No. 20-4032

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

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

APPELLANT'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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RULE 35 STATEMENT

The panel made a fundamental error in holding that plaintiffs who allege a failure to accommodate their disabilities under the Americans with Disabilities Act must demonstrate that they were subjected to disparate treatment on the basis of their disability, even though failure-to-accommodate and disparate-treatment claims are distinct under the ADA. The error conflicts with precedent of the U.S. Supreme Court, decisions of other circuit courts, and prior cases of this Court. Neither party argued for this holding, this issue was never briefed, and the topic was not discussed at oral argument.

In addition to creating an inter- and intra-circuit split, this error is exceptionally important. Every plaintiff asserting a failure-to-accommodate claim in the Tenth Circuit will now be obligated to demonstrate that they were treated differently on account of their disability, even though the gravamen of a failure-to-accommodate claim is that a disabled plaintiff was *not* treated differently from people without disabilities—that is, they did not receive a reasonable accommodation of their disability. This would foreclose vast numbers of failure-to-accommodate claims, such as those of a wheelchair user challenging the lack of a ramp outside a public library. This Court should grant rehearing or rehearing en banc to correct its mistake.

BACKGROUND

Brock Tucker entered the Central Utah Correctional Facility at seventeen years old. *Crane v. Utah Dep't of Corr.*, 15 F.4th 1296, 2021 WL 4898816, at *1 (10th Cir. 2021). He came into prison with "severe brain damage and impulse control disorders" and once there "endured long periods of punitive isolation." *Id.* In 2014, roughly two years into his incarceration, Utah Department of Corrections (UDC) staff diagnosed him with "unspecified psychosis and major depressive disorder." *Id.* at *2. He nonetheless was repeatedly placed into a particularly punitive form of solitary confinement where he was let out of his cell, at most, one hour every other day and "was denied access to recreation, exercise equipment, the library, visitation, phone calls, and the commissary." *Id.* In September 2014, a UDC staff member sentenced Tucker again to punitive isolation without consulting mental health staff on whether he could psychologically bear the punishment, violating UDC policy. *Id.* His solitary confinement cell had both a hanging implement and a tie-off point. *Id*. at 9. On October 2, 2014, Tucker placed a towel over his window, which officers observed but did not investigate. *Id.* at *2. When an officer distributing medication finally looked into the cell, he discovered Tucker's body hanging from the tie-off point. *Id*.

Janet Crane is Tucker's grandmother and the administrator of his estate. *Id.* at *1. As relevant here, she sued UDC under the Americans with Disabilities Act

(ADA) and the Rehabilitation Act. *Id.* She alleged that Tucker's mental problems met the ADA's lenient definition of qualifying disabilities; that a safe housing unit is a program, service, or activity under the ADA; that Tucker's need for an accommodation was obvious; and that placing him in a particularly harsh form of solitary confinement with a hanging implement and a tie-off point was not, as a matter of law, a reasonable accommodation for his disabilities. Opening Br. 29–42. Defendants moved for judgment on the pleadings, arguing that ADA claims do not survive death under Utah's survival statute. *Id.* The district court granted the motion on that sole basis. *Id.*

Crane appealed, arguing that the district court erred in concluding that her ADA claim did not survive Tucker's death. Opening Br. 7. Crane argued that federal law governed the survivability of federal disability claims and provided that such claims survive death. But even under the state law that Defendants argued applied, Crane explained that the applicable Utah survival statute clearly extends claims like hers after the death of the injured individual. Opening Br. 28 (citing Utah Code § 78B-3-107). UDC argued in response that the provision Crane cited did not apply, Answering Br. 60, and that in any event Crane had not stated a claim under the ADA because he had failed to allege a qualifying disability or deliberate indifference, Answering Br. 60–66.

This Court affirmed on a single basis not raised by the district court or either party: that the ADA requires that Crane allege that Tucker was denied "appropriate housing 'by reason of his disability'" and that she had not done so. *Crane*, 2021 WL 4898816, at *12. Crane had therefore failed "to allege Mr. Tucker's disability was a but-for cause of the purported discrimination." *Id.* at *13. "The closest" Crane came, the panel explained, to showing causation was her allegation that Tucker was put in isolation for behavior caused by his disability. *Id.* But the panel then noted that defendants had disciplined Tucker by putting him in solitary confinement without consulting mental health staff, an allegation that the panel determined "appears to belie causality." *Id.* The panel therefore unambiguously held that because Crane could not show that Tucker was treated differently because of his disability, she could not show that he was discriminated against "by reason of" his disability. This was the sole basis for affirming the dismissal of Crane's ADA claim. *Id.*

ARGUMENT

Crane asserted a claim under the ADA for failure to accommodate Tucker's disability. Unlike an ADA claim for disparate or discriminatory treatment, a failure-to-accommodate claim does not require a showing that a plaintiff was treated differently based on a qualifying disability—in fact, at the very heart of such a claim is the notion that a defendant *should have*, but did not, treat a disabled plaintiff differently by offering a reasonable accommodation. Contrary to precedent from the

Supreme Court, this Court, and its sister circuits, the panel imported a disparate treatment requirement into a failure-to-accommodate claim. This error warrants correction via panel rehearing or rehearing en banc.

I. The Panel Opinion Conflicts with Decades of Supreme Court Precedent.

In interpreting federal disability statutes, the Supreme Court has repeatedly rejected the narrow notion of "discrimination"—requiring a showing of disparate treatment—that the panel adopted. Even before the passage of the ADA, the Court analyzed the analogous Rehabilitation Act[1] and rejected the version of causality that the panel applied. In *Alexander v. Choate*, the Court explained:

> Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect. … Federal agencies and commentators on the plight of the handicapped similarly have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus. … In addition, much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent. For example, elimination of architectural barriers was one of the central aims of the Act, yet such barriers were clearly not erected with the aim or intent of excluding the handicapped.

[1] As the panel opinion noted, with a "few limited exceptions, courts evaluate claims under these Acts identically." *Crane*, 2021 WL 4898816, at *3 n.4.

469 U.S. 287, 295–97 (1985). The Court thus concluded that the Rehabilitation Act did not require "proof of discriminatory animus" but could also reach action "that discriminates against the handicapped by effect rather than by design." *Id.* at 292.

The Court made this point even more explicitly in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598 (1999). The defendant in *Olmstead* argued that the plaintiffs "encountered no discrimination 'by reason of' their disabilities" because those disabilities were not the reason for the challenged conduct. *Id.* Similarly, the defendant argued that the plaintiffs had not been "subjected to 'discrimination'" because "'discrimination' necessarily requires uneven treatment of similarly situated individuals,' and [plaintiffs] had identified no comparison class, i.e., no similarly situated individuals given preferential treatment." *Id.* The Court explicitly rejected the state's argument, stating that it was "satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA" than the one advanced by the defendant. *Id.*; *see also id.* at 616 (Thomas, J., dissenting) (criticizing the Court for rejecting an interpretation of "discrimination" under Title II of the ADA that would have required "a showing that a claimant received differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic").

The U.S. Supreme Court made this point again, and perhaps most clearly, in *Tennessee v. Lane*, 541 U.S. 509 (2004). The plaintiffs in *Lane* were paraplegics

who could not access courtrooms up flights of stairs. *Id.* at 513. The defendant in *Lane* did not take any affirmative steps to deny plaintiffs access to courtrooms or treat them differently because they were disabled; it merely neglected to accommodate their disabilities by providing any accessible means of getting to the courtroom. But the Court held that this failure to accommodate constituted discrimination against those with disabilities and denial of access to programs, services, or activities "by reason of" their disabilities. As the *Lane* Court noted, in passing the ADA, "Congress learned that many individuals, in many States across the country, were being excluded from courthouses and court proceedings *by reason of their disabilities*," not because states were taking discriminatory actions to bar them from courthouses but because states failed to take affirmative steps to make courtrooms accessible. *Id.* at 527 (emphasis added).

The panel opinion cannot be reconciled with *Lane* or the Supreme Court's other precedent interpreting federal disability laws. In recognizing that Congress enacted the ADA to address "the many forms" disability discrimination can take, "includ[ing] outright intentional exclusion as well as the failure to make modifications to existing facilities and practices," *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674–75 (2001) (internal quotation marks omitted), the Court has made clear that a cognizable form of "discrimination" under the ADA is the failure to accommodate a disability—that is, the *failure* to treat disabled individuals

differently on account of their disability. But under the panel opinion's reasoning, the evidence that a defendant did not intentionally treat those with disabilities differently would "belie causality" and therefore not be discrimination "by reason of" disability.

II. The Panel Opinion Conflicts with Both Its Own Past Opinions and Those of Its Sister Circuits.

Because the panel opinion deviates from well-established Supreme Court precedent, it naturally creates both inter- and intra-circuit splits. No circuit court has held that plaintiffs asserting an ADA failure-to-accommodate claim must demonstrate that they were treated differently from non-disabled individuals to state a claim, and many circuit courts, including this one, have expressly stated the opposite.

It is the consensus position among the courts of appeals that a plaintiff need not demonstrate disparate treatment on account of disability to state an ADA claim for failure to accommodate. Instead, all a plaintiff needs to show to satisfy "the third prong of the prima facie case—discrimination 'by reason of his disability'"—is that "the defendants have failed to make reasonable accommodations." *Valentine v. Collier*, 993 F.3d 270, 290 (5th Cir. 2021).

That is, for purposes of a failure-to-accommodate claim under the ADA, the causation requirement simply means that a plaintiff's disability was the "reason" the plaintiff was unable to participate in or was denied the benefits of "the services,

programs, or activities of a public entity," 42 U.S.C. § 12132. *See, e.g.*, *Summers v. City of Fitchburg*, 940 F.3d 133, 138–39 (1st Cir. 2019) (distinguishing between claims of "disparate treatment" and "failure to make reasonable accommodations" under the ADA); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 274 (2d Cir. 2003) (noting that an "'otherwise qualified ... applicant'" need not "show that other applicants receive more favorable treatment" (alteration in original)); *Frame v. City of Arlington*, 657 F.3d 215, 231 (5th Cir. 2011) (stating that a city building a sidewalk that "benefits persons without disabilities" but is "inaccessible to individuals with disabilities" "is the type of discrimination the ADA prohibits"); *Wilson v. Gregory*, 3 F.4th 844, 859 (6th Cir. 2021) ("Title II imposes affirmative obligations on public entities and does not merely require them to refrain from intentionally discriminating against the disabled."); *McGary v. City of Portland*, 386 F.3d 1259, 1265 (9th Cir. 2004) (holding that it was error for the district court to dismiss an ADA claim "solely on the ground that [the plaintiff] failed to allege facts indicating that the [defendant] acted 'by reason of' his disability, since non-disabled residents were also subject to" the same ordinance, and recognizing "that facially neutral policies may violate the ADA when such policies unduly burden disabled persons, even when such policies are consistently enforced"); *Holly v. Clairson Indus., L.L.C.*, 492 F.3d 1247, 1262–63 (11th Cir. 2007) (holding that defendants are "not insulated from liability under the ADA by treating" non-disabled and

disabled people "exactly the same" and explaining that "the very purpose of reasonable accommodation laws is to require" different treatment of disabled individuals "in some circumstances").

Even circuits that have not expressly held that a failure-to-accommodate claim does not require a showing of disparate treatment routinely permit plaintiffs to assert such claims against facially neutral policies and practices that have "excluded [them] from participation in or … denied [them] the benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. For instance, courts have permitted failure-to-accommodate challenges to inaccessible showers in a restrictive housing prison unit, *Furgess v. Pennsylvania Dep't of Corr.*, 933 F.3d 285, 291 (3d Cir. 2019); a universally applicable vote-by-mail ballot that did not provide blind individuals an "opportunity to participate … equal to that afforded to others," *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 498, 506 (4th Cir. 2016) (alteration in original); court proceedings on the second floor of a county courthouse that were "not accessible to citizens with mobility impairments," *Layton v. Elder*, 143 F.3d 569, 471–72 (8th Cir. 1998); *see also Shotz v. Cates*, 256 F.3d 1077, 1080–81 (11th Cir. 2001); and the printing of paper currency that is not "readily distinguishable to the visually impaired," *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1259 (D.C. Cir. 2008) (applying the Rehabilitation Act). These challenges were all to

generally applicable services, programs, and activities made inaccessible to certain disabled individuals based on the failure to provide reasonable accommodations.

This Court has previously joined its sister circuits in recognizing that "a claim for failure to make a reasonable accommodation does not require a showing of discriminatory motive." *Brooks v. Colo. Dep't of Corr.*, 12 F.4th 1160, 1167 (10th Cir. 2021). In *Brooks*, a prison conditions case, a prisoner with "frequent, unpredictable fecal incontinence" sued under the ADA after the prison revoked his "movement pass," which afforded him flexibility in determining when to eat meals as a means of accommodating his disability. *Id.* at 1163. There was no indication in the record that the revocation was intended to treat Brooks differently from non-disabled prisoners on account of his disability. In fact, Brooks continued to be treated better than other prisoners, as the Colorado Department of Corrections provided him diapers as an accommodation for his disability. Nonetheless, this Court held that a factual question remained of whether the diapers, in contrast to the movement pass, were a reasonable accommodation such that he was denied meaningful access to meals "by reason of his disability." *Id.* at 1167.

Similarly, in *Robertson v. Las Animas County Sheriff's Department*, a deaf detainee sued a county sheriff's department because he was given access to only a standard telephone that he could not use and his probable cause hearing occurred over a closed-circuit television that he could not hear. 500 F.3d 1185, 1189 (10th

Cir. 2007). In short, he was treated like all other detainees: He was provided with standard-issue resources, but he was unable to adequately use those resources by reason of his disability. This Court reversed the district court's grant of summary judgment to the defendant on the ADA claim. Under a section heading titled "Discrimination by reason of disability," this Court held that a fact question remained on whether the defendant failed to affirmatively accommodate a known disability of the plaintiff by failing to provide him an auxiliary aid that would give him access to a telephone-equivalent service and the ability to understand his own probable cause hearing.

Even the lone authority that the panel opinion invokes in its ADA section, *J.V. v. Albuquerque Public Schools*, cited *Robertson* for the proposition that the ADA "require[s] public entities to provide reasonable accommodations to disabled persons." 813 F.3d 1289, 1299 (10th Cir. 2016). *J.V.* analyzed the meaning of "by reason of disability," but it did so in response to plaintiff's argument that the conduct itself that motivated the state action was induced by a disability.[2] *J.V.* went on to

[2] Crane did not make an analogous argument in her briefing before this Court; that is, she did not assert that Defendants violated the ADA by sanctioning Tucker for conduct that was a manifestation of his disability. Instead, Crane argued that regardless of the reason for Tucker's sanction, he was punished in a way that did not reasonably accommodate his disabilities. *See Furgess*, 933 F.3d at 291 ("[T]he reason why Furgess was housed in [segregation] is irrelevant. A prisoner's misconduct does not strip him of his right to reasonable accommodations, and a prison's obligation to comply with the ADA and the RA does not disappear when

consider the plaintiff's failure to accommodate claim, holding that the defendant was not aware of J.V.'s disability, such that it could not be responsible for failing to accommodate that disability. But that case does nothing to undermine Crane's claim that Tucker was denied the benefits of a public service "by reason of [his] disability" and that the defendants—who were unquestionably aware of that disability—failed to provide him a reasonable accommodation.[3]

III. The Requirement that a Plaintiff Prove Deliberate Indifference to Obtain Damages Further Demonstrates the Panel's Error.

This Court has held that while a plaintiff can obtain equitable relief under the Rehabilitation Act simply by proving a failure to accommodate, such a plaintiff must satisfy an additional intent requirement to obtain damages. *See Havens v. Colo. Dep't of Corr.*, 897 F.3d 1250, 1264 (10th Cir. 2018). This Court has yet to resolve that question in the context of the ADA, although all circuits to reach the question have held that the same intent requirement applies. *See Hans v. Bd. of Shawnee Cty. Comm'rs*, 775 F. App'x 953, 964 (10th Cir. 2019) (explaining that all circuit courts

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inmates are placed in a segregated housing unit, regardless of the reason for which they are housed there.").

[3] If this Court interprets *J.V.* to hold that the "by reason of" language in § 12132 means that a failure-to-accommodate plaintiff must show that he was treated differently from other individuals on the basis of his disability despite the conflicting reasoning in other, more recent precedential cases like *Brooks*, it should take this case en banc to conform this Court's precedent to the Supreme Court's.

have reached this "same result" with respect to the ADA while noting that this Court "has yet to decide" it).

Almost every circuit to address the definition of "intentional discrimination" under the ADA has held that it requires "deliberate indifference," *id.*, and this Court has held the same in the context of the Rehabilitation Act, *Havens*, 897 F.3d at 1264. Deliberate indifference does not require animosity, but it does require knowledge that the violation of the ADA was substantially likely and a failure to act upon that likelihood. *Id.*

Under the panel's holding requiring a showing of disparate treatment to state an ADA failure-to-accommodate claim, this requirement of deliberate indifference to be eligible for damages would be entirely superfluous. The showing that the panel required for Crane to state her ADA claim—essentially discriminatory animus or at the very least knowledge of disparate treatment—is higher than the showing required for deliberate indifference. *Every* violation of Title II would involve defendants who treated plaintiffs worse because of their disabilities and would therefore qualify as "intentional discrimination." The panel has written out of existence the claims that could obtain equitable relief but not damages—those in which defendants failed to accommodate the plaintiff's disabilities but did so unknowingly. This dissonance with the universal holdings of this Court and its sister circuits further demonstrates the panel's error.

IV. The Panel's Decision Did Not Turn on Deliberate Indifference.

Unlike the issue of causation, whether Defendants were deliberately indifferent in their failure to accommodate was briefed by the parties and at issue in the case. Opening Br. 41–42; Answering Br. 63; Reply Br. 21. Brock Tucker died as a result of Defendants' failure to accommodate his disability, and therefore his estate had no standing to pursue equitable relief; it was eligible only for damages. Significantly, however, although a claim for damages under the ADA requires a showing of deliberate indifference, the panel clearly did not make its decision on this basis.

Holding that defendants were not deliberately indifferent on these allegations would have incorrectly applied the law, but at least stated it correctly. This is not what the panel did, however. The panel opinion's section on the ADA never mentions either that Crane is seeking damages or whether defendants were deliberately indifferent in their failure to accommodate Tucker's disability. Instead, it relies exclusively on the causation requirement and the "by reason of" language, both of which apply to all ADA and Rehabilitation Act claims, including those for equitable relief. *Crane*, 2021 WL 4898816, at *12–13. This erroneous decision implicates an issue of extraordinary importance—the abrogation of failure-to-accommodate claims altogether under the ADA and the Rehabilitation Act—and requires rehearing.

CONCLUSION

For the reasons set forth above, Crane respectfully requests that this Court grant this petition for rehearing or rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2021, a true and correct copy of the foregoing and corrected Petition for Plaintiff-Appellant was served via electronic filing with the Clerk of Court and all registered ECF users.

Dated: November 5, 2021

/s/ Samuel Weiss_____
Samuel Weiss

CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because it contains 3,639 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

This petition 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 the petition has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: November 5, 2021

/s/ Samuel Weiss_____

Samuel Weiss

FILED
United States Court of Appeals
Tenth Circuit

October 21, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JANET CRANE, as Administrator of Brock Tucker's Estate,

Plaintiff - Appellant,

v.

UTAH DEPARTMENT OF CORRECTIONS; ALFRED BIGELOW, Warden of the Central Utah Correctional Facility; RICHARD GARDEN, Director of the Clinical Services Bureau for the Utah Department of Corrections; DON TAYLOR, Inmate Disciplinary Officer at the Central Utah Correctional Facility; FNU COX, Correctional Officer at Central Utah Correctional Facility; BRENT PLATT, Director of Utah Division of Child and Family Services; UNIVERSAL HEALTH SERVICES INC., a Private for-Profit Corporation; SUSAN BURKE,

Defendants - Appellees,

and

FUTURES THROUGH CHOICES, a private corporation; JEREMY COTTLE, CEO and Managing Director of Provo Canyon School,

Defendants.

No. 20-4032

PROFESSORS AND PRACTITIONERS OF PSYCHIATRY AND PSYCHOLOGY; MARTIN F. HORN; STEVE J. MARTIN; RICHARD MORGAN; DAN PACHOLKE; ELDON VAIL; BROOKLYN LAW SCHOOL'S DISABILITY AND CIVIL RIGHTS CLINIC; CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER; COLORADO CROSS-DISABILITY COALITION; DISABILITY LAW COLORADO; DISABILITY RIGHTS ADVOCATES; DISABILITY RIGHTS NEW YORK; HIGHLANDS LAW FIRM; KILLMER, LANE & NEWMAN, LLP; LAW OFFICE OF SARAH MORRIS, LLC,

Amici Curiae.

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:16-CV-01103-DN)

Samuel Weiss, Rights Behind Bars, Washington, DC (Randall W. Richards, Richards & Brown PC, Clearfield, Utah, with him on the briefs), argued for Plaintiff – Appellant.

Joshua D. Davidson, Assistant Utah Solicitor General, Utah Attorney General's Office, Salt Lake City, Utah, argued for Defendants - Appellees.

Before **HOLMES**, **BACHARACH**, and **McHUGH**, Circuit Judges.

McHUGH, Circuit Judge.

This is an appeal from the dismissal of a suit brought by the estate of a mentally ill and intellectually disabled prisoner who committed suicide while in Utah Department of Corrections ("UDC") custody. Brock Tucker was seventeen when he was imprisoned at the Central Utah Correctional Facility ("CUCF"). His incarceration followed a childhood marred by abuse and tragedy, including a near fatal accident that caused severe brain damage and impulse control disorders. At CUCF, Mr. Tucker endured long periods of punitive isolation. CUCF officials rarely let Mr. Tucker out of his cell, and he was often denied recreation, exercise equipment, media, commissary, visitation, and library privileges. Mr. Tucker hanged himself approximately two years after his arrival at CUCF.

Plaintiff-appellant Janet Crane is Mr. Tucker's grandmother and the administrator of his estate. She sued on his estate's behalf, and she continues to pursue three types of claims on appeal: (1) Eighth Amendment claims against four prison officials (the "CUCF Defendants"); (2) statutory claims for violations of the Americans with Disabilities Act ("ADA") and the Rehabilitation Act against UDC; and (3) a claim under the Unnecessary Rigor Clause of the Utah Constitution against both the CUCF Defendants and UDC. The CUCF Defendants are: (1) Alfred Bigelow, the warden of CUCF from approximately 2007 to July 2010 and April 2014 to February 2017; (2) Richard Garden, the Director of the Clinical Services Bureau for UDC during the relevant time period; (3) Don Taylor, an inmate disciplinary officer at CUCF; and (4) Officer Cox, a correctional officer at CUCF.[1]

[1] Officer Cox's first name is not in the record on appeal.

The Defendants moved for judgment on the pleadings. The district court granted the motion, holding the CUCF Defendants were entitled to qualified immunity on the federal constitutional claims and the federal statutory claims did not survive Mr. Tucker's death. As a result, the district court declined to exercise supplemental jurisdiction over the state constitutional claim.

Ms. Crane timely appealed. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

A. Factual History[2]

Brock Tucker lived a difficult life. His parents were heavy drug abusers, and they separated shortly after his birth. Mr. Tucker's mother, father, grandmother, and Utah's Division of Child and Family Services ("DCFS") all had custody of Mr. Tucker at various points in time. He spent years rotating in and out of juvenile facilities and programs, during which he experienced severe abuse by staff. The Amended Complaint

[2] For purposes of this appeal, we accept all facts Ms. Crane pleaded as true, and we grant all reasonable inferences from the pleadings in her favor. *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1228 (10th Cir. 2012) ("We review a district court's grant of a motion for judgment on the pleadings de novo, using the same standard that applies to a Rule 12(b)(6) motion. [W]e accept all facts pleaded by the non-moving party as true and grant all reasonable inferences from the pleadings in favor of the same." (alteration in original) (quotation marks omitted)).

details the abuse Mr. Tucker suffered and the toll it took on his mental health, including numerous instances of self-mutilation and suicidal ideation. *See* App. at 25–27.[3]

Mr. Tucker's mental health was already fragile prior to the abuse. He nearly drowned as a child, and the incident damaged his brain and stunted his cognitive development. When Mr. Tucker began having behavioral issues at age eleven, Ms. Crane took him to see Dr. David Nilsson, a certified clinical neuropsychologist who specialized in treating neurodevelopmental and neurobehavioral disorders resulting from brain injuries. Dr. Nilsson diagnosed Mr. Tucker with brain damage, an IQ of 70, and an impulse control disorder that left Mr. Tucker "unduly impressionable and overly influenced by his surroundings and other people." *Id.* at 25.

The Amended Complaint alleges Mr. Tucker was "fully beaten down from repeated mental and physical abuse" and took solace in gang activity. *Id.* at 28. In March 2012, Mr. Tucker was charged with automobile theft and related offenses. In August 2012, he was sentenced to imprisonment for 2 to 5 years. UDC transferred Mr. Tucker to CUCF shortly after his sentencing.

Once there, inmate disciplinary officers—including Defendant Taylor—punished Mr. Tucker for various non-violent infractions. This punishment included "punitive isolation" that kept Mr. Tucker isolated in his cell except for, at most, one hour every other day to shower. *Id.* Mr. Tucker was denied access to recreation, exercise equipment,

[3] The allegations of abuse do not concern either the Defendants or the issues remaining on appeal. They were lodged against five Defendants since dismissed from the case. *See* App. at 46–53.

the library, visitation, phone calls, and the commissary. Between February 2013–2014, Mr. Tucker spent more than 154 days in punitive isolation. CUCF staff also changed Mr. Tucker's inmate classification code on June 9, 2014, resulting in his placement in maximum security housing and his confinement to a cell for 21 hours per day, with reduced visitation time and reduced privileges.

In June 2014, UDC physician Bruce Burnham diagnosed Mr. Tucker with unspecified psychosis and major depressive disorder, along with moderate back pain and hepatitis C. Dr. Burnham prescribed anti-depressant and anti-anxiety medications, and, in July 2014, he ordered Mr. Tucker to outpatient mental health treatment. Mr. Tucker also met with social worker Brian Droubay on September 12, 2014. At this meeting, Mr. Tucker complained about mistreatment by CUCF staff.

On September 19, 2014, Defendant Taylor sentenced Mr. Tucker to two consecutive 20-day periods of punitive isolation for having a new tattoo, making verbal threats to staff, and opening another inmate's door and discharging a liquid from a container at the inmate. Defendant Taylor levied this punishment without consulting mental health staff, in apparent violation of CUCF Policy FD18/12.03. This policy provides "[w]hen disciplinary action is being considered for an offender in outpatient treatment, the psychiatrist mental health staff shall provide information to the discipline hearing officer stating whether or not the behavior was due to mental illness." *Id.* at 33. Three days later, Mr. Tucker received two new disciplinary notices, meaning his time in punitive isolation would likely be extended. The record does not identify who sentenced Mr. Tucker to these additional punitive isolation terms.

On October 2, 2014, Defendant Cox argued with Mr. Tucker through his cell door. Defendant Cox refused to allow Mr. Tucker to leave his isolation cell for exercise that day, and Defendant Cox was seen entering Mr. Tucker's cell by himself, in violation of prison policy. Shortly afterward, Mr. Tucker placed a towel over his cell door window, which the Amended Complaint characterizes as "a clear indication that [Mr. Tucker] was going to harm himself." *Id*. at 34. His isolation cell had a top bunk bed, sheets, and towels, "thereby giving [Mr. Tucker] the means to commit suicide." *Id*. Later that evening, an officer distributing medication discovered Mr. Tucker dead, hanging from the top of his bunk bed in his isolation cell.

B. Procedural History

Ms. Crane filed suit under 42 U.S.C. § 1983 in Utah state court. Defendants removed the suit to federal court in October 2016. Thereafter, Ms. Crane filed a six-count amended complaint, asserting: (1) an Eighth Amendment claim against the CUCF Defendants collectively, alleging cruel and unusual punishment based on Mr. Tucker's conditions of confinement and deliberate indifference to his serious medical needs; (2) an Eighth Amendment claim against Defendant Taylor, based on his choice to discipline Mr. Tucker with punitive isolation in September 2014; (3) an Eighth Amendment claim against Defendant Cox, based on the events of October 2, 2014; (4) a Fourteenth Amendment claim against five "DCFS Defendants," based on the abuse Mr. Tucker suffered at various facilities overseen by those parties; (5) a claim for ADA and

Rehabilitation Act violations against UDC;[4] and (6) a claim for violation of article I, section 9, of the Utah Constitution ("Unnecessary Rigor") against all Defendants. Ms. Crane sued the CUCF Defendants in their individual capacities.

In September 2017, the district court dismissed two DCFS Defendants after determining the allegations against them were "conclusory statements devoid of supporting factual allegations." *Crane v. Utah Dep't of Corr.*, No. 2:16-CV-1103 DN, 2017 WL 4326490, at *3 (D. Utah Sept. 28, 2017). The remaining Defendants moved for judgment on the pleadings, arguing Ms. Crane failed to state a plausible claim and the CUCF Defendants were entitled to qualified immunity.

In February 2020, the district court entered a written order granting the Motion for Judgment on the Pleadings. Before turning to the merits, the district court dismissed the remaining DCFS Defendants.[5] It then analyzed the three categories of remaining allegations: (1) Eighth Amendment claims against all of the CUCF Defendants, including allegations of supervisor liability against Defendants Bigelow and Garden and the counts specific to Defendants Taylor and Cox; (2) the ADA claim against Defendant UDC; and

[4] We adopt the convention used by the district court and the parties of referring to both Ms. Crane's ADA and Rehabilitation Act claims as her 'ADA claim' and analyze them as such. With few limited exceptions, courts evaluate claims under these Acts identically. One such exception is the additional requirement under the Rehabilitation Act that entities receive federal funding. *See Nielsen v. Moroni Feed Co*., 162 F.3d 604, 608 n.7 (10th Cir. 1998). Another exception involves the different causation standards articulated by each statute. *See infra*, Part II.B.

[5] Ms. Crane has not challenged the dismissal of any DCFS Defendant on appeal.

(3) the unnecessary rigor claims against all of the remaining Defendants—i.e., the CUCF Defendants and Defendant UDC.

The district court dismissed Ms. Crane's claims against all three groups. First, the district court held qualified immunity shielded each CUCF Defendant from the Eighth Amendment claims because Ms. Crane failed to identify a clearly established constitutional right the Defendants allegedly violated. Because this was dispositive, the district court did not analyze whether any of the CUCF Defendants had violated Mr. Tucker's constitutional rights. Second, the district court rejected the ADA claim, citing a District of Utah case that held ADA claims do not survive a plaintiff's death under Utah's state survival statute. Third, having dismissed all of Ms. Crane's federal law claims, the court declined to exercise supplemental jurisdiction over the remaining state constitutional claim.

II. DISCUSSION

"We review a district court's grant of a motion for judgment on the pleadings de novo, using the same standard that applies to a Rule 12(b)(6) motion." *Leiser v. Moore*, 903 F.3d 1137, 1139 (10th Cir. 2018) (quotation marks omitted). To survive a motion for judgment on the pleadings,[6] "a complaint must contain sufficient factual matter, accepted

[6] Ms. Crane argues it is typically inappropriate to resolve qualified immunity cases at the Rule 12 stage. *See* Oral Arg. at 11:57–12:09 (asserting "it is very rare that a motion to dismiss based on qualified immunity is appropriate"). This position, however, conflicts with Supreme Court guidance to "resolv[e] immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam); *see also Pearson v. Callahan*, 555 U.S. 223, 231 (2009) ("[T]he 'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that '"insubstantial claims" against

as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A complaint pleading "facts that are 'merely consistent with' a defendant's liability" does not meet this threshold. *Id.* (quoting *Twombly*, 550 U.S. at 557). Courts do not assume as true allegations that are legal conclusions, formulaic recitations of elements, or naked assertions devoid of further factual enhancement. *See id.*

A. Eighth Amendment Claims and Qualified Immunity

Ms. Crane alleges the CUCF Defendants subjected Mr. Tucker to cruel and unusual punishment in violation of the Eighth Amendment. The CUCF Defendants argue they are shielded from these claims by qualified immunity. *See Cummings v. Dean*, 913 F.3d 1227, 1239 (10th Cir. 2019) (noting qualified immunity "protects public employees from both liability and from the burdens of litigation arising from their exercise of discretion" (internal quotation marks omitted)). To defeat a qualified immunity defense, the plaintiff must demonstrate "(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." *Id.* (emphasis and internal quotations marks omitted). The court may address these two

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government officials [will] be resolved prior to discovery.'" (second alteration in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987))).

prongs in either order. *Id*. We begin by analyzing the second prong because it proved dispositive in the district court and proves dispositive here.

A right is clearly established for qualified immunity purposes if "every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). This ordinarily means "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Schwartz v. Booker*, 702 F.3d 573, 587 (10th Cir. 2012) (quotation marks omitted). Precedent need not be "directly on point" so long as it places the "statutory or constitutional question beyond debate." *Mullenix*, 577 U.S. at 12 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). Still, clearly established law must remain moored in a specific set of facts. "The dispositive question is 'whether the violative nature of *particular* conduct is clearly established,'" which means courts may not "'define clearly established law at a high level of generality.'" *Id.* (emphasis in original) (quoting *al-Kidd*, 563 U.S. at 742). "The plaintiff bears the burden of citing to us what he thinks constitutes clearly established law." *Thomas v. Durastanti*, 607 F.3d 655, 669 (10th Cir. 2010).

On appeal, Ms. Crane asserts that "putting the severely mentally ill in solitary confinement can constitute deliberate indifference to substantial harm." Aplt. Br. at 10. She bases this assertion on the purportedly "well-recognized and clearly established right of seriously mentally ill prisoners at risk of suicide not to be confined in excessively punitive solitary confinement—particularly in conditions that facilitate suicide, such as

cells that contain hanging implements and a tie-off point." Aplt. Reply at 6. We thus examine whether mentally ill prisoners have a clearly established right to be free from punitive isolation.[7]

Ms. Crane does not argue that a single case clearly establishes this right. Rather, she cites two lines of cases that she contends together do so. Specifically, Ms. Crane asserts the first line of cases clearly establishes "that placing the seriously mentally ill in solitary confinement can constitute deliberate indifference." Aplt. Br. at 14. She argues the second line of cases clearly establishes "that housing seriously mentally ill prisoners

[7] Before the district court, Ms. Crane argued the operative right was provided by *Cox v. Glanz*, 800 F.3d 1231 (10th Cir. 2015). In *Cox,* we explained that Eighth Amendment claims based on a jail suicide "must be judged against the deliberate indifference to serious medical needs test." 800 F.3d at 1248 (quotation marks omitted). We then held prison officials satisfied the subjective component of the deliberate indifference test only when they failed "to take reasonable steps to protect" an inmate from suicide despite having "actual knowledge . . . of an individual inmate's substantial risk of suicide." *Id.* at 1248–49 (internal quotation marks omitted). In the district court, Ms. Crane asserted the deliberate indifference standard for Eighth Amendment liability, as applied to a prison suicide in *Cox*, was the clearly established law the CUCF Defendants violated here. On appeal, however, she does not cite or rely on *Cox,* and we do not consider it. *See generally* Aplt. Br.

In any event, we agree with the concurrence that Ms. Crane could not prevail under a traditional deliberate indifference theory because she fails to allege each defendant had actual knowledge of Mr. Tucker's substantial risk of suicide. *See* Concurrence at 8–14. Ms. Crane therefore fails to allege a constitutional violation even under *Cox*. And because we decided *Cox* after Mr. Tucker's suicide, it could not have notified the CUCF Defendants that their alleged conduct was unconstitutional in any event. *See Elder v. Holloway*, 510 U.S. 510, 516 (1994) (instructing courts to review "all relevant authority" to determine "[w]hether an asserted federal right was clearly established *at a particular time*, so that a public official who allegedly violated the right has no qualified immunity from suit") (emphasis added). Finally, Ms. Crane does not argue the caselaw undergirding *Cox*—specifically *Estelle v. Gamble*, 429 U.S. 97 (1976) and *Farmer v. Brennan*, 511 U.S. 825 (1994)—is similar enough to the circumstances here to provide clearly established law.

at risk of suicide in cells that facilitated hanging constituted deliberate indifference." *Id.* at 16. Ms. Crane claims the combination of these cases provided the CUCF Defendants fair notice that their conduct was unconstitutional.[8] Significantly, when defining the right-at-issue on appeal, Ms. Crane does not mention any requirement that a defendant have subjective knowledge of the inmate's substantial risk of suicide.

The lines of cases Ms. Crane cites do not clearly establish either proposition she claims they stand for, nor do they together clearly establish the constitutional right Ms. Crane espouses on appeal. We address each line of cases in turn.

1. Confining Mentally Ill Inmates in Punitive Isolation

Ms. Crane contends that "placing the seriously mentally ill in solitary confinement can constitute deliberate indifference." Aplt. Br. at 14. That is, she argues there is a

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[8] Ms. Crane cites *Wilson v. Seiter*, 501 U.S. 294 (1991), for the proposition that "[s]ome combinations of inhumane conditions may establish an Eighth Amendment violation when each alone would not do so." Aplt. Br. at 9. In *Wilson*, the Court held an Eighth Amendment violation could be established by combining multiple "conditions of confinement . . . when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets." *Wilson*, 501 U.S. at 304. There, the Court was evaluating whether the objective component of the deliberate indifference test for Eighth Amendment liability could be satisfied by a combination of prison conditions, not whether different conditions could be combined to clearly establish the illegality of specific conduct for qualified immunity purposes. The latter interpretation of *Wilson* advanced by Ms. Crane seems to conflict with the Court's repeated instruction that clearly established law must render the violative nature of particular conduct beyond debate. *See Mullenix v. Luna*, 577 U.S. 7, 12 (2015). Under the circumstances here, however, we need not determine whether a plaintiff can combine different lines of precedent to clearly establish the illegality of a defendant's specific conduct. That is because, as we shall explain, neither line of cases Ms. Crane presents clearly establishes the constitutional rights she claims.

clearly established constitutional right of all seriously mentally ill inmates not to be placed in solitary confinement. In support, Ms. Crane cites four district court cases from outside this circuit. Even if they were controlling, these cases do not carry the weight she places upon them.

a. Cited precedent

First, in *Madrid v. Gomez*, the Northern District of California held that conditions in the security housing units of a state prison subjected mentally ill inmates to cruel and unusual punishment. 889 F. Supp. 1146 (N.D. Cal. 1995). These conditions included cells designed to reduce visual stimulation and views of the outside world; complete social isolation for 22.5 hours each day for weeks, months, or years; exclusion from prison job opportunities or other recreational or educational programs; and limited media and visitation privileges. *Id.* at 1228–30. The court said "subjecting individuals to [these] conditions that are 'very likely' to . . . seriously exacerbate an existing mental illness . . . deprives [mentally ill] inmates of a minimal civilized level" of mental health, "especially when certain aspects of those conditions appear to bear little relation to security concerns." *Id.* at 1266. The court then held the prison officials acted with deliberate indifference toward mentally ill inmates by failing to ameliorate the offending conditions, despite knowing of their detrimental effects on mentally ill inmates. *Id.* at 1266–67.

Second, in *Ruiz v. Johnson*, the Southern District of Texas held the conditions in the Texas prison system's "administrative segregation units clearly violate constitutional standards when imposed on the subgroup of . . . mentally-ill prisoners." 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999), *rev'd on other grounds sub nom. Ruiz v. United States*, 243

F.3d 941 (5th Cir. 2001). These conditions included stripping inmates of virtually all personal property and hygienic materials, restricting inmate diets, forcing inmates to wear paper gowns, and depriving inmates of exercise, social activity, and outside contact. *Id*. at 908 & n.91. Experts reported that incidents of self-mutilation, incessant babbling, and shrieking were almost daily events in the segregation units. *Id.* at 908. The court determined that prison officers were "well aware of both these conditions and these inmates' ensuing pain and suffering," and "knowingly turned [their] back on this most needy segment of its population." *Id.* at 913–14. Accordingly, the court held defendants were "deliberately indifferent to the serious risks posed by subjecting such inmates to confinement in administrative segregation for extended periods of time." *Id.* at 915.

Third, in *Jones'El v. Berge*, the Western District of Wisconsin granted in part a preliminary injunction to inmates at a supermaximum security facility, which was comprised of 500 segregation cells. 164 F. Supp. 2d 1096, 1125–26 (W.D. Wis. 2001). The injunction required the state to transfer several mentally ill inmates and to conduct mental health evaluations of others. *Id.* In granting the injunction, the court found plaintiffs' claim that conditions in the facility's segregation cells violated the Eighth Amendment rights of mentally ill inmates had a "better than negligible chance of succeeding." *Id.* at 1098, 1117. The facility's segregation cells created "almost total sensory deprivation" by isolating inmates for all but four hours a week, preventing incidental contact with others outside the cells, severely restricting programming and exercise opportunities, and keeping lights on at all hours of the day. *Id.* at 1118; *see also id.* at 1119–20 (comparing the supermax to the prisons in *Madrid* and *Ruiz*). Because

prison officials knew the segregation cells exacerbated mental illness, the defendants' "burden is to demonstrate that they took reasonable steps to keep seriously mentally ill inmates from being transferred to [the facility] and to transfer out any inmates who develop serious mental illnesses." *Id.* at 1121. The court then determined defendants failed to carry this burden, meaning they acted with deliberate indifference towards this subset of inmates. *Id*. at 1121–23.

Fourth, in *Indiana Protection and Advocacy Services Commission v. Commissioner, Indiana Department of Correction*, the Southern District of Indiana held state prison officials violated the Eighth Amendment rights of mentally ill inmates held in segregation units. No. 1:08-CV-01317-TWP-MJD, 2012 WL 6738517 (S.D. Ind. Dec. 31, 2012). These inmates spent up to 22.75 hours per day in isolation and had limited recreation, commissary, and media privileges. *Id.* at *3–5, *7. The court noted "the severe conditions in the segregation units cause a predictable deterioration of the mental health of seriously mentally ill prisoners [that the state] has explicitly observed." *Id.* at *17. Yet, prison records regarding one prisoner who committed suicide "disclose[d] that there was only one correctional staff member for the entire area and the staff person was unable to visually supervise the prisoner." *Id.* Records concerning another prisoner noted he was not brought to multiple mental health appointments shortly before his suicide, and after one missed appointment he was not seen for a week. *Id.* The court then held the state acted with deliberate indifference toward mentally ill prisoners confined in segregation units by failing to provide "minimally adequate mental health care in terms

of scope, intensity, and duration," even though they knew of the substantial risk of harm created by their failure to do so. *Id.* at *22–23.

b. Analysis

These cases share a common theme. They stand for the proposition that isolating mentally ill inmates in conditions that seriously and predictably exacerbate their mental illness is cruel and unusual when the official has subjective knowledge of both the mental illness and the impact of isolation. Although these trial court decisions may portend future legal developments, they do not constitute clearly established law capable of overcoming qualified immunity here.

District court cases lack the precedential weight necessary to clearly establish the law for qualified immunity purposes. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (noting "[m]any Courts of Appeals . . . decline to consider district court precedent when determining if constitutional rights are clearly established for purposes of qualified immunity" because they are not binding precedent); *Lowe v. Raemisch*, 864 F.3d 1205, 1211 (10th Cir. 2017) (rejecting that district court's holding clearly established underlying right because district court holdings are "not controlling in any jurisdiction"); *Bailey v. Twomey*, 791 F. App'x 724, 730 (10th Cir. 2019) (unpublished) ("[A] district-court case . . . [does not] suffice to show the law is clearly established."). Tellingly, Ms. Crane does not rely on these district court cases in her reply brief. *See* Aplt. Reply at 6 (claiming Defendants failed to "refute the chorus of *circuit courts* that have recognized this [espoused] right" (emphasis added). And Ms. Crane cites no on-point decisions from this circuit or the Supreme Court, nor decisions from any other circuit court, that hold

punitive isolation of mentally ill inmates violates the Eighth Amendment in the absence of knowledge that a specific inmate is suicidal. Thus, the CUCF Defendants' general use of punitive isolation to discipline prisoners who happen to be mentally ill does not violate clearly established law.

2. Confining Suicidal Inmates in Cells that Facilitate Suicide

Ms. Crane next argues that "housing seriously mentally ill prisoners at risk of suicide in cells that facilitated hanging constituted deliberate indifference." Aplt. Br. at 16. However, she does not support this claim with any precedent from the Supreme Court or this circuit—which is ordinarily required to demonstrate a right is clearly established. *See Schwartz*, 702 F.3d at 587. And even the out-of-circuit cases she cites do not stand for the proposition asserted. Specifically, the cited cases do not clearly establish that confining suicidal inmates in cells that facilitate hanging is unconstitutional *per se*. Rather, these cases stand for a more limited proposition that does not expand the right recognized by this circuit's deliberate indifference jurisprudence. Namely, as we explained in *Cox v. Glanz*, prison officials are deliberately indifferent if they fail to take reasonable steps to protect a pre-trial detainee or an inmate from suicide when they have subjective knowledge that person is a substantial suicide risk. 800 F.3d 1231, 1248–49 (10th Cir. 2015).

a. Cited precedent

First, in *Sanville v. McCaughtry*, the Seventh Circuit held the allegations made by a decedent's estate could, if proven, defeat qualified immunity for prison officials guarding the decedent's cell during his suicide. 266 F.3d 724, 737–41 (7th Cir. 2001).

The decedent was a mentally ill inmate incarcerated in an isolation cell at the time of his death. *Id.* at 728, 731. His estate brought a § 1983 action against various prison officials for Eighth Amendment violations; the district court dismissed the action, finding all the named officials were entitled to qualified immunity. *Id.* at 732. In its complaint, the estate alleged certain prison guards knew the inmate presented a substantial suicide risk. *Id.* at 737. And that allegation was supported by specific factual assertions. The guards knew the inmate had written a last will and testament, had been told by the inmate that he was suicidal, were aware the inmate had previously attempted suicide and suffered from mental illness, had observed that the inmate had stopped eating and had lost significant weight, and knew the inmate's mother had alerted the prison about his suicidality. *Id*. at 730, 737. His estate further alleged the inmate covered his cell window with toilet paper, the window remained covered for five hours, and three guards saw but ignored the obstructed window on four separate occasions. *Id.* at 739–40. During this time, the inmate hanged himself using a pillowcase. *Id.* at 731.

The Seventh Circuit held these allegations would, if proven, show the guards made "no apparent attempt to discern whether [the inmate] was stable . . . [which] could easily be considered egregious enough to rise to the level of deliberate indifference." *Id.* at 739. Like Ms. Crane's reliance on *Cox* in the district court, *see* note 7 *supra*, the Seventh Circuit cited deliberate indifference to a known risk of suicide as the clearly established right violated by the guards' conduct. *Id.* at 740 ("There can be little debate that it was clearly established, long before 1998, 'that prison officials will be liable under Section

1983 for a pretrial detainee's suicide if they were deliberately indifferent to a substantial suicide risk.'" (quoting *Hall v. Ryan*, 957 F.2d 402, 406 (7th Cir. 1992))).

Second, in *Jacobs v. West Feliciana Sheriff's Department*, the Fifth Circuit affirmed the denial of qualified immunity for two of three officers detaining an arrestee who committed suicide. 228 F.3d 388 (5th Cir. 2000). Survivors of the arrestee brought § 1983 claims against the officers,[9] and a magistrate judge denied the officers' motion for summary judgment based on qualified immunity. *Id.* at 392. On appeal, the Fifth Circuit noted the officers were aware the arrestee had attempted suicide following her arrest, deemed her a suicide risk, and placed her in an isolation cell. *Id.* at 390–91. Nevertheless, the officers provided her with loose bedding and assigned her a cell with a substantial blind spot and multiple tie-off points that two of the officers knew another inmate had used to commit suicide. *Id.* at 394, 395–97. The officers also violated unwritten departmental policy by avoiding observation of the arrestee for a long period of time. *Id.* at 394.

The Fifth Circuit held these actions provided "sufficient evidence . . . for a jury to conclude [two of the officers] acted with deliberate indifference to [the arrestee's] known suicidal tendencies." *Id.* at 396 (discussing first officer); *id.* at 397–98 (reaching the same conclusion with respect to second officer); *see also id.* at 393 ("It is well-settled in the

[9] The § 1983 claims alleged Fourteenth Amendment violations. Unlike convicted prisoners whose right to be free from cruel and unusual punishment is protected by the Eighth Amendment, the Fourteenth Amendment's due process protections prohibit the state from inflicting punishment on pretrial detainees. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *Colbruno v. Kessler*, 928 F.3d 1155, 1162 (10th Cir. 2019).

law that 'a state official's episodic act or omission violates a pretrial detainee's due process rights to medical care [and protection from harm] if the official acts with subjective deliberate indifference to the detainee's rights.' (alteration in original) (quoting *Nerren v. Livingston Police Dep't*, 86 F.3d 469, 473 (5th Cir. 1996))). The Fifth Circuit held the third officer, who had been on the job for only about six months prior to the arrestee's death, was entitled to qualified immunity because he did not have any direct control over the decisions to place the arrestee in the isolation cell or to give her loose bedding, and he did not know about the previous suicide in the isolation cell. *Id.* at 398 (noting this officer "was essentially following orders" and "cannot be said to have been on the same notice" as the other two officers that the isolation cell was obviously inadequate).

Third, in *Snow ex rel. Snow v. City of Citronelle*, the Eleventh Circuit reversed summary judgment for one of six officers guarding a pretrial detainee who committed suicide. 420 F.3d 1262 (11th Cir. 2005). The administrator of the detainee's estate sued the officers under § 1983, and the district court granted summary judgment to all six officers on qualified immunity grounds. *Id.* at 1268. On appeal, the Eleventh Circuit reversed summary judgment as to one officer. *Id.* at 1265. The court noted that another correctional institution reported to this officer the detainee's recent attempt to cut her wrists and the officer personally observed the detainee wildly beat on her cell door and climb on the sink in her cell. *Id.* at 1266–67, 1270. The officer, however, went off duty without communicating to his colleagues his belief the detainee was a strong suicide risk, and he admitted to not monitoring the detainee as if she were suicidal. *Id.* at 1270. The

detainee's parents also testified the officer informed them their daughter was suicidal. *Id.* The court held the officer was not protected by qualified immunity, as "a jury could find that [the officer] had subjective knowledge that there was a strong risk that [the detainee] would attempt suicide and deliberately did not take any action to prevent that suicide." *Id.*

The court, however, affirmed dismissal of the claims against the other five officers based on qualified immunity because the plaintiff had "not presented any evidence that these five defendants had subjective knowledge of a strong likelihood that [the detainee] would attempt to commit suicide." *Id.* at 1269. The court reached this conclusion despite the detainee's "emergency room records show[ing] a strong likelihood that she would attempt to commit suicide" because "there [was] no evidence that these defendants knew about that information." *Id.*

Fourth, in *Coleman v. Parkman*, the Eighth Circuit affirmed the denial of qualified immunity to two officers responsible for an arrestee who committed suicide. 349 F.3d 534 (8th Cir. 2003). The administrator of the arrestee's estate sued the officers for violating his constitutional rights, and the district court denied the officers' motion for summary judgment based on qualified immunity. *Id.* at 536–37. On appeal, the Eighth Circuit concluded "the evidence supports an inference that [the officers] recklessly disregarded the risk that [the arrestee] would commit suicide." *Id.* at 539. The court highlighted evidence suggesting the officers were told the arrestee was a suicide risk and would kill himself if jailed, the arrestee was on suicide watch, and the officers knew the arrestee recently threatened suicide. *Id.* at 536. Yet, the officers provided the arrestee with a bed sheet and placed him in a "drunk tank" with tie-off points that were difficult to

observe. *Id.* The arrestee used the bed sheets to commit suicide, *id.*, and the court held a "jury could reasonably deduce that [the officers] recklessly disregarded" the arrestee's suicide risk, *id.* at 539.

Importantly, the "sole issue on appeal [was] whether the district court erred when it found the alleged facts . . . show[ed] [the officers] violated the Constitution." *Id.* at 538. The officers did "not argue that the [espoused] right was not 'clearly established,'" meaning this case did not affirm the existence of any constitutional right. *Id.* at 538 n.2. On the contrary, the court "pause[d] . . . to note the difficulty courts have experienced when evaluating [the clearly established law prong] in deliberate indifference cases."[10] *Id.*

b. Analysis

Ms. Crane claims these cases give the CUCF Defendants fair notice that providing an inmate at substantial risk of suicide, like Mr. Tucker, with "a hanging implement in a solitary confinement cell with a tie-off point," and "knowingly ignor[ing his cell's] window covering instead of investigating" it, constitute deliberate indifference under the Eighth Amendment. Aplt. Br. at 16. Yet, she overlooks a connective thread uniting these cases. It is true the defendants' decision to give a suicidal arrestee bedding and their subsequent failure to monitor her in a cell with multiple tie-off points were key facts in *Jacobs*. 228 F.3d at 395–98. It is also true the defendants' refusal to check on a suicidal inmate after he covered his cell window with toilet paper was critical in *Sanville*. 266

[10] Ms. Crane also relies on the Middle District of Alabama's decision in *In Braggs v. Dunn*, 257 F. Supp. 3d 1171, 1267 (M.D. Ala. 2017). As discussed in Part II.A.1.b., *supra*, however, a district court decision cannot provide clearly established law for purposes of qualified immunity.

F.3d at 739–40. In *Snow*, the officer's failure to alert others to the known risk of suicide before going off duty drove the court's decision. 420 F.3d at 1270. And in *Coleman*, the officers provided bedsheets the decedent used to commit suicide despite being aware of that risk. 349 F.3d at 536, 539.

Even if these decisions were sufficient to clearly establish the law of this circuit, they do not support Ms. Crane's position on appeal. None of the cases adopts a blanket rule against punitive isolation of mentally ill inmates, or against the placement of such inmates in cells with tie off points. At most, they reiterate the principle articulated in this court's decision in *Cox*—prison officials are deliberately indifferent if they fail to take reasonable steps to protect a pre-trial detainee or an inmate from suicide when they have *subjective knowledge* that person is a substantial suicide risk. *Cox*, 800 F.3d at 1248–49. But we see nothing in these cases clearly establishing a constitutional right where the defendant lacks that subjective knowledge.

To be sure, prison conditions may be so deficient that an inmate's constitutional rights are implicated, without regard to the inmate's mental health. *See Wilson v. Seiter*, 501 U.S. 294 (1991). But the clearly established law in this area is limited. This is because the facts of such cases vary significantly, and "general statements of law . . . provide fair warning that certain conduct is unconstitutional . . . [only] if they 'apply with obvious clarity to the specific conduct in question.'" *Halley v. Huckaby*, 902 F.3d 1136, 1157 (10th Cir. 2018) (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)); *see also Redmond v. Crowther*, 882 F.3d 927, 939 (10th Cir. 2018) ("General legal standards . . . rarely clearly establish rights."). Obvious cases are rare and inarguable. *See, e.g.*,

Taylor v. Riojas, 141 S. Ct. 52, 53–54 (2020) (per curiam) (stating general constitutional principles provided fair warning that confining an inmate in a cell covered in massive amounts of feces or forcing him to sleep naked in sewage was unconstitutional); *Hope v. Pelzer*, 536 U.S. 734–35, 738 (2002) (deeming the second instance of handcuffing a shirtless inmate to a hitching post for seven hours, in the sun, without bathroom breaks, and with minimal water, an "obvious" Eighth Amendment violation); *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082–83 (10th Cir. 2015) (denying qualified immunity to a police officer who used his official squad car and activated its emergency lights to speed through city streets at more than sixty miles per hour and for over 8.8 miles, all for his personal pleasure rather than for official business, thereby causing a car crash, because his conduct was "so obviously unlawful").

The CUCF Defendants' actions—when viewed outside the context of this circuit's deliberate indifference standard as articulated in *Cox*, do not cross a clearly established constitutional line. Here, the facts are more analogous to cases where qualified immunity was granted. In *Lowe v. Raemisch*, for example, an inmate alleged prison staff violated his Eighth Amendment rights by refusing him outdoor exercise for two years and one month. 864 F.3d at 1206–07. Importantly, there was no allegation the inmate in *Lowe* was mentally ill or suicidal. The district court denied the officials qualified immunity after holding "Tenth Circuit cases and many other cases clearly establish[ed] . . . depriving [an inmate] of outdoor exercise for an extended period of time [is] likely a violation of his constitutional rights." *Id.* at 1207. This court reversed, despite having previously recognized the "denial of outdoor exercise hinders an inmate's psychological and

physical health," because there was no clearly established precedent establishing how long the deprivation must last before the constitutional violation becomes obvious. *Id.* at 1211 & n.11. Citing one case noting "[r]estricting outdoor exercise to one hour per week does not violate the Eighth Amendment," and another acknowledging "[t]he denial of outdoor exercise for three years could arguably involve deliberate indifference," we held "[t]he deprivation of outdoor exercise for two years and one month is not so obviously unlawful that a constitutional violation would be undebatable." *Id.* at 1209–10.

Ms. Crane dismisses the requirement to identify existing precedent with high levels of factual similarity by emphasizing the Tenth Circuit "has 'adopted a sliding scale to determine when law is clearly established.'" Aplt. Br. at 10 (quoting *Davis v. Clifford*, 825 F.3d 1131, 1136 (10th Cir. 2016)). Under the sliding scale approach, "[t]he more obviously egregious the conduct . . . , the less specificity is required from prior case law to clearly establish the violation." *Davis*, 825 F.3d at 1136 (quotation marks omitted).

However, Ms. Crane provides no rationale for why the sliding scale should lower the level of factual similarity required here. She claims she has "alleged particularly egregious conduct," Aplt. Br. at 12, so problematic that one "cannot dispute the obvious cruelty of [the CUCF Defendants'] conduct," Aplt. Reply at 9. But Ms. Crane neither compares the facts here to cases where we used the sliding scale to lower the level of factual similarity required, nor cites any precedent deeming similar conduct obviously egregious. The cases she cites as supportive include arguably more egregious facts than those here. *See Sanville*, 266 F.3d at 730, 737 (noting the defendants knew the inmate wrote a last will and testament contemplating his imminent suicide); *Jacobs*, 228 F.3d at

394, 395–97 (noting the defendants provided a detainee with bedding, even though they knew she was a suicide risk and other inmates had committed suicide in the same cell and manner). And as previously discussed, the CUCF Defendants' actions do not rise to the level of egregiousness the Supreme Court and this court have declared obviously unlawful. Therefore, the sliding scale approach cannot save Ms. Crane's Eighth Amendment claims from the inability to locate a clearly established constitutional right.

In summary, on appeal, Ms. Crane argues only that "[i]t was clearly established that subjecting a suicidal and intellectually disabled individual to these unusually harsh solitary confinement conditions was unconstitutional." Aplt. Br. at 13. Yet, she fails to identify any precedent clearly establishing this theory. We therefore hold Ms. Crane has failed to satisfy the second requirement necessary to overcome qualified immunity, and accordingly, we do not evaluate the first prong of the qualified immunity test. *See Cummings*, 913 F.3d at 1239.

B. ADA Claim

The district court dismissed Ms. Crane's ADA claim after concluding it did not survive Mr. Tucker's death under state law, a result Ms. Crane disputes.[11] We need not address this issue—or the parties' broader arguments about federal common law, our circuit's precedent, or the correct interpretation of Utah's survival statute—to resolve this claim. Instead, we conclude the Amended Complaint fails to state a claim under Title II

[11] Both the ADA and the Rehabilitation Acts are silent on whether claims brought under them abate at the time of a claimant's death. *See* 42 U.S.C. § 12101-12213 (ADA) and 29 U.S.C. §§ 701-796 (Rehabilitation Act).

of the ADA.[12] *See United States v. Chavez*, 976 F.3d 1178, 1203 n.17 (10th Cir. 2020) (noting this court can "affirm on any ground adequately supported by the record" (quotation marks omitted)).

Title II of the ADA provides "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. "State prisons fall squarely within [Title II's] statutory definition of 'public entity.'" *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998). To state a claim under Title II of the ADA, a plaintiff must allege: (1) he is "a qualified individual with a disability"; (2) he "was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities, or was otherwise discriminated against by the public entity"; and (3) "such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability." *J.V. v. Albuquerque Pub. Sch.*, 813 F.3d 1289, 1295 (10th Cir. 2016) (quotation marks omitted). Failure to satisfy any of these prongs defeats an ADA claim.[13] *See id.* (stating, in the

[12] Ms. Crane argues Defendants conceded this issue in the district court "by not refuting or even mentioning any of [Ms.] Crane's responses to their initial arguments" about the plausibility of Ms. Crane's ADA claim in their Reply in Support of Defendants' Motion for Judgment on the Pleadings. Aplt. Br. at 29–30. She is mistaken. As Defendants note, they "raised and fully argued the point in [their] motion for judgment on the pleadings, and reply briefs are optional." Aple. Br. at 66 (citing App. at 79–98). Ms. Crane does not cite any binding authority for her argument.

[13] Ms. Crane satisfies the prong unique to the Rehabilitation Act by plausibly alleging UDC receives federal funds. *See* App. at 53; *see also Cohon ex rel. Bass v. N.M. Dep't of Health*, 646 F.3d 717, 725 (10th Cir. 2011) (describing the elements of a claim

context of a motion for summary judgment, "a viable claim . . . require[s] proof of the foregoing three elements"); *see also Cohon ex rel. Bass v. N.M. Dep't of Health*, 646 F.3d 717, 725 (10th Cir. 2011) (affirming district court's order granting defendants' motion to dismiss an ADA claim notwithstanding that parties did not dispute the first prong was satisfied).

We typically evaluate claims identically under the ADA and Rehabilitation Act. *See Nielsen v. Moroni Feed Co*., 162 F.3d 604, 608 n.7 (10th Cir. 1998). Yet, a point of possible divergence is the different causation standards employed by the two statutes. The Rehabilitation Act prohibits discriminating against qualified individuals "solely by reason of [their] disability." 29 U.S.C. § 794(a). The ADA, on the other hand, prohibits discriminating against qualified individuals "by reason of such disability." 42 U.S.C. § 12132. The overwhelming majority of our sibling circuits have declined to import the Rehabilitation Act's "solely by reason of" causation standard into ADA claims. *See, e.g*., *Katz v. City Metal Co.*, 87 F.3d 26, 33 (1st Cir. 1996); *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 336–37 (2d Cir. 2000); *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 469–70 (4th Cir. 1999); *Pinkerton v. Spellings*, 529 F.3d 513, 519 (5th Cir. 2008); *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 315 (6th Cir. 2012); *Pedigo v. P.A.M. Transp., Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995); *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1074 (11th Cir. 1996).

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under the Rehabilitation Act, including the requirement that "the program or activity in question receives federal financial assistance" (quotation marks omitted)).

Our caselaw, however, is less certain. At times, we have suggested that the "solely by reason of" standard applies to ADA claims. *See Fitzgerald v. Corr. Corp. of America*, 403 F.3d 1134, 1144 (10th Cir. 2005). More frequently, we have at least presumed that plaintiffs need only prove their disability was a but-for cause of the alleged discrimination—that is, they need only prove that the alleged discrimination was "by reason of" their disability. *See, e.g.*, *Taylor v. Colo. Dep't of Health Care Pol'y & Fin.*, 811 F.3d 1230, 1233 & n.3 (10th Cir. 2016); *J.H. ex rel. J.P. v. Bernalillo Cnty.*, 806 F.3d 1255, 1260 (10th Cir. 2015; *Robertson v. Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1193 (10th Cir. 2007). We resolve this tension today by joining our sibling circuits in holding the ADA merely requires the plaintiff's disability be a but-for cause (i.e., "by reason of") of the discrimination, rather than—as the Rehabilitation Act requires—its sole cause (i.e., "solely by reason of").

Ms. Crane's averments do not permit her to plausibly plead her ADA claim under even the less onerous, but-for standard. The ADA claim, therefore, fails on the third prong. Ms. Crane argues UDC owed Mr. Tucker, who was disabled due to his mental illness, "access to safe, appropriate housing" under ADA regulations. Aplt. Br. at 36 (quoting 28 C.F.R. § 35.152(b)(3)). The Amended Complaint alleges UDC denied Mr. Tucker this housing benefit by "locking him in a solitary cell with an obvious tie-off point and a hanging implement," which "endangered him." App. at 55. Ms. Crane contends Mr. Tucker was therefore entitled to two reasonable modifications—those "to prevent his suicide and those to keep him out of solitary confinement in the first place." Aplt. Br. at 37. And because these modifications never occurred, Ms. Crane alleges a trier

of fact could reasonably infer UDC denied Mr. Tucker benefits he was owed. Even accepting all of these averments as true for purposes of analysis, the Amended Complaint fails to state an ADA claim.

Under the third prong of Title II of the ADA, the Amended Complaint must plausibly allege UDC denied Mr. Tucker appropriate housing "by reason of [his] disability." *J.V.*, 813 F.3d at 1295. Yet, the Amended Complaint fails to allege Mr. Tucker's disability was a but-for cause of the purported discrimination.

The closest the Amended Complaint comes to alleging this causal link is claiming the "CUCF Defendants knew . . . that [Mr. Tucker's] conduct for which he was being punished . . . and placed in isolation was a product of his brain damage, low IQ, and mental illnesses." App. at 36–37. But this allegation is accompanied by only one factual averment, which appears to belie causality. Ms. Crane alleges the CUCF Defendants disciplined Mr. Tucker *without* first enlisting mental health staff "to determine if [his] conduct for which he was being punished by being placed in isolation were connected to [his] mental illnesses." *Id*. at 33.

C. Unnecessary Rigor Claims

Section 1367(c) enables a federal district court to forgo exercising supplemental jurisdiction over a related state law claim if "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). "When all federal claims have been dismissed, the court may, and usually should, decline to exercise jurisdiction over any remaining state claims." *Koch v. City of Del City*, 660 F.3d 1228, 1248 (10th Cir. 2011) (quotation marks omitted). Ms. Crane does not allege the district court abused

its discretion in denying supplemental jurisdiction after dismissing her federal claims. *See* Aplt. Br. at 42 ("As this Court should reverse the district court's dismissal of her claims under the Eighth Amendment and the ADA, it should reverse the dismissal of her state law claim as well because supplemental jurisdiction under 28 U.S.C. § 1367 is appropriate."). Because we affirm the district court's decision to dismiss Ms. Crane's federal claims, and Ms. Crane does not argue the district court abused its discretion, we also affirm its dismissal of the unnecessary rigor claim without prejudice.

III. CONCLUSION

Qualified immunity shields the CUCF Defendants from Ms. Crane's Eighth Amendment claims, the Amended Complaint fails to state a plausible claim for relief under Title II of the ADA, and the district court appropriately declined to exercise supplemental jurisdiction over Ms. Crane's state constitutional claim. We **AFFIRM** the district court's order.

Crane v. Utah Department of Corrections, et al., No. 20-4032
BACHARACH, J., concurring.

Like the majority, I would affirm the district court's rulings. I agree with the majority's discussion of the claims under the Americans with Disabilities Act, the Rehabilitation Act, and the Utah Constitution. And I largely agree with the majority's discussion of the Eighth Amendment claims involving confinement in cells facilitating suicide. But I would take a different approach toward the Eighth Amendment claims involving lengthy and punitive isolation of mentally ill inmates.

On these claims, the majority declines to consider Ms. Crane's

- reliance on a "sliding scale" to establish Mr. Tucker's right against punitive isolation and
- claim of deliberate indifference to a substantial risk of suicide under *Cox v. Glanz*, 800 F.3d 1231 (10th Cir. 2015).

I would consider these arguments and reject them on the merits.

I. The alleged constitutional right against lengthy, punitive isolation is not clearly established under a sliding scale of egregiousness.

Ms. Crane could overcome qualified immunity by showing the violation of a clearly established constitutional right. *See Lowe v. Raemisch*, 864 F.3d 1205, 1208 (10th Cir. 2017) (stating that a right is clearly established when a prior case involves "materially similar conduct" or "applies 'with obvious clarity'") (quoting *Est. of Reat v. Rodriguez*, 824 F.3d 960, 964-65 (10th Cir. 2016)). In determining the clarity of a

constitutional right, we apply a sliding scale. *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007). Under this sliding scale, the required specificity of the case law turns on the egregiousness of the conduct. *Id.* When the conduct is obviously egregious, even precedents with general principles might create a clearly established right. *Id.* On the other hand, greater specificity in the case law is required when the conduct is less egregious. *Id.*[1]

The majority states that Ms. Crane has not provided a rationale for softening the burden to present factually similar opinions. Maj. Op. at 26. But Ms. Crane argued that we should apply a sliding scale, and our precedents require it. *See Fogarty v. Gallegos*, 523 F.3d 1147, 1161 (10th Cir. 2008) ("[O]ur circuit uses a sliding scale to determine when law is clearly established."). So I would apply our sliding scale when considering whether Mr. Tucker's right is clearly established.

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[1] We've questioned the viability of the sliding scale under Supreme Court authority. *Lowe v. Raemisch*, 864 F.3d 1205, 1211 n.10 (10th Cir. 2017) (citing *Aldaba ex rel. Leija v. Pickens*, 844 F.3d 870, 874 n.1 (10th Cir. 2016)). But we've not overruled our precedent recognizing the sliding scale. As a result, two judges recently concluded that our circuit's case law continues to require use of the sliding scale. *See Contreras ex rel. A.L. v. Dona Ana Cnty. Bd. Of Cnty. Comm'rs*, 965 F.3d 1114, 1123 (10th Cir. 2020) (per curiam) (Carson, J., concurring in part and concurring in the judgment) ("With no case overruling it, the sliding-scale approach lives in this Circuit."), *cert. denied*, 141 S. Ct. 1382 (2021); *id.* at 1135 n.4 (Baldock, J., concurring in part and dissenting in part) (stating that the sliding scale continues to be "the law in this circuit" because "[t]he Supreme Court has neither directly commented upon nor overruled our sliding-scale approach").

Application of the sliding scale turns on the egregiousness of the conduct. Egregiousness can sometimes entail subjective judgments. So if we were to apply our own opinions on the egregiousness, we might differ in our assessments. No consensus exists among judges now, and none existed in 2014 (when Mr. Tucker died).

Only one circuit court has addressed whether mentally ill inmates had a clearly established right in 2014 to avoid long-term solitary confinement: *Latson v. Clarke*, 794 F. App'x 266 (4th Cir. 2019) (unpublished). There the Fourth Circuit concluded that placement in solitary confinement might have violated the Eighth Amendment when the prisoner suffered from post-traumatic stress disorder, autism spectrum disorder, and intellectual disability. 794 F. App'x at 270. But the court added that "this [had not been] the state of the law at the time of [the prisoner's] incarceration" in 2014–2015. *Id*. The court reasoned that prior case law had held that "long-term solitary confinement did not violate the Eighth Amendment." *Id.* So reasonable prison officials might not have recognized a possible Eighth Amendment violation when the prisoner was put in solitary confinement. *Id.*

The *Latson* panel's reasoning is persuasive. Before Mr. Tucker committed suicide, some courts had held that imposing long-term solitary confinement for serious violations of prison rules does not violate the Eighth Amendment. *See, e.g.*, *Bass v. Perrin*, 170 F.3d 1312, 1315–16 (11th

Cir. 1999) (concluding that the Eighth Amendment did not prohibit imposing years of indoor solitary confinement on prisoners who had been convicted of violent crimes, were serving a life sentence with no opportunity for release in the foreseeable future, were continuing to engage in violent behavior, and had attempted to escape from prison). And we held after Mr. Tucker's suicide that

- long-term punitive solitary confinement did not violate a clearly established right under the Eighth Amendment, *see Grissom v. Roberts*, 902 F.3d 1162, 1174 (10th Cir. 2018) (twenty years); *Apodaca v. Raemisch*, 864 F.3d 1071, 1074, 1080 (10th Cir. 2017) (eleven months without outdoor exercise), and

- placing a prisoner with violent behavior in solitary confinement for 30 years did not violate the Eighth Amendment, *Silverstein v. Fed. Bureau of Prisons*, 559 F. App'x 739, 762–63 (10th Cir. 2014) (unpublished).[2]

These opinions did not address an inmate with a major mental illness. But a panel of our court held that the Eighth Amendment doesn't necessarily require screening for mental illness before assigning a person

[2] Unpublished opinions can show that the law was not clearly established. *See Apodaca v. Raemisch*, 864 F.3d 1071, 1078 (10th Cir. 2017) (relying in part on an unpublished case to show that the officials reasonably embraced a different interpretation of the law from the plaintiffs); *Quinn v. Young*, 780 F.3d 998, 1012 n.4 (10th Cir. 2015) (same); *see also Denno v. Sch. Bd. of Volusia Cnty.*, 218 F.3d 1267, 1274 (11th Cir. 2000) ("We have noted that it would be inappropriate to hold government officials to a higher level of knowledge and understanding of the legal landscape than the knowledge and understanding displayed by judges whose everyday business it is to decipher the meaning of judicial opinions.").

to solitary confinement. *Graham v. Van Der Veur*, 986 F.2d 1427, 1992 WL 401584, at *4 (10th Cir. 1992) (unpublished table decision). And before Mr. Tucker committed suicide, the Eighth Circuit had held that keeping a mentally ill person in solitary confinement for nine months had not violated the Eighth Amendment. *Orr v. Larkins*, 610 F.3d 1032, 1034–35 (8th Cir. 2010) (per curiam).

Putting these opinions together,[3] a prison official could have reasonably thought that the Eighth Amendment would not prohibit repeated placements of a mentally ill person in solitary confinement. When Mr. Tucker died, prison officials could have seen that

- judges in our circuit had held that the Constitution didn't require screening for mental illness before imposing solitary confinement,
- judges elsewhere had held that lengthy solitary confinement didn't violate the Eighth Amendment, and
- judges in another circuit had concluded that the Eighth Amendment didn't prevent placement of a mentally ill inmate in solitary confinement for nine months.

So under a sliding scale, placement of Mr. Tucker in punitive isolation would not have been sufficiently egregious to loosen the need for an

[3] Ms. Crane also relies on rulings by several district courts. Appellant's Opening Br. at 15. But these rulings did not clearly establish a constitutional right. *See Lowe v. Raemisch*, 864 F.3d 1205, 1211 (10th Cir. 2017) (noting that a district court opinion was not controlling in any jurisdiction in determining whether a constitutional right was clearly established) (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

applicable precedent. *See Hardaway v. Meyerhoff*, 734 F.3d 740, 745 (7th Cir. 2013) (concluding that prison officials had qualified immunity because the circuit's earlier precedents had been ambiguous on the constitutionality of a disciplinary segregation for 182 days when combined with a solid metal door, a confrontational cellmate, and limited access to a shower and recreational yard); *see also Porter v. Pa. Dep't of Corrs.*, 974 F.3d 431, 451 (3d Cir. 2020) (concluding that the defendants were entitled to qualified immunity because only one out-of-circuit court had held that the Eighth Amendment prohibited prolonged solitary confinement for an inmate on death row).

II. Though Mr. Tucker had a clearly established right against deliberate indifference to a substantial risk of suicide, Ms. Crane has not adequately alleged a violation of that right.

When Mr. Tucker committed suicide, our precedent clearly prohibited officials from acting with deliberate indifference toward an inmate's substantial risk of suicide. But Ms. Crane did not plausibly allege recognition of a substantial risk that Mr. Tucker would commit suicide.

A. By the time of Mr. Tucker's death, our precedent had clearly established a right against deliberate indifference to a substantial risk of suicide.

We stated in *Cox v. Glanz* that our precedents had long held that prison officials incur liability for deliberate indifference if they know "that a specific inmate presents a substantial risk of suicide" and disregard that risk. *Cox v. Glanz*, 800 F.3d 1231, 1249–50 (10th Cir. 2015) (citing *Est. of*

Hocker v. Walsh, 22 F.3d 995, 1000 (10th Cir. 1994) and *Barrie v. Grand Cnty.*, 119 F.3d 862, 868–69 (10th Cir. 1997)).

The majority does not consider this theory because Ms. Crane did not cite *Cox* in her opening brief. Maj. Op. at 12 n.7.[4] This omission bears significance to the majority, which states that "the plaintiff bears the burden of citing to us what he thinks constitutes clearly established law." *Id.* at 11 (citation omitted). But the plaintiff bears the burden only to present an argument for a clearly established right.

Ms. Crane did that. Appellant's Reply Br. at 1 (arguing that the defendants ignore Ms. Crane's allegations in the complaint regarding knowledge of, and deliberate indifference to, Mr. Tucker's risk of suicide). Even the defendants acknowledge Ms. Crane's reliance on cases providing liability under the Eighth Amendment for a prison suicide when the official knows and disregards "a substantial and significant risk that the defendant may imminently seek to commit suicide." Appellees' Answer Br. at 21. Regardless of whether Ms. Crane cited *Cox* for this argument, we must consider the applicable case law. *See Elder v. Holloway*, 510 U.S. 510, 516

[4] The majority also reasons that Mr. Tucker had committed suicide before we decided *Cox*. Maj. Op. at 12 n.7. In *Cox*, however, we recognized that the state-of-mind requirement in jail-suicide cases had "been settled since at least the mid-1990s." *Cox v. Glanz*, 800 F.3d 1231, 1248 (10th Cir. 2015). *Cox* thus sheds light on the status of our precedents by 2014 (when Mr. Tucker committed suicide).

(1994) (stating that a court reviewing qualified immunity should use its "full knowledge of its own [and other relevant] precedents") (alteration in original) (quoting *Davis v. Scherer*, 468 U.S. 183, 192 n.9 (1984)); *Williams v. Hansen*, 5 F.4th 1129, 1133 (10th Cir. 2021) (stating that our review on qualified immunity isn't limited to the cited opinions because we must consider "all relevant case law"); *see also Cortez v. McCauley*, 478 F.3d 1108, 1122 n.19 (10th Cir. 2007) (en banc) ("While it is true that Plaintiffs should cite to what constitutes clearly established law, we are not restricted to the cases cited by them.") (citing *Elder v. Holloway*, 510 U.S. 510, 513–14 (1994)). So I would consider Ms. Crane's theory of deliberate indifference to a substantial risk of suicide.[5]

B. The right against deliberate indifference to a substantial risk of suicide does not apply here.

When prison officials recognize a substantial risk of suicide, they must take reasonable steps to protect the inmate. *Cox v. Glanz*, 800 F.3d 1231, 1248–49 (10th Cir. 2015). For a violation of this right, Ms. Crane must allege each individual defendant's knowledge of Mr. Tucker's substantial risk of suicide. *Id.* at 1249. I would affirm because Ms. Crane failed to plausibly allege any defendant's knowledge of a substantial risk of suicide.

[5] The majority agrees that Ms. Crane failed "to allege a constitutional violation even under *Cox*." Maj. Op. at 12 n.7.

1. Many of Ms. Crane's key allegations are conclusory.

The district court determined that

- the individual defendants had lacked "notice of mental illness or suicidal inclination" and
- Ms. Crane had not alleged the defendants' personal knowledge of Mr. Tucker's psychiatric history or his recent diagnosis of mental illness.

Appellant's App'x at 137.

On appeal, Ms. Crane argues that she plausibly alleged the defendants' knowledge. The defendants characterized these allegations as conclusory. I agree with the defendants for six of the allegations:

1. The individual defendants "knew [solitary confinement] would cause or exacerbate [Mr. Tucker's] well-documented brain damage, severe mental illness, mental anguish, helplessness, depression, anxiety, and suicidal tendencies." Appellant's App'x at 36–37 ¶ 82.

2. The individual defendants "were aware that [Mr. Tucker] was already suffering from mental illness, that [Mr. Tucker] had repeatedly complained he was being mistreated by staff, and that [Mr. Tucker] was experiencing significant and lasting injury." *Id.* at 39 ¶ 89.[6]

3. Officer "Taylor should have known and did know that [Mr. Tucker] had a long history of severe mental health conditions including brain damage, unspecified psychosis and major depressive disorder and was under treatment for those

[6] Ms. Crane also alleged that "[i]t should have been obvious to the [prison officials] and to any reasonable person that the conditions imposed on [Mr. Tucker] would cause tremendous mental anguish, suffering, pain, and a much higher risk of suicide." Appellant's App'x at 39 ¶ 89. But Ms. Crane bears the burden to allege actual knowledge, not merely constructive knowledge. *See Cox v. Glanz*, 800 F.3d 1231, 1249 (10th Cir. 2015).

conditions at the time [Officer] Taylor imposed back-to-back sentences of 20 days in punitive isolation." *Id.* at 43 ¶ 103.

4. Officer Taylor "should have known, and did know, that holding [Mr. Tucker] in punitive isolation was likely to, and did, cause or exacerbate [his] severe mental illness . . . and risk of suicide." *Id.*

5. Officer Cox "knew . . . that [Mr. Tucker] had a long history of severe mental health conditions[,] . . . was under treatment . . . [,] and that prolonged periods of isolation tortured [Mr. Tucker] and would cause or exacerbate severe mental illness . . . and suicidal tendencies." *Id.* at 45 ¶ 114.

6. "On the day of [Mr. Tucker's] death, [Officer] Cox should have known, and did know, that [Mr. Tucker] was a significantly increased suicide risk." *Id.* at 45 ¶ 115.

The defendants liken these allegations to complaints deemed conclusory in

- *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and
- *Vega v. Davis*, 572 F. App'x 611 (10th Cir. 2014) (unpublished).

As these opinions show, plaintiffs must do more than allege knowledge; they must allege facts making such knowledge plausible.

First, in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), a prisoner sued under § 1983, asserting a Fourteenth Amendment claim premised on discrimination. *Id.* at 663. He pleaded that the defendants had "'kn[own] of, condoned, and willfully and maliciously agreed to subject [him]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate

penological interest.'" *Id.* at 680 (citation omitted). The Supreme Court held that these allegations had amounted to a "formulaic recitation of the elements" of the claim. *Id.* at 681.

Second, in *Vega v. Davis*, 572 F. App'x 611 (10th Cir. 2014) (unpublished), a prisoner alleged that a warden had violated the Eighth Amendment because he "knew about or was willfully ignorant of [the inmate's] medical needs." *Id.* at 618–19. We regarded this allegation as conclusory. *Id.*

Ms. Crane's allegations resembled those in *Iqbal*, asserting knowledge but failing to say *how* or *when* the defendants had learned of the underlying fact. In *Iqbal*, that fact involved discriminatory conditions of confinement; here the fact involves Mr. Tucker's suicide risk. Ms. Crane said that Mr. Tucker's mental disability and illnesses had been "well-documented," but she did not allege how the defendants would have recognized Mr. Tucker's suicide risk—whether

- Mr. Tucker himself told the defendants,
- the defendants had access to and reviewed Mr. Tucker's medical records or spoke with medical staff,[7] or

[7] For the ADA claim, Ms. Crane alleged that prison officials had "reviewed [Mr. Tucker's] personal and medical history." Appellant's App'x at 54. For two reasons, this allegation does not imply awareness of Mr. Tucker's substantial suicide risk:

1. This allegation came later in the pleading and was not incorporated into the § 1983 claims. *See* Appellant's App'x at

- Mr. Tucker's behavior simply made his suicide risk apparent.

See Vega v. Davis, 572 F. App'x 611, 618 (10th Cir. 2014) (unpublished) (holding that the plaintiff's allegation of the existence of prison medical records does not entitle the plaintiff to the inference that the warden read them). So Ms. Crane's allegations of knowledge are conclusory.

2. Officer Taylor

Ms. Crane points to two other allegations about Officer Taylor:

1. Officer Taylor imposed "inappropriate and extremely disproportionate discipline for relatively minor offenses," which led to a higher risk of Mr. Tucker's suicide.

2. Officer Taylor did not "follow policies to obtain recommendations from [Mr. Tucker's] mental health treatment provider when sentencing [him] to his final periods of isolation."

Appellant's App'x at 43.

Officer Taylor would have been deliberately indifferent only if he had known of Mr. Tucker's "substantial risk of suicide." *Cox v. Glanz*, 800 F.3d 1231, 1249 (10th Cir. 2015). But Ms. Crane didn't allege how Officer

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35, 42, 44 (each claim incorporating by reference "the allegations contained in the *preceding* paragraphs") (emphasis added).

2. The complaint does not suggest that Mr. Tucker's prison medical records would have shown a substantial suicide risk. *See id.* at 31 (noting that a diagnosis of "major depressive disorder" does not necessarily involve suicidality); *id.* at 25–27 (failing to allege that Mr. Tucker's self-mutilation and suicide attempts had appeared in his prison medical records).

Taylor would have known that Mr. Tucker had a substantial risk of suicide. *See* Part 2(A)(1), above. No one could reasonably infer such knowledge from Officer Taylor's role as a hearing officer. So even if we credit these allegations, they would not have adequately alleged deliberate indifference.

3. Officer Cox

Beyond the allegations discussed earlier, Ms. Crane made two other allegations against Officer Cox. But these allegations don't suggest recognition of a substantial risk of suicide.

First, Ms. Crane alleged that Officer Cox had entered Mr. Tucker's cell and refused to permit out-of-cell exercise that day. No one could reasonably infer notice of a substantial suicide risk from this allegation about the inability to exercise one day.

Second, Ms. Crane alleged that Officer Cox had known that Mr. Tucker "hung a towel over the window of his cell." Appellant's App'x at 45. But Ms. Crane did not allege that Officer Cox had recognized the draping of a towel as a sign that Mr. Tucker might try to commit suicide. *See Estate of Novack ex rel. Turbin v. Cnty. of Wood*, 226 F.3d 525, 529 (7th Cir. 2000) (stating that freaky behavior doesn't impute awareness of a substantial risk of suicide).

These two allegations don't suggest knowledge on the part of Officer Cox.

4. Warden Bigelow and Director Garden

Ms. Crane did not point to any other allegations that Warden Bigelow and Director Garden had recognized a substantial risk of suicide.

For supervisory liability under § 1983, a plaintiff must link supervisors to the constitutional violation through

- their personal involvement,
- a sufficient causal connection, and
- a culpable state of mind.

Cox v. Glanz, 800 F.3d 1231, 1248 (10th Cir. 2015) (quoting *Dodds v. Richardson*, 614 F.3d 1185, 1195 (10th Cir. 2010)). A plaintiff can often satisfy these three elements through "[p]roof of a supervisor's personal direction or knowledge of and acquiescence in" the continued operation of unconstitutional policies. *Dodds*, 614 F.3d at 1196–97 (citing *Jenkins v. Wood*, 81 F.3d 988, 995 (10th Cir. 1996), and *Woodward v. City of Worland*, 977 F.2d. 1392, 1399–1400 n.11 (10th. Cir. 1992)).

But Ms. Crane does not allege that Warden Bigelow or Director Garden directed any actions toward Mr. Tucker. The only pertinent allegations are conclusory. *See* Appellant's App'x at 20–21, 47, 51–52.[8]

[8] Ms. Crane argues that this conclusion burdens her "with an unworkable pleading standard, as this information is simply impossible to obtain before discovery with Tucker dead." Appellant's Reply Br. 12. But "Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

* * *

In my view, we should consider all of the pertinent case law, including our recognition of a sliding scale and *Cox*. But reasonable prison officials might regard long stints of solitary confinement as constitutional even for a mentally ill prisoner. Given the lack of a judicial consensus in 2014, how could a prison official have regarded a possible constitutional violation as obvious?

And in my view, Ms. Crane failed to allege that any of the individual defendants recognized a substantial suicide risk. So she did not state a claim that would trigger liability under *Cox*.