

No. 25-5079

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Jamelle Russell,

Plaintiff-Appellee,

v.

Justin Zysman et al.,

Defendants-Appellants.

Appeal from the
United States District Court for the District of Nevada
Case No. 3:23-cv-00539, Hon. Anne R. Traum

**ANSWERING BRIEF FOR PLAINTIFF-APPELLEE
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Introduction

Jamelle Russell, a prisoner at Northern Nevada Correctional Center, filed grievances to report officers for racially harassing and abusing another prisoner. Immediately afterward, the officers started harassing Russell too, using threats and racial slurs. Just two weeks later, Officer Justin Zysman refused to take Russell to a scheduled surgery. Russell tried to file an emergency grievance to report Zysman, but Officer Jeffrey Holz told Russell the grievance was “b.s.” and refused to turn it in.

Later that same day, officers escalated their abuse. Russell was using the toilet in his cell, with his blanket over the window for privacy, when Officers Zysman, Holz, and Bradley Bicksler approached. They reached into Russell’s cell without warning and ripped his blanket away. This force threw Russell to the floor, injuring him.

Drawing all inferences in Russell’s favor, Russell’s complaint plausibly alleges that the officers violated his constitutional rights two times over. First, they violated the First Amendment by retaliating against him for filing grievances. Second, they violated the Eighth Amendment by using excessive force for the malicious and sadistic purpose of causing him harm. Decades of precedent clearly established these rights. On that basis, the district court correctly held that the officers are not entitled to qualified immunity and denied their motion to dismiss. This Court should affirm and give Russell the chance to prove his case.

Statement of Jurisdiction

The district court had jurisdiction under 28 U.S.C. § 1331. The district court's July 11, 2025, order denying qualified immunity was immediately appealable. ER-3-10; *Sanderlin v. Dwyer*, 116 F.4th 905, 910 (9th Cir. 2024). Defendants filed a timely notice of appeal on August 8, 2025. ER-96. This Court has jurisdiction under 28 U.S.C. § 1291.

Issues Presented

I. Whether the district court correctly decided that Defendants are not entitled to qualified immunity on Russell's First Amendment retaliation claim.

II. Whether the district court correctly decided that Defendants are not entitled to qualified immunity on Russell's Eighth Amendment excessive-force claim.

Statement of the Case

I. Factual background

When Jamelle Russell, a prisoner at Northern Nevada Correctional Center, saw officers harassing another prisoner, Russell reported their misconduct. Russell's grievance triggered two weeks of retaliatory, escalating harassment that culminated in the officers injuring him.

Russell reports harassment. Russell witnessed prison guards inflicting physical and race-based harassment against prisoners. ER-77. Much of this harassment was directed at Dezmond Remus, a prisoner

whose cell was across from Russell's. ER-77. On January 17, 2023, Russell saw Officers Justin Zysman and Jeffrey Holz throw Remus's food on the floor, call him a racial slur, and threaten to harm him. ER-77. After Remus swept the food out of his cell, the officers pushed it back in. ER-77.

That day, Russell filed an emergency grievance, reporting the officers' harassment and mistreatment of Remus. ER-77. But the officers continued to harass Remus. On another day, Zysman and Holz, now joined by Officer Bradley Bicksler, locked Remus in the shower for two hours. ER-79. Right after that, Russell saw the three officers "slam[] + jump[]" on Remus while Remus was cuffed. ER-79.

Officers retaliate against Russell. The day after Russell filed the emergency grievance and "spoke up" about the harassment of Remus, both Zysman and Holz "turned their attention" to Russell. ER-77. Zysman began targeting Russell with threats, harassment, and racial slurs. ER-77. Russell filed a second emergency grievance addressing this mistreatment. ER-39-40, 77. The officers continued to harass Russell over the next two weeks. ER-76.

Near the end of January 2023, another officer (not party to this suit) injured Russell. ER-78. Russell was hospitalized, and he returned to his cell with a leg brace and crutches. ER-78.

Zysman refuses to take Russell to surgery. At the same time, Russell needed oral surgery for a persistent medical problem that had

caused him three infections and one medical emergency. ER-76, 78. By January, he had been waiting ten months for this necessary surgery. ER-76, 78.

On the morning of January 31, Zysman arrived at Russell's cell to bring him to his long-awaited surgery. ER-76, 78. Typically, to transport a prisoner, officers handcuff the person's wrists through the food slot and then open the door. ER-76, 78. But Russell couldn't use his crutches with his hands cuffed together, so he needed belly chains. ER-76, 78. That would have required an officer to open the door before restraining Russell. ER-76, 78. Zysman—the subject of Russell's recent grievances—inexplicably refused to use the belly chains, thereby preventing Russell from having his surgery. ER-76, 78.

Russell immediately asked for an emergency grievance form to report Zysman's actions. ER-78. Holz brought one, and Russell completed it. ER-78. But when Holz picked it up, he said he would “not turn[] it in” and called the grievance “b.s.” ER-78. Instead, Holz issued Russell a disciplinary write-up for the interaction. ER-80.

Officers injure Russell. That afternoon, Russell used the toilet in his cell, hanging a blanket over the window in his door for privacy. ER-79. He was finishing up when officers came around for an institutional count. ER-7, 79. As Russell reached for the blanket, Zysman, Holz, and Bicksler reached through the door's food slot—which is below the window—and grabbed the blanket. ER-79. Russell announced that he

was taking it down, but the officers pulled on the blanket. ER-79. Russell held on and reiterated that he was removing it. ER-79. At that moment, the three officers “snatch[ed] it harder,” yanking the blanket from his hands. ER-79. Their forceful pull “threw [Russell] to the ground,” slamming his hands against his cell door and banging his leg against the wall. ER-79.

As a result of this incident, Russell reinjured his left knee. ER-79. The officers also injured Russell’s right index finger, right wrist, and left thumb. ER-79.

Russell reports the incidents. During the next officer shift, Russell filed two emergency grievances. ER-78-79. The first detailed Zysman’s refusal to properly cuff Russell, causing him to miss his surgery. ER-78. The second recounted the afternoon incident in which Russell was injured. ER-79. Supervisors—who were defendants below but are not parties to this appeal—received these grievances but did “nothing” about the harassment. ER-79.

II. Procedural background

Russell filed a Section 1983 lawsuit against Zysman, Holz, Bicksler, and other prison employees. ER-73. The district court screened Russell’s complaint under 28 U.S.C. § 1915(a) and allowed his First Amendment retaliation claim and Eighth Amendment excessive-force claim to

proceed against Zysman, Holz, and Bicksler. ER-87-89, 94-95. The district court dismissed the other claims and defendants. ER-94-95.

Defendants moved to dismiss the remaining claims, asserting qualified immunity. ER-63, 67-71. The magistrate judge recommended denying Defendants' motion to dismiss because Russell alleged sufficient facts to state both claims and "a reasonable official would know that inmates have a right to be free from cruel and unusual punishment and [are] free to file prison grievances." ER-29. Defendants objected to this recommendation, arguing that the magistrate judge (1) manufactured facts not in the complaint and (2) erroneously found that the officers violated Russell's clearly established rights. ER-14.

The district court overruled Defendants' objections and denied their motion to dismiss. ER-3-10. First, the district court found that the magistrate judge's recommendation "relied upon a construction of facts from the screening order that is materially consistent with what was pleaded in the complaint." ER-6 (citations omitted). Second, the district court held that the law was clearly established because "several cases ... would have put Defendants on clear notice that there is a right to file prison grievances" and a "right to be free from excessive force used maliciously and sadistically to cause harm." ER-9. Defendants appealed. ER-96.

Summary of Argument

I.A. Russell plausibly alleged a First Amendment retaliation claim. Defendants dispute only two of that claim's five elements: whether their treatment of Russell was causally connected to Russell's grievances and whether they lacked a legitimate penological purpose for their conduct.

First, Defendants' retaliatory motive can be inferred from the tight sequence of events between Russell's protected speech and Defendants' use of force, as well as from Defendant Holz's derogatory comment about Russell's grievance. Just one day after Russell filed his first grievance, Defendants began harassing him. Two weeks later, he attempted to file another grievance, which Holz immediately called "b.s." and refused to turn in. Defendants injured Russell that same afternoon. Defendants argue that their actions had a non-retaliatory motive: to stop Russell from using his blanket as a temporary privacy curtain in violation of prison rules. But the existence of a possibly legitimate motive is not alone sufficient to require dismissal because all inferences must be drawn in Russell's favor, not Defendants'.

Second, no legitimate penological purpose justified Defendants' conduct. At this stage, Russell's allegations that support Defendants' retaliatory motive satisfy this element as well, because retaliation cannot be a legitimate penological purpose. At any rate, Russell plausibly alleges facts that show force was unnecessary to maintain order. Russell offered to remove the blanket, demonstrating that he posed no threat to

institutional security. And with all inferences drawn in Russell's favor, Defendants cannot rely on Russell's alleged violation of a prison regulation to justify their purported penological purpose.

B. As the district court correctly held, Russell's right to be free from retaliation for filing grievances was clearly established. Defendants argue that no case is sufficiently analogous to this one. But this Court has long recognized that retaliation for filing grievances is unconstitutional regardless of the precise form of the officers' adverse actions. So, Defendants were on notice that their actions violated the First Amendment.

II.A. Russell plausibly pleaded an Eighth Amendment violation. Russell's complaint supports an inference that Defendants maliciously and sadistically used force to harm him, not to restore or maintain discipline.

Russell's complaint supports an inference that Defendants' use of force was malicious and sadistic because Defendants didn't need to use force at all. Russell was not a threat at the time of the incident: He was locked in his cell, physically injured, and not resisting. Defendants assert that the situation could have escalated into a dangerous disturbance. But that makes no sense because Russell was alone and locked in his cell, using the toilet. Thus, Defendants' use of force was disproportionate to the need presented. Defendants caused Russell harm and made no effort to temper their forceful response.

B. Russell’s right to be free from excessive force was clearly established. This Court has recognized that when officers use force for the purpose of causing harm, instead of for some legitimate purpose, they always violate the Eighth Amendment. Defendants were therefore on notice that using force without a permissible purpose was unlawful.

Standard of Review

This Court reviews “de novo a denial of a motion to dismiss based on qualified immunity.” *Hyde v. City of Willcox*, 23 F.4th 863, 869 (9th Cir. 2022).

At the pleadings stage, qualified immunity must be denied if “the complaint alleges sufficient facts, taken as true, to support the claim that the officials’ conduct violated clearly established constitutional rights.” *Keates v. Koile*, 883 F.3d 1228, 1235 (9th Cir. 2018). Because deciding “claims of qualified immunity at the motion-to-dismiss stage raises special problems for legal decision making,” *id.* at 1234, courts “disfavor[] determining qualified immunity claims” at this stage, *Michelle K. v. County of Sonoma*, 2024 WL 4336618, at *5 (N.D. Cal. Sep. 27, 2024) (citing *Keates*, 883 F.3d at 1234).

“[W]here, as here, a plaintiff proceeds pro se, [the court] must ‘construe the pleadings liberally’ and ‘afford the petitioner the benefit of any doubt.’” *Boquist v. Courtney*, 32 F.4th 764, 774 (9th Cir. 2022) (quoting *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010)).

Argument

Russell plausibly pleaded that Defendants violated his First and Eighth Amendment rights by retaliating against him for filing grievances and by using excessive force to injure him. It was “clearly established” at the time of the incident that these violations were unconstitutional. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). Therefore, Defendants are not entitled to qualified immunity, and the district court correctly denied their motion to dismiss. This Court should affirm.

I. Defendants are not entitled to qualified immunity on Russell’s First Amendment retaliation claim.

A. Russell plausibly pleaded that Defendants retaliated against him for filing grievances.

Prisoners have a First Amendment right to file grievances against prison officials and to be free from retaliation for doing so. *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009). To plead retaliation, a prisoner must allege “[(1)] that a state actor took some adverse action against an inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005).

Defendants do not dispute elements (1), (3), or (4). Nor could they. Russell pleaded that Defendants took an adverse action against him by ripping away the blanket, thereby throwing him to the ground and that

Russell engaged in protected conduct by filing grievances. ER-78-79. Defendants' adverse actions would also reasonably have chilled his First Amendment right to file grievances because even "the mere *threat* of harm can ... have a chilling effect." *Brodheim*, 584 F.3d at 1270.

Russell has also plausibly pleaded the two remaining elements: that Defendants' adverse actions were (2) motivated by his grievances and (5) did not reasonably serve a legitimate penological purpose. Thus, Russell has stated a First Amendment retaliation claim.

1. Russell plausibly pleaded that Defendants' actions were motivated by his grievances.

a. Russell has alleged a causal connection between Defendants' adverse action and the filing of his grievances. *See Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012). "[C]ausation can be inferred from timing alone." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002). "Because direct evidence of retaliatory intent rarely can be pleaded in a complaint, allegation of a chronology of events from which retaliation can be inferred is sufficient to survive dismissal." *Watison*, 668 F.3d at 1114.

Russell alleges that Defendants retaliated just weeks—or sometimes mere hours—after he filed grievances. Two weeks before Defendants injured him, Russell filed a grievance reporting that Zysman and Holz racially harassed and assaulted Remus. ER-77. The next day, Zysman and Holz began harassing Russell as well. ER-76-77. Zysman escalated

the situation two weeks later when he refused to take Russell to surgery. ER-78. In response, Russell attempted to file another grievance, which Holz refused to turn in. ER-78. Later that afternoon, Defendants injured him. ER-79. Because even an “eleven-month gap in time” standing alone “is within the range that has been found to support an inference” of retaliation, this much tighter sequence between Russell’s grievances and injuries easily supports such an inference. *Allen v. Iranon*, 283 F.3d 1070, 1078 (9th Cir. 2002).

Holz’s conduct also supports an inference of retaliation. “[E]xpressed opposition to the [protected] speech” is evidence of retaliatory motive. *McCollum v. Cal. Dep’t of Corrs. & Rehab.*, 647 F.3d 870, 882 (9th Cir. 2011). Holz expressed opposition to Russell’s grievances when he refused to turn in one of them, calling it “b.s.” ER-78.

b. Defendants argue that their use of force was motivated by Russell’s “contemporaneous conduct”—his use of a blanket as a temporary privacy curtain—not his grievances. Opening Br. 19-20. Maybe, maybe not. But accepting Defendants’ interpretation of events (that is, drawing inferences in *their* favor) is impermissible at the pleadings stage. “[T]he mere existence of a legitimate motive ... is insufficient to mandate dismissal.” *Capp v. County of San Diego*, 940 F.3d 1046, 1056 (9th Cir. 2019). Russell adequately alleged a chronology suggesting that “defendants’ actions were substantially motivated by opposition to [his] protected speech.” *O’Brien v. Welty*, 818 F.3d 920, 936 (9th Cir. 2016).

In any event, nothing in Russell’s complaint suggests that Defendants acted in response to Russell’s “contemporaneous conduct.” *Contra* Opening Br. 19-20. Defendants injured Russell after he repeatedly announced he was “taking [the blanket] down.” ER-79. Because Russell did not resist any orders from Defendants, the alleged violation could have been resolved without using force. *See infra* at 21-23; *see also Rodriguez v. County of Los Angeles*, 891 F.3d 776, 795 (9th Cir. 2018). The decision to escalate the encounter was made by Defendants, not Russell. *Contra* Opening Br. 21.

c. Defendants insinuate in a footnote that Russell failed to plead causation because he did not explicitly allege that Zysman and Bicksler were aware of the “content of Russell’s grievance.” Opening Br. 21 n.2. This suggestion should be rejected. Unreasoned arguments presented in a footnote are ordinarily forfeited. *City of Emeryville v. Robinson*, 621 F.3d 1251, 1262 n.10 (9th Cir. 2010). Regardless, Russell needed to allege only facts from which Defendants’ awareness can be “reasonably inferred.” *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 754 (9th Cir. 2001). He did exactly that. As just explained, the tight sequence of events supports the inference that Defendants were aware of Russell’s grievances. Russell’s allegation that he “spoke up” about Defendants’ treatment of Remus reinforces this inference. ER-77; *see Bruce v. Ylst*, 351 F.3d 1283, 1289 (9th Cir. 2003). And even if Defendants “were not aware of the precise content” of the grievances, their knowledge that

Russell supported Remus is sufficient. *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 928 (9th Cir. 2004).

In the same footnote, Defendants erroneously assert that Holz could not have had retaliatory animus because (unlike the other officers) Holz was not the subject of Russell’s grievances before he injured Russell. Opening Br. 21 n.2. That’s incorrect: Holz was the subject of Russell’s January 17 and 18 grievances. *See* ER-39, 46. It’s true that one officer—Bicksler—was not named in these earlier grievances. But that is irrelevant. Officers can (and do) harbor retaliatory animus based on grievances filed against coworkers. *See Watison*, 668 F.3d at 1115. That’s what is alleged here.

2. Russell plausibly pleaded an absence of legitimate penological purpose behind Defendants’ conduct.

Defendants argue that they had a penological interest in “maintaining institutional security and restoring discipline” when they used force against Russell. Opening Br. 22. That’s wrong.

At the pleadings stage, Russell’s “allegations of retaliation for the filing of grievances are sufficient to satisfy the requirement that [he] plead an absence of a legitimate penological purpose.” *Austin v. Terhune*, 367 F.3d 1167, 1171 n.3 (9th Cir. 2004); *see also Bruce*, 351 F.3d at 1289. So, this element is met, and this Court need not go further to affirm on Russell’s First Amendment claim.

In any case, Russell pleaded facts supporting an inference that Defendants' actions were "unnecessary to the maintenance of order in the institution." *Watison*, 668 F.3d at 1115 (quoting *Franklin v. Murphy*, 745 F.2d 1221, 1230 (9th Cir. 1984)). Russell "announced [he] was taking [the blanket] down" as Defendants began to pull it from him. ER-79. Because of Russell's statement, Defendants knew of Russell's presence in his cell to effectuate the count. Defendants could have waited for Russell to remove the blanket, rather than escalating the situation by yanking harder on the blanket. *See* ER-79. Or they could have held the blanket to the side to see Russell, rather than ripping it away from him.

Defendants argue that they applied force only *before* the blanket was removed. Opening Br. 16-17. But the precise timing of Defendants' force is irrelevant; either way, the amount of force was not necessary to maintain "order in the institution." *Watison*, 668 F.3d at 1115.

To justify a penological purpose, Defendants cite a Nevada Department of Corrections regulation prohibiting a prisoner from "[s]hut[ting] oneself into place by blocking avenues of ingress or visual inspection." Opening Br. 22. But they cannot defeat Russell's claim "by articulating a general justification for a neutral process." *Bruce*, 351 F.3d at 1289. Instead of "borrow[ing] generic justifications" from prison regulations, Defendants must show how their actions in the particular situation actually advanced their stated goals. *Shepard v. Quillen*, 840 F.3d 686, 691-92 (9th Cir. 2016). As explained above, Defendants' actions

were unnecessary to maintain discipline or ensure safety. And even if Russell broke a rule, that doesn't justify Defendants' assault.

B. Russell's right to be free from retaliation for filing grievances was clearly established.

Because prisoners have a "First Amendment right to file prison grievances," "retaliation against [them] for their exercise of this right" violates "clearly established law." *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009) (citing *Rhodes v. Robinson*, 408 F.3d 559, 566 (9th Cir. 2005)). And it is "clearly established that prison officials may not abuse a valid procedure," such as enforcing a rule, "as a cover or a ruse to silence and punish" a prisoner. *Shepard v. Quillen*, 840 F.3d 686, 694 (9th Cir. 2016) (quoting *Bruce v. Ylst*, 351 F.3d 1283, 1289 (9th Cir. 2003)).

Defendants argue that the prohibition against retaliatory punishment is too general "to have placed Defendants on notice that their alleged conduct violated the First Amendment." Opening Br. 34. That's wrong. Though "the right's contours [must be] sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it," *Plumhoff v. Rickard*, 572 U.S. 765, 778-79 (2014), prior cases need not "mirror[] the specific facts" of the case at hand, *Ballentine v. Tucker*, 28 F.4th 54, 66 (9th Cir. 2022).

No matter *how* an officer retaliates, it is clearly established that *any* retaliation for filing grievances is unconstitutional. See *Brodheim*, 584 F.3d at 1269; *Rhodes*, 408 F.3d at 567, 569. For instance, an officer was

on notice that he couldn't retaliate against a prisoner by investigating him for alleged gang activity. *Bruce*, 351 F.3d at 1289-90. Officers were also on notice that they could not retaliate against a prisoner by threatening him. *Brodheim*, 584 F.3d at 1274. Similarly, retaliating by “denying medical care, threatening transfer, destroying property, and other actions” all violate clearly established law “when done to chill an inmate’s right to file grievances or lawsuits.” *Howard v. Groover*, 706 F. Supp. 3d 1090, 1105 (D. Nev. 2023) (collecting cases). Because caselaw clearly established that prison officials may not retaliate—in any way or for any reason—against a prisoner who files grievances, Defendants were on notice that their actions violated the First Amendment.

II. Defendants are not entitled to qualified immunity on Russell’s Eighth Amendment excessive-force claim.

A. Russell plausibly pleaded that Defendants used excessive force.

Officers violate the Eighth Amendment when they use excessive force with no proper justification. *Rodriguez v. County of Los Angeles*, 891 F.3d 776, 797 (9th Cir. 2018). An excessive-force claim “turns on ‘whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.’” *Hudson v. McMillian*, 503 U.S. 1, 6 (1992) (quoting *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)). This Court applies a five-factor balancing test to determine whether the use of force was malicious and sadistic. *Hughes*

v. Rodriguez, 31 F.4th 1211, 1221 (9th Cir. 2022). That test looks at “(1) the extent of injury suffered by an inmate; (2) the need for application of force; (3) the relationship between that need and the amount of force used; (4) the threat reasonably perceived by the responsible officials; and (5) any efforts made to temper the severity of the forceful response.” *Id.* (quoting *Furnace v. Sullivan*, 705 F.3d 1021, 1028 (9th Cir. 2013)). Though Defendants’ “subjective intent is critical in an Eighth Amendment analysis,” “[o]bjective reasonableness may inform the Eighth Amendment inquiry, providing evidence of good faith or of malice.” *Rodriguez*, 891 F.3d at 797.

As the district court held, Russell’s complaint supports the inference that Defendants used force maliciously and sadistically for the purpose of causing Russell harm. *See Hudson*, 503 U.S. at 6; *see also* ER-7-8. Each of the five factors cuts in Russell’s favor.

Extent of injury. When Defendants yanked the blanket that Russell was using for privacy, they “threw [Russell] to the ground.” ER-79. In doing so, they aggravated Russell’s previous injury to his left knee, which was already in a leg brace. ER-79. By pulling the blanket, Defendants also “banged [Russell’s] hands against the door [and] food slot.” ER-79. In doing so, Defendants injured Russell’s “left thumb, right wrist, [and] right index finger.” ER-79.

To be sure, Russell’s injuries weren’t life-threatening. But the absence of serious injury “does not end” the Eighth Amendment inquiry. *Hudson*,

503 U.S. at 7. Put differently, a prisoner does not lose his excessive-force claim “merely because he ha[d] the good fortune to escape without serious injury.” *Wilkins v. Gaddy*, 559 U.S. 34, 38 (2010) (per curiam).

The Eighth Amendment does not require a specific “arbitrary quantity of injury” to state an excessive-force claim. *Wilkins*, 559 U.S. at 37 (quoting *Hudson*, 503 U.S. at 9). Excessive-force claims are “based on the nature of the force rather than the extent of the injury.” *Id.* at 34. Russell’s injuries are relevant because they provide “an indication of the amount of force applied.” *Id.* at 37. But they are not dispositive. The ultimate question is not whether those injuries were severe but whether those injuries resulted from force that “was applied ... maliciously and sadistically to cause harm,” as the following factors discuss. *Id.* at 39 (quoting *Hudson*, 503 U.S. at 7).

Reasonably perceived threat. The next three factors assess the “proportionality” between the force used and the need for it. *Hughes*, 31 F.4th at 1221. All cut in Russell’s favor.

To start, Russell posed no threat. Russell was “locked in his cell behind a large metal door, and had not, by his account, made any aggressive or threatening remarks, or taken any actions against [Defendants] or anyone else.” *Furnace*, 705 F.3d at 1029; see ER-79. Russell had recently returned from the hospital and was using “crutches [and] a leg brace.” ER-76, 78. Injured and locked up, Russell could not be a threat to anyone.

Defendants argue that Russell's blanket threatened institutional security because they couldn't see Russell during the count. Opening Br. 25. They also speculate that he could have been concealing weapons or contraband. *Id.* Defendants' reasoning is doubly flawed.

First, even accepting that Russell broke a rule by temporarily hanging a blanket for privacy, that doesn't mean he posed a threat. Defendants' purported "institutional security" concerns, Opening Br. 25, hardly compare to cases where force was justified. These cases involved large prison riots, *Rodriguez*, 891 F.3d at 784; escaping prisoners, *Hughes*, 31 F.4th at 1216-17; or guards held hostage by prisoners with weapons, *Whitley*, 475 U.S. at 322-23. Russell did not pose a similar threat when he placed a blanket as a momentary privacy curtain while using the toilet. Defendants' dramatized threat doesn't suggest good faith. Quite the opposite: It's "evidence of ... malice." *Rodriguez*, 891 F.3d at 797.

Second, the blanket didn't pose a threat because Russell announced he was taking it down before Defendants used force. *See* ER-79. Defendants accuse the district court of "manufactur[ing]" this allegation. Opening Br. 17-18. But the complaint, viewed "in the light most favorable to [Russell]," is consistent with this chronology. *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Russell alleges that he first announced he was taking the blanket down when Defendants grabbed it. ER-79. And Russell communicated his intent again, "only to have them snatch it

harder,” throwing him to the ground. ER-79. The district court just recited the events in that order. *Compare* ER-7-8, *with* ER-79.

Regardless, the order doesn't matter. Defendants' alternative chronology is (1) they used force, (2) Russell communicated he would remove the blanket, and then (3) they used more force. *See* Opening Br. 18. Either way, Defendants used force *after* they heard Russell say he would remove the blanket. As the district court found, this supports a reasonable inference that the force was used for the purpose of causing harm, not because it was necessary. ER-7-8.

Need for force. Defendants did not need to use force against Russell. Prison officials cannot justify using force to maintain or restore discipline when they injure a prisoner who is “not resisting.” *Rodriguez*, 891 F.3d at 795. Russell's complaint plausibly alleges that he “announced [he] was taking [the blanket] down as they pulled it from [him].” ER-79. While Defendants kept pulling, Russell announced *again* that he would take it down. ER-79. It can be reasonably inferred that Russell was making a good-faith effort to remove the blanket while also maintaining his privacy as he was finishing using the toilet. *See* ER-79. Russell's instinctive hold on the blanket does not indicate that he was “actively resist[ing]” Defendants. *Contra* Opening Br. 26.

Defendants insinuate that Russell was disobeying an order, so they needed to use force. Opening Br. 30. But based on Russell's complaint, Defendants never gave him an order. *See* ER-79. Defendants “cannot

justify force as necessary for gaining inmate compliance when inmates have been given no order with which to comply.” *Furnace*, 705 F.3d at 1029.

Seemingly recognizing that Russell’s conduct was harmless, Defendants instead argue that they faced an exigent circumstance, which risked “becoming dangerous.” Opening Br. 26-28 (quoting *Simmons v. G. Arnett*, 47 F.4th 927, 933 (9th Cir. 2022)). Defendants never explain how this incident could have escalated into a dangerous disturbance. Instead of grappling with the facts here, Defendants rely on cases with drastically different (and more serious) facts. For example, officers may sometimes need to use force to break up fights or address a hostage situation. *See Whitley*, 475 U.S. at 314-16; *Simmons*, 47 F.4th at 933; *Marquez v. Gutierrez*, 322 F.3d 689, 691 (9th Cir. 2003). These kinds of incidents could very well escalate into dangerous disturbances. Russell’s circumstances hardly compare. He was locked in his cell alone and could not be a threat to Defendants or other prisoners. By using force, Defendants escalated the situation themselves.

Defendants urge this Court to defer to their perception that force was required. Opening Br. 24, 26-27. But deference to prison officials “does not insulate from review actions taken in bad faith and for no legitimate purpose.” *Whitley*, 475 U.S. at 322. The Eighth Amendment “is not always consistent with allowing complete deference to all administrative determinations by prison officials.” *Spain v. Procunier*, 600 F.2d 189, 193

(9th Cir. 1979). At this stage, any deference afforded to Defendants' decision to use force should be based on Russell's complaint and not on Defendants' after-the-fact justifications conjured from outside of it.

Proportionality. The amount of force Defendants used when they ripped the blanket from Russell was disproportionate to the need for force. As just explained, Defendants did not need to apply force in the first place. Any force used must be proportionate to the “threats to the safety of [Defendants], as reasonably perceived by the responsible officials on the basis of the facts known to them.” *Hughes*, 31 F.4th at 1222 (quoting *Whitley*, 475 U.S. at 321). Defendants assert that their force was proportionate because Russell was interfering with the count and intentionally obstructing Defendants' view into his cell. Opening Br. 30. It defies reason to suggest that they could not confirm Russell's presence or retrieve the blanket without using force when Russell had already announced he would take the blanket down. *See* ER-79. Construing the complaint in the light most favorable to Russell, it can be reasonably inferred that Defendants' use of force was “quite extensive and disproportionate relative to the disturbance posed” by Russell, who was simply holding onto the blanket covering the toilet in his cell. *Furnace*, 705 F.3d at 1029.

Efforts to temper response. Defendants made no effort to temper the severity of their response before using force. *See Hughes*, 31 F.4th at 1222. They could have warned Russell before reaching inside his cell.

They could have held the blanket to the side briefly to verify Russell's presence. Or they could have waited a moment after Russell announced he would take the blanket down himself. *See* ER-79. Defendants didn't take any of these steps—they just used force.

* * *

Defendants needlessly used force to pull Russell's blanket and injured him in the process. This Court can reasonably infer that this force was used for a malicious and sadistic purpose, rather than in a good-faith effort to maintain or restore discipline. And if Russell's complaint "contains even one allegation of a harmful act that would constitute a violation of a clearly established constitutional right," then Russell is "entitled to go forward" with his Eighth Amendment claim. *Keates v. Koile*, 883 F.3d 1228, 1235 (9th Cir. 2018) (citation omitted).

B. Russell's right to be free from excessive force was clearly established.

A right is clearly established if "a reasonable official would understand that what he is doing violates that right." *Ballentine v. Tucker*, 28 F.4th 54, 64 (9th Cir. 2022) (quoting *Acosta v. City of Costa Mesa*, 718 F.3d 800, 824 (9th Cir. 2013)); *see supra* at 16. That's the case here. The Supreme Court has long held that "maliciously and sadistically us[ing] force to cause harm" will "always" violate "contemporary standards of decency." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992); *Wilkins v. Gaddy*, 599 U.S. 34, 37 (2010) (per curiam). Russell plausibly pleaded that Defendants

“maliciously and sadistically use[d] force to cause [him] harm” when they snatched his blanket and threw him to the ground. *Hudson*, 503 U.S. at 9; *see supra* at 17-24.

Defendants argue that the district court defined this right “too broadly.” Opening Br. 34 (quoting *Carley v. Aranas*, 103 F.4th 653, 661 (9th Cir. 2024)). They assert that courts must instead conduct a more “individualized analysis.” Opening Br. 34 (quoting *Cunningham v. Gates*, 229 F.3d 1271, 1289 (9th Cir. 2000)). But, when the “law has provided” officers with “fair warning” that their conduct is unlawful, “closely analogous pre-existing case law is not required to show that the law is clearly established.” *Schwenk v. Hartford*, 204 F.3d 1187, 1198 (9th Cir. 2000) (quoting *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir. 1994)). Officers just need notice about what constitutes unlawful conduct. *See Ballentine*, 28 F.4th at 64.

Because of the Supreme Court’s decision in *Hudson v. McMillian*, “[o]fficers have been on notice since at least 1992 that intentionally harming a prisoner without a permissible purpose violates the Eighth Amendment.” *Rodriguez v. County of Los Angeles*, 96 F. Supp. 3d 990, 1002 (C.D. Cal. 2014) (citing *Hudson*, 503 U.S. at 6); *see Alexander v. Perez*, 124 F. App’x 525, 526 (9th Cir. 2005); *see also Thompson v. Virginia*, 878 F.3d 89, 103 (4th Cir. 2017) (“Simply put, there are many ways of physically and maliciously assaulting a helpless prisoner, and all of them violate the Eighth Amendment.”). Therefore, Defendants had

“fair warning that their conduct was unconstitutional.” *Ballentine*, 28 F.4th at 64 (quoting *Ford v. City of Yakima*, 706 F.3d 1188, 1195 (9th Cir. 2013)).

Defining the right at this level of generality is proper. This Court has described the right similarly—for example, by recognizing that clearly established law bars the use of “malicious and sadistic” force. *Robins v. Meecham*, 60 F.3d 1436, 1442 (9th Cir. 1995); *Rodriguez v. County of Los Angeles*, 891 F.3d 776, 796 (9th Cir. 2018); see *Perez v. Cox*, 788 F. App’x 438, 444 (9th Cir. 2019). Other decisions of this Court have used the same level of generality, articulating the right to be free from the “unwarranted infliction of pain.” *Jordan v. Gardner*, 986 F.2d 1521, 1525 (9th Cir. 1993); see *Furnace v. Sullivan*, 705 F.3d 1021, 1027 (9th Cir. 2013). Both formulations mean the same thing: Officers cannot use force without a permissible reason. As these cases demonstrate, that right has been clearly established for decades.

III. Alternatively, Russell should be given leave to amend his complaint.

If this Court finds that Russell did not adequately allege facts to support either of his claims, Russell should be given leave to amend the complaint to cure any deficiencies. As this Court has held for decades, leave to amend should be granted unless “the pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th

Cir. 1995)), *overruled on other grounds by Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014). If, for instance, the Court thinks that Russell could have provided more detail about the context in which force was used, leave to amend would be required. And because Russell is a “pro se litigant,” the “rule favoring liberality in amendments to pleadings is particularly important.” *Id.* at 1131 (quoting *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987)).

Conclusion

This Court should affirm the district court’s denial of Defendants’ motion to dismiss.

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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