For more than a decade, this Court has cautioned against placing a suicidal detainee in solitary confinement. *Linden*, 167 F. App'x at 425-26. Especially in light of the trivial nature of Mr. Johnson's offense, "no reasonable correctional officer could have concluded that [this punishment] … was constitutionally permissible." *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020) (per curiam).

C. The Correction Defendants' alternative arguments are unavailing, as they misunderstand Plaintiff's claim and the District Court's ruling.

II. The Executive Defendants violated clearly established law by promulgating and knowingly acquiescing in the policies that led to Mr. Johnson's death.

A. Plaintiff has plausibly alleged that the Executive Defendants' "acts and omissions" caused "the alleged constitutional injuries." *Campbell v. City of Springboro, Ohio*, 700 F.3d 779, 790 (6th Cir. 2012). Indeed, Plaintiff has offered three independent bases for supervisory liability:

1. First, the Executive Defendants promulgated and implemented the Regionalization Policy, which created jail conditions—including inadequate

medical care and supervision—that posed an unconstitutionally high risk to inmate safety, including a risk of suicide in particular.

2. Second, the Executive Defendants knowingly acquiesced in the unconstitutional policies of their subordinates, including policies that (i) encouraged placing inmates and detainees in solitary confinement for minor offenses; and (ii) denying adequate food to inmates as punishment.

3. Third, the Executive Defendants abdicated their specific job responsibilities, including by (i) failing to create suicide prevention policies; (ii) failing to supervise their direct subordinates, even as those officials were overseeing the CCCC in a criminal fashion; and (iii) failing to properly train their subordinates on suicide prevention.

B. Plaintiff has also plausibly alleged that the Executive Defendants promulgated and maintained those policies with deliberate indifference to inmate safety.

1. Plaintiff included detailed factual allegations showing that the Executive Defendants were well aware of a serious risk to inmate safety, as they had received repeated warnings to that effect from CCCC staff, medical personnel, and the Cuyahoga City Council.

2. The Executive Defendants do not dispute as much. Instead, they argue that they were not deliberately indifferent to *Mr. Johnson*'s safety, specifically.

But that is irrelevant. Under longstanding Supreme Court and Circuit precedent, "the correct inquiry is whether [an official] had knowledge about the substantial risk of serious harm to a *particular class of persons*, not whether he knew who the *particular victim* turned out to be." *Taylor v. Mich. Dep't of Corr.*, 69 F.3d 76, 81 (6th Cir. 1995).

C. The Executive Defendants alternatively argue that Mr. Johnson's constitutional rights were not clearly established. That argument is plainly wrong. Both as a matter of case law and common sense, the Executive Defendants were well aware that they could not promulgate or maintain policies that they *knew* created a risk of inmate suicide. *See Linden*, 167 F. App'x at 424-25.

D. Finally, to the extent the Executive Defendants question the adequacy of Plaintiffs' pleadings against each individual Defendant, they are mistaken. Plaintiff's Complaint pleads that the Executive Defendants acted in concert to violate Mr. Johnson's rights, and it is inappropriate to parse the Complaint more finely at the motion-to-dismiss stage.

STANDARD OF REVIEW

This Court has repeatedly stressed that a plaintiff faces a "low bar" to overcome a defendant's qualified immunity defense at the motion-to-dismiss stage. *Marvaso*, 971 F.3d at 605; *see also Courtright*, 839 F.3d at 518. Dismissal on that basis is "disfavored," and "this Court generally denies qualified immunity at

the motion to dismiss stage in order for the case to proceed to discovery, so long as the plaintiff states a plausible claim for relief." *Marvaso*, 971 F.3d at 606.

"This Court reviews *de novo* a district court's denial of a defendant's motion to dismiss on qualified immunity grounds." *Id.* at 605. "[W]hen evaluating a complaint's sufficiency, [it] accept[s] [the complaint's] factual allegations as true, draw[ing] all reasonable inferences in the plaintiff's favor." *Id.* The Court can "affirm on any basis supported by the record." *EA Mgmt. v. JP Morgan Chase Bank, N.A.*, 655 F.3d 573, 575 (6th Cir. 2011).

ARGUMENT

For decades, the Supreme Court has deemed it "settled that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). The Fourteenth Amendment's Due Process Clause extends protections at least as generous to a pretrial detainee like Mr. Johnson. *Troutman v. Louisville Metro Dep't of Corr.*, 979 F.3d 472, 482 n.8 & 483 (6th Cir. 2020).

Plaintiff plausibly alleged that both sets of Defendants violated clearly established Fourteenth Amendment law, and this Court should allow the complaint to proceed to discovery.

I. THE DISTRICT COURT PROPERLY DECLINED TO DISMISS ON QUALIFIED IMMUNITY GROUNDS PLAINTIFF'S FOURTEENTH AMENDMENT CLAIMS AGAINST THE CORRECTION DEFENDANTS

The Correction Defendants were the officials most directly responsible for Mr. Johnson's health and safety. On appeal, the Correction Defendants do not dispute that they were deliberately indifferent to Mr. Johnson's serious medical needs, including his suicidal tendencies. RE76-1 Page ID #582; *cf.* Br. 3, 7. Instead, they seek dismissal only of Plaintiffs' excessive discipline claim. Br. 3. Even as to that claim, the Correction Defendants do not dispute that Plaintiff has "plausibly alleged" that they "lock[ed] [Mr. Johnson] down in isolation as punishment, without monitoring and without consideration for his suicidal tendencies." RE97 Page ID #723-24.

Accordingly, the only questions on appeal are whether those alleged facts show "(1) that the [Correction Defendants] violated a … constitutional right" and (2) "that the right was clearly established." *Marvaso*, 971 F.3d at 605 (quotations omitted). The answer to both is yes.

A. The Correction Defendants Violated Mr. Johnson's Constitutional Right to Be Free from Excessive Punishment

"The Supreme Court established in *Bell v. Wolfish* that, under the due process clause, a [pretrial] detainee may not be punished prior to an adjudication of guilt." *J.H.*, 951 F.3d at 717. Under *Bell*, a prison restriction or condition

constitutes unconstitutional punishment if it is not "rationally related to a legitimate nonpunitive governmental purpose" or it "appear[s] excessive in relation to that purpose." 441 U.S. at 561; *accord Kingsley*, 576 U.S. at 398. That is precisely what happened here: the Correction Defendants imposed discipline on Mr. Johnson that was patently "excessive" in light of the minor infraction cited. *See Bell*, 441 U.S. at 561.

This Court recently reaffirmed those settled principles in *J.H.* There, the Court held that prison officials imposed excessive punishment by placing a pretrial detainee "in solitary confinement" in "direct response to … [a] disciplinary incident" involving threatening behavior. *J.H.*, 951 F.3d at 717. In so holding, the Court accepted that the prison officials had a "legitimate governmental purpose" when responding to the infraction, i.e., "maintaining institutional security and preserving internal order." *Id.* at 717-18 (quoting *Bell*, 441 U.S. at 546). But, just as *Bell* instructs, this Court held that a court must consider whether the plaintiff has plausibly alleged that "the discipline … was excessive" in relation to that interest. *Id.* at 718; *see also Bell*, 441 U.S. at 538-39.

To answer that question, a court must first consider the gravity of the discipline, *see Bell*, 441 U.S. at 542-43, bearing in mind the detainee's "known mental health issues," *J.H.*, 951 F.3d at 718. In *J.H.*, for instance, this Court faulted the correctional defendant for imposing solitary confinement on a juvenile

with a disorder that "often manifests in multiple psychiatric symptoms." *Id.* at 713, 719. "Placement of a mentally-ill detainee in solitary confinement," the Court explained, "raises genuine concern that the negative psychological effects of his segregation will drive him to self-harm," and thus makes segregation a "particularly harsh form of discipline." *Id.* at 718-719.

Those concerns apply with even greater force in this case. Plaintiff has alleged that the Correction Defendants were aware that Mr. Johnson was *suicidal*, RE55 Page ID #290 ¶¶ 39, an allegation they do not contest and that is taken as true, *see* RE76-1 Page ID #592. Mr. Johnson thus had grave "documented mental health issues [that] made him particularly vulnerable to the effects of solitary confinement." *J.H.*, 951 F.3d at 719. He was known to be prone to suicide specifically, and solitary confinement—especially without proper monitoring—poses an acute threat to suicidal inmates, as this Court has cautioned. *Linden*, 167 F. App'x at 423-26.[5]

[5] In *J.H.*, the Court also held that the plaintiff was vulnerable to solitary confinement because of his age, but it made clear that it did "not mean to imply that [that] factor[] … must be present for the imposition of solitary confinement to be unconstitutionally excessive under *Bell*." 951 F.3d at 720 n.2. For the reasons explained in the text, it suffices that Mr. Johnson's known suicidal tendencies made him "particularly vulnerable to the effects of solitary confinement." *Id.* at 719.

This Court also considers the severe "nature" of Mr. Johnson's confinement. *J.H.*, 951 F.3d at 719 (citing *Bistrian v. Levi*, 696 F.3d 352, 374 (3d Cir. 2012)); *cf. Bell*, 441 U.S. at 543. In *J.H.*, the Court stressed the gravity of housing an inmate "in an eleven-by-seven-foot cell where he was not allowed to interact with any other juveniles." *Id.* It explained that "even a few days of solitary confinement will predictably shift the electroencephalogram (EEG) pattern toward an abnormal pattern characteristic of stupor and delirium." *Id.* But at least in that case, J.H. was granted "short daily visits with his parents" (later changed to weekly visits), and officials allowed J.H. limited time in a recreation yard and in the T.V. room. *Id.* at 714.

Mr. Johnson's confinement was more extreme. Not only was Mr. Johnson isolated from his fellow inmates, but the Correction Defendants understood that under the CCCC's "Red Zone" initiative, Mr. Johnson would be confined for up to 30 days in solitary confinement before his first disciplinary hearing. *See* DOJ Report 41 (stating CCCC policy). During that time, he would be left alone in his cell for "27+ hours" at a time, precluded from accessing "dayrooms, showers, telephone, and outside recreation," and denied access to basic necessities like a tooth brush, toothpaste, and toilet paper. *See supra* at 7-8. This Court could find

Mr. Johnson's punishment excessive based on the "nature" of his confinement alone. *See J.H.*, 951 F.3d at 720 n.2 (citing *Bistrian*, 696 F.3d at 374).[6]

Finally, this Court "weigh[s]" the correction officials' interests in the discipline imposed. *Id.* at 719; *Bell*, 441 U.S. at 538-39. In *J.H.*, prison officials isolated J.H. because he had "destroyed property, punched a window, and verbally threatened [other juveniles] with sexual assault if they reported his conduct." *Id.* at 714. The prison officials argued that J.H. was a "threat to himself and others," requiring them to house him separately to "protect the juvenile detainee population." *Id.* at 725, 727-28 (Readler, J., concurring in part and in the judgment). This Court nevertheless thought it "apparent that his punishment was disproportionate in light of the stated purpose of maintaining institutional security" because the juvenile had not yet "physically injur[ed] another detainee" and the infraction involved only a "single incident." *Id.* at 719 (quotation omitted).

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[6] Mr. Johnson did not ultimately spend an extended period on lockdown, as he died shortly after the Correction Defendants imposed the punishment. But that does not diminish the seriousness of his punishment *ex ante*, when Defendants selected a punishment that they understood imposed extreme conditions, including a potentially lengthy confinement, DOJ Report at 39. A defendant who elects to punish an inmate with a disproportionate penalty cannot escape liability simply because the inmate dies by suicide before the punishment is complete. *See Kingsley*, 576 U.S. at 399 ("[A] court must judge the reasonableness of the [punishment] from the perspective and with the knowledge of the defendant officer.").

If the issues in *J.H.* were not weighty enough to warrant solitary confinement, it follows *a fortiori* that the punishment in this case was excessive. The Correction Defendants punished Mr. Johnson because (at most) he "allegedly tr[ied] to steal food from the commissary." RE55 Page ID #297 ¶ 65. That "single incident" did not justify the severe penalty of solitary confinement for a suicidal inmate. *J.H.*, 951 F.3d at 719; *see* Page ID #290 RE55 ¶ 37 (alleging Defendants acted with "no legitimate reason"). Mr. Johnson did not destroy property or physically threaten anyone, much less "physically injur[e] another detainee," which made his removal from the general population even more a mismatch for his alleged offense than in *J.H.* *See* 951 F.3d at 719.

The Correction Defendants' punishment is all the more egregious in light of Mr. Johnson's apparent motivation for stealing food: The Defendants had systematically denied Mr. Johnson and other individuals housed in the facility access to adequate sustenance. DOJ Report 3, 38. As explained below, that policy alone is a constitutional violation. *Clark-Murphy v. Foreback*, 439 F.3d 280, 292 (6th Cir. 2006); *see infra* at 42. There can be no justification for placing a suicidal detainee in solitary confinement because he stole food to meet his "basic human needs." *Clark-Murphy*, 439 F.3d at 292 (quotations omitted). The Correction Defendants' decision to do so violated the Fourteenth Amendment.

B. The Correction Defendants Are Not Entitled to Qualified Immunity

The Correction Defendants maintain that they did not violate any clearly established law by "placing a [suicidal] pretrial detainee in disciplinary isolation without regular monitoring." Br. 15. Indeed they did.

A clearly established right is one whose contours are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir. 2003) (citation omitted). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal citations omitted). "In evaluating whether a constitutional right was clearly established, [t]he key determination is whether a defendant … was on notice that his alleged actions were unconstitutional." *Stoudemire v. Mich. Dep't of Corr.*, 705 F.3d 560, 568 (6th Cir. 2013) (quotations omitted).

It was well established by 2018 that a pretrial detainee could not "be punished prior to an adjudication of guilt." *Bell*, 441 U.S. at 535. For more than four decades, the Supreme Court has held that jail officials could not impose "excessive" discipline on pretrial detainees. *Id.* at 539. The Court reaffirmed in 2015 that a pretrial detainee can establish liability by showing that the "challenged

governmental action … is excessive in relation to [its stated] purpose." *Kingsley*, 576 U.S. at 398. Accordingly, by 2018, courts of appeals had regularly held that correction defendants violated a pretrial detainee's rights by placing him in solitary confinement without sufficient justification.[7]

True, there may be some cases that present the question whether a "reasonable official would understand" that solitary confinement was excessive in relation to its legitimate purpose. *See Feathers*, 319 F.3d at 848 (quotations omitted). That was so in *J.H.*, where this Court granted qualified immunity at the summary judgment stage because "[m]any of the cases recognizing what a punishing experience placement in solitary confinement can be—especially for juveniles and those with mental health issues—[were] issued after *2013*." 951 F.3d at 720 (emphasis added).

But the question is not close here, for four reasons. First, while the gravity of placing juveniles or mentally ill detainees in solitary confinement may have been unsettled in 2013, the risks of placing a *suicidal* inmate in solitary

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[7] *See, e.g.*, *Quintanilla v. Bryson*, 730 F. App'x 738, 747 (11th Cir. 2018) ("Arbitrary placement in [administrative segregation] surely constitutes the gratuitous infliction of suffering in violation of the Eighth Amendment."); *Hiser v. Nev. Dep't Of Corr.*, 708 F. App'x 297, 300 (9th Cir. 2017) (violation to place detainee in "solitary confinement without a legitimate purpose"); *Magluta v. Samples*, 375 F.3d 1269, 1277 (11th Cir. 2004) (clearly established that defendants could not impose solitary confinement "for no reason at all except punishment").

confinement were "beyond debate" even then. *Ashcroft*, 563 U.S. at 741. This Court held as early as 2006 that a "reasonable person with [] knowledge of [a detainee's suicidal tendencies] would not have transferred [him] into a solitary cell." *Linden*, 167 F. App'x at 425-26. In so holding, it made clear that placing a suicidal detainee in isolation could "aggravate[]" his "suicidal tendencies," thereby "endanger[ing] [his] life." *Id.* at 425. The Court reaffirmed the same principle just five months before the events at issue here. *See Finley v. Huss*, 723 F. App'x 294, 298 (6th Cir. 2018). Defendants were therefore "on notice" that housing a suicidal detainee in solitary confinement was inappropriate. *Stoudemire*, 705 F.3d at 568.

Second, the risks of solitary confinement—even for nonsuicidal inmates—were well known by June 29, 2018, as almost all of the cases this Court cited in *J.H.* were issued by that date. The Third Circuit, for instance, had recognized the "growing consensus" that solitary confinement can cause "severe and traumatic psychological damage," documenting the "high rates of suicide and self-mutilation amongst inmates who have been subjected to solitary confinement." *Palakovic v. Wetzel*, 854 F.3d 209, 225-26 (3d Cir. 2017) (quotations omitted); *see also Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d 549, 566 (3d Cir. 2017) (citing the "robust body of scientific research on the effects of solitary confinement"). Likewise, by 2018, Justice Kennedy had issued his influential concurrence in *Davis v. Ayala*, explaining the "new and growing awareness in the broader public"

on solitary confinement, and the "human toll" it entails. 576 U.S. 257, 287, 289 (2015) (Kennedy, J., concurring). Other authorities agreed that the traumatic effects of confinement were "well-known and amply documented." *United States v. D.W.*, 198 F. Supp. 3d 18, 91 (E.D.N.Y. 2016) (quotations omitted).

Third, in *J.H.*, the prison officials had identified a serious countervailing interest in confinement. *J.H.*, 951 F.3d at 729. Not so here. The Correction Defendants ordered solitary confinement without any basis to believe that "the conditions of [Mr. Johnson's] confinement were compelled by necessity or exigency." *Taylor*, 141 S. Ct. at 54 (summarily reversing the Fifth Circuit's decision granting qualified immunity); RE55 Page ID#290 ¶ 37. Indeed, federal regulations directly advised correctional officers that solitary confinement should be used only in cases "involv[ing] violence, escape or a threat to institution safety." DOJ Report 40. Under the circumstances, "no reasonable correctional officer could have concluded that … it was constitutionally permissible" to impose solitary confinement. *Taylor*, 141 S. Ct. at 53.

Finally, in *J.H.*, this Court considered an appeal from a motion for summary judgment, not a motion to dismiss. But this Court has cautioned, again and again, that it is "generally inappropriate for a district court to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity." *Wesley v. Campbell*, 779 F.3d 421,

433 (6th Cir. 2015) (collecting cases).[8] That is especially so in this case, as Plaintiff has not yet had the opportunity to directly probe Defendants' knowledge and intent in imposing this punishment. Nor has Plaintiff taken discovery into "the prior experience" of those Defendants, which will illuminate their awareness of the punishment's excessive nature. *Palakovic*, 854 F.3d at 232-33. Especially at this stage of the proceedings, the District Court correctly held that qualified immunity was improper.

C. The Correction Defendants' Remaining Counterarguments Are Unavailing

The Correction Defendants offer a slew of additional arguments in favor of reversal. None persuades.

First, the Correction Defendants criticize the District Court for holding that prison officials cannot employ "punishment against a pretrial detainee." Br. 8; *see also* Br. 16. But that is exactly what the Supreme Court and this Court have held: "a detainee may not be punished prior to an adjudication of guilt." *Bell*, 441 U.S.

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[8] For that reason, Defendants' cited cases (Br. 10) considering qualified immunity at the summary judgment stage are inapposite. *Compare Marvaso*, 971 F.3d at 605 (describing the "low bar" to survive a qualified immunity defense at the motion-to-dismiss stage), *with Beck v. Hamblen Cnty., Tenn.*, 969 F.3d 592, 599 (6th Cir. 2020) (describing the "high bar" at the summary judgment stage); *White v. Pauly*, 137 S. Ct. 548, 549 (2017) (per curiam) (similar).

at 535; *see also Kingsley*, 576 U.S. at 400 ("[P]retrial detainees (unlike convicted prisoners) cannot be punished at all[.]"). That is not to say, of course, that the Fourteenth Amendment "categorically prohibit[s] discipline imposed by jail officials for infractions committed while in pretrial detention." *J.H.*, 951 F.3d at 717. But the Fourteenth Amendment *does* preclude prison officials from adopting disciplinary measures against pretrial detainees that are "excessive" in relation to the infraction. *Id.* The District Court correctly held that Mr. Johnson had pleaded adequate facts to support that latter theory. *See supra* Part I.A.

Second, the Correction Defendants suggest that Mr. Johnson was required to plead that they used physical force against him. Br. 13, 15-16. Not so. The Supreme Court, as explained, has made clear that *any* form of discipline can be "excessive," regardless of whether it involves physical restraint or violence. *J.H.*, 951 F.3d at 717-18 (citing *Bell* and *Kingsley*).[9] While the Court in *Kingsley* considered allegations that prison officers had used inappropriate physical force, 576 U.S. at 392-93, the same analysis applies to any prison restriction that

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[9] For this reason, the phrase "excessive force" is something of a misnomer, as the true question is "whether the *discipline* [imposed] was excessive." *J.H.*, 951 F.3d at 718 (emphasis added). While both the District Court and parties have referred to this claim as an "excessive force" claim, the Complaint and briefing below described the relevant misconduct as the Correction Defendants' unwarranted punishment. *See* RE55, ¶¶ 42, 65; Opposition to Motion to Dismiss, RE80 Page ID #635-36.

"amount[s] to punishment," including prison policies like "double-bunking" or a "prohibition against receipt" of packages. *Bell*, 441 U.S. at 541-43, 550-51; *see also Kingsley*, 576 U.S. at 398. The District Court therefore correctly focused on whether the Correction Defendants' actions "amount[ed] to punishment" in light of the need "to preserve internal order and discipline," rather than whether their actions involved physical force. RE97 Page ID #722-23.

Third, Defendants suggest in a footnote that "Plaintiff's claim is technically a deliberate indifference claim," rather than a standalone claim for excessive discipline. Br. 15 n.4. Not so. Plaintiff brought two distinct claims against the Correction Defendants. First, as explained, she alleged that the Correction Defendants were liable for their deliberate indifference to Mr. Johnson's serious medical need, i.e., his suicidal tendencies. *See supra* at 14. That deliberate indifference claim remains pending below, as Defendants did not move to dismiss it, and they do not press any arguments related to it on appeal. *See id.* at 14-15. Second, Plaintiff brought a separate claim for excessive punishment, a distinction Defendants necessarily appreciated in moving to dismiss only the excessive punishment claim below, RE76-1 Page ID #582. That claim, as explained, alleges that Mr. Johnson's placement in solitary confinement was an unconstitutionally excessive punishment, and it can proceed independently of whether the Correction

Defendants also were deliberately indifferent to Mr. Johnson's suicidal tendencies. *See Kingsley*, 576 U.S. at 398.

The district court appropriately confined its analysis to the claim that defendants had moved to dismiss, evaluating whether the defendants used "excessive force that amounts to punishment." RE97 Page ID #722-23. True, in this particular case, the two claims share a common factual predicate: Defendants' awareness that Mr. Johnson was suicidal makes his excessive punishment claim a particularly strong one.[10] But the two claims are distinct, the district court treated them as such, and they should be allowed to proceed separately.

II. THE DISTRICT COURT PROPERLY DECLINED TO DISMISS ON QUALIFIED IMMUNITY GROUNDS PLAINTIFF'S FOURTEENTH AMENDMENT CLAIMS AGAINST THE EXECUTIVE DEFENDANTS

Mr. Johnson's death was the immediate result of the Correction Defendants' actions, but it was also the direct—and predictable—result of the CCCC's policies and practices. There is no dispute that those policies "resulted in Mr. Johnson's constitutional rights being violated." Br. 22. The only question is whether the

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[10] Indeed, the fact that Defendants will need to participate in similar discovery regardless of the outcome of this appeal further diminishes their arguments for avoiding litigation of the excessive punishment claim. *Cf. Harlow v. Fitzgerald*, 457 U.S. 800, 817-818 (1982) (explaining that the purpose of qualified immunity is to protect active government officials from "the burdens of broad-reaching discovery").

Executive Defendants can be held liable for supervising that constitutional injury—and the answer is yes.

To state a claim for supervisory liability, a plaintiff must plead a "causal connection between [the supervisor's] acts and omissions and the alleged constitutional injuries." *Campbell*, 700 F.3d at 790. In a prison suicide case, a plaintiff can plead that connection by alleging that the defendant supervisor (i) was "responsible for the policies … that gave rise to an unreasonable risk" of suicide (or other constitutional injury) and (ii) adopted or maintained those policies with deliberate indifference to that risk. *See Palakovic*, 854 F.3d at 241 n.10. Plaintiff has plausibly pleaded both prongs.[11]

A. The Executive Defendants Created an Unreasonable Risk of Constitutional Injury

The Executive Defendants created an unreasonable risk of harm to detainees in three independent ways: (1) they promulgated the Regionalization Policy, which strained CCCC resources to the point of crisis; (2) they knowingly acquiesced in the unconstitutional policies of their direct subordinates at the CCCC; and (3) they abandoned their job responsibilities, failing to enact reasonable policies or

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[11] In the District Court, the parties addressed separately a "supervisory liability" claim and a "deliberate indifference" claim. RE96 Page ID #709-14. But because all of Plaintiff's claims against the Executive Defendants arise through their roles as supervisors, and all claims require Plaintiffs to establish deliberate indifference, Plaintiff considers them together here.

appropriately supervise and train their direct subordinates. Plaintiff could state a claim for supervisory liability based on any one of those allegations. These failings, alone and together, make the case for supervisory liability overwhelming.

1. *The Executive Defendants Devised and Implemented the Regionalization Policy*

The most obvious way for supervisory liability to attach is where a "supervisor [directly] implements an unconstitutional policy." *Taylor*, 69 F.3d at 81 (citing *Redman v. Cnty. of San Diego*, 942 F.2d 1435, 1446-47 (9th Cir. 1991)). That is the case when a supervisor (i) "creates, promulgates, [or] implements" a policy; and (ii) the enforcement of that policy "(by the defendant-supervisor or her subordinates) … 'subjects, or causes to be subjected' [the] plaintiff 'to the deprivation of any rights ... secured by the Constitution.'" *Dodds v. Richardson*, 614 F.3d 1185, 1200-01 (10th Cir. 2010) (quoting 42 U.S.C. § 1983)).

In this case, the Executive Defendants implemented the principal policy responsible for the "unreasonable risk of [Mr. Johnson's] suicide": the Regionalization Policy. *See Palakovic*, 854 F.3d at 234. Pursuant to that policy, the Executive Defendants "intentionally overcrowd[ed]" the CCCC by bringing additional inmates to a facility that was already operating above capacity. *See* RE55 Page ID#292 ¶ 43; *supra* at 6. Budish spearheaded the effort, RE55 Page ID #294 ¶ 52, but the other Executive Defendants—Pinkney, Taylor, and Carney—all played a role in creating and implementing the policy at the CCCC, *id.* #295 ¶ 55.

The Regionalization Policy strained CCCC's resources to the point that the facility could not provide adequate medical or mental healthcare to its inmates. In particular, the Policy left the CCCC short a dozen medical officials, forcing the facility to rely on nurses and medical staff with outdated credentials or no licenses at all. *See supra* at 7. Because the staff was strained, the facility did not conduct comprehensive medical and mental health appraisals within two weeks of an inmate's arrival. RE55 Page ID #301 ¶ 72(t). Even initial intake assessments were rushed, as a single nurse conducted more than one hundred assessments per day. *Id.* #294-95 ¶ 54. That meant that when Mr. Johnson arrived at the CCCC and was identified as a suicide risk, the facility did nothing to further assess his condition, much less provide the basic treatment or mental healthcare that the Constitution requires. *Id.* #297 ¶ 63. Likewise, staff ignored Mr. Johnson's cries for "help[]," even as he repeated that he was suicidal and requested medical attention. *Id.* #289-90 ¶¶ 37-38.

Moreover, the regionalization policy created an unreasonable risk of suicide by leaving Mr. Johnson (and other inmates like him) without adequate supervision while incarcerated. The Regionalization Policy left CCCC short 96 correction officers, or nearly 15% of its staff. *Id.* #299 ¶ 72(f); DOJ Report 29. In light of that inadequate staffing, correction officers could not personally supervise inmates and detainees at regular intervals. Instead—and as discussed below—the facility

developed a policy of leaving inmates and detainees alone in solitary confinement for extended periods, apparently to reduce the burden of supervising inmates in the recreation yard or television room. *See infra* at 41-42; DOJ Report 3. That was true in Mr. Johnson's case, as the Defendants placed him in solitary confinement for a minor offense and then failed to monitor him at all. *See supra* at 13. The constitutional injury Mr. Johnson suffered thus traces directly to the Regionalization Policy, which forced the CCCC to adopt its draconian lockdown policies in the first instance.

2. *The Executive Defendants Knowingly Acquiesced in Their Subordinates' Unconstitutional Policies*

Plaintiff may also establish supervisory liability by plausibly alleging that an official "knowingly acquiesced in the unconstitutional conduct of the offending subordinate[s]." *Troutman*, 979 F.3d at 487-88 (quotations omitted).[12] That will be so where the supervisor is aware of an unconstitutional policy or practice and implicitly endorses it, including by knowingly "allow[ing] the continuance of such a policy or custom." *Brock v. Wright*, 315 F.3d 158, 165 (2d Cir. 2003) (quotations omitted); *Dodds*, 614 F.3d at 1199 (supervisory liability appropriate

[12] The Complaint also alleges that Defendants "authorized[or] approved" their subordinate's unlawful policies. RE55 Page ID #279-82 ¶¶ 5-7, 10. They are liable on that additional basis, but for purposes of this motion to dismiss, Plaintiff need plead only that the Defendants "knowingly acquiesced" in the policies. *Troutman*, 979 F.3d at 487-88.

where official "possesses responsibility for the continued operation of a[n unconstitutional] policy"). The Complaint plausibly alleges that each of the Executive Defendants "authorized, approved, or knowingly acquiesced" in policies that created an unreasonable risk to inmate safety, including the risk of suicide. RE55 Page ID #279-282 ¶¶ 5-7, 10. Those policies included, among others:

The Red Zone Policy. The Executive Defendants knowingly acquiesced in the CCCC's Red Zone Policy, which increased the use of "solitary confinement" as "unwarranted punishment" for minor infractions. *See* RE55 Page ID #291 ¶ 42, #296 ¶ 60, #300 ¶ 72(p). Shortly after Mr. Johnson's death, the Department of Justice reviewed the CCCC's "Inmate Discipline policy and procedure" and found it facially deficient, as it authorized solitary confinement for minor violations like "refusing a direct order from staff or … stealing or possession of stolen property," DOJ Report 5. Worse still, the Red Zone policy also dictated severe conditions of confinement for detainees on "lock down," requiring detainees be held alone in their cells for more than 27 straight hours without access to showers, recreation, or telephones. RE55 Page ID #300 ¶ 72(p).

For reasons explained in detail above, that policy was unconstitutional, at least as applied to suicidal pretrial detainees. *See supra* Part I.A. In this case in particular, the policy caused Mr. Johnson to be held in disciplinary isolation for the petty infraction of stealing food, and it ensured that the conditions he met in

solitary confinement were "horrific." RE55 Page ID #292 ¶ 43. While the Correction Defendants bear individual responsibility for executing a policy that violated clearly established law, *see supra* Parts I.A, I.B, the Executive Defendants are also liable for knowingly acquiescing in the policy. *See* 42 U.S.C. § 1983 (applying to any person that "subjects[] or *causes to be subjected* … 'to the deprivation of any rights ... secured by the Constitution'") (emphasis added).

The deliberate denial of food as punishment. Moreover, the Executive Defendants authorized or knowingly acquiesced in the CCCC's systematic failure to provide "edible food" to inmates, RE55 Page ID #292-93 ¶¶ 43, 49, including the CCCC warden's policy and/or practice of denying food to inmates as punishment, *see supra* at 7-8. That policy was unconstitutional in its own right, as "it should come as no surprise that [Mr. Johnson] had a clearly established right not to be deprived of food and water." *Clark-Murphy*, 439 F.3d at 292. It also unreasonably increased the risk of inmate suicide, making the conditions inmates faced in prison all the more horrific. In Mr. Johnson's case, the policy played a particularly direct role in his death, RE55 Page ID #296 ¶ 60, as he was placed in solitary confinement precisely because he attempted to steal the type of "edible food" that he otherwise lacked, *id.* #297 ¶ 65; *see supra* at 13, 28. The Executive Defendants are liable for this policy, too.

3. *The Executive Defendants Abandoned the Duties of Their Positions*

The Executive Defendants also failed to take the actions required by their jobs to reduce the unreasonable risk of suicide to inmates. While this Court will not hold supervisors liable based only "on a *respondeat superior* theory," a supervisor may be held liable for "abandon[ing] the specific duties of [his or her] position" or "abdicat[ing] his or her job responsibilities." *Troutman*, 979 F.3d at 487 (quoting *Taylor*, 69 F.3d at 81). In such instances, a supervisor's "corrective inaction amounts to deliberate indifference to or tacit authorization of the violative practices." *Luckert v. Dodge Cnty.*, 684 F.3d 808, 817 (8th Cir. 2012); *see also Beers-Capitol v. Whetzel*, 256 F.3d 120, 134 (3d Cir. 2001) (holding that the "risk of constitutionally cognizable harm [may be] so great and so obvious that the risk and the failure of supervisory officials to respond will alone support" liability (quotations omitted)).

This Court's decision in *Campbell* is instructive. The plaintiffs in that case filed suit under § 1983 against a chief of police after a police dog (Spike) in the department's canine unit attacked them. *Campbell*, 700 F.3d at 782. The police chief himself was "not actively involved" in the incident, but this Court discerned a "causal connection between his acts and omissions and the alleged constitutional injuries." *Id.* at 790. In particular the chief: (i) had allowed the dog into the field after his training lapsed; (ii) "never required appropriate supervision of the canine

unit and essentially allowed it to run itself"; (iii) "failed to establish and publish an official K-9 unit policy;" and (iv) was "seemingly oblivious to the increasing frequency of dog-bite incidents involving Spike." *Id.*

The Executive Defendants' dereliction of duties were even more substantial. For one thing, they failed to put in place reasonable policies to prevent suicide or provide adequate mental healthcare, despite their direct responsibility to do so. *See, e.g.*, RE55 Page ID #293 ¶ 48, #306-310 ¶¶ 98-87. Liability is proper on that basis alone. *Campbell*, 700 F.3d at 790; *Taylor*, 69 F.3d at 81 (holding supervisor liable for "his failure to adopt reasonable policies to insure that the transferees were not placed in grave danger of rape"); *Luckert*, 684 F.3d at 823-24 (supervisory liability where official "failed to make a single revision to [prison' suicide prevention policy" despite awareness of serious risk).

More egregiously, the Executive Defendants failed to provide "appropriate supervision" of the prison and "essentially allowed it to run itself." *Campbell*, 700 F.3d at 790. In the mine-run prison conditions case, executive officials like Defendants can escape liability so long as they put "procedures in place calling for others to pursue the matter." *Wharton v. Danberg*, 854 F.3d 234, 242 (3d Cir. 2017) (quotation omitted). But in some cases, a prison in crisis "may require bureaucratic solutions from top management," as action by "top administrators" is "the only effective way to reduce the overall risk of unconstitutional error." *Id.*

This is one of those cases. The official that the Executive Defendants placed at the helm of CCCC—Kenneth Mills—was allegedly performing his duties in a criminal manner. He has since been indicted for jeopardizing inmate safety by failing to provide "adequate food" and "medical attention." RE73-4 Page ID #549-50. Likewise, the CCCC's warden, as explained, was endangering inmate and detainees by implementing a slew of unconstitutional (and unconscionable) policies, including withholding food as punishment. *See supra* at 7-8. He, too, has pleaded guilty to a misdemeanor for covering up the prison's failure. RE55 Page ID #292-92 ¶ 42. The result was a prison system in chaos: inmates slept on mattresses on the floor, food was stored in offices that reeked of vermin, rodents roamed the cafeteria, and nearly 80% of detainees and inmates reported to the Department of Justice that there were inadequate medical and mental healthcare services. *See supra* at 6-7. Under those extreme circumstances, the "problem [would] not likely be resolved unless [the Executive Defendants] addresse[d] it," as there were no superior officers left to intervene. *Wharton*, 854 F.3d at 242 (quotation omitted).

Finally, the Executive Defendants are liable for their "failure to train the corrections officers" and other direct subordinates. *Walker v. Norris*, 917 F.2d 1449, 1455-56 (6th Cir. 1990) (quotations omitted; brackets omitted). To bring a failure-to-train claim against a supervisor in his or her individual capacity, a

plaintiff in a prison suicide case must (1) "identify specific training not provided that could reasonably be expected to prevent the suicide that occurred" and (2) plead "that the failure of those responsible for the content of the training program to provide it can reasonably be attributed to [their] deliberate indifference." *Palakovic*, 854 F.3d at 233. The Third Circuit, for instance, has sustained supervisory liability claims where supervisors "provided essentially no training on suicide, mental health, or the impact of solitary confinement." *Id.* at 233-34.

The same was true here. The Executive Defendants had a duty to establish training curricula for the CCCC, RE55 Page ID #306-07 ¶ 86(a), but under their policies, correctional officers received annual training of only eight hours, which included no training on offender supervision. *See* DOJ Report 27; RE55 Page ID #300 ¶ 72(j). Likewise, professional staff and support employees received only two hours of annual training each year, which included no training on "supervision of detainees/inmates; signs of suicide risks [and] suicide precautions." DOJ Report 28. Those training policies directly bucked applicable federal guidelines, *id.*, as well as an "obvious … need" for suicide training, *Palakovic*, 854 F.3d at 233.

In all, each of the Executive Defendants "personally had a job to do, and [each] did not do it." *Taylor*, 69 F.3d at 81. Because that failure occurred with deliberate indifference, *see infra* Part II.B, the Executive Defendants violated the Fourteenth Amendment.

B. The Executive Defendants Acted with Deliberate Indifference

Once this Court determines that the Executive Defendants' acts and omissions created an unreasonable risk of danger, the only question remaining is whether the Executive Defendants acted "with deliberate indifference," i.e., whether they acted or failed to act while knowing "of potential danger to a particular class of persons." *Troutman*, 979 F.3d at 483, 488. Plaintiff plausibly alleged that Defendants did so.

1. *The Executive Defendants Understood the Unreasonable Risk to Mentally Ill Inmates*

Whether a prison official "had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." *Farmer*, 511 U.S. at 842. The plaintiff may plead, for instance, that "a prison official knew of a substantial risk from the very fact that the risk was obvious" or that the risk was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past." *Id.* (quotations omitted). Likewise, the plaintiff may rely on "circumstances [that] suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it." *Id.* at 842-43. In all events, a supervisor cannot "escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm

inferences of risk that he strongly suspected to exist." *Comstock v. McCrary*, 273 F.3d 693, 703 (6th Cir. 2001).

Critically, the Executive Defendants do not dispute that they "perceived a risk to … detainee[s]" generally housed within the CCCC. Br. 21. Nor could they, as Plaintiff squarely alleged their knowledge of an unreasonable risk to inmate safety, including a risk of suicide in particular. By the time of Mr. Johnson's death, the Executive Defendants had been directly informed that the CCCC lacked adequate medical and correctional officer staffing, including by (i) the CCCC's nursing director, who resigned in protest; (ii) the union representing staff and guards; (iii) the Cuyahoga County Council; and (iv) a medical staff member. *See supra* at 9-10. Indeed, the Cuyahoga County Council wrote Budish directly just weeks before the incident reminding him of the "life-or-death" issues at stake. RE55 Page ID #396 ¶ 59.

Plaintiff also alleged ample circumstantial evidence suggesting that the Executive Defendants would have gained knowledge of the risk. The facts on the ground at CCCC foretold Mr. Johnson's death, as the facility was (i) operating substantially over capacity; (ii) short 96 correctional officers and 13 medical staff; and (iii) failing to conduct any full assessments of inmates within the first two weeks of arrival. *Id.* #299-301 ¶ 72. By the time of Mr. Johnson's suicide, there was also a clear pattern of inmate suicide attempts and deaths directly attributable

to the CCCC's poor conditions. *See supra* at 10. From November 2017 to November 2018 alone, more than 55 inmates attempted suicide, leading to at least three confirmed deaths. DOJ Report 24. The Executive Defendants had thus been "exposed to information" from which they "must have known" of an unreasonable risk of detainee suicide. *Farmer*, 511 U.S. at 842-43.

2. *The Executive Defendants Did Not Need to Understand the Risk To Mr. Johnson, Specifically*

The Executive Defendants do not disagree. Instead, they maintain that Plaintiff was required to additionally "plead facts showing that the Executive Defendants perceived a risk of harm to *Mr. Johnson*," specifically. Br. 21 (emphasis added). They repeat this refrain again and again, stressing that there are insufficient "facts demonstrating that each of the Executive Defendants subjectively perceived that *Mr. Johnson* was a suicide risk." *Id.* (emphasis added); *see also* Br. 4-5.

They misunderstand the law. The Supreme Court has made "clear that the correct inquiry is whether [an official] had knowledge about the substantial risk of serious harm to a *particular class of persons*, not whether he knew who the *particular victim* turned out to be." *Taylor*, 69 F.3d at 81 (citing *Farmer*, 511 U.S. at 842-43). In *Farmer*, the Court considered allegations against officials for failing to protect an inmate from sexual assault. 511 U.S. at 843. The defendants had successfully argued in the district court that they lacked the requisite knowledge of

potential danger because the plaintiff never expressed any safety concerns to them. 511 U.S. at 843. The Supreme Court disagreed. "[I]t does not matter," the Court explained, "whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk." *Id.* at 843-44. Rather, if prison officials understood the circumstances giving rise to an unreasonable risk, it was "obviously … irrelevant to liability that the officials could not guess beforehand precisely who would attack whom." *Id.*

This Court has held the same. In *Taylor*, inmates brought claims against a supervisor for failing to "adopt[] and implement[] an operating procedure that would require a review of the inmate's files before authorizing the transfers" to a certain cell. 69 F.3d at 81-82. This Court held that the supervisor's "failure to adopt reasonable policies" created an excessive risk that inmates would be placed in danger of sexual assault. *Id.* at 81. In so holding, the Court squarely rejected an official's argument that he could not "be liable because he had no personal knowledge of [the plaintiff's] particular vulnerabilities to sexual assault." *Id.*

That line of authority applies equally here. As explained above, the Executive Defendants understood that inmates and detainees similarly situated to Mr. Johnson—i.e., inmates or detainees that were mentally ill or suicidal—faced an unreasonable risk of danger. *See supra* Part II.B.1. In light of that understanding, it is irrelevant whether the officials knew that Mr. Johnson would

be the particular inmate to fall casualty to their unconstitutional policies. It is enough that that they understood "the substantial risk [of serious harm] … to a particular class of persons." *Troutman*, 979 F.3d at 488.

C. The Executive Defendants Are Not Entitled to Qualified Immunity

Defendants alternatively argue that none of the foregoing actions violated clearly established law. Br. 22-23, 27. They are wrong.

To determine whether qualified immunity is appropriate, as explained, this Court "must determine if the constitutional right violated was so clearly established that preexisting law would alert a reasonable person to its existence." *Linden*, 167 F. App'x at 424-25 (emphasis omitted). In this case, Plaintiff alleges that the Defendants violated Mr. Johnson's constitutional rights by implementing or maintaining policies that created an unreasonably high risk of suicide, even as they understood the risk those policies posed. Hence the "'right' that is truly at issue [is] … the right to have steps taken that would have prevented suicide." *Id.* (quotation omitted). There is no dispute that that right is clearly established. As explained above, "this Circuit has recognized that suicidal tendencies constitute a serious medical need in the Eighth Amendment context [for decades] and has established an extensive line of cases reiterating this holding." *Id.*; *see, e.g.*, *Barber v. City of Salem*, 953 F.2d 232, 239-40 (6th Cir. 1992); *Molton v. City of Cleveland*, 839 F.2d 240, 243 (6th Cir. 1988). In light of those precedents,

Defendants were "on notice" that they could not promulgate—or knowingly acquiesce in—policies that created an unreasonable risk of inmate suicide. *Stoudemire*, 705 F.3d at 568.

The Executive Defendants counter that it was not clearly established that promulgating a Regionalization Policy, specifically, was unconstitutional. Br. 22. But in so arguing, the Executive Defendants "erroneously hon[e] in on the *specific act*"—i.e., the creation of the Regionalization Policy—"elid[ing] the function of this prong of the test: determining whether a *right* is clearly established." *Linden*, 167 F. App'x at 425. The point of Plaintiff's claims is that the Executive Defendants introduced a policy that they *knew* created an unreasonable risk of inmate suicide, or at the very least, were deliberately indifferent to that risk. Because "ample case law teaches that deliberate indifference toward a detainee's suicidal tendencies is a violation of Constitutional rights," the Executive Defendants are not entitled to qualified immunity. *Id.* at 424-25.

In any event, Defendants were "on notice" that their specific policies and practices violated clearly established rights. This Court and others have made clear that prison officials cannot:

- intentionally overcrowd prisons to a substantial degree, *see, e.g.*, *Brown v. Plata*, 563 U.S. 493, 501 (2011);
- deny inmates adequate food, *see, e.g.*, *Clark-Murphy*, 439 F.3d at 292;

- impose excessive punishment on pretrial detainees, *Bell*, 441 U.S. at 535; *see also infra* at 23-31;

- ignore the specific duties of their job, *Taylor*, 69 F.3d at 81; *Campbell*, 700 F.3d at 790; or

- fail to establish suicide policies or training, *Palakovic*, 854 F.3d at 233-34; *Luckert*, 684 F.3d at 823-24.

By June 18, 2019, there was accordingly no room for debate as to whether Defendants' actions or omissions were constitutional, and the District Court was therefore correct to deny qualified immunity.

D. The Executive Defendants' Remaining Arguments Are Inappropriate at This Stage in the Proceeding

Finally, the Executive Defendants at times complain that Plaintiff's claims are not plausible because she fails to allege "what *each* defendant did to violate the asserted constitutional right(s)." Br. 24. But the Executive Defendants elsewhere make clear that although they "dispute whether Plaintiff alleged facts to support a constitutional claim against any of the Defendants, [their] appeal is confined to the question of whether Defendants' conduct violated clearly established law." Br. 10. This Court can accordingly ignore their complaints about any "threadbare facts [alleged] to support a constitutional violation." Br. 24-26.

In any event, they are incorrect. Plaintiff alleges that each of the Executive Defendants shared responsibility for implementing the unconstitutional policies and practices at issue. For one, Plaintiff alleged with particularity that Budish

spearheaded the Regionalization Policy, making it a priority as soon as he assumed office in 2015. RE55 Page ID #294 ¶ 52. The Complaint also alleges that Carney (among others) helped Budish move forward with "plans for 'regionalization,'" *id.* #295 ¶ 55; #282 ¶ 10, and Defendants do not dispute that Carney was involved in the "decision … to regionalize … [the] jail system," Br. 22. Those allegations are plausible, as both Budish and Carney exercised policymaking authority over the CCCC, and regionalization was a major CCCC initiative. *See* RE55 Page ID #279-282 ¶¶ 5, 10.

The Complaint also plausibly alleges that Pinkney and Taylor were involved in implementing the Regionalization Policy, *see id.* #295 ¶ 55, as well as in authorizing and/or acquiescing in the CCCC's other unconstitutional policies, *see, e,g.*, *id.* #279-80 ¶¶ 6-7, #293 ¶ 49, #296 ¶ 60. Those allegations are consistent with their job descriptions, as the Sheriff Department directly "operate[d]" the CCCC, and Pinkney and Taylor thus supervised the facility's day-to-day operations. *See* DOJ Report 5; *see also* RE55 Page ID #279-80 ¶¶ 6, 7 (noting that Taylor was the "assistant to Pinkney" charged with "making policy decisions with regard to the [CCCC]").

The Executive Defendants complain that Plaintiff at times makes "categorical references" to them in her pleadings (Br. 24), but there is nothing implausible about alleging that the four high-level executives at issue in this

appeal—who were all charged with overseeing the CCCC—worked together to execute the facility's most critical policy initiatives. Nor is it implausible that all the Executive Defendants failed to perform certain non-delegable duties, as each Defendant's failure to act cascaded through the chain of command. When Pinkney and Taylor realized that Mills and Ivey were not properly performing their job, it fell on them to intervene, as they were the members of the Sheriff's Department tasked with overseeing the CCCC. *See* RE55 Page ID #279-80 ¶¶ 6-7. When they failed to do so, Carney should have intervened as the member of Budish's Executive branch charged with overseeing the Sheriff's Department. *See id.* #282 ¶ 10. And when Carney failed, the onus fell on Budish to act. *Id.* #279 ¶ 5.

Defendants' demand for more fine-grained parsing is inappropriate at the motion-to-dismiss stage. *See Marvaso*, 971 F.3d at 605. That is especially so in this case. For one thing, Plaintiff's most relevant witness—Mr. Johnson—died by suicide, so he is unable to provide a first-hand account of the officials most involved in this death. Nor has Plaintiff been able to receive critical evidence through Defendants, who have taken steps to actively conceal evidence of the events precipitating Mr. Johnson's death. RE55 Page ID # 291-92 ¶ 42. Indeed, Ivey and Mills are under criminal indictment for obstructing investigations into the CCCC's conditions. *See supra* at 11. But despite those efforts, there is every reason to believe that discovery will allow Plaintiff to more fully develop her

claims. Since Plaintiff first brought suit, both Pinkney and Taylor have resigned from their posts, reportedly amidst scrutiny related to the CCCC.[13] Moreover, while this case has been pending, a state criminal investigation and at least one civil lawsuit[14] into the CCCC have unearthed additional evidence of the Executive Defendants' involvement in the violations. *See supra* at 11. Plaintiff should have the opportunity to explore similar evidence in discovery.

CONCLUSION

For the foregoing reasons, the District Court's judgment should be affirmed.

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[13] Pinkney resigned as Sheriff on August 2, 2019, Adam Ferrise, *Cuyahoga County Sheriff Clifford Pinkney Resigns*, Cleveland.com (May 24, 2019), https://tinyurl.com/ycdq35m7. Taylor later assumed the role of Cuyahoga County Jail Interim Director and retired on April 5, 2019. Drew Scofield, *Interim Cuyahoga County Jail Director To Retire Next Month*, News 5: Cleveland (Mar. 15, 2019), https://tinyurl.com/ycc89yjr.

[14] Gary Brack, the former CCCC medical supervisor, brought suit alleging that Budish fired him in retaliation for exposing problems at the county jail. *Brack v. Budish*, No. 19-cv-915706, Complaint (N.D. Ohio, May 21, 2019); *see also* Sam Allard, *Gary Brack Suing County, Email Proves Budish Knew About Pending Jail Catastrophe*, Cleveland Scene (Jan. 14, 2020), https://tinyurl.com/y9qxjbfk.

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Dated: January 4, 2021

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,906 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 6th Cir. R. 32(b).

2. 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 proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2021, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

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ADDENDUM

Designation of Relevant District Court Documents

Record Entry ("RE")	Document Description	Page ID #
55	Amended Complaint	273
73-4	Motion to Stay, Exhibit C	548
75	Motion to Dismiss	562
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