No. __-____

In the Supreme Court of the United States

MARIANO MOYA AND LONNIE PETRY,
PETITIONERS

v.

ROBERT GARCIA, SANTA FE COUNTY SHERIFF; MARK CALDWELL, WARDEN OF SANTA FE COUNTY ADULT CORRECTIONAL FACILITY; MARK GALLEGOS, FORMER WARDEN OF SANTA FE COUNTY ADULT CORRECTIONAL FACILITY; BOARD OF COMMISSIONERS OF SANTA FE COUNTY, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners were arrested in Santa Fe County on bench warrants and jailed for 63 and 30 days, respectively, before being given access to a court for arraignment and bail review. On behalf of a class, Petitioners brought this action under 42 U.S.C. § 1983 against their jailers—Santa Fe County, its sheriff, and its wardens—to seek redress for this unlawful deprivation of their liberty. The Tenth Circuit assumed that Petitioners had pleaded a due process violation, but it affirmed the dismissal of the complaint anyway, holding that Respondents "did not cause" any deprivation of Petitioners' liberty. The Tenth Circuit reached this conclusion by focusing solely on the state court's delay in scheduling the arraignments, all but ignoring the unlawful detention itself. As the dissent recognized, this approach creates a conflict of authority between the Tenth Circuit and the Fifth, Seventh, Eighth, and Ninth Circuits.

The question thus presented is as follows:

When a jailer detains a person for an extended period with no access to a court hearing for arraignment and bail review, in violation of his or her Due Process rights, can the jailer avoid liability under § 1983 on the ground that the state court caused the violation because it bears sole responsibility for setting such a hearing?

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INTRODUCTION

Santa Fe County has a frequent practice of arresting people and jailing them for weeks or months without an arraignment or an opportunity to post bail. Petitioner Lonnie Petry was forced to spend a month in jail—and Petitioner Mariano Moya spent two—without so much as laying eyes on a judge. Neither received the process guaranteed them by the Fourteenth Amendment and New Mexico law, including an arraignment and an opportunity to post bail "within a reasonable time," and in no event longer than 15 days after arrest. N.M. Stat. Ann. § 31-1-5; see also N.M. R. Cr. P. 5-303(A); see, *e.g.*, *Hewitt* v. *Helms*, 459 U.S. 460, 466 (1983) ("Liberty interests protected by the Fourteenth Amendment may arise from two sources—the Due Process Clause itself and the laws of the States.") (citing *Meachum* v. *Fano*, 427 U.S. 215, 223–27 (1976)). Seeking relief for this unlawful detention, Petitioners filed this class action lawsuit, asserting claims under 42 U.S.C. § 1983 against Santa Fe County, its sheriff, and its wardens.

The Tenth Circuit rejected these claims, provoking a powerful dissent that called out the conflict between the majority's approach and that of the Fifth, Seventh, Eighth, and Ninth Circuits. All of these courts have upheld § 1983 claims by detainees against their jailers based on extended detention without a prompt arraignment or the ability to seek bail. See *Jauch* v. *Choctaw Cty.*, 874 F.3d 425 (5th Cir. 2017) (96-day detention before first court appearance), petition for cert. pending, No. 18-7; *Hayes* v. *Faulkner Cty.*, 388 F.3d 669 (8th Cir. 2004) (38 days); *Armstrong* v. *Squadrito*, 152 F.3d 564 (7th Cir. 1998) (57 days); *Oviatt* v. *Pearce*, 954 F.2d 1470 (9th Cir. 1992) (114 days). These cases differ in whether

they analyze such claims through the lens of substantive or procedural due process, but they uniformly hold that such extended pretrial detention without access to a court is an unconstitutional violation of the detainee's liberty—and they hold the jailers themselves responsible. See, *e.g.*, *Jauch*, 874 F.3d at 435–46 (finding it "obvious" that jailers' policy of inaction while awaiting next court session caused the plaintiff's harm); *Armstrong*, 152 F.3d at 579 (jailers cannot "pass[] responsibility off on another party—whether the courts or the prosecutor"). As the Seventh Circuit explained, "jailers hold not only the keys to the jail cell, but also the knowledge of who sits in the jail and for how long. * * * They are the ones directly depriving detainees of liberty." *Armstrong*, 152 F.3d at 579. A jailer who allows arrestees to languish for weeks or months with no effort to bring them before a court thus cannot complain that he could not have forced earlier hearings. *Jauch*, 874 F.3d at 437 n.10 ("[W]e cannot know what [the sheriff] could have done to allow bail, or legal or judicial action[,] *because he did nothing at all*." (emphasis added)).

The decision below departs from this consistent and proper approach to causation in overdetention cases. According to the Tenth Circuit, the gist of Petitioners' complaint was that they were held for extended periods without timely arraignments, which "could only be scheduled by the court itself." Pet. App. 9a. By focusing solely on who had responsibility for scheduling the arraignment, however, the Tenth Circuit lost sight of who was carrying out the unlawful detention, which lays at the heart of Petitioners' claim for loss of liberty. This overly narrow view of causation led Judge McHugh to dissent, decrying the majority's refusal to recognize "that the jailers are

the ones directly depriving the detainees of their protected liberty interest in freedom pending trial." Pet. App. 35a. It also led Chief Judge Tymkovich and Judges Lucero, McHugh, and Moritz to vote in favor of granting a petition for rehearing en banc. Pet. App. 2a.

This Court has previously recognized the "serious" consequences of pretrial confinement, which "may imperil the suspect's job, interrupt his source of income, and impair his family relationships." *Gerstein* v. *Pugh*, 420 U.S. 103, 114 (1975). Protection against unwarranted pretrial detention is older than the Republic itself. *Jauch*, 874 F.3d at 432–34 (surveying English common law and declaring: "This is our adoptive tradition. At the embryonic stage, we claimed all the rights of Englishmen."). New Mexico statutes reflect this principle by guaranteeing that an arrestee will be brought before the court for arraignment and setting bail "without unnecessary delay" and in no event more than 15 days after arrest. N.M. Stat. Ann. § 31-1-5; see also N.M. R. Cr. P. 5-303(A); Pet. App. 122a–123a. Yet in a three-year period in Santa Fe County alone, more than 150 pretrial detainees were held for 16 days or more without seeing a judge. Pet. App. 137a–138a. The approach adopted by the Tenth Circuit all but sanctions this practice, "grant[ing] jailers refuge behind judges cloaked with absolute immunity," and "enabling the jailers to violate the Constitution with impunity." Pet. App. 42a.

This is an issue of exceptional importance, and this case is an ideal vehicle to address it. Indeed, because the Tenth Circuit assumed that Petitioners had adequately pleaded a due process violation, this case would enable the Court to address causation alone,

without wading into whether substantive or procedural due process (or both) provides the correct lens through which to analyze the underlying claims. This Court should grant certiorari and restore the consistency and fairness in the law that the Tenth Circuit's decision has now undermined.

OPINIONS BELOW

The Court of Appeals' decision (Pet. App. 3a–43a), as well as its order denying Petitioners' Petition for Rehearing En Banc (Pet. App. 1a–2a), are reported together at 895 F.3d 1229. The district court's decision (Pet. App. 86a–116a) is available at *Moya* v. *Garcia*, No. 1:16-cv-01022-WJ-KBM, 2017 WL 4536080 (D.N.M. Feb. 13, 2017).

JURISDICTION

After a timely petition for rehearing, the Tenth Circuit entered judgment on July 20, 2018, granting rehearing only to make minor changes in its opinion. On September 27, 2018, Justice Sotomayor extended the time for seeking certiorari to November 23, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions appear in the Appendix to this Petition.

STATEMENT

The Underlying Facts and State Law

In August 2014 and June 2015, respectively, Petitioners Moya and Petry were indicted for state crimes in New Mexico. Pet. App. 89a. After they each failed to appear in response to a summons sent by mail, the district court issued bench warrants for their arrests.

Pet. App. 89a–90a. Both were subsequently arrested and booked into the Santa Fe County Adult Correctional Facility. *Ibid.*

At the time of both arrests, New Mexico law required that pretrial detainees be brought before a court "without unnecessary delay," and in all cases be arraigned within 15 days following arrest, at which time the court was required to conduct a bail hearing. N.M. Stat. Ann. §§ 31-1-3, 31-1-5; N.M. R. Cr. P. 5-303. Furthermore, the New Mexico Constitution provided that a defendant charged with a felony (with narrow exceptions not relevant here) was *entitled* to release on bail and could not be held because of financial inability to pay a bond. N.M. Const. art. II, § 13; see also *State* v. *Brown*, 338 P.3d 1276, 1292 (N.M. 2014); *Vitek* v. *Jones*, 445 U.S. 480, 488 (1980) ("We have repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment."). Thus, at the time of their arrests, Petitioners were entitled to be brought before a judge without unnecessary delay (and in all cases within 15 days) for arraignment, and then to be released on bail.

Despite these protections, both Petitioners were held well beyond 15 days. Petitioner Moya, who was arrested and booked on September 15, 2014, stayed in jail until November 17, 2014—a total of 63 days. Pet. App. 89a. When he was finally arraigned that day, the state district court set his bond and ordered his immediate release. *Ibid.* Similarly, Petitioner Petry was arrested and booked on July 22, 2015, and remained in jail for 30 days before his arraignment

on August 21, 2015. *Ibid.* Again, the court set Petry's bond and ordered his immediate release. *Ibid.*

Unfortunately, Petitioners' prolonged pretrial detention is not an anomaly in Santa Fe County. The sheriff and the wardens—who share responsibility under New Mexico law for the policies of their jails—have implemented no policies or procedures to address such detention. See Pet. App. 134a; N.M. Stat. Ann. §§ 33-3-1, 33-1-2(E); *Wilson* v. *Montano*, 715 F.3d 847, 857 (10th Cir. 2013). Thus, other than informing the state court that Petitioners had been arrested—which Respondents did not do for more than a week after the arrests—Respondents did *nothing* to ensure that Petitioners did not sit in jail for weeks or months without access to a court. Given the complete absence of any procedures within Santa Fe County to avoid overdetention, it is not surprising that between September 2013 and September 2016, more than 150 people were held in Santa Fe County jail for 16 days or more before gaining access to a judge and a bail hearing. Pet. App. 137a–138a.

Proceedings in the District Court

Petitioners brought this § 1983 action on behalf of themselves and all others similarly situated, asserting that their prolonged pretrial detention with no access to a court or bail violated their substantive and procedural due process rights under the Fourteenth Amendment. Pet. App. 87a. Named as defendants (in their individual capacities) were Respondents Robert Garcia, the sheriff of Santa Fe County at all relevant times; Mark Caldwell, the warden of the county jail from 2012 to 2014; and Mark Gallegos, the warden since November 2014. Petitioners also brought a municipal liability claim

against Santa Fe County, through its Board of Commissioners. The district court had jurisdiction under 28 U.S.C. § 1331.

On Respondents' motion, the district court dismissed the case under Rule 12(b)(6), emphasizing that it is the state court—not the sheriff or wardens—that sets the date for arraignment. Pet. App. 116a. The court acknowledged that Petitioners "may very well have been deprived of a liberty interest *by the [state] District Court*," but it held that Respondents could not be charged with that deprivation of liberty because the Respondents did not do "anything to cause Plaintiffs' arraignment to be scheduled in an untimely manner." Pet. App. 111a (emphasis added).

The district court further held that Petitioners could not plead supervisory liability because the complaint alleged only the "absence of a policy" to avoid extended pre-arraignment detention, rather than an affirmative "policy that bears on the way in which arraignment hearings are scheduled." Pet. App. 109a. Such an "absence of policy," the district court held, could not justify supervisory liability. *Ibid.* But see *City of Canton* v. *Harris*, 489 U.S. 378, 390 (1989) (noting that failure to act in response to an obvious risk that constitutional rights will be violated can constitute actionable "deliberate[] indifference," which can itself "be said to represent a policy").

Proceedings in the Tenth Circuit

On appeal, the Tenth Circuit affirmed the district court on narrow grounds. The majority opinion "assume[d], without deciding," that Petitioners had alleged a violation of due process based on their extended detention without arraignment or a bail hearing. Pet. App. 20a. Nonetheless, the majority held

that Petitioners' claims failed because "the arraignments could not be scheduled by anyone working for the sheriff or wardens." Pet. App. 7a. Thus, in the majority's view, Petitioners' overdetention was caused, not by the sheriff or wardens, but "by the court's failure to schedule and conduct timely arraignments." Pet. App. 8a.

The majority recognized the rulings by the Fifth, Seventh, Eighth, and Ninth Circuits, all of which had allowed similar claims to proceed. Pet. App. 10a–11a. But the majority concluded that these cases were either distinguishable (because they involved a clerical error by the court) or, as to *Jauch* and *Hayes*, not "precedential, pertinent, or persuasive." Pet. App. 10a. The majority also denied leave to amend, reasoning that there was nothing Petitioners could add to or change about their complaint that could save their claims. Pet. App. 20a.

Judge McHugh dissented. On the merits of the claim, she explained that she would have held that the right to freedom before trial was a protected liberty interest (citing *Baker* v. *McCollan*, 443 U.S. 137, 144 (1979)) and "would have no difficulty holding that Plaintiffs have plausibly alleged that they were not afforded an appropriate level of process." Pet. App. 26a. (She declined to address whether Petitioners had stated a claim based on substantive due process, noting some uncertainty in the Tenth Circuit regarding the appropriate standard and her inability to address that uncertainty "writing only for [her]self." Pet. App. 31a.

As for causation, Judge McHugh sharply criticized the majority's analysis. She explained that causation in this case was "straightforward: [Petitioners] allege

the sheriff and wardens jointly held the keys to their jail cells," and, by "keeping Plaintiffs behind bars—day after day after day—the sheriff and wardens were deliberately indifferent to their constitutional right to freedom pending trial." Pet. App. 31a–32a. The majority's singular focus on the state court's scheduling decisions ignored that Petitioners were complaining not only of scheduling delays but also of "lengthy detentions that no court authorized." Pet. App. 32a. By focusing only on the scheduling decisions, the majority failed to "consider[] whether the complaint adequately alleges a violation of the more fundamental right [to liberty pending trial]." Pet. App. 33a.

The dissent also recognized that the majority's opinion created a circuit split, putting the Tenth Circuit "at odds with every circuit to consider the apportionment of blame between state courts and state jailers" for overdetention. Pet. App. 34a. The majority's attempts to distinguish the other circuits' decisions, the dissent said, did not address the "underlying reasoning" in those cases "that the jailers are the ones directly depriving the detainees of their protected liberty interest in freedom pending trial." Pet. App. 35a. And the majority's narrow conception of the relevant liberty interest "as an interest in a state court proceeding, rather than in liberty itself, * * * sanctions a system by which states could regularly violate detainees' constitutional rights by holding them indefinitely on account of untimely state courts, without any fear of their collaborating municipalities or state officials ever incurring monetary penalties." Pet. App. 41a. Indeed, the majority's reasoning lacked any "logical endpoint" and would shield the

jailer even if the courts had waited more than a year to schedule the arraignment. *Ibid.*

Finally, Judge McHugh explained that while she would have found the individual Respondents entitled to qualified immunity, she would have reversed and remanded for further proceedings with respect to the claim against the County, since "municipalities are not entitled to qualified immunity." Pet. App. 43a.

Petitioners timely moved for panel rehearing or rehearing en banc, arguing that the panel's decision created an unwarranted circuit split. See Pet. App. 2a. The panel declined to rehear the case except to the extent of a few very minor edits to the majority's opinion, which changed neither its reasoning nor its outcome. *Ibid.* The Tenth Circuit also declined to rehear the case en banc, though four judges voted in favor of such rehearing. *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents an exceptionally important but narrow question of law on which the circuits are divided. The decision below essentially insulates jailers from claims for overdetention by enabling them to point to the courts as the true cause of any delay. Accordingly, the decision below could impact hundreds or thousands of presumptively innocent detainees who may languish for weeks or months in state or county jails with no access to a court or opportunity to make bail. This Court should grant certiorari to resolve the conflict and restore detainees' rights in the Tenth Circuit to assert claims under § 1983 for overdetention pending arraignment and bail.

I. The Tenth Circuit's causation analysis conflicts with the holdings of the Fifth, Seventh, Eighth, and Ninth Circuits, which would correctly allow these claims to proceed.

The Tenth Circuit's decision in this case turned narrowly on the issue of causation. The majority assumed that Petitioners had adequately pleaded a due process violation, and it affirmed the dismissal solely on the theory that "the arraignments could not be scheduled by anyone working for the sheriff or wardens." Pet. App. 7a. As shown below, this analysis conflicts with decisions of the Fifth, Seventh, Eighth, and Ninth Circuits with respect to causation in cases involving detention pending arraignment. Although the decision below made some effort to distinguish these cases, those distinctions were based on irrelevant factual differences and inconsequential variations in state law. In the end, these cases follow an analysis that fairly and appropriately respects the nature of the liberty interests at stake.

A. The Fifth, Seventh, Eighth, and Ninth Circuits each have concluded that jailers cannot pass off their responsibility for unlawful detention to the state courts that schedule detainees' initial appearances.

1. In *Jauch*, the Fifth Circuit encountered a claim strikingly similar to Petitioners' claims here. Like Petitioners, Jauch was arrested on an outstanding warrant and taken to a county jail. 874 F.3d at 428. As in Santa Fe County, the sheriff of Choctaw County, Mississippi, had adopted a policy whereby detainees were held after their arrests without access to an arraignment or bail until the state court next convened, even if that took weeks or months. *Id.* at 435.

And, like Petitioners, because the state court did not convene for Jauch's hearing for many weeks after her arrest, Jauch was held for an extended period (in her case, 96 days) without access to a court or any bail determination. *Id.* at 428.

Applying a procedural due process analysis, the Fifth Circuit concluded that Choctaw County's policy of indefinite detention until the court next convened was a violation of Jauch's Fourteenth Amendment rights, whether analyzed under *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), or *Medina* v. *California*, 505 U.S. 437 (1992). See *Jauch*, 874 F.3d at 430–33. "[B]lithely waiting months before affording the defendant access to the justice system," the court concluded, "is patently unfair in a society where guilt is not presumed." *Id.* at 434. Such prolonged detention "denies criminal defendants their *enumerated* constitutional rights relating to criminal procedure by cutting them off from the judicial officers charged with implementing constitutional criminal procedure." *Ibid.*

As here, the sheriff and Choctaw County argued that there was a "failure of causation" because the scheduling of arraignment and bail hearings was the "exclusive jurisdiction" of the state court, and "[s]heriffs are not allocated the function of arraigning prisoners, setting bond or appointing counsel." Brief of Appellees at 22–29, *Jauch*, 874 F.3d 428 (No. 16-60690), 2017 WL 639611. The Fifth Circuit rejected this argument out of hand, stating that causation was "straightforward" and that the county's detention policy was certainly "'the moving force' behind Jauch's constitutional injury." 874 F.3d at 436 (quoting *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978)).

It was "obvious that the indefinite detention procedure caused the due process violation Jauch complains of—indefinite detention." *Ibid.* "[W]e cannot know," the court said, "what [the sheriff] could have done to allow bail, or legal or judicial action[,] because he did nothing at all. We only know that the sheriff kept [Jauch] in jail." *Id.* at 437 n.10.

The Tenth Circuit below attempted to distinguish *Jauch* on the ground that it "rested on Mississippi law and the jailers' authority to release detainees" (Pet. App. 11a), but this is an inaccurate description of *Jauch*'s reasoning. As Judge McHugh's dissent explains, *Jauch* cited Mississippi law only for the propositions that sheriffs are responsible for their jails and must "hold detainees in a manner consistent with their oaths to uphold the federal and state constitutions." See 874 F.3d at 437 (citing Miss. Code Ann. § 19-25-69; *Sheffield* v. *Reece*, 28 So.2d 745, 748 (Miss. 1947)). Both of those propositions are equally true under New Mexico law. N.M. Const. art. XX, § 1 (stating "[e]very person elected or appointed to any office" must take an oath to support the federal and state constitutions); N.M. Stat. Ann. § 33-3-1 ('The common jails shall be under the control of the respective sheriffs."); *id.* § 33-1-2(E) (defining "warden" as "the administrative director of a correctional facility"); *Wilson*, 715 F.3d at 856–57 (acknowledging that wardens and sheriffs are responsible for policies and customs at county jails in New Mexico). Thus, to the extent that *Jauch* relied on Mississippi state law, New Mexico law is no different. The two cases simply cannot be reconciled.

2. The Eighth Circuit faced a similar claim in *Hayes*. Like Petitioners, Hayes was arrested on a

bench warrant and taken to a county jail, where he spent 38 days before being brought in front of a judge for his first appearance. 388 F.3d at 672–73. Like Petitioners, Hayes suffered an extended detention that deprived him of the process he was due under state law. *Id.* at 675 (citing Ark. R. Cr. P. 8.1 ("An arrested person who is not released by citation or by other lawful manner shall be taken before a judicial officer without unnecessary delay.")). Like Petitioners, Hayes was harmed by his captors' policy "to submit the names of confinees to the court and then wait for the court to schedule a hearing," even when that hearing took weeks or months to occur. *Id.* at 674. And like Petitioners, Hayes brought a § 1983 claim against the county, the sheriff, and the jail administrator alleging a violation of his Fourteenth Amendment due process rights. *Id.* at 672.

Applying a substantive due process analysis, the Eighth Circuit concluded that the county's policy was "deliberately indifferent to detainees' due process rights" and that the failure to take Hayes before a court for 38 days "shocks the conscience." *Id.* at 674 (citing *Cty. of Sacramento* v. *Lewis*, 523 U.S. 833, 846–47 (1998)). The extended detention thus "deprived Hayes of substantive due process." 388 F.3d at 675.

Like the Fifth Circuit in *Jauch*, the Eighth Circuit rejected outright the notion that the county and the jailers could avoid liability simply by arguing that it was the state court that scheduled Hayes' first appearance. *Id.* at 674. Such "attempts to delegate the responsibility of bringing detainees to court for a first appearance," the court held, "ignore[] the jail's authority for long-term confinement." *Ibid.* Indeed, the

very attempt to delegate such responsibility reflected deliberate indifference on the county's part. *Ibid.*

The Tenth Circuit attempted to distinguish *Hayes* on the ground that it "attributed responsibility to the jailers based solely on federal law, not on state law," (Pet. App. 13a–14a), but this makes little sense. The question of causation for a § 1983 claim is undeniably a question of *federal* law. Moreover, *Hayes* was decided on substantive due process grounds, not on the ground that Arkansas law required more process than was provided. 388 F.3d at 673–75. As a result, for purposes of the analysis in *Hayes*, it makes no logical difference whether state law required the sheriff to bring detainees before the court or not; the issue was that the jail's policy ignored its "authority for long-term confinement." *Id.* at 674. And in any event, there is no meaningful difference between the Arkansas law discussed in *Hayes* and the relevant New Mexico law. Arkansas Rule of Criminal Procedure 8.1, which requires that arrestees be brought before a court "without unnecessary delay," is nearly identical to Section 31-1-5 of New Mexico's Code. And while the majority asserts that New Mexico law says that the "arresting officer" is responsible for taking an arrestee before the court, this is beside the point; the reference to the arresting officer lies in a different statutory section. See N.M. Stat. Ann. § 31-1-4(C). Section 31-1-5(B), just like Arkansas Rule of Criminal Procedure 8.1, frames the procedural right in the passive voice; it provides only that arrestees "shall be brought before a court having jurisdiction to release the accused without unnecessary delay." See also N.M. R. Cr. P. 5-303(A) (stating that arrestees "shall be arraigned * * * within fifteen (15) days").

3. *Armstrong* presented similar facts to the Seventh Circuit. There, the arrestee surrendered to the county jail after learning of a "body attachment" warrant for his arrest. 152 F.3d at 567–68. As in this case, once the jail notified the court of the arrest, the jail's procedure was to do nothing further to ensure a prompt court appearance "other than waiting for word of hearing date from the court," with "no procedures to determine when a detainee * * * had waited too long." *Id.* at 577–78. Thus, after the sheriff made a mistake in filing Armstrong's records with the court, which therefore did not timely schedule Armstrong's first appearance, Armstrong was held for 57 days before he finally secured a hearing and release. *Id.* at 567–68. As in this case, such prolonged detention before detainees were brought before a court was inconsistent with state law. See *id.* at 574 (citing Ind. Code § 34-4-9-2.1(c)–(d)).

The Seventh Circuit reversed an award of summary judgment against Armstrong on his § 1983 claim against the sheriff and jail officers. *Id.* at 567. Analyzing Armstrong's claim through the lens of substantive due process, the court concluded that the jailers had violated Armstrong's constitutional rights. *Ibid.* This was because: (1) the Due Process Clause protects against extended confinement "without an appearance before a magistrate" (*id.* at 570–76); (2) the jail's failure to adopt any procedures to protect detainees against such detention constituted a "failure to make policy in a situation that demands policy" and thus deliberate indifference to the "plainly obvious danger" of overdetention (*id.* at 578); and (3) the jailers' behavior "shock[ed] the conscience" where they made "no efforts on behalf of Armstrong" and

"d[id] not seem to have understood their basic responsibility" (*id.* at 582).

As in other cases, *Armstrong* rejected the notion that the sheriff and jailers, who "are the ones directly depriving detainees of liberty," can avoid responsibility for unconstitutional pretrial detention by "pass[ing] responsibility off on another party—whether the courts or the prosecutor." *Id.* at 579. A jailer cannot "abdicate responsibility" to the courts for its detainees' constitutional rights, except "at its own peril." *Ibid.*

The Tenth Circuit characterized *Armstrong* as involving a mere clerical error in the court filing system (Pet. App. 10a), but that distinction is meaningless. The majority opinion provides no reason why it should matter to the causation analysis whether the reason for the state court's delay in setting a hearing is an error or simply a failure to promptly schedule hearings. Certainly, the Seventh Circuit did not rely on any such distinction. Indeed, if this distinction has any effect at all, it *strengthens* Petitioners' case. *Armstrong* warned that jailers cannot abdicate their responsibility for their inmates by deferring to the state court and then avoid liability when the state court makes a scheduling error. *Id.* at 579. But such abdication is even more problematic when, as in this case, the delay resulted not from an occasional error but from a problem so systemic that 150 pretrial detainees were overdetained in a three-year period. See *Bd. of Cty. Comm'rs* v. *Brown*, 520 U.S. 397, 407 (1997) ("If a program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for.").

4. The Ninth Circuit's decision in *Oviatt* follows the same pattern. Oviatt was arrested pursuant to a bench warrant after he failed to appear for a hearing on outstanding criminal charges. 954 F.2d at 1473. Jail staff placed his name on the booking register, but the state court erroneously failed to schedule his arraignment. *Ibid.* He thus spent 114 days in county jail before finally being arraigned and released. *Ibid.* The jail never took any steps to secure Oviatt's appearance with a court because it had "no internal procedures for keeping track of whether inmates had received an arraignment or attended other scheduled court appearances." *Ibid.*

Analyzing Oviatt's claim against the county's sheriff under the rubric of procedural due process, the Ninth Circuit affirmed a jury verdict in favor of Oviatt. *Id.* at 1483. First, the court held that Oviatt had a protected liberty interest in "being free from extended incarceration without any arraignment or pretrial procedure"—an interest that arose both from the Due Process Clause itself and from Oregon state law requiring that his arraignment be held within 36 hours of arrest. *Id.* at 1474 (citing Or. Rev. Stat. § 135.010; *Olim* v. *Wakinekona*, 461 U.S. 238 (1983)). Second, the court noted the ready availability of procedures to identify inmates held for overlong periods of time and "lessen[] the risk of erroneous deprivation of plaintiff's liberty interest." 954 F.2d at 1476. Third, the court held that the jail's decision to "do nothing" to avoid such overdetention was itself a municipal policy—"the policy was one of inaction"—and constituted deliberate indifference to detainees' constitutional rights. *Id.* at 1477.

As in *Jauch*, *Hayes*, and *Armstrong*, the court in *Oviatt* rejected the argument that the "true cause" of the plaintiff's overdetention was the state court's scheduling error. *Id.* at 1478. Oviatt simply needed to show that the jail's absence of any procedures to discover inmates who had been overdetained was "closely related to the ultimate injury." *Ibid.* (quoting *City of Canton*, 489 U.S. at 391). Oviatt had established this, as it was "unlikely [he] would have spent 114 days in jail" if the county had adopted proper procedures to identify and remediate cases of overdetention. *Ibid.*

As with *Armstrong*, the fact that the state court in *Oviatt* made a scheduling error is a distinction without a difference. The key holding in *Oviatt* is that the jailer cannot avoid liability for an overlong detention by shifting the blame to the court—a holding squarely at odds with the Tenth Circuit's holding in this case.

B. The analysis correctly followed by these other circuits compels the conclusion that Petitioners adequately pleaded causation.

Fundamentally, the Tenth Circuit's mistake—a mistake that has now produced a serious conflict in federal law—flows from the majority's failure to take proper account of the nature of a § 1983 claim based on overlong detention. The majority's reasoning was overly simplistic: Petitioners complained of being jailed for too long before they were brought before a court for an arraignment and bail hearing, but it was the court, rather than the sheriff or the warden, that scheduled arraignments, and thus only the court could be charged with this delay. Pet. App. 20a ("Mr. Moya and Mr. Petry sued the sheriff, wardens, and

county, and these parties did not cause the arraignment delays. Thus, the district court did not err."). But this deceptively simple analysis masks a basic failure to engage with the facts or the law.

To start, Petitioners' injury was not the delay of arraignment *in itself*. Rather, as the majority was forced to acknowledge, Petitioners' injury was the unduly long period they spent in the county jail. Pet. App. 16a ("Under the theory articulated by [Petitioners], the defendants violated the *right to freedom from detention* by failing to ensure timely arraignments." (emphasis added)). This is evident both from the complaint and from Petitioners' briefing below. See Pet. App. 142a ("The plainly obvious consequence of [Respondents' actions] was that detainees would regularly be deprived of their constitutional right to pretrial release."); Plaintiffs-Appellants' Opening Brief at 4, 11, 16, 20, 895 F.3d 1229, No. 17-2037, 2017 WL 2839709 (repeatedly referring to a liberty interest in freedom pending trial). The majority's decision to focus solely on what caused the delay in *arraignment*—noting but then ignoring the jailers' role in the unlawful *detention*—was thus a function of its divergent legal analysis, not any flaw in the pleadings themselves.

Indeed, nearly every case of overdetention—including *Jauch*, *Armstrong*, and the other cases discussed above—necessarily involves *both* a failure of court officials to set a timely hearing *and* a jailer's actions (or inactions) in holding the detainee for an extended period without access to a judge. Thus, in every one of these cases, the court could well have focused on the delay in the hearing, just as the Tenth Circuit majority did. But the detainees who bring

such cases are not complaining of the lack of process *qua* process; they are complaining that, while they were entitled to a timely hearing and bail, they spent weeks and months in a jail cell instead.

Again, the majority assumed that Petitioners had pleaded a deprivation of due process. Pet. App. 20a. The only question, then, is whether Respondents' actions caused that deprivation—that is, the unlawful detention without access to a judge. This Court has described causation under § 1983 as requiring that the "government action is the 'moving force' behind the alleged constitutional violation." *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 345 (2002) (quoting *Monell*, 436 U.S. at 694). Or, stated differently, "there must be an affirmative link between the policy and the particular constitutional violation alleged." *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 823 (1985). Thus, the causation issue in this case is whether Respondents' policy of leaving pretrial detainees locked in a jail cell for weeks and months—while taking *no action at all* to ensure timely bail determination—was a "moving force" behind Petitioners' extended detention, or at least "affirmatively linked" to their detention.

As the Fifth Circuit recognized in *Jauch*, when properly framed in this manner, the result of this causation analysis is blindingly obvious. 874 F.3d at 436 ("[W]e have no trouble concluding that this is an obvious case."). A jailer whose policy is to keep detainees confined until the court calls for them—regardless of how long that takes and even with the knowledge that it could take many weeks—has effectively adopted a procedure of "indefinite detention." *Ibid.* And where the relevant policymaker "insti-

tute[s] a policy whereby certain arrestees [are] indefinitely detained without access to courts or the benefit of basic constitutional rights," this is undoubtedly the "moving force" behind such indefinite detention. *Id.* at 435–36 ("It is also obvious that the indefinite detention procedure caused the due process violation Jauch complains of—indefinite detention.").

Moreover, the Tenth Circuit's myopic focus on whether Respondents could have themselves taken over the state court's calendaring of arraignments ignores the many other policies Respondents could have adopted to avoid illegal pretrial detention. As the dissent noted, "the sheriff and wardens could have reviewed court dockets to determine whether arraignments were being timely scheduled, and if not, they could have requested immediate arraignments." Pet. App. 37a. That failing, they "could have physically brought [Petitioners] before a judicial officer at any time." *Ibid.* Instead, they did *nothing*—except leave Petitioners, and hundreds of others in Santa Fe County, locked in a jail cell. This is more than sufficient to plead a violation of due process caused by the jailers themselves.

II. This case raises an exceptionally important issue of basic constitutional rights for presumptively innocent detainees.

Even beyond the conflict of authority created by the decision below—and the troubling problems with its reasoning—review is warranted in this case because the Tenth Circuit's approach to these claims conflicts with basic notions of fairness and liberty and will have life-altering consequences for pretrial detainees.

As this Court has noted, unwarranted pretrial detention can have consequences that greatly exceed those of arrest. *Gerstein*, 420 U.S. at 114 ("Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships."). The Court has thus emphasized the "importance and fundamental nature" of the right to liberty pending trial. *United States* v. *Salerno*, 481 U.S. 739, 750 (1987) (rejecting a due process challenge to the Bail Reform Act, but only after concluding that the Act involved "narrow circumstances" in which the government "musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community").

Empirical research has confirmed that even short periods of pretrial detention increase the likelihood of conviction, decrease employment opportunities for years after the detention, increase the risk of failure to appear after bail is ultimately set, and increase the risk of recidivism after trial, even when controlling for other relevant factors. Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. & ECON. 529, 530–31 (2017); Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 202–05 (2018); Christopher T. Lowenkamp et al., *The Hidden Costs of Pretrial Detention*, LJAF 4 (Nov. 2013), https:// www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf. Indefinite pretrial detention without access to a court is thus not just fundamen-

tally unfair, but can have dramatic adverse impacts on detainees' lives.

Nor is there any reason to believe that the county policy that resulted in the overdetention of Petitioners (and hundreds of others) is unique to Santa Fe or to New Mexico generally. Indeed, beyond revealing the analytical problems with the Tenth Circuit's approach, the decisions in *Jauch*, *Hayes*, *Armstrong*, and *Oviatt* illustrate that similar policies have made their way to the Courts of Appeals repeatedly over the course of the last two decades. The decision below promises to make matters worse. As the dissent noted, the result of the majority's conclusion is that jailers doing *nothing* to avoid unlawful pretrial detentions may take "refuge behind judges cloaked with absolute immunity"—a result that will lead pretrial detainees to be held indefinitely "with impunity." Pet. App. 42a. For the sake of the liberty interests of detainees in the six states that form the Tenth Circuit—and in other states as well should other circuits follow the Tenth Circuit's lead—this Court should intervene.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2018

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 17-2037

MARIANO MOYA; Lonnie Petry, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

ROBERT GARCIA, Santa Fe County Sheriff; Mark Caldwell, Warden of Santa Fe County Adult Correctional Facility; Mark Gallegos, former Warden Santa Fe County Adult Correctional Facility, in their individual capacities; Board of Commissioners of Santa Fe County,

Defendants-Appellees.

Filed July 10, 2018

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 1:16-CV-01022-WJ-KBM)

A. Nathaniel Chakeres (Todd A. Coberly with him on the briefs), of Coberly & Martinez, LLLP, Santa Fe, New Mexico, for Plaintiffs-Appellants.

Brandon Huss of The New Mexico Association of Counties, Santa Fe, New Mexico, for Defendants-Appellees.

ORDER

Before TYMKOVICH, Chief Judge, BRISCOE, LUCERO, HARTZ, HOLMES, MATHESON, BACHARACH, PHILLIPS, McHUGH, MORITZ, EID, and CARSON, Circuit Judges.

This matter is before the court on the appellants' *Petition for Rehearing En Banc*. We also have a response from the appellees.

Upon consideration, a majority of the original panel members grant panel rehearing in part and only to the extent of the limited changes made to the attached revised opinion. Panel rehearing is otherwise denied. The Clerk is directed to file the amended decision, with the original separate writing from Judge McHugh, effective the date of this order.

In addition, however, the petition and the response were circulated to all of the judges of the court who are in regular active service. A poll was called, and a majority voted to deny the en banc petition. *See* Fed. R. App. P. 35(a). Consequently, the request for en banc consideration is denied.

Chief Judge Tymkovich, as well as Judges Lucero, McHugh and Moritz voted to grant rehearing en banc.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARIANO MOYA, LONNIE PETRY, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

ROBERT GARCIA, Santa Fe County Sheriff; MARK CALDWELL, Warden of Santa Fe County Adult Correctional Facility; MARK GALLEGOS, former Warden of Santa Fe County Adult Correctional Facility, in their individual capacities; BOARD OF COMMISSIONERS OF SANTA FE COUNTY,

Defendants-Appellees.

July 10, 2018
Elisabeth A. Shumaker Clerk of Court

Before MATHESON, BACHARACH, and McHUGH, Circuit Judges.

BACHARACH, Circuit Judge.

This appeal involves claims of overdetention by Mr. Mariano Moya and Mr. Lonnie Petry. Both men were arrested based on outstanding warrants and detained in a county jail for 30 days or more prior to their arraignments. These arraignment delays violated New Mexico law, which requires arraignment of a defendant within 15 days of arrest. N.M. Stat. Ann. § 31-1-3; Rule 5-303(A) NMRA.

The arraignment delays led Mr. Moya and Mr. Petry to sue under 42 U.S.C. § 1983 for deprivation of due process, alleging claims against

- Sheriff Robert Garcia, Warden Mark Caldwell, and former Warden Mark Gallegos in their individual capacities under theories of personal participation and supervisory liability and
- the Board of Commissioners of Santa Fe County under a theory of municipal liability.

The district court granted the defendants' motion to dismiss for failure to state a valid claim. We affirm because Mr. Moya and Mr. Petry failed to plausibly allege a factual basis for liability.[1]

I. Standard of Review

We engage in de novo review of the dismissal under Federal Rule of Civil Procedure 12(b)(6). *Albers v. Bd. of Cty. Commis*, 771 F.3d 697, 700 (10th Cir. 2014). In engaging in this review, we credit the well-pleaded allegations in the complaint and construe them favorably to the plaintiffs. *Thomas v. Kaven*, 765 F.3d 1183, 1190 (10th Cir. 2014). To withstand dismissal, the plaintiffs' allegations must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The claim is plausible only if it contains sufficient factual allegations to allow the court to reasonably infer liability. *Ashcroft v. Iqbal*,

[1] The complaint contains claims based on both substantive and procedural due process. Based on our disposition, we need not distinguish between the claims involving procedural and substantive due process.

556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

II. Supervisory Liability

The individual defendants served as the sheriff and wardens of the jail where Mr. Moya and Mr. Petry were detained. These defendants could potentially incur liability under § 1983 if they had acted under color of state law. 42 U.S.C. § 1983. But individual officials enjoy qualified immunity when their conduct does not violate "'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Cordova v. City of Albuquerque*, 816 F.3d 645, 655 (10th Cir. 2016) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009)).

To avoid qualified immunity at the motion-to-dismiss stage, a plaintiff must show that

- "'the defendant's [alleged conduct] violated a constitutional or statutory right'" and
- "the right was 'clearly established at the time of the [violation].'"

Thomas v. Kaven, 765 F.3d 1183, 1194 (10th Cir. 2014) (quoting *Archuleta v. Wagner*, 523 F.3d 1278, 1283 (10th Cir. 2008)). There are two questions at the first step:

1. whether the plaintiff has adequately alleged the violation of a constitutional or statutory right and
2. whether the defendant's alleged conduct deprived the plaintiff of that right.

See Dodds v. Richardson, 614 F.3d 1185, 1192-94 (10th Cir. 2010) (engaging in this two-part analysis of the first step of qualified immunity).

The first question is whether Mr. Moya and Mr. Petry have adequately alleged a deprivation of due process. We need not decide this question because of our answer to the second question: in our view, the complaint does not plausibly allege facts attributing the potential constitutional violation to the sheriff or wardens.[2]

To prevail, Mr. Moya and Mr. Petry must have alleged facts showing that the sheriff and wardens had been personally involved in the underlying violations through their own participation or supervisory control. *Dodds v. Richardson*, 614 F.3d 1185, 1195 (10th Cir. 2010); *see also Brown v. Montoya*, 662 F.3d 1152, 1163 (10th Cir. 2011) ("A § 1983 defendant sued in an individual capacity may be subject to personal liability and/or supervisory liability."). The district court rejected both theories of liability. Here, though, Mr. Moya and Mr. Petry rely only on their theory of supervisory liability. For this theory, Mr. Moya and Mr. Petry blame the sheriff and wardens for the delays in the arraignments. In our view, however, the sheriff and wardens did not cause the arraignment delays.[3]

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[2] Even in the absence of qualified immunity, Mr. Moya and Mr. Petry would have needed to adequately allege facts attributing the potential constitutional violation to the defendants.

[3] The dissent disagrees with our causation analysis. In our view, however, the dissent stretches both the plaintiffs' theory of liability and the standard of causation applicable to § 1983 claims.

A plaintiff may succeed on a § 1983 supervisory-liability claim by showing that the defendant

- "promulgated, created, implemented or possessed responsibility for the continued operation of a policy that ... caused the complained of constitutional harm" and
- "acted with the state of mind required to establish the alleged constitutional deprivation."

Dodds, 614 F.3d at 1199. But the arraignments could not be scheduled by anyone working for the sheriff or wardens; scheduling of the arraignments lay solely with the state trial court.

Mr. Moya and Mr. Petry disagree, relying on *Wilson v. Montano*, 715 F.3d 847 (10th Cir. 2013). There two sheriff's deputies arrested Mr. Wilson without a warrant. *Wilson*, 715 F.3d at 850. He was taken to jail and detained for eleven days without the filing of a complaint or an opportunity for a probable-cause determination. *Id.* Mr. Wilson sued the sheriff and the warden, alleging that they (1) had routinely allowed deputies to make arrests without warrants and (2) had failed to file criminal complaints or bring the arrestees to court. *Id.* at 851. The *Wilson* court upheld supervisory liability, reasoning that under New Mexico law the sheriff and the warden were responsible for running the jail and ensuring prompt probable-cause determinations. *Id.* at 856-58.

Wilson differs from our case on who controlled the situation causing the overdetention. In *Wilson*, the sheriff and the warden were in control because (1) deputy sheriffs had arrested Mr. Wilson and (2) the warden's staff had detained Mr. Wilson without a warrant. These facts proved decisive because (1) New Mexico law requires the sheriff to "diligently file a

complaint or information," N.M. Stat. Ann. §§ 4-37-4, 29-1-1, and (2) the sheriff's staff had never filed a complaint against Mr. Wilson. *Wilson*, 715 F.3d at 851, 853. Without a complaint, the court could not make a probable-cause determination. By preventing a probable-cause determination, the sheriff impeded the criminal-justice process; and the warden exacerbated the delay by detaining Mr. Wilson for eleven days without a court order. *Id.* at 857-59.

In contrast, the court was firmly in control here. Grand juries indicted Mr. Moya and Mr. Petry, and both individuals were arrested based on outstanding warrants issued by the court. And after these arrests, jail officials notified the court that Mr. Moya and Mr. Petry were in custody.

The arrests triggered New Mexico's Rules of Criminal Procedure, which entitled Mr. Moya and Mr. Petry to arraignments within fifteen days. Rule 5-303(A) NMRA. Compliance with this requirement lay solely with the court, for an arraignment is a court proceeding that takes place only when scheduled by the court. *See People v. Carter*, 91 N.Y.2d 795, 676 N.Y.S.2d 523, 699 N.E.2d 35, 38 (1998) ("Responsibility for scheduling an arraignment date and securing a defendant's appearance lies with the court, not the People.").

The court failed to comply with this requirement, resulting in overdetention of Mr. Moya and Mr. Petry. These overdetentions were caused by the court's failure to schedule and conduct timely arraignments rather than a lapse by the sheriff or wardens. *See Webb v. Thompson*, 643 F. App'x 718, 726 (10th Cir. 2016) (unpublished) (Gorsuch, J., concurring in part and dissenting in part) ("[T]he only relevant law anyone has cited to us comes from state law, and it

indicates that the duty to ensure a constitutionally timely arraignment in Utah falls on the *arresting* officer—not on *correctional* officers.").

Mr. Moya and Mr. Petry argue that the sheriff and wardens could have mitigated the risk of overdetention by keeping track of whether detainees had been timely arraigned, requesting arraignments for those who had been overdetained, or bringing detainees to court prior to a scheduled arraignment. But even if the sheriff and wardens had taken these actions, the allegations in the complaint give us no reason to think that the state trial court would have conducted the arraignments and ordered release any earlier than it did. Thus, the sheriff and wardens did not cause the overdetention.

At most, the sheriff and wardens failed to remind the court that it was taking too long to arraign Mr. Moya and Mr. Petry. But even with such a reminder, the arraignments could only be scheduled by the court itself. *See Estate of Brooks ex rel. Brooks v. United States*, 197 F.3d 1245, 1248 (9th Cir. 1999) (holding that the county did not cause the overdetention, reasoning that the county could only ask for federal help and that the county lacked the "ability itself to bring the prisoner before the appropriate judicial officer").[4]

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[4] The dissent points out that (1) *Estate of Brooks* involved a federal detainee's claim against a county and (2) our case involves a state detainee. Dissent at 1246 n.7. This difference shrouds the underlying rationale in *Estate of Brooks*. There the court reasoned that the county's policies did not cause the overdetention because the county lacked authority to release the detainee or bring him before a federal magistrate judge. *Estate of Brooks*, 197 F.3d at 1248. Here the defendants did not cause the

The plaintiffs rely in part on *Armstrong v. Squadrito*, 152 F.3d 564 (7th Cir. 1998), and *Oviatt ex rel. Waugh v. Pearce*, 954 F.2d 1470 (9th Cir. 1992). In those cases, a clerical error prevented the court from discovering the arrests and the need to schedule arraignments.[5] But here, Mr. Moya and Mr. Petry do not allege a failure to tell the court of their arrests in sufficient time to conduct the arraignments within fifteen days.

Mr. Moya and Mr. Petry also rely on *Jauch v. Choctaw County*, 874 F.3d 425 (5th Cir. 2017), and *Hayes v. Faulkner County*, 388 F.3d 669 (8th Cir. 2004). But the conclusions in *Jauch* and *Hayes* are not precedential, pertinent, or persuasive.

In *Jauch*, the sheriff's office adopted a procedure of holding defendants in jail without any court proceeding until the reconvening of the circuit court that had issued the capias warrants. *Jauch*, 874 F.3d at 430, 435. This procedure resulted in detention for 96 days, with jail officials rejecting the defendant's requests to be brought before a judge. *Id.* at 428. The Fifth Circuit Court of Appeals held that the sheriff could incur

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overdetention because they could not have initiated an arraignment and, as discussed below, the plaintiffs have disavowed any argument that the sheriff or wardens could have ordered release. *See* p.1235, below.

Although the circumstances differed in Estate of Brooks, the court reasoned that the jailers' limited powers prevented causation. That rationale is applicable and persuasive.

[5] *Oviatt* arguably implies that jailers can cause an arraignment delay by failing to remind a court to schedule the arraignment. To the extent that *Oviatt* draws this implication, we disagree.

liability for the institution of this unconstitutional policy. *Id.* at 436-37.[6]

In our view, *Jauch* bears limited applicability. *Jauch* rested on Mississippi law and the jailers' authority to release detainees when they had been detained too long without an opportunity for bail. *Id*. In interpreting Mississippi law, the court pointed to *Sheffield v. Reece*, 201 Miss. 133, 28 So.2d 745, 748 (1947), which had required sheriffs to prevent detention "'for an unreasonable length of time.'" *Jauch*, 874 F.3d at 437 (quoting *Sheffield*, 28 So.2d at 748). As *Jauch* pointed out, *Sheffield* had recognized the responsibility of the sheriff to release an arrestee who has been detained too long without bail. *Id.* at 437.

Here, however, Mr. Moya and Mr. Petry have not alleged that they could have been released. To the contrary, they expressly disavowed this theory in their opening brief:

> [The district court] ... noted that the [county jail] was legally prohibited from releasing detainees without a valid court order.
>
> Yet Mr. Moya and Mr. Petry never argued that Defendants should have unconditionally released them from jail, so the fact that the [county jail] may have been prohibited from releasing them absent a court order is irrelevant.

Appellants' Opening Br. at 29 (citation omitted). In light of this disavowal of an argument that Mr. Moya and Mr. Petry should have been released, *Jauch* provides little guidance on what the sheriff and wardens

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[6] On the basis of the sheriff's policy, the county also incurred liability. *Jauch*, 874 F.3d at 436.

could have done to avoid the due process violations other than remind the state trial court of *its* failure to schedule timely arraignments.[7]

Hayes, too, provides little that is pertinent or persuasive. There an arrestee alleged that (1) he should have been brought before a judge in a timely manner and (2) no one from the jail had told him when his court date was (even though one had been set at the time of arrest). *Hayes v. Faulkner Cty.*, 388 F.3d 669, 672 (8th Cir. 2004). The Eighth Circuit Court of Appeals concluded that an extended detention without a first appearance, after an arrest by warrant, violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 673. The court added that responsibility for the arrestee's overdetention fell on the jailers, who

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[7] In *Jauch*, the Fifth Circuit Court of Appeals recently denied a petition for rehearing en banc. *See Jauch v. Choctaw Cty.*, 886 F.3d 534 (5th Cir. 2018). Judge Southwick—joined by five other judges—dissented from the denial, arguing that the sheriff should have obtained qualified immunity. *Id.* at 535 (Southwick, J., dissenting). In making this argument, the dissent concluded that

- under Mississippi law, the state district court had the sole responsibility to schedule an arraignment and
- no federal law clearly established that the sheriff would violate the U.S. Constitution by following state law.

Id. at 538-41. In reaching these conclusions, the dissent observed that under Mississippi law, the jailers could not prevent the overdetention because the state district court had the exclusive authority to schedule and conduct arraignments. *See id.* at 535 ("I cannot discern how these defendants had any effect on when this plaintiff was considered for release."); *id.* at 539 ("There was no obligation on the sheriff to have Jauch arraigned because that is a duty that falls elsewhere."); *id.* at 538 ("The clear responsibilities relevant to this case are those of the county's circuit court judges.").

could not delegate responsibility for the first appearance to the court. *Id.* at 674.

But *Hayes* sheds no light on what the jailers here could have done to ensure timely court proceedings. In *Hayes*, the Eighth Circuit apparently relied on a state procedural rule: Arkansas Rule of Criminal Procedure 8.1. This rule requires arrestees to be brought before the court "'without unnecessary delay.'" *Id.* at 675 (quoting Ark. R. Crim. P. 8.1).

Like Arkansas, New Mexico requires "[e]very accused" to be "brought before a court ... without unnecessary delay." N.M. Stat. Ann. § 31-1-5(B). Arkansas's version goes no further, omitting any mention of *who* is required to bring the arrestee to court. Ark. R. Crim. P. 8.1. New Mexico takes a different approach, clarifying elsewhere that the *arresting officer* is obligated to bring the defendant to court "without unnecessary delay." N.M. Stat. Ann. § 31-1-4(C).[8]

Unlike the Arkansas rule, New Mexico's version of the rule does not impose any duties on the sheriff or warden to bring an arrestee to court in the absence of a scheduled arraignment. In light of this difference between the Arkansas and New Mexico rules, we see nothing in *Hayes* to tell us what the sheriff or wardens could have done to provide timely arraignments for Mr. Moya and Mr. Petry.

The approach taken in *Hayes* is also inconsistent with our own precedent. The *Hayes* court attributed responsibility to the jailers based solely on federal law,

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[8] This statute did not apply here, for the plaintiffs do not allege that they were arrested by officers subject to the defendants' supervisory authority. We thus have no occasion to decide whether a cause of action could have been asserted against the arresting officers or their supervisors.

not state law. By contrast, our precedent directs us to focus on *state* law when determining the scope of the defendants' responsibility to ensure prompt hearings. *See Wilson v. Montano*, 715 F.3d 847, 854 (10th Cir. 2013) ("We consider New Mexico state law insofar as it bears on the scope of each appellant's responsibility to ensure a prompt probable cause determination.").

And as we have discussed, New Mexico law did not require the sheriff or wardens to bring Mr. Moya and Mr. Petry to court. Accordingly, once the arresting officers brought Mr. Moya and Mr. Petry to the jail and the court was notified of the arrests, New Mexico law required the court (not the sheriff or wardens) to schedule timely arraignments.

Under New Mexico law, *Jauch* and *Hayes* provide little guidance to us in addressing the issue framed by Mr. Moya and Mr. Petry. They allege that the state trial court failed to schedule timely arraignments and that the sheriff and wardens told the court about the arrests early enough for timely arraignments. But Mr. Moya and Mr. Petry did not sue the court; they sued the sheriff and wardens, officials that could not have caused the arraignment delays because of their inability to schedule the arraignments.

III. The Dissent's Theory

The dissent argues that we have analyzed the wrong right. According to the dissent, the right to an arraignment within fifteen days is "'an expectation of receiving process,'" which cannot alone be a protected liberty interest. Dissent at 1241–42, 1243, 1246 (quoting *Olim v. Wakinekona*, 461 U.S. 238, 250 n.12, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983)). Thus, the dissent reasons that the right at issue must be the right to freedom from pretrial detention rather than the right to a timely

arraignment. Based on this reasoning, the dissent concludes that our misplaced focus on the arraignments has caused us to improperly focus on the state district court's role and overlook actions that the defendants could have taken, such as releasing Mr. Moya and Mr. Petry.

We have focused on the plaintiffs' right to timely arraignment because that's what the plaintiffs have alleged. As the dissent admits, Mr. Moya and Mr. Petry are imprecise about their asserted right, conflating the right to an arraignment within fifteen days of arrest and the right to pretrial release (or bail). This conflation is understandable because the rights are coextensive under their theory of the case.

Mr. Moya and Mr. Petry recognize freedom from detention as an applicable liberty interest. *See, e.g.*, Joint App'x at 7 (stating in the complaint that the New Mexico Constitution creates a right to pretrial liberty); *id.* at 83 (asserting in district court briefing that Mr. Moya and Mr. Petry "have a liberty interest in not being unnecessarily detained without the opportunity to post bail"); Appellants' Opening Br. at 16 ("The principal protected liberty interest that may be created by state law is the freedom from detention."). But Mr. Moya and Mr. Petry also allege a right to an arraignment within fifteen days of arrest. *See, e.g.*, Joint App'x at 14 (alleging in the complaint that "[b]ecause detainees charged in New Mexico district courts ... are guaranteed the right under state law to have their conditions of release set at the least restrictive level to assure their appearance and the safety of ... the community within fifteen days of their indictment or arrest, they have a federally protected liberty interest in this right"); *id.* at 69 (asserting in district court that "Plaintiffs had a liberty interest in

having bail set within fifteen days of their arrest"); Appellants' Opening Br. at 36 ("In summary, under settled procedural due process principles, Defendants deprived Mr. Moya and Mr. Petry of their liberty interest in a prompt pretrial arraignment....").

Under the theory articulated by Mr. Moya and Mr. Petry, the defendants violated the right to freedom from detention by failing to ensure timely arraignments. *See, e.g.*, Appellants' Opening Br. at 41 ("The Complaint alleged that the failure to implement any policies ensuring that detainees appear before a district court within fifteen days of indictment or arrest caused Mr. Moya and Mr. Petry to be injured."). The rights are coextensive to Mr. Moya and Mr. Petry because to them, a violation of the right to a timely arraignment resulted in violation of their right to freedom from prolonged detention.[9]

Yet the dissent disregards the claim of delay in the arraignment because this claim would founder based on the absence of a due-process violation. The dissent may be right about the absence of a due-process violation from a delay in an arraignment.[10] But in our view, we should interpret the claim and appeal based

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[9] This link is illustrated by the plaintiffs' definition of the class. In the complaint, Mr. Moya and Mr. Petry identified the class to include everyone detained at the same facility as the named plaintiffs within the previous three years "who [had not been] brought before a district court within fifteen days of their indictment or arrest to have their conditions of release set or reviewed." Joint App'x at 12-13. Timely arraignment is so fundamental to Mr. Moya and Mr. Petry's claims that the fifteen-day demarcation defines class membership.

[10] As noted above, we have assumed for the sake of argument that the arraignment delays would result in a deprivation of due process. *See* p. 1232, above.

on what the plaintiffs have actually said rather than which possible interpretation could succeed. In district court, the plaintiffs based their claim on the delays in arraignments. And on appeal, the plaintiffs have consistently framed their argument based on the arraignment delays. The dissent's theory is not the theory presented by the plaintiffs.[11]

As discussed above, the defendants were powerless to cause timely arraignments because arraignments are scheduled by the court rather than jail officials. The dissent agrees.

But the dissent theorizes that jail officials could have simply released Mr. Moya and Mr. Petry. This theory is not only new but also contrary to what Mr. Moya and Mr. Petry have told us, for they expressly disavowed this theory: "Mr. Moya and Mr. Petry never argued that Defendants should have unconditionally released them from jail...." Appellants' Opening Br. at 29; *see* p. 1235, above. Thus, Mr. Moya and Mr. Petry have waived reliance on that theory as a basis for reversal. *See Modoc Lassen Indian Hous. Auth. v. U.S. Dep't of Hous. & Urban Dev.*, 864 F.3d 1212, 1224 n.8 (10th Cir. Jul. 25, 2017) (stating that a theory never raised was waived as a basis for reversal). Even if it were otherwise appropriate to raise the issue sua sponte, the dissent's theory would create a Catch-22 for jailers. Under New Mexico law, jailers commit a misdemeanor and must be removed from office if they deliberately release a prisoner absent a court order. N.M. Stat. Ann. § 33-3-12. Thus, a jailer would be

[11] For this reason, we need not decide whether Mr. Moya and Mr. Petry would have stated a valid claim if they had alleged a broader right to freedom from pretrial detention (unrelated to Rule 5-303(A)'s fifteen-day requirement). We are deciding only the validity of the theory advanced by Mr. Moya and Mr. Petry.

forced to choose between committing a crime and facing civil liability under § 1983.

According to the dissent, jailers can eventually defend themselves based on the Supremacy Clause. But Mr. Moya and Mr. Petry do not challenge the constitutionality of the state law preventing release in the absence of a court order. *See Estate of Brooks ex rel. Brooks v. United States*, 197 F.3d 1245, 1248 (9th Cir. 1999) (affirming the dismissal of a § 1983 claim involving overdetention when the county defendant was required under state law to hold the plaintiff detainee until receiving an order from the United States and the plaintiff made no allegation that the statute was unconstitutional).

Even if Mr. Moya and Mr. Petry had challenged the constitutionality of the state law, the Supremacy Clause would supply cold comfort to a jailer facing this dilemma, particularly in light of the dissent's acknowledgment that there is no bright-line rule for when a delayed arraignment becomes a due-process violation. *See* Dissent at 1242–45. We need not decide whether the Constitution would subject jailers to this Catch-22.

* * *

The state trial court's alleged failure to schedule timely arraignments cannot be attributed to the sheriff or wardens. Thus, the complaint does not plausibly allege a basis for supervisory liability of the sheriff or wardens.

IV. Municipal Liability

Mr. Moya and Mr. Petry also assert § 1983 claims against the county, alleging that it failed to adopt a policy to ensure arraignments within fifteen days.

These claims are based on the alleged inaction by the sheriff and wardens. But, as discussed above, the sheriff and wardens did not cause the arraignment delays. Thus, the county could not incur liability under § 1983 on the basis of the alleged inaction. *See Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 777 (10th Cir. 2013). Therefore, we affirm the dismissal of the claims against the county.

V. Leave to Amend

In opposing dismissal, Mr. Moya and Mr. Petry stated generically that amendment would not be futile and that they should have the opportunity to amend if an element were deemed missing from the complaint. The district court dismissed the complaint without granting leave to amend. Mr. Moya and Mr. Petry argue that the district court erred by refusing to allow amendment of the complaint.

Generally, leave to amend should be freely granted when justice requires, but amendment may be denied when it would be futile. *Full Life Hospice, LLC v. Sebelius*, 709 F.3d 1012, 1018 (10th Cir. 2013). We conclude that the district court did not err because amendment would have been futile based on the plaintiffs' submissions.

We ordinarily apply the abuse-of-discretion standard when reviewing a denial of leave to amend. *Fields v. City of Tulsa*, 753 F.3d 1000, 1012 (10th Cir. 2014). But here, the district court denied leave to amend based on futility. In this circumstance, "our review for abuse of discretion includes de novo review of the legal basis for the finding of futility." *Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Schs.*, 565 F.3d 1232, 1249 (10th Cir. 2009).

The complaint fails to allege a factual basis for supervisory or municipal liability. To cure the pleading defect, the plaintiffs needed to add factual allegations tying the arraignment delays to a lapse by the sheriff or wardens. The plaintiffs did not say how they could cure this pleading defect. Instead, they stated only that amendment would not be futile if the complaint had omitted an element. They did not tell the district court what they could have added to attribute the arraignment delays to the sheriff or wardens.

Mr. Moya and Mr. Petry have failed to say even now how they could have cured this defect in the complaint. As a result, the district court did not abuse its discretion in denying leave to amend the complaint. *See Hall v. Witteman*, 584 F.3d 859, 868 (10th Cir. 2009) (holding that the district court did not abuse its discretion in denying leave to amend when the claimant had failed to explain how an amendment would cure the deficiencies identified by the district court).

VI. Conclusion

Mr. Moya and Mr. Petry allege a deprivation of due process when they were detained for more than fifteen days without arraignments. We can assume, without deciding, that this allegation involved a constitutional violation. But Mr. Moya and Mr. Petry sued the sheriff, wardens, and county, and these parties did not cause the arraignment delays. Thus, the district court did not err in dismissing the complaint or in denying leave to amend.

McHUGH, Circuit Judge, concurring in the result in part and dissenting in part.

Mariano Moya was arrested pursuant to a valid bench warrant and booked into a Santa Fe County jail. The warrant, issued by New Mexico's First Judicial District Court, commanded any authorized officer to (1) arrest Mr. Moya and (2) bring him "forthwith" before said court. New Mexico's law enforcement officers complied with the first directive, but not the second. As a result, Mr. Moya sat in jail for more than two months.[1] When finally brought before a judge—sixty-three days after he was first detained—the judge set bond at $5,000 and directed the state to release Mr. Moya from custody immediately. The same thing happened to Lonnie Petry, except that his jail stay was only about half as long.

Believing their prolonged detentions to be systemic of a policy and practice affecting dozens, if not hundreds, of similarly situated arrestees, Mr. Moya and Mr. Petry brought this § 1983 action against the Board of Commissioners of Santa Fe County ("the County") and three County officials who were responsible for implementing policy at the jail. The majority affirms the dismissal of Plaintiffs' claims for failure to allege plausibly that any of these defendants violated their constitutional rights. Respectfully, I disagree. I would reverse the district court's order dismissing Plaintiffs' claims against the County. But because the Defendants did not violate clearly established law, I would hold that the individual defendants are entitled to

[1] Because the district court dismissed Plaintiffs' claims on a Rule 12(b)(6) motion, we presume Plaintiffs' factual allegations are true. *See Dahn v. Amedei*, 867 F.3d 1178, 1185 (10th Cir. 2017).

qualified immunity and, on that basis alone, partially affirm the district court's order.

I. PLAINTIFFS' THEORIES OF HARM

To begin, it is important to be clear about the nature of the alleged constitutional violations. Plaintiffs' claims fall "into a category of claims which unfortunately have become so common that they have acquired their own term of art: 'overdetention,' *i.e.*, when the plaintiff has been imprisoned by the defendant for longer than legally authorized, whether because the plaintiff's incarcerative sentence has expired or otherwise." *Dodds v. Richardson*, 614 F.3d 1185, 1192 (10th Cir. 2010) (some internal quotation marks omitted). In this case, Plaintiffs argue that their overdetention supports both a procedural due process claim and a substantive due process claim. Although the majority does not distinguish between these theories, *see* Maj. Op. at 1231–32 n.1, I think it worthwhile to consider how Plaintiffs' allegations fit within each framework.

A. *Procedural Due Process*

"Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the ... Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quotations omitted). "To assess whether an individual was denied procedural due process, courts must engage in a two-step inquiry: (1) did the individual possess a protected interest such that the due process protections were applicable; and,

if so, then (2) was the individual afforded an appropriate level of process." *Merrifield v. Bd. of Cty. Commis*, 654 F.3d 1073, 1078 (10th Cir. 2011).[2]

Starting with the first prong, "[p]rotected liberty interests may arise from two sources—the Due Process Clause itself and the laws of the States." *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989) (internal quotation marks omitted). We have already held that the "right of an accused to freedom pending trial is inherent in the concept of a liberty interest protected by the due process clause of the Fourteenth Amendment." *Dodds*, 614 F.3d at 1192; *Meechaicum v. Fountain*, 696 F.2d 790, 791–92 (10th Cir. 1983).[3]

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[2] In *Jauch v. Choctaw Cty.*, 874 F.3d 425, 431 (5th Cir. 2017), the Fifth Circuit analyzed a comparable procedural due process claim under the framework set forth in *Medina v. California*, 505 U.S. 437, 443, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992), rather than the framework set forth in *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). In this case, both parties have assumed that the *Mathews* framework applies. For purposes of this dissent, I will presume without deciding that the *Mathews* framework is applicable.

[3] There is no serious question that Plaintiffs have a protected liberty interest arising from the Due Process Clause itself. "[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 570–71, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) (citation omitted). The liberty guaranteed by the Fourteenth Amendment "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, [and so on]. In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Id.* at 572, 92 S.Ct. 2701 (citation omitted) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923)). In this case, the

In this case, however, Plaintiffs assert that the protected liberty interest grounding their procedural due process claims arises not from the Due Process Clause itself, but rather from New Mexico law. This is fine. *See Sandin v. Conner*, 515 U.S. 472, 483–84, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995) ("States may under certain circumstances create liberty interests which are protected by the Due Process Clause[, b]ut these interests will be generally limited to freedom from restraint...." (citation omitted)). But it is imperative that we accurately identify the exact nature of the state-created liberty interest Plaintiffs seek to protect. In presenting their case, Plaintiffs have tended to conflate the right to freedom (or bail) with the right to procedures requiring timely bail hearings. Although both are rights created by New Mexico law, *see State v. Brown*, 338 P.3d 1276, 1282 (N.M. 2014) ("The New Mexico Constitution affords criminal defendants a right to bail...."); Rule 5–303(A) NMRA (providing that defendants shall be arraigned within fifteen days of a triggering event, such as an arrest), only the former can be a protected liberty interest. That is because "an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause." *Olim v. Wakinekona*, 461 U.S. 238, 250 n.12, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983); *accord Cordova v. City of Albuquerque*, 816 F.3d 645, 657 (10th Cir. 2016) ("[N]ot all state laws create constitutionally protected liberty interests.").

Plaintiffs allege they *were deprived of freedom from bodily restraint*—the very core of liberty itself. This a state cannot do without affording adequate process. *See, e.g.*, *Ingraham v. Wright*, 430 U.S. 651, 674, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) ("It is fundamental that the state cannot hold ... an individual except in accordance with due process of law.").

To the extent Plaintiffs argue that New Mexico's fifteen-day rule "creates a liberty interest protected by constitutional procedural due process," their position "reflects a confusion between what is a liberty interest and what procedures the government must follow before it can restrict or deny that interest." *See Elliott v. Martinez*, 675 F.3d 1241, 1245 (10th Cir. 2012). In other words, "[t]hey 'collapse the distinction between the interest protected and the process that protects it.'" *Id.* (quoting *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 772, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005) (Souter, J., concurring) (alterations omitted)). And Plaintiffs are inconsistent in how they frame their protected liberty interest, sometimes relying on New Mexico's fifteen-day rule as an end unto itself and sometimes hinting at the fundamental underlying right to be free of restraint. *Compare* Aplt. Br. at 16 ("New Mexico[ ] ... guaranteed Mr. Moya and Mr. Petry the opportunity to obtain pretrial release no later than fifteen days after arrest."), *and id.* at 32 ("[I]t should have been clear to Defendants that, based on New Mexico law and settled due process principles, pretrial detainees have procedural due process rights *to adequate procedures* allowing them to timely obtain bail.") (emphasis added)), *with id.* at 16 ("The principal protected liberty interest that may be created by state law is the freedom from detention."), *and id.* at 18 ("Mr. Moya and Mr. Petry ... had a protected liberty interest in obtaining a prompt bail determination").

I would, accordingly, begin the procedural due process analysis by clarifying that Plaintiffs' only relevant protected liberty interest is in their right to "freedom pending trial." *Dodds*, 614 F.3d at 1192; *see Baker v. McCollan*, 443 U.S. 137, 144, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979) (finding that arrestee was "deprived of his liberty" when detained in county jail

for three days). That right may be duly honored via a timely bail determination, but the timely bail determination is a means, not an end. The source of Plaintiffs' liberty interest does not much matter, but it can be said to arise from either the United States Constitution, *see Baker*, 443 U.S. at 144, 99 S.Ct. 2689; *Dodds*, 614 F.3d at 1192, the New Mexico Constitution, *see Brown*, 338 P.3d at 1282, or both. Although New Mexico is free to create procedural rights protecting the underlying right to bail, as it has done here, *see* Rule 5–303 NMRA, the failure of its state officials to protect *state-law* procedural rights is not a Fourteenth Amendment violation, so long as federal due process requirements (which may well be lower) are satisfied. We would not be the first court to note the irony that, were the rule otherwise, its effect would be to subject states offering *more* procedural protections to stricter federal oversight. *See Hewitt v. Helms*, 459 U.S. 460, 471, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983); *Fields v. Henry County*, 701 F.3d 180, 186 (6th Cir. 2012) (noting that such a policy could even discourage states from creating their own systems of procedural rights for fear of triggering federal liability).

The sufficiency of the process afforded Plaintiffs—the adequacy and timeliness of their bail determinations—implicates the second prong of the procedural due process test, not the first. As to this latter question, we ask whether Plaintiffs were afforded all the process that was their due. *See Thompson*, 490 U.S at 460, 109 S.Ct. 1904. I would have no difficulty holding that Plaintiffs have plausibly alleged that they were not afforded an appropriate level of process. *See Jauch v. Choctaw Cty.*, 874 F.3d 425, 434 (5th Cir. 2017) ("[B]lithely waiting months before affording the defendant access to the justice system is patently unfair in a society where guilt is not presumed.");

Oviatt ex rel. Waugh v. Pearce, 954 F.2d 1470, 1476 (9th Cir. 1992) (applying the *Mathews v. Eldridge* balancing test and finding a county jail's procedures for avoiding overdetention to be inadequate); *cf. Porter v. Epps*, 659 F.3d 440, 445 (5th Cir. 2011) ("Detention of a prisoner for over thirty days beyond the expiration of his sentence in the absence of a facially valid court order or warrant constitutes a deprivation of due process." (internal quotation marks omitted)).

B. *Substantive Due Process*

"Substantive due process bars 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Brown v. Montoya*, 662 F.3d 1152, 1172 (10th Cir. 2011) (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 840, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)). Under our precedent there are "two strands of the substantive due process doctrine. One strand protects an individual's fundamental liberty interests, while the other protects against the exercise of governmental power that shocks the conscience." *Seegmiller v. LaVerkin City*, 528 F.3d 762, 767 (10th Cir. 2008) (citing *Chavez v. Martinez*, 538 U.S. 760, 787, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003) (Stevens, J., concurring in part and dissenting in part)). "A fundamental right or liberty interest is one that is 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Id.* (quoting *Chavez*, 538 U.S. at 775, 123 S.Ct. 1994 (plurality opinion)). "Conduct that shocks the judicial conscience, on the other hand, is deliberate government action that is 'arbitrary' and 'unrestrained by the established principles of private right and distributive justice.'" *Id.* (quoting *Lewis*, 523 U.S. at 845, 118 S.Ct. 1708). From this point in the analysis, our precedent is decidedly less clear.

Substantive due process limits what the government may do in both its legislative and executive capacities. And the Supreme Court has said that the doctrinal strand to be applied "differ[s] depending on whether it is legislation or a specific act of a governmental officer that is at issue." *Lewis*, 523 U.S. at 846, 118 S.Ct. 1708. Here, Plaintiffs challenge executive action, which the Court has said violates substantive due process "*only* when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." *Id.* at 847, 118 S.Ct. 1708 (emphasis added) (internal quotation marks omitted). In *Seegmiller*, however, we refused to read *Lewis* as "establish[ing] an inflexible dichotomy" between cases challenging legislative and executive action. 528 F.3d at 768. In that case, which also involved executive action, the district court had found "that the *only* appropriate standard with which to measure [the substantive due process] claim is the shocks the conscience standard." *Id.* at 767. We held that was error. *Id.* Although we had "no qualms agreeing with the district court that the [Defendant's] conduct would not meet the requirements of the shocks the conscience test," we proceeded to analyze the challenged executive action under the "fundamental liberty" framework. *See id.* at 769–72 & 769 n.2. "[T]he distinction between legislative and executive action," we explained, "is ancillary to the real issue in substantive due process cases: whether the plaintiff suffered from governmental action that either (1) infringes upon a fundamental right, or (2) shocks the conscience." *Id.* at 768. Those two tests, we continued, "are but two separate approaches to analyzing governmental action under the Fourteenth Amendment." *Id.* at 769. "They are not mutually exclusive," we concluded, and "[c]ourts should not unilaterally choose to consider

only one or the other of the two strands. Both approaches may well be applied in any given case." *Id.*

More recent opinions from this court have called the *Seegmiller* framework into doubt. *See Browder v. City of Albuquerque*, 787 F.3d 1076, 1078–79 (10th Cir. 2015) ("If the infringement is the result of executive action, the Supreme Court has instructed us to ask whether that action bears a 'reasonable justification in the service of a legitimate governmental objective' or if instead it might be 'characterized as arbitrary, or conscience shocking.'" (quoting *Lewis*, 523 U.S. at 846, 847, 118 S.Ct. 1708)); *id.* at 1079 n.1 ("[W]e can say with certainty ... that *Chavez* did not expressly overrule *Lewis*'s holding that the 'arbitrary or conscience shocking' test is the appropriate one for executive action so we feel obliged to apply it."); *Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1182 (10th Cir. 2009) (clarifying that "when *legislative* action is at issue, ... only the traditional [fundamental rights] substantive due process framework is applicable"). Neither *Browder* nor *Dias* was heard by the full court. "Because one panel of our court cannot overrule prior panel decisions and earlier panel decisions control over later ones," *Storagecraft Tech. Corp. v. Kirby*, 744 F.3d 1183, 1191 n.2 (10th Cir. 2014), I would normally treat *Seegmiller*'s gloss on *Lewis* as binding and ask whether Plaintiffs' complaint alleges that they "suffered from governmental action that either (1) infringes upon a fundamental right, *or* (2) shocks the conscience." *Seegmiller*, 528 F.3d at 768 (emphasis added).

Notwithstanding our normal rule about favoring earlier panel decisions, it is an open question in my mind whether *Seegmiller* is binding on this point. First, our published decision in *Brower* characterizes

Seegmiller's analysis as dicta. *Browder*, 787 F.3d at 1079, n.1. Second, in a recent unpublished opinion, Chief Judge Tymkovich, who wrote for the panel in *Seegmiller* and joined then-Judge Gorsuch's panel opinion in *Browder*, explained that he is in accord with *Browder* and *Dias* and that, to the extent *Seegmiller* is inconsistent, the earlier case is properly dismissed as dicta. *See Dawson v. Bd. of Cty. Commis*, No. 17-1118, 732 F. App'x 624, 634–37, 2018 WL 1256477, at *9–10 (10th Cir. Mar. 9, 2018) (Tymkovich, C.J., concurring) ("Our Circuit has settled on the following solution: if the case involves a *legislative act*, only the 'rights' strand applies. On the other hand, when the case involves *executive action* by a government official or entity, we apply the 'shocks the conscience' test." (citations omitted)).

Following *Lewis*, the district court in this case applied only the "shocks the conscience" test. *See Moya v. Garcia*, No. 1:16-CV-01022-WJ-KBM, 2017 WL 4536080, at *4 (D.N.M. Feb. 13, 2017) ("To establish a substantive due process violation, Plaintiffs must show Defendants' behavior was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" (quoting *Lewis*, 523 U.S. at 847 n.8, 118 S.Ct. 1708)). On appeal, the parties have argued past each other without ever focusing on the tension in our case law. Neither side cited either *Seegmiller* or *Broward*. Plaintiffs' opening brief did not even reference the "shocks the conscience" test at all, asserting instead a "fundamental liberty interest in pretrial release" as the basis for their substantive due process claim. Aplt. Br. at 21. Defendants in turn did not engage with Plaintiffs' "fundamental liberty" analysis, urging instead that the district court be affirmed because Plaintiffs "failed to allege conscience-shocking conduct on the part of the defendants." Aplee.

Br. at 34–36. Plaintiffs then asserted in their reply brief that their "allegations, if proven, shock the conscience." Aplt. Reply Br. at 21. And at oral argument Plaintiffs effectively adopted the *Seegmiller* view, stating "there's two ways you can get to substantive due process violations," Oral Arg. 2:30–2:57. That is, either the "shocks the conscience" standard or the fundamental rights standard will do. *Id.*

I need not and, writing only for myself, cannot resolve the crosswinds in our case law. I have already explained that Plaintiffs have plausibly pleaded a deprivation of their procedural due process rights. That is grist enough for me to engage with the majority's causation analysis.[4]

II. CAUSATION

Properly understood, Plaintiffs' alleged injury is the unconstitutional deprivation of their liberty through overdetention. As to causation, Plaintiffs' argument is straightforward: they allege the sheriff and wardens jointly held the keys to their jail cells. By keeping Plaintiffs behind bars—day after day after day—the

[4] Defendants argue that Plaintiffs should be permitted to litigate their claims only under the rubric of procedural due process. We have previously said that "[w]here a plaintiff has recourse to an 'explicit textual source of constitutional protection,' a more general claim of substantive due process is not available." *Shrum v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006) (quoting *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)). Our sister circuits are divided as to whether overdetention claims sound in procedural or substantive due process. *See Jauch*, 874 F.3d at 430 (collecting cases). Although I would hold that Plaintiffs have pleaded a plausible procedural due process claim, I decline to opine on whether a substantive due process claim might also be viable.

sheriff and wardens were deliberately indifferent to their constitutional right to freedom pending trial.

In finding causation lacking, the majority focuses on the state court's conduct, rather than the Defendants' conduct. As portrayed by the majority, Mr. Moya and Mr. Petry "blame the sheriff and wardens for the delays in the arraignments." Maj. Op. at 1233. Because the sheriff and wardens had no power to schedule the arraignments, the majority's thinking goes, the sheriff and wardens had no power to prevent or cure the alleged constitutional violations. *See id.* ("the sheriff and wardens did not cause the arraignment delays"); *id.* at 1243 ("[T]he sheriff and wardens did not *cause* the overdetention. At most, the sheriff and wardens failed to remind the court that it was taking too long to arraign Mr. Moya and Mr. Petry."); *id.* at 1238 ("The state trial court's alleged failure to schedule timely arraignments cannot be attributed to the sheriff or wardens."). But, in my view, causation follows from the constitutionally cognizable injury that Plaintiffs alleged. Here we see why "a 'careful description' of the allegedly violated right," *Browder*, 787 F.3d at 1078, is so crucial. On my reading of the complaint, Plaintiffs are not seeking to hold the sheriff and wardens accountable for the court's scheduling decisions; instead, they are seeking to hold them accountable for the lengthy detentions that no court authorized.[5] Again, a timely bail hearing is a means to

[5] Recall the Complaint alleges that the bench warrants authorizing Plaintiffs' arrests "commanded any authorized officer to 'arrest [Plaintiff], and bring him forthwith before this court.'" Joint App'x 10–11, Compl. ¶¶ 26, 33; *see Forthwith*, Black's Law Dictionary (10th ed. 2014) ("1. Immediately; without delay. 2. Directly; promptly; within a reasonable time under the circumstances; with all convenient dispatch.").

securing Plaintiffs' protected liberty interests, not an end unto itself.

The majority explains that it focused on the right to a timely bail hearing "because that's what the plaintiffs have alleged," Maj. Op. at 1237, all the while conceding that Plaintiffs have *also* alleged a violation of their "right to freedom from detention," *id.* at 1237. Under the majority's framing, these rights "are coextensive to Mr. Moya and Mr. Petry because to them, a violation of the right to a timely arraignment resulted in violation of their right to freedom from prolonged detention." *Id.* But the majority's own description demonstrates that these rights are not one and the same.[6] The state-law procedural right to a timely arraignment is protective of, not coextensive with, the right to liberty. The majority assumes without deciding that Plaintiffs alleged a violation of the state-law procedural right to a timely arraignment and then concludes that their constitutional claims fail because the warden and sheriffs did not cause the violation of state procedural law. That analysis works fine as far as it goes, but it is incomplete. The majority never considers whether the complaint adequately alleges a violation of the more fundamental right. Nor does it consider whether the individual defendants' alleged conduct deprived Plaintiffs of that right. In my view, this more fundamental question is fairly alleged in the complaint and presented in Plaintiffs' briefing.

[6] According to the majority, the interchangeability of the liberty interests is illustrated by Plaintiffs' definition of the putative class, which would include only those detainees held for longer than the fifteen days allowed under New Mexico law. Maj. Op. at 1237–38 n.9. This is a non sequitur. Plaintiffs' proposed class definition tells us nothing about whether their complaint plausibly alleges individual due process claims on any theory fairly presented.

Therefore, I think this court is obliged to consider it, not least because it is an "interpretation [that] could succeed." Maj. Op. at 1238.

By focusing on the arraignment rather than the detention, the majority naturally finds that the causal force lies with the state court's conduct, rather than with the jailers' conduct. And by focusing on the state court's conduct, rather than the jailers' conduct, the majority reaches a result heretofore unseen in an overdetention case. As best I can tell, our decision today puts us at odds with every circuit to consider the apportionment of blame between state courts and state jailers where a § 1983 plaintiff alleges that he or she was overdetained. *See Jauch*, 874 F.3d at 430, 436 (county's policy of indefinitely detaining arrestees until the court next convened was "the moving force" behind the constitutional injury); *Hayes v. Faulkner Cty.*, 388 F.3d 669, 674 (8th Cir. 2004) (county's policy of waiting for the court to schedule a hearing "ignore[d] the jail's authority for long-term confinement" and was "deliberately indifferent to detainees' due process rights"); *Armstrong v. Squadrito*, 152 F.3d 564, 579 (7th Cir. 1998) ("[J]ailers hold not only the keys to the jail cell, but also the knowledge of who sits in the jail and for how long they have sat there. They are the ones directly depriving detainees of liberty."); *Oviatt*, 954 F.2d at 1476–77 (holding that due process required sheriff to enact reasonable procedures for decreasing erroneous incarcerations).[7] The majority

[7] *Estate of Brooks ex rel. Brooks v. United States*, 197 F.3d 1245 (9th Cir. 1999), is not to the contrary. That case also involved an over-detention claim brought under § 1983 against a county, but there the county acted pursuant to an order from the United States Marshals Service. *Id.* at 1246. Distinguishing *Oviatt*, the Ninth Circuit held that "[w]hereas *Oviatt* was a case involving whether the left hand knew what the right hand was doing, this

distinguishes *Armstrong* and *Oviatt* because, in those cases, "a clerical error prevented the court from discovering the arrests and the need to schedule arraignments," so there would have been no basis for placing blame on the state court. Maj. Op. at 1234. And in our case, by contrast, "Mr. Moya and Mr. Petry do not allege a failure to tell the court of their arrests in sufficient time to conduct the arraignments within" the time required under state law. *Id.* at 1234. I agree with the majority that *Armstrong* and *Oviatt* are distinguishable. But that distinction does not change the underlying reasoning that the jailers are the ones directly depriving the detainees of their protected liberty interest in freedom pending trial. And, in any event, *Jauch* and *Hayes* are not so easily distinguished.

In *Jauch*, the plaintiff, Jessica Jauch, was indicted by a grand jury, arrested, and put in jail, where she waited for ninety-six days before she was brought before a judge. 874 F.3d at 428. She later brought suit under § 1983 against the county and the sheriff, alleging, *inter alia*, violations of both procedural and substantive due process. *Id.* The district court denied Ms. Jauch's motion for summary judgment and instead ordered judgment in favor of the defendants. *Id.* The Fifth Circuit reversed, holding that (a) the sheriff was not entitled to qualified immunity and (b) Ms. Jauch was entitled to judgment in her favor on her procedural due process claim. *Id.* at 429, 437.

The majority distinguishes *Jauch* on the ground that its causation analysis "rested on Mississippi law,"

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is a case involving whether *my* left hand knows what *your* right hand is doing." *Id.* at 1248. In this case, we consider only state actors, and so *Brooks* is easily distinguishable.

which "recognize[s] the responsibility of the sheriff to release an arrestee who has been detained too long without bail." Maj. Op. at 1235 (citing *Jauch*, 874 F.3d at 437). As the Fifth Circuit explained, however, it merely cited Mississippi law for the unremarkable propositions that (1) the sheriff is responsible for those incarcerated in his jail, *see Jauch*, 874 F.3d at 436–37 (citing Miss. Code. Ann. § 19-25-69), and (2) county sheriffs are responsible "to hold detainees in a manner consistent with their oaths to uphold the federal and state constitutions," *id.* at 437 (citing *Sheffield v. Reece*, 201 Miss. 133, 28 So.2d 745, 748 (1947)). New Mexico law does not differ on either point, except perhaps that it extends those responsibilities to its wardens as well. *See* N.M. Stat. Ann. § 33–3–1 ("The common jails shall be under the control of the respective sheriffs...."); *id.* § 33–1–2(E) (stating "'warden' ... means the administrative director of a correctional facility"); *Wilson v. Montano*, 715 F.3d 847, 856–57 (10th Cir. 2013) (relying on these provisions to conclude that, under New Mexico law, wardens and sheriffs share responsibility for the policies and customs at county jails and for any failure to adequately train their subordinates); *see also* N.M. Const. art. XX, § 1 (requiring "[e]very person elected or appointed to any office" to take an oath to support the federal and state constitutions).

Next, the majority finds *Jauch* of limited guidance because Mr. Moya and Mr. Petry expressly disavowed any argument that the sheriff and wardens could have or should have released them from custody without a valid court order. Maj. Op. at 1244–45. Respectfully, I am not persuaded. Mr. Moya and Mr. Petry argue there was "plenty Defendants could, and should, have done short of releasing Mr. Moya and Mr. Petry to

ensure that they received prompt bail determinations." Aplt. Br. at 29. For instance, they suggest, the sheriff and wardens could have reviewed court dockets to determine whether arraignments were being timely scheduled, and if not, they could have requested immediate arraignments. Or they could have physically brought Mr. Moya or Mr. Petry before a judicial officer at any time. But alas "we cannot know what ... could have [been] done to allow bail, because [the jailers] did nothing at all." *Jauch*, 874 F.3d at 437 n.10.[8] Even on the majority's view of Plaintiffs' alleged liberty interest, its causation analysis is "overly rigid." *Estate of Brooks ex rel. Brooks v. United States*, 197 F.3d 1245, 1250 (9th Cir. 1999) (Hawkins, J., dissenting) (noting that the county could have reminded the relevant authorities of the detainee's right to see a magistrate; thus, "the County was not helpless to avoid the injury to [the detainee] and so was a legal cause of his injury").

Nor does the majority meaningfully distinguish the Eighth Circuit's opinion in *Hayes*. In that case, the

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[8] The Fifth Circuit recently decided against rehearing *Jauch* en banc. *See Jauch v. Choctaw Cty.*, 886 F.3d 534 (5th Cir. 2018). Six judges voted in favor of rehearing; they would have held that qualified immunity applies. *Id.* at 433 (Southwick, J., dissenting from denial of rehearing en banc). But the dissenting judges seemingly were not in agreement as to whether *Jauch*'s holding as to Choctaw County also should have been reconsidered. *See id.* at 434. In any event, they were not blind to the possibility that jailers have the power to prevent constitutional violations in cases like these. *See id.* ("[A] a county should not be allowing a prisoner's pretrial release to be unaddressed for extended periods. Judges and jailers could cooperate to minimize delays in consideration.... Even a sheriff, though not having the power to schedule a hearing, might rattle the cage on behalf of such a prisoner so that those who have the authority to do something will hear." (emphasis deleted)).

plaintiff, James M. Hayes, was ticketed for not having automobile tags and vehicle insurance. *Hayes*, 388 F.3d at 672. Mr. Hayes failed to appear at his municipal court hearing, and so bench warrants were issued for his arrest. *Id.* On April 3, 1998, he was stopped for a traffic violation, arrested on the warrants, given a court date of May 11, and jailed. *Id.* Mr. Hayes did not post a $593 cash-only bond and remained in jail until appearing before the court on May 11, thirty-eight days after his arrest. *Id.* He too brought suit under § 1983 against the county and sheriff. *Id.* The Eighth Circuit affirmed the district court's entry of judgment against the sheriff in his individual capacity, finding that a "law enforcement officer cannot reasonably believe that holding a person in jail for 38 days without bringing him before a judicial officer for an initial appearance is constitutional." *Id.* at 675. The majority explains that it cannot follow *Hayes* because the Eighth Circuit's approach, which "attributed responsibility to the jailers based solely on federal law, not state law," is "inconsistent" with Tenth Circuit precedent that "directs us to focus on state law when determining the scope of the defendants' responsibility to ensure prompt hearings." Maj. Op. at 1236 (emphasis deleted) (citing *Wilson*, 715 F.3d at 854).[9] Again, I differ with the majority, which

[9] I agree with the majority that *Hayes* "attributed responsibility to the jailers based solely on federal law, not state law." Maj. Op. at 1236. And for that reason, the majority's comparative analysis of Arkansas and New Mexico criminal procedure rules is but a distraction. *See id.* at 1236. True, under New Mexico law, "[w]hen a warrant is issued in a criminal action, ... the defendant named in the warrant shall, upon arrest, be brought by the [arresting] officer before the court without unnecessary delay." N.M. Stat. Ann. § 31-1-4(C). The majority reads that rule and apparently concludes that, because the arresting officer is vested with statutory responsibility to ensure a prompt hearing, the

in my view focuses on the wrong deprivation and thus the wrong actor.

Nothing in *Wilson* requires us to adopt the majority's analytical approach. Nor does *Wilson* preclude us from following our sister circuits' persuasive reasoning in comparable cases. In *Wilson*, the plaintiff, Michael Wilson Sr., was arrested without a warrant and booked into a New Mexico county jail. 715 F.3d at 850. He was detained for eleven days before he was released by order of a magistrate judge. *Id.* Because Mr. Wilson was arrested without a judicial finding of probable cause, his ensuing § 1983 action sounded in the Fourth Amendment, rather than the Fourteenth. *Id.* We held that the district court correctly denied the sheriff's and warden's motions to dismiss for failure to state a claim and for qualified immunity. *Id.* at 857–58. In reaching that conclusion, as the majority rightly notes, we "consider[ed] New Mexico state law insofar as it bears on the scope of [a defendant's] responsibility to ensure a prompt probable cause determination." *Id.* at 854. Likewise, here, we ought to consider New Mexico law insofar as it bears on the scope of Defendants' responsibility to ensure that detainees are not deprived of their right to freedom pending

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arresting officer (and, one supposes, that officer's supervisors) is *alone* responsible for ensuring the state court promptly schedules a hearing. But § 31-1-4(C) does not make the arresting officer responsible for protecting a defendant's constitutional rights to the exclusion of anyone else's responsibility. Nor is it clear why the arresting officer would be the proximate cause of an *overdetention* violation, which will not ripen until some indeterminate amount of time has passed and in which, typically, the detainee will no longer be held under the arresting officer's authority. Under the majority's approach, there is no § 1983 remedy to be had, no matter how long an arrestee is unconstitutionally held without an arraignment.

trial. The majority puts it somewhat differently. My colleagues look to New Mexico law only insofar as it bears on the scope of the Defendants' responsibility to ensure a prompt bail hearing. Finding no such requirement in state law, the majority concludes the Defendants did nothing unconstitutional. But ensuring a prompt bail hearing is just one possible means of ensuring that Plaintiffs' constitutional rights are not violated. Other means will also suffice. Most obviously, the Defendants could have simply released Mr. Moya and Mr. Petry from custody.[10] To the extent doing so would have been inconsistent with Defendants' duties under state law, it is no matter, because federal constitutional law trumps. *See* U.S. Const. art. VI, cl. 2.

Wilson is not in tension with *Jauch* or *Hayes*. The New Mexico sheriff and warden in *Wilson* could no more force the state court to make a probable cause determination than the sheriffs in Mississippi (*Jauch*) or Arkansas (*Hayes*) could force their state courts to make a bail determination. Any reference in *Wilson* to a duty to "ensure" a state court proceeding must simply mean that state officials have a duty to seek the state court's cooperation. And should the state court fail to cooperate, it will be left to the sheriff and warden to desist from holding detainees when they lack continued constitutional authority to do so. *See Wilson*, 715 F.3d at 853 n.6 (noting that it is settled

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[10] I recognize that Plaintiffs have expressly disavowed that argument, *see* Maj. Op. at 1235–36 (citing Aplt. Br. at 29), but I comment on it anyway to acknowledge the reach of my reasoning. In any case, Plaintiffs identified tactics short of outright release that the defendants in this case could have adopted. *See supra*. In my view they have sufficiently alleged causation at this stage of the proceedings.

law that defendants "who effected the plaintiffs' arrests and detentions[ ] could be held liable *for the plaintiffs' prolonged detentions* without probable cause" (emphasis added)). Again, in my view it is the "prolonged detentions," not the absence of a bail hearing or probable-cause hearing, that is the fundamental due process concern.

The majority's chosen approach, moreover, comes with troubling implications. By (a) looking to state law to determine the scope of state officials' responsibility to ensure prompt bail hearings, and (b) conceptualizing Plaintiffs' liberty interest as an interest in a state court proceeding, rather than in liberty itself, the majority sanctions a system by which states could regularly violate detainees' constitutional rights by holding them indefinitely on account of untimely state courts, without any fear of their collaborating municipalities or state officials ever incurring monetary penalties under § 1983. Such an outcome is not farfetched. We know from *Jauch* that, in at least one part of Mississippi, the only court empowered to set bail would sometimes go months between sessions. And, accepting Plaintiffs' allegations as true, as we must, we can infer that courts in Santa Fe County—New Mexico's third-most populous—routinely fail to schedule arraignments with any earnest.

The majority's causation analysis also lacks a logical endpoint. What if the state court had scheduled Mr. Moya's arraignment a month later than it did? What about a year later? As I read the majority opinion, even then Mr. Moya would have no actionable § 1983 claim. *See supra*, n.9. To be sure, I agree with the majority that New Mexico sheriffs and wardens are powerless to force New Mexico courts to schedule bail hearings in a timely fashion. Only New Mexico courts can do

that. But the solution is not to grant jailers refuge behind judges cloaked with absolute immunity, enabling the jailers to violate the Constitution with impunity.[11] The better solution is to hold state officials and municipalities responsible for the constitutional violations they themselves commit. True, the effect could be that New Mexico sheriffs and wardens respond by releasing pretrial detainees, some of whom may have been arrested for alleged violent acts or pose a risk of flight, without the deterrence of bail. But it is our role to assure that New Mexico runs its criminal-justice system with the timeliness that the Fourteenth Amendment commands. If it does not, there should be consequences: either pre-trial detainees go free pending trial, or they will be entitled to civil damages against the state's officials and municipalities so that they may be compensated for the violations of their civil rights.

III. QUALIFIED IMMUNITY

As the Supreme Court recently reiterated, state officials "are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, —— U.S. ——, 138 S.Ct. 577, 589, 199 L.Ed.2d 453 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012)). "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly

[11] It is no answer to say that Plaintiffs' complaint was deficient for not alleging that they were arrested by officers subject to the defendants' supervisory authority, as the majority opinion could be read to suggest. *See* Maj. Op. at 1236 n.8. The arresting officer can no more force the court to act than can the sheriff or warden.

established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Becker v. Bateman*, 709 F.3d 1019, 1023 (10th Cir. 2013) (quotation omitted). The Supreme Court has "repeatedly stressed that courts must not define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Wesby*, 138 S.Ct. at 590 (internal quotation marks omitted). "This demanding standard protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* at 589 (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)).

In my view, the complaint plausibly alleges that Sheriff Garcia, Warden Caldwell, and Warden Gallegos violated Plaintiffs' constitutional rights. But I recognize that conclusion is not foretold. No opinion from this court or the Supreme Court has ever clearly established that a jailer violates the Constitution by detaining an individual lawfully arrested in anticipation of an untimely scheduled arraignment. That principle of law, to be sure, is clearly established in at least two of our sister circuits, but that is not enough for the law to be clearly established here. I would thus affirm the district court's order insofar as it dismissed Plaintiffs' claims against the sheriff and wardens on the basis of qualified immunity, and so I partially concur in the majority's result. But because municipalities are not entitled to qualified immunity, I would reverse and remand to the district court for further proceedings against the County.

Thus, as to the County, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 17-2037

MARIANO MOYA, Lonnie Petry, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

ROBERT GARCIA, Santa Fe County Sheriff; Mark Caldwell, Warden of Santa Fe County Adult Correctional Facility; Mark Gallegos, Former Warden of Santa Fe County Adult Correctional Facility, in their individual capacities; Board of Commissioners of Santa Fe County,

Defendants-Appellees.

Filed April 24, 2018

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 1:16-CV-01022-WJ-KBM)

A. Nathaniel Chakeres (Todd A. Coberly with him on the briefs), of Coberly & Martinez, LLLP, Santa Fe, New Mexico, for Plaintiffs-Appellants.

Brandon Huss of The New Mexico Association of Counties, Santa Fe, New Mexico, for Defendants-Appellees.

Before MATHESON, BACHARACH, and McHUGH, Circuit Judges.

BACHARACH, Circuit Judge.

This appeal involves claims of overdetention by Mr. Mariano Moya and Mr. Lonnie Petry. Both men were arrested based on outstanding warrants and detained in a county jail for 30 days or more prior to their arraignments. These arraignment delays violated New Mexico law, which requires arraignment of a defendant within 15 days of arrest. N.M. Stat. Ann. § 31-1-3; Rule 5-303(A) NMRA.

The arraignment delays led Mr. Moya and Mr. Petry to sue under 42 U.S.C. § 1983 for deprivation of due process, alleging claims against

- Sheriff Robert Garcia, Warden Mark Caldwell, and former Warden Mark Gallegos in their individual capacities under theories of personal participation and supervisory liability and
- the Board of Commissioners of Santa Fe County under a theory of municipal liability.

The district court granted the defendants' motion to dismiss for failure to state a valid claim. We affirm because Mr. Moya and Mr. Petry failed to plausibly allege a factual basis for liability.[1]

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[1] The complaint contains claims based on both substantive and procedural due process. Based on our disposition, we need

I. Standard of Review

We engage in de novo review of the dismissal under Federal Rule of Civil Procedure 12(b)(6). *Albers v. Bd. of Cty. Commis*, 771 F.3d 697, 700 (10th Cir. 2014). In engaging in this review, we credit the well-pleaded allegations in the complaint and construe them favorably to the plaintiffs. *Thomas v. Kaven*, 765 F.3d 1183, 1190 (10th Cir. 2014). To withstand dismissal, the plaintiffs' allegations must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The claim is plausible only if it contains sufficient factual allegations to allow the court to reasonably infer liability. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

II. Supervisory Liability

The individual defendants served as the sheriff and wardens of the jail where Mr. Moya and Mr. Petry were detained. These defendants could potentially incur liability under § 1983 if they had acted under color of state law. 42 U.S.C. § 1983. But § 1983 is not always available against individual officials because they enjoy qualified immunity when their conduct does not violate "'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Cordova v. City of Albuquerque*, 816 F.3d 645, 655 (10th Cir. 2016) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009)).

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not distinguish between the claims involving procedural and substantive due process.

To avoid qualified immunity at the motion-to-dismiss stage, a plaintiff must show that

- "'the defendant's [alleged conduct] violated a constitutional or statutory right'" and
- "the right was 'clearly established at the time of the [violation].'"

Thomas v. Kaven, 765 F.3d 1183, 1194 (10th Cir. 2014) (quoting *Archuleta v. Wagner*, 523 F.3d 1278, 1283 (10th Cir. 2008)). There are two questions at the first step:

1. whether the plaintiff has adequately alleged the violation of a constitutional or statutory right and
2. whether the defendant's alleged conduct deprived the plaintiff of that right.

See Dodds v. Richardson, 614 F.3d 1185, 1192-94 (10th Cir. 2010) (engaging in this two-part analysis of the first step of qualified immunity).

The first question is whether Mr. Moya and Mr. Petry have adequately alleged a deprivation of due process. We need not decide this question because of our answer to the second question: in our view, the complaint does not plausibly allege facts attributing the potential constitutional violation to the sheriff or wardens.[2]

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[2] Even if the defendants had not asserted qualified immunity, Mr. Moya and Mr. Petry would have needed to adequately allege facts showing causation. *See* 42 U.S.C. § 1983 ("Every person who, under color of [state law], subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any [federal right], shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."); *see also* Martin A.

To prevail, Mr. Moya and Mr. Petry must have alleged facts showing that the sheriff and wardens had been personally involved in the underlying violations through their own participation or supervisory control. *Dodds v. Richardson*, 614 F.3d 1185, 1195 (10th Cir. 2010); *see also Brown v. Montoya*, 662 F.3d 1152, 1163 (10th Cir. 2011) ("A § 1983 defendant sued in an individual capacity may be subject to personal liability and/or supervisory liability."). The district court rejected both theories of liability. Here, though, Mr. Moya and Mr. Petry rely only on their theory of supervisory liability. For this theory, Mr. Moya and Mr. Petry blame the sheriff and wardens for the delays in the arraignments. In our view, however, the sheriff and wardens did not cause the arraignment delays.[3]

A plaintiff may succeed on a § 1983 supervisory-liability claim by showing that the defendant

- "promulgated, created, implemented or possessed responsibility for the continued operation of a policy that ... caused the complained of constitutional harm" and
- "acted with the state of mind required to establish the alleged constitutional deprivation."

Dodds, 614 F.3d at 1199. But the arraignments could not be scheduled by anyone working for the sheriff or

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Schwartz, Section 1983 Litigation 91 (3d ed. 2014) ("The proximate cause requirement applies to all § 1983 claims.").

[3] The dissent disagrees with our causation analysis. In our view, however, the dissent stretches both the plaintiffs' theory of liability and the standard of causation applicable to § 1983 claims.

wardens; scheduling of the arraignments lay solely with the state trial court.

Mr. Moya and Mr. Petry disagree, relying on *Wilson v. Montano*, 715 F.3d 847 (10th Cir. 2013). There two sheriff's deputies arrested Mr. Wilson without a warrant. *Wilson*, 715 F.3d at 850. He was taken to jail and detained for eleven days without the filing of a complaint or an opportunity for a probable-cause determination. *Id.* Mr. Wilson sued the sheriff and the warden, alleging that they (1) had routinely allowed deputies to make arrests without warrants and (2) had failed to file criminal complaints or bring the arrestees to court. *Id.* at 851. The *Wilson* court upheld supervisory liability, reasoning that under New Mexico law the sheriff and the warden were responsible for running the jail and ensuring prompt probable-cause determinations. *Id.* at 856-58.

Wilson differs from our case on who controlled the situation causing the overdetention. In *Wilson*, the sheriff and the warden were in control because (1) deputy sheriffs had arrested Mr. Wilson and (2) the warden's staff had detained Mr. Wilson without a warrant. These facts proved decisive because (1) New Mexico law requires the sheriff to "diligently file a complaint or information," N.M. Stat. Ann. §§ 4-37-4, 29-1-1, and (2) the sheriff's staff had never filed a complaint against Mr. Wilson. *Wilson*, 715 F.3d at 851, 853. Without a complaint, the court could not make a probable-cause determination. By preventing a probable-cause determination, the sheriff impeded the criminal-justice process; and the warden exacerbated the delay by detaining Mr. Wilson for eleven days without a court order. *Id.* at 857-59.

In contrast, the court was firmly in control here. Grand juries indicted Mr. Moya and Mr. Petry, and both individuals were arrested based on outstanding warrants issued by the court. And after these arrests, jail officials notified the court that Mr. Moya and Mr. Petry were in custody.

The arrests triggered New Mexico's Rules of Criminal Procedure, which entitled Mr. Moya and Mr. Petry to arraignments within fifteen days. Rule 5-303(A) NMRA. Compliance with this requirement lay solely with the court, for an arraignment is a court proceeding that takes place only when scheduled by the court. *See People v. Carter*, 91 N.Y.2d 795, 676 N.Y.S.2d 523, 699 N.E.2d 35, 38 (N.Y. 1998) ("Responsibility for scheduling an arraignment date and securing a defendant's appearance lies with the court, not the People.").

The court failed to comply with this requirement, resulting in overdetention of Mr. Moya and Mr. Petry. These overdetentions were caused by the court's failure to schedule and conduct timely arraignments rather than a lapse by the sheriff or wardens. *See Webb v. Thompson*, 643 Fed. Appx. 718, 726 (10th Cir. 2016) (unpublished) (Gorsuch, J., concurring in part and dissenting in part) ("[T]he only relevant law anyone has cited to us comes from state law, and it indicates that the duty to ensure a constitutionally timely arraignment in Utah falls on the *arresting* officer—not on *correctional* officers.").

Mr. Moya and Mr. Petry argue that the sheriff and wardens could have mitigated the risk of overdetention by keeping track of whether detainees had been timely arraigned, requesting arraignments for those who had been overdetained, or bringing detainees to court prior to a scheduled arraignment. But the sheriff

and wardens did not *cause* the overdetention. At most, the sheriff and wardens failed to remind the court that it was taking too long to arraign Mr. Moya and Mr. Petry. But even with such a reminder, the arraignments could only be scheduled by the court itself. *See Estate of Brooks ex rel. Brooks v. United States*, 197 F.3d 1245, 1248 (9th Cir. 1999) (holding that the county did not cause the overdetention, reasoning that the county could only ask for federal help and that the county lacked the "ability itself to bring the prisoner before the appropriate judicial officer").[4]

The plaintiffs rely in part on *Armstrong v. Squadrito*, 152 F.3d 564 (7th Cir. 1998), and *Oviatt ex rel. Waugh v. Pearce*, 954 F.2d 1470 (9th Cir. 1992). In those cases, a clerical error prevented the court from discovering the arrests and the need to schedule arraignments.[5] But here, Mr. Moya and Mr. Petry do not allege a failure to tell the court of their arrests in

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[4] The dissent points out that (1) *Estate of Brooks* involved a federal detainee's claim against a county and (2) our case involves a state detainee. Dissent at 1177 n.7. This difference shrouds the underlying rationale in *Estate of Brooks*. There the court reasoned that the county's policies did not cause the overdetention because the county lacked authority to release the detainee or bring him before a federal magistrate judge. *Estate of Brooks*, 197 F.3d at 1248. Here the defendants did not cause the overdetention because they could not have initiated an arraignment and, as discussed below, the plaintiffs have disavowed any argument that the sheriff or wardens could have ordered release. *See* pp. 1165–66, below.

Although the circumstances differed in *Estate of Brooks*, the court reasoned that the jailers' limited powers prevented causation. That rationale is applicable and persuasive.

[5] *Oviatt* arguably implies that jailers can cause an arraignment delay by failing to remind a court to schedule the arraignment. To the extent that *Oviatt* draws this implication, we disagree.

sufficient time to conduct the arraignments within fifteen days.

Mr. Moya and Mr. Petry also rely on *Jauch v. Choctaw County*, 874 F.3d 425 (5th Cir. 2017), and *Hayes v. Faulkner County*, 388 F.3d 669 (8th Cir. 2004). But the conclusions in *Jauch* and *Hayes* are not precedential, pertinent, or persuasive.

In *Jauch*, the sheriff's office adopted a procedure of holding defendants in jail without any court proceeding until the reconvening of the circuit court that had issued the capias warrants. *Jauch*, 874 F.3d at 430, 435. This procedure resulted in detention for 96 days, with jail officials rejecting the defendant's requests to be brought before a judge. *Id.* at 428. The Fifth Circuit Court of Appeals held that the sheriff could incur liability for the institution of this unconstitutional policy. *Id.* at 436-37.[6]

In our view, *Jauch* bears limited applicability. *Jauch* rested on Mississippi law and the jailers' authority to release detainees when they had been detained too long without an opportunity for bail. *Id*. In interpreting Mississippi law, the court pointed to *Sheffield v. Reece*, 201 Miss. 133, 28 So.2d 745, 748 (1947), which had required sheriffs to prevent detention "'for an unreasonable length of time.'" *Jauch*, 874 F.3d at 437 (quoting *Sheffield*, 28 So.2d at 748). As *Jauch* pointed out, *Sheffield* had recognized the responsibility of the sheriff to release an arrestee who has been detained too long without bail. *Id.* at 437.

Here, however, Mr. Moya and Mr. Petry have not alleged that they could have been released. To the

[6] On the basis of the sheriff's policy, the county also incurred liability. *Jauch*, 874 F.3d at 436.

contrary, they expressly disavowed this theory in their opening brief:

> [The district court] ... noted that the [county jail] was legally prohibited from releasing detainees without a valid court order.
>
> Yet Mr. Moya and Mr. Petry never argued that Defendants should have unconditionally released them from jail, so the fact that the [county jail] may have been prohibited from releasing them absent a court order is irrelevant.

Appellants' Opening Br. at 29 (citation omitted). In light of this disavowal of an argument that Mr. Moya and Mr. Petry should have been released, *Jauch* provides little guidance on what the sheriff and wardens could have done to avoid the due process violations other than remind the state trial court of *its* failure to schedule timely arraignments.[7]

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[7] In *Jauch*, the Fifth Circuit Court of Appeals recently denied a petition for rehearing en banc. *See Jauch v. Choctaw Cty.*, 886 F.3d 534 (5th Cir. 2018) (Southwick, J., dissenting from denial of rehearing en banc). Judge Southwick—joined by five other judges—dissented from the denial, arguing that the sheriff should have obtained qualified immunity. *Id.* at 535. In making this argument, the dissent concluded that

- under Mississippi law, the state district court had the sole responsibility to schedule an arraignment and
- no federal law clearly established that the sheriff would violate the U.S. Constitution by following state law.

Id. at 538–41. In reaching these conclusions, the dissent observed that under Mississippi law, the jailers could not prevent the overdetention because the state district court had the exclusive authority to schedule and conduct arraignments. *See id.* at 535 ("I cannot discern how these defendants had any effect on when this plaintiff was considered for release."); *id.* ("There was no obligation on the sheriff to have Jauch arraigned because that is

Hayes, too, provides little that is pertinent or persuasive. There an arrestee alleged that (1) he should have been brought before a judge in a timely manner and (2) no one from the jail had told him when his court date was (even though one had been set at the time of arrest). *Hayes v. Faulkner Cty.*, 388 F.3d 669, 672 (8th Cir. 2004). The Eighth Circuit Court of Appeals concluded that an extended detention without a first appearance, after an arrest by warrant, violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 673. The court added that responsibility for the arrestee's overdetention fell on the jailers, who could not delegate responsibility for the first appearance to the court. *Id.* at 674.

But *Hayes* sheds no light on what the jailers here could have done to ensure timely court proceedings. In *Hayes*, the Eighth Circuit apparently relied on a state procedural rule: Arkansas Rule of Criminal Procedure 8.1. This rule requires arrestees to be brought before the court "'without unnecessary delay.'" *Id.* at 675 (quoting Ark. R. Crim. P. 8.1).

Like Arkansas, New Mexico requires "[e]very accused" to be "brought before a court ... without unnecessary delay." N.M. Stat. Ann. § 31-1-5(B). Arkansas's version goes no further, omitting any mention of *who* is required to bring the arrestee to court. Ark. R. Crim. P. 8.1. New Mexico takes a different approach, clarifying elsewhere that the *arresting officer* is obligated to bring the defendant to court

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a duty that falls elsewhere."); *id.* at 539 ("The clear responsibilities relevant to this case are those of the county's circuit court judges."); *id.* ("There was no obligation on the sheriff to have Jauch arraigned because that is a duty that falls elsewhere.").

"without unnecessary delay." N.M. Stat. Ann. § 31-1-4(C).[8]

Unlike the Arkansas rule, New Mexico's version of the rule does not impose any duties on the sheriff or warden to bring an arrestee to court in the absence of a scheduled arraignment. In light of this difference between the Arkansas and New Mexico rules, we see nothing in *Hayes* to tell us what the sheriff or wardens could have done to provide timely arraignments for Mr. Moya and Mr. Petry.

The approach taken in *Hayes* is also inconsistent with our own precedent. The *Hayes* court attributed responsibility to the jailers based solely on federal law, not state law. By contrast, our precedent directs us to focus on *state* law when determining the scope of the defendants' responsibility to ensure prompt hearings. *See Wilson v. Montano*, 715 F.3d 847, 854 (10th Cir. 2013) ("We consider New Mexico state law insofar as it bears on the scope of each appellant's responsibility to ensure a prompt probable cause determination.").

And as we have discussed, New Mexico law did not require the sheriff or wardens to bring Mr. Moya and Mr. Petry to court. Accordingly, once the arresting officers brought Mr. Moya and Mr. Petry to the jail and the court was notified of the arrests, New Mexico law required the court (not the sheriff or wardens) to schedule timely arraignments.

Under New Mexico law, *Jauch* and *Hayes* provide little guidance to us in addressing the issue framed by

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[8] This statute did not apply here, for the plaintiffs do not allege that they were arrested by officers subject to the defendants' supervisory authority. We thus have no occasion to decide whether a cause of action could have been asserted against the arresting officers or their supervisors.

Mr. Moya and Mr. Petry. They allege that the state trial court failed to schedule timely arraignments and that the sheriff and wardens told the court about the arrests early enough for timely arraignments. But Mr. Moya and Mr. Petry did not sue the court; they sued the sheriff and wardens, officials that could not have caused the arraignment delays because of their inability to schedule the arraignments.

III. The Dissent's Theory

The dissent argues that we have analyzed the wrong right. According to the dissent, the right to an arraignment within fifteen days is "'an expectation of receiving process,'" which cannot alone be a protected liberty interest. Dissent at 1172– 74, 1176–77 (quoting *Olim v. Wakinekona*, 461 U.S. 238, 250 n.12, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983)). Thus, the dissent reasons that the right at issue must be the right to freedom from pretrial detention rather than the right to a timely arraignment. Based on this reasoning, the dissent concludes that our misplaced focus on arraignment has caused us to improperly focus on the state district court's role and overlook actions that the defendants could have taken, such as releasing Mr. Moya and Mr. Petry.

We have focused on the plaintiffs' right to timely arraignment because that's what the plaintiffs have alleged. As the dissent admits, Mr. Moya and Mr. Petry are imprecise about their asserted right, conflating the right to an arraignment within fifteen days of arrest and the right to pretrial release (or bail). This conflation is understandable because the rights are coextensive under their theory of the case.

Mr. Moya and Mr. Petry recognize freedom from detention as an applicable liberty interest. *See, e.g.*,

Joint App'x at 7 (stating in the complaint that the New Mexico Constitution creates a right to pretrial liberty); *id.* at 83 (asserting in district court briefing that Mr. Moya and Mr. Petry "have a liberty interest in not being unnecessarily detained without the opportunity to post bail"); Appellants' Opening Br. at 16 ("The principal protected liberty interest that may be created by state law is the freedom from detention."). But Mr. Moya and Mr. Petry also allege a right to an arraignment within fifteen days of arrest. *See, e.g.*, Joint App'x at 14 (alleging in the complaint that "[b]ecause detainees charged in New Mexico district courts ... are guaranteed the right under state law to have their conditions of release set at the least restrictive level to assure their appearance and the safety of ... the community within fifteen days of their indictment or arrest, they have a federally protected liberty interest in this right"); *id.* at 69 (asserting in district court that "Plaintiffs had a liberty interest in having bail set within fifteen days of their arrest"); Appellants' Opening Br. at 36 ("In summary, under settled procedural due process principles, Defendants deprived Mr. Moya and Mr. Petry of their liberty interest in a prompt pretrial arraignment....").

Under the theory articulated by Mr. Moya and Mr. Petry, the defendants violated the right to freedom from detention by failing to ensure timely arraignments. *See, e.g.*, Appellants' Opening Br. at 41 ("The Complaint alleged that the failure to implement any policies ensuring that detainees appear before a district court within fifteen days of indictment or arrest caused Mr. Moya and Mr. Petry to be injured."). The rights are coextensive to Mr. Moya and Mr. Petry because to them, a violation of the right to a timely

arraignment resulted in violation of their right to freedom from prolonged detention.[9]

Yet the dissent disregards the claim of delay in the arraignment because this claim would founder based on the absence of a due-process violation. The dissent may be right about the absence of a due-process violation from a delay in an arraignment.[10] But in our view, we should interpret the claim and appeal based on what the plaintiffs have actually said rather than which possible interpretation could succeed. In district court, the plaintiffs based their claim on the delays in arraignments. And on appeal, the plaintiffs have consistently framed their argument based on the arraignment delays. The dissent's theory is not the theory presented by the plaintiffs.[11]

As discussed above, the defendants were powerless to cause timely arraignments because arraignments

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[9] This link is illustrated by the plaintiffs' definition of the class. In the complaint, Mr. Moya and Mr. Petry identified the class to include everyone detained at the same facility as the named plaintiffs within the previous three years "who [had not been] brought before a district court within fifteen days of their indictment or arrest to have their conditions of release set or reviewed." Joint App'x at 12-13. Timely arraignment is so fundamental to Mr. Moya and Mr. Petry's claims that the fifteen-day demarcation defines class membership.

[10] As noted above, we have assumed for the sake of argument that the arraignment delays would result in a deprivation of due process. *See* p. 1163, above.

[11] For this reason, we need not decide whether Mr. Moya and Mr. Petry would have stated a valid claim if they had alleged a broader right to freedom from pretrial detention (unrelated to Rule 5-303(A)'s fifteen-day requirement). We are deciding only the validity of the theory advanced by Mr. Moya and Mr. Petry.

are scheduled by the court rather than jail officials. The dissent agrees.

But the dissent theorizes that jail officials could have simply released Mr. Moya and Mr. Petry. This theory is not only new but also contrary to what Mr. Moya and Mr. Petry have told us, for they expressly disavowed this theory: "Mr. Moya and Mr. Petry never argued that Defendants should have unconditionally released them from jail...." Appellants' Opening Br. at 29; *see* p. 1166, above. Thus, Mr. Moya and Mr. Petry have waived reliance on that theory as a basis for reversal. *See Modoc Lassen Indian Hous. Auth. v. U.S. Dep't of Hous. & Urban Dev.*, 864 F.3d 1212, 1224 n.8 (10th Cir. Jul. 25, 2017) (stating that a theory never raised was waived as a basis for reversal).

Even if it were otherwise appropriate to raise the issue sua sponte, the dissent's theory would create a Catch-22 for jailers. Under New Mexico law, jailers commit a misdemeanor and must be removed from office if they deliberately release a prisoner absent a court order. N.M. Stat. Ann. § 33-3-12. Thus, a jailer would be forced to choose between committing a crime and facing civil liability under § 1983.

According to the dissent, jailers can eventually defend themselves based on the Supremacy Clause. But Mr. Moya and Mr. Petry do not challenge the constitutionality of the state law preventing release in the absence of a court order. *See Estate of Brooks ex rel. Brooks v. United States*, 197 F.3d 1245, 1248 (9th Cir. 1999) (affirming the dismissal of a § 1983 claim involving overdetention when the county defendant was required under state law to hold the plaintiff detainee until receiving an order from the United States and the plaintiff made no allegation that the statute was unconstitutional).

Even if Mr. Moya and Mr. Petry had challenged the constitutionality of the state law, the Supremacy Clause would supply cold comfort to a jailer facing this dilemma, particularly in light of the dissent's acknowledgment that there is no bright-line rule for when a delayed arraignment becomes a due-process violation. *See* Dissent at 1172-76. We need not decide whether the Constitution would subject jailers to this Catch-22.

* * *

The state trial court's alleged failure to schedule timely arraignments cannot be attributed to the sheriff or wardens. Thus, the complaint does not plausibly allege a basis for supervisory liability of the sheriff or wardens.

IV. Municipal Liability

Mr. Moya and Mr. Petry also assert § 1983 claims against the county, alleging that it failed to adopt a policy to ensure arraignments within fifteen days. These claims are based on the alleged inaction by the sheriff and wardens. But, as discussed above, the sheriff and wardens did not cause the arraignment delays. Thus, the county could not incur liability under § 1983 on the basis of the alleged inaction. *See Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 777 (10th Cir. 2013); *see generally* note 2, above. Therefore, we affirm the dismissal of the claims against the county.

V. Leave to Amend

In opposing dismissal, Mr. Moya and Mr. Petry stated generically that amendment would not be futile and that they should have the opportunity to amend if an element were deemed missing from the complaint.

The district court dismissed the complaint without granting leave to amend. Mr. Moya and Mr. Petry argue that the district court erred by refusing to allow amendment of the complaint.

Generally, leave to amend should be freely granted when justice requires, but amendment may be denied when it would be futile. *Full Life Hospice, LLC v. Sebelius*, 709 F.3d 1012, 1018 (10th Cir. 2013). We conclude that the district court did not err because amendment would have been futile based on the plaintiffs' submissions.

We ordinarily apply the abuse-of-discretion standard when reviewing a denial of leave to amend. *Fields v. City of Tulsa*, 753 F.3d 1000, 1012 (10th Cir. 2014). But here, the district court denied leave to amend based on futility. In this circumstance, "our review for abuse of discretion includes de novo review of the legal basis for the finding of futility." *Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Schs.*, 565 F.3d 1232, 1249 (10th Cir. 2009).

The complaint fails to allege a factual basis for supervisory or municipal liability. To cure the pleading defect, the plaintiffs needed to add factual allegations tying the arraignment delays to a lapse by the sheriff or wardens. The plaintiffs did not say how they could cure this pleading defect. Instead, they stated only that amendment would not be futile if the complaint had omitted an element. They did not tell the district court what they could have added to attribute the arraignment delays to the sheriff or wardens.

Mr. Moya and Mr. Petry have failed to say even now how they could have cured this defect in the complaint. As a result, the district court did not abuse its discretion in denying leave to amend the complaint. *See Hall*

v. Witteman, 584 F.3d 859, 868 (10th Cir. 2009) (holding that the district court did not abuse its discretion in denying leave to amend when the claimant had failed to explain how an amendment would cure the deficiencies identified by the district court).

VI. Conclusion

Mr. Moya and Mr. Petry allege a deprivation of due process when they were detained for more than fifteen days without arraignments. We can assume, without deciding, that this allegation involved a constitutional violation. But Mr. Moya and Mr. Petry sued the sheriff, wardens, and county, and these parties did not cause the arraignment delays. Thus, the district court did not err in dismissing the complaint or in denying leave to amend.

McHUGH, Circuit Judge, concurring in the result in part and dissenting in part.

Mariano Moya was arrested pursuant to a valid bench warrant and booked into a Santa Fe County jail. The warrant, issued by New Mexico's First Judicial District Court, commanded any authorized officer to (1) arrest Mr. Moya and (2) bring him "forthwith" before said court. New Mexico's law enforcement officers complied with the first directive, but not the second. As a result, Mr. Moya sat in jail for more than two months.[1] When finally brought before a judge—sixty-three days after he was first detained—the judge set bond at $5,000 and directed the state to release Mr. Moya from custody immediately. The same thing happened to Lonnie Petry, except that his jail stay was only about half as long.

Believing their prolonged detentions to be systematic of a policy and practice affecting dozens, if not hundreds, of similarly situated arrestees, Mr. Moya and Mr. Petry brought this § 1983 action against the Board of Commissioners of Santa Fe County ("the County") and three County officials who were responsible for implementing policy at the jail. The majority affirms the dismissal of Plaintiffs' claims for failure to allege plausibly that any of these defendants violated their constitutional rights. Respectfully, I disagree. I would reverse the district court's order dismissing Plaintiffs' claims against the County. But because the Defendants did not violate clearly established law, I would hold that the individual defendants

[1] Because the district court dismissed Plaintiffs' claims on a Rule 12(b)(6) motion, we presume Plaintiffs' factual allegations are true. *See Dahn v. Amedei*, 867 F.3d 1178, 1185 (10th Cir. 2017).

are entitled to qualified immunity and, on that basis alone, partially affirm the district court's order.

I. PLAINTIFFS' THEORIES OF HARM

To begin, it is important to be clear about the nature of the alleged constitutional violations. Plaintiffs' claims fall "into a category of claims which unfortunately have become so common that they have acquired their own term of art: 'overdetention,' *i.e.*, when the plaintiff has been imprisoned by the defendant for longer than legally authorized, whether because the plaintiff's incarcerative sentence has expired or otherwise." *Dodds v. Richardson*, 614 F.3d 1185, 1192 (10th Cir. 2010) (some internal quotation marks omitted). In this case, Plaintiffs argue that their overdetention supports both a procedural due process claim and a substantive due process claim. Although the majority does not distinguish between these theories, *see* Maj. Op. at 1162 n.1, I think it worthwhile to consider how Plaintiffs' allegations fit within each framework.

A. *Procedural Due Process*

"Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the ... Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quotations omitted). "To assess whether an individual was denied procedural due process, courts must engage in a two-step inquiry: (1) did the individual possess a protected interest such that the due process protections were applicable; and, if so, then (2) was the individual afforded an

appropriate level of process." *Merrifield v. Bd. of Cty. Commis*, 654 F.3d 1073, 1078 (10th Cir. 2011).[2]

Starting with the first prong, "[p]rotected liberty interests may arise from two sources—the Due Process Clause itself and the laws of the States." *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989) (internal quotation marks omitted). We have already held that the "right of an accused to freedom pending trial is inherent in the concept of a liberty interest protected by the due process clause of the Fourteenth Amendment." *Dodds*, 614 F.3d at 1192; *Meechaicum v. Fountain*, 696 F.2d 790, 791–92 (10th Cir. 1983).[3]

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[2] In *Jauch v. Choctaw Cty.*, 874 F.3d 425, 431 (5th Cir. 2017), the Fifth Circuit analyzed a comparable procedural due process claim under the framework set forth in *Medina v. California*, 505 U.S. 437, 443, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992), rather than the framework set forth in *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). In this case, both parties have assumed that the *Mathews* framework applies. For purposes of this dissent, I will presume without deciding that the *Mathews* framework is applicable.

[3] There is no serious question that Plaintiffs have a protected liberty interest arising from the Due Process Clause itself. "[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 570–71, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) (citation omitted). The liberty guaranteed by the Fourteenth Amendment "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, [and so on]. In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Id.* at 572, 92 S.Ct. 2701 (citation omitted) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923)). In this case, the Plaintiffs allege they *were deprived of freedom from bodily restraint*—the very core of liberty itself. This a state cannot

In this case, however, Plaintiffs assert that the protected liberty interest grounding their procedural due process claims arises not from the Due Process Clause itself, but rather from New Mexico law. This is fine. *See Sandin v. Conner*, 515 U.S. 472, 483–84, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995) ("States may under certain circumstances create liberty interests which are protected by the Due Process Clause[,b]ut these interests will be generally limited to freedom from restraint...." (citation omitted)). But it is imperative that we accurately identify the exact nature of the state-created liberty interest Plaintiffs seek to protect. In presenting their case, Plaintiffs have tended to conflate the right to freedom (or bail) with the right to procedures requiring timely bail hearings. Although both are rights created by New Mexico law, *see State v. Brown*, 338 P.3d 1276, 1282 (N.M. 2014) ("The New Mexico Constitution affords criminal defendants a right to bail...."); Rule 5–303(A) NMRA (providing that defendants shall be arraigned within fifteen days of a triggering event, such as an arrest), only the former can be a protected liberty interest. That is because "an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause." *Olim v. Wakinekona*, 461 U.S. 238, 250 n.12, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983); *accord Cordova v. City of Albuquerque*, 816 F.3d 645, 657 (10th Cir. 2016) ("[N]ot all state laws create constitutionally protected liberty interests.").

To the extent Plaintiffs argue that New Mexico's fifteen-day rule "creates a liberty interest protected by

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do without affording adequate process. *See, e.g.*, *Ingraham v. Wright*, 430 U.S. 651, 674, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) ("It is fundamental that the state cannot hold ... an individual except in accordance with due process of law.").

constitutional procedural due process," their position "reflects a confusion between what is a liberty interest and what procedures the government must follow before it can restrict or deny that interest." *See Elliott v. Martinez*, 675 F.3d 1241, 1245 (10th Cir. 2012). In other words, "[t]hey 'collapse the distinction between the interest protected and the process that protects it.'" *Id.* (quoting *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 772, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005) (Souter, J., concurring) (alterations omitted)). And Plaintiffs are inconsistent in how they frame their protected liberty interest, sometimes relying on New Mexico's fifteen-day rule as an end unto itself and sometimes hinting at the fundamental underlying right to be free of restraint. *Compare* Aplt. Br. at 16 ("New Mexico[ ] ... guaranteed Mr. Moya and Mr. Petry the opportunity to obtain pretrial release no later than fifteen days after arrest."), *and id.* at 32 ("[I]t should have been clear to Defendants that, based on New Mexico law and settled due process principles, pretrial detainees have procedural due process rights *to adequate procedures* allowing them to timely obtain bail.") (emphasis added), *with id.* at 16 ("The principal protected liberty interest that may be created by state law is the freedom from detention."), *and id.* at 18 ("Mr. Moya and Mr. Petry ... had a protected liberty interest in obtaining a prompt bail determination.").

I would, accordingly, begin the procedural due process analysis by clarifying that Plaintiffs' only relevant protected liberty interest is in their right to "freedom pending trial." *Dodds*, 614 F.3d at 1192; *see Baker v. McCollan*, 443 U.S. 137, 144, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979) (finding that arrestee was "deprived of his liberty" when detained in county jail for three days). That right may be duly honored via a

timely bail determination, but the timely bail determination is a means, not an end. The source of Plaintiffs' liberty interest does not much matter, but it can be said to arise from either the United States Constitution, *see Baker*, 443 U.S. at 144, 99 S.Ct. 2689; *Dodds*, 614 F.3d at 1192, the New Mexico Constitution, *see Brown*, 338 P.3d at 1282, or both. Although New Mexico is free to create procedural rights protecting the underlying right to bail, as it has done here, *see* Rule 5–303 NMRA, the failure of its state officials to protect *state-law* procedural rights is not a Fourteenth Amendment violation, so long as federal due process requirements (which may well be lower) are satisfied. We would not be the first court to note the irony that, were the rule otherwise, its effect would be to subject states offering *more* procedural protections to stricter federal oversight. *See Hewitt v. Helms*, 459 U.S. 460, 471, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983); *Fields v. Henry County*, 701 F.3d 180, 186 (6th Cir. 2012) (noting that such a policy could even discourage states from creating their own systems of procedural rights for fear of triggering federal liability).

The sufficiency of the process afforded Plaintiffs—the adequacy and timeliness of their bail determinations—implicates the second prong of the procedural due process test, not the first. As to this latter question, we ask whether Plaintiffs were afforded all the process that was their due. *See Thompson*, 490 U.S at 460, 109 S.Ct. 1904. I would have no difficulty holding that Plaintiffs have plausibly alleged that they were not afforded an appropriate level of process. *See Jauch v. Choctaw Cty.*, 874 F.3d 425, 434 (5th Cir. 2017) ("[B]lithely waiting months before affording the defendant access to the justice system is patently unfair in a society where guilt is not presumed."); *Oviatt ex rel. Waugh v. Pearce*, 954 F.2d 1470, 1476

(9th Cir. 1992) (applying the *Mathews v. Eldridge* balancing test and finding a county jail's procedures for avoiding overdetention to be inadequate); *cf. Porter v. Epps*, 659 F.3d 440, 445 (5th Cir. 2011) ("Detention of a prisoner for over thirty days beyond the expiration of his sentence in the absence of a facially valid court order or warrant constitutes a deprivation of due process." (internal quotation marks omitted)).

B. *Substantive Due Process*

"Substantive due process bars 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Brown v. Montoya*, 662 F.3d 1152, 1172 (10th Cir. 2011) (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 840, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)). Under our precedent there are "two strands of the substantive due process doctrine. One strand protects an individual's fundamental liberty interests, while the other protects against the exercise of governmental power that shocks the conscience." *Seegmiller v. LaVerkin City*, 528 F.3d 762, 767 (10th Cir. 2008) (citing *Chavez v. Martinez*, 538 U.S. 760, 787, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003) (Stevens, J., concurring in part and dissenting in part)). "A fundamental right or liberty interest is one that is 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Id.* (quoting *Chavez*, 538 U.S. at 775, 123 S.Ct. 1994 (plurality opinion)). "Conduct that shocks the judicial conscience, on the other hand, is deliberate government action that is 'arbitrary' and 'unrestrained by the established principles of private right and distributive justice.'" *Id.* (quoting *Lewis*, 523 U.S. at 845, 118 S.Ct. 1708). From this point in the analysis, our precedent is decidedly less clear.

Substantive due process limits what the government may do in both its legislative and executive capacities. And the Supreme Court has said that the doctrinal strand to be applied "differ[s] depending on whether it is legislation or a specific act of a governmental officer that is at issue." *Lewis*, 523 U.S. at 846, 118 S.Ct. 1708. Here, Plaintiffs challenge executive action, which the Court has said violates substantive due process "*only* when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." *Id.* at 847, 118 S.Ct. 1708 (emphasis added) (internal quotation marks omitted). In *Seegmiller*, however, we refused to read *Lewis* as "establish[ing] an inflexible dichotomy" between cases challenging legislative and executive action. 528 F.3d at 768. In that case, which also involved executive action, the district court had found "that the *only* appropriate standard with which to measure [the substantive due process] claim is the shocks the conscience standard." *Id.* at 767. We held that was error. *Id.* Although we had "no qualms agreeing with the district court that the [Defendant's] conduct would not meet the requirements of the shocks the conscience test," we proceeded to analyze the challenged executive action under the "fundamental liberty" framework. *See id.* at 769–72 & 769 n.2. "[T]he distinction between legislative and executive action," we explained, "is ancillary to the real issue in substantive due process cases: whether the plaintiff suffered from governmental action that either (1) infringes upon a fundamental right, or (2) shocks the conscience." *Id.* at 768. Those two tests, we continued, "are but two separate approaches to analyzing governmental action under the Fourteenth Amendment." *Id.* at 769. "They are not mutually exclusive," we concluded,

and "[c]ourts should not unilaterally choose to consider only one or the other of the two strands. Both approaches may well be applied in any given case." *Id.*

More recent opinions from this court have called the *Seegmiller* framework into doubt. *See Browder v. City of Albuquerque*, 787 F.3d 1076, 1078–79 (10th Cir. 2015) ("If the infringement is the result of executive action, the Supreme Court has instructed us to ask whether that action bears a 'reasonable justification in the service of a legitimate governmental objective' or if instead it might be 'characterized as arbitrary, or conscience shocking.'" (quoting *Lewis*, 523 U.S. at 846, 847, 118 S.Ct. 1708)); *id.* at 1079 n.1 ("[W]e can say with certainty ... that *Chavez* did not expressly overrule *Lewis*'s holding that the 'arbitrary or conscience shocking' test is the appropriate one for executive action so we feel obliged to apply it."); *Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1182 (10th Cir. 2009) (clarifying that "when *legislative* action is at issue, ... only the traditional [fundamental rights] substantive due process framework is applicable"). Neither *Browder* nor *Dias* was heard by the full court. "Because one panel of our court cannot overrule prior panel decisions and earlier panel decisions control over later ones," *Storagecraft Tech. Corp. v. Kirby*, 744 F.3d 1183, 1191 n.2 (10th Cir. 2014), I would normally treat *Seegmiller*'s gloss on *Lewis* as binding and ask whether Plaintiffs' complaint alleges that they "suffered from governmental action that either (1) infringes upon a fundamental right, *or* (2) shocks the conscience." *Seegmiller*, 528 F.3d at 768 (emphasis added).

Notwithstanding our normal rule about favoring earlier panel decisions, it is an open question in my mind whether *Seegmiller* is binding on this point.

First, our published decision in *Browder* characterizes *Seegmiller*'s analysis as dicta. *Browder*, 787 F.3d at 1079, n.1. Second, in a recent unpublished opinion, Chief Judge Tymkovich, who wrote for the panel in *Seegmiller* and joined then-Judge Gorsuch's panel opinion in *Browder*, explained that he is in accord with *Browder* and *Dias* and that, to the extent *Seegmiller* is inconsistent, the earlier case is properly dismissed as dicta. *See Dawson v. Bd. of Cty. Commis*, No. 17-1118, —— F.3d ——, —— – ——, 2018 WL 1256477, at *9–10 (10th Cir. Mar. 9, 2018) (Tymkovich, C.J., concurring) ("Our Circuit has settled on the following solution: if the case involves a *legislative act*, only the 'rights' strand applies. On the other hand, when the case involves *executive action* by a government official or entity, we apply the 'shocks the conscience' test." (citations omitted)).

Following *Lewis*, the district court in this case applied only the "shocks the conscience" test. *See Moya v. Garcia*, No. 1:16-CV-01022-WJ-KBM, 2017 WL 4536080, at *4 (D.N.M. Feb. 13, 2017) ("To establish a substantive due process violation, Plaintiffs must show Defendants' behavior was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" (quoting *Lewis*, 523 U.S. at 847 n.8, 118 S.Ct. 1708)). On appeal, the parties have argued past each other without ever focusing on the tension in our case law. Neither side cited either *Seegmiller* or *Browder*. Plaintiffs' opening brief did not even reference the "shocks the conscience" test at all, asserting instead a "fundamental liberty interest in pretrial release" as the basis for their substantive due process claim. Aplt. Br. at 21. Defendants in turn did not engage with Plaintiffs' "fundamental liberty" analysis, urging instead that the district court be affirmed because Plaintiffs "failed to allege conscience-

shocking conduct on the part of the defendants." Aplee. Br. at 34–36. Plaintiffs then asserted in their reply brief that their "allegations, if proven, shock the conscience." Aplt. Reply Br. at 21. And at oral argument Plaintiffs effectively adopted the *Seegmiller* view, stating "there's two ways you can get to substantive due process violations," Oral Arg. 2:30–2:57. That is, either the "shocks the conscience" standard or the fundamental rights standard will do. *Id.*

I need not and, writing only for myself, cannot resolve the crosswinds in our case law. I have already explained that Plaintiffs have plausibly pleaded a deprivation of their procedural due process rights. That is grist enough for me to engage with the majority's causation analysis.[4]

II. CAUSATION

Properly understood, Plaintiffs' alleged injury is the unconstitutional deprivation of their liberty through overdetention. As to causation, Plaintiffs' argument is straightforward: they allege the sheriff and wardens jointly held the keys to their jail cells. By keeping Plaintiffs behind bars—day after day after day—the

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[4] Defendants argue that Plaintiffs should be permitted to litigate their claims only under the rubric of procedural due process. We have previously said that "[w]here a plaintiff has recourse to an 'explicit textual source of constitutional protection,' a more general claim of substantive due process is not available." *Shrum v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006) (quoting *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)). Our sister circuits are divided as to whether overdetention claims sound in procedural or substantive due process. *See Jauch*, 874 F.3d at 430 (collecting cases). Although I would hold that Plaintiffs have pleaded a plausible procedural due process claim, I decline to opine on whether a substantive due process claim might also be viable.

sheriff and wardens were deliberately indifferent to their constitutional right to freedom pending trial.

In finding causation lacking, the majority focuses on the state court's conduct, rather than the Defendants' conduct. As portrayed by the majority, Mr. Moya and Mr. Petry "blame the sheriff and wardens for the delays in the arraignments." Maj. Op. at 1163. Because the sheriff and wardens had no power to schedule the arraignments, the majority's thinking goes, the sheriff and wardens had no power to prevent or cure the alleged constitutional violations. *See id.* ("The sheriff and wardens did not cause the arraignment delays."); *id.* at 1165 ("[T]he sheriff and wardens did not *cause* the overdetention. At most, the sheriff and wardens failed to remind the court that it was taking too long to arraign Mr. Moya and Mr. Petry."); *id.* at 1169 ("The state trial court's alleged failure to schedule timely arraignments cannot be attributed to the sheriff or wardens."). But, in my view, causation follows from the constitutionally cognizable injury that Plaintiffs alleged. Here we see why "a 'careful description' of the allegedly violated right," *Browder*, 787 F.3d at 1078, is so crucial. On my reading of the complaint, Plaintiffs are not seeking to hold the sheriff and wardens accountable for the court's scheduling decisions; instead, they are seeking to hold them accountable for the lengthy detentions that no court authorized.[5] Again, a timely bail hearing

[5] Recall the Complaint alleges that the bench warrants authorizing Plaintiffs' arrests "commanded any authorized officer to 'arrest [Plaintiff], and bring him forthwith before this court.'" Joint App'x 10–11, Compl. 55 26, 33; *see Forthwith*, Black's Law Dictionary (10th ed. 2014) ("1. Immediately; without delay. 2. Directly; promptly; within a reasonable time under the circumstances; with all convenient dispatch.").

is a means to securing Plaintiffs' protected liberty interests, not an end unto itself.

The majority explains that it focused on the right to a timely bail hearing "because that's what the plaintiffs have alleged," Maj. Op. at 1167, all the while conceding that Plaintiffs have *also* alleged a violation of their "right to freedom from detention," *id.* at 1168. Under the majority's framing, these rights "are coextensive to Mr. Moya and Mr. Petry because to them, a violation of the right to a timely arraignment resulted in violation of their right to freedom from prolonged detention." *Id.* But the majority's own description demonstrates that these rights are not one and the same.[6] The state-law procedural right to a timely arraignment is protective of, not coextensive with, the right to liberty. The majority assumes without deciding that Plaintiffs alleged a violation of the state-law procedural right to a timely arraignment and then concludes that their constitutional claims fail because the warden and sheriffs did not cause the violation of state procedural law. That analysis works fine as far as it goes, but it is incomplete. The majority never considers whether the complaint adequately alleges a violation of the more fundamental right. Nor does it consider whether the individual defendants' alleged conduct deprived Plaintiffs of that right. In my view, this more fundamental question is fairly alleged in the complaint and presented in Plaintiffs' briefing.

[6] According to the majority, the interchangeability of the liberty interests is illustrated by Plaintiffs' definition of the putative class, which would include only those detainees held for longer than the fifteen days allowed under New Mexico law. Maj. Op. at 1168 n.9. This is a non sequitur. Plaintiffs' proposed class definition tells us nothing about whether their complaint plausibly alleges individual due process claims on any theory fairly presented.

Therefore, I think this court is obliged to consider it, not least because it is an "interpretation [that] could succeed." Maj. Op. at 1168.

By focusing on the arraignment rather than the detention, the majority naturally finds that the causal force lies with the state court's conduct, rather than with the jailers' conduct. And by focusing on the state court's conduct, rather than the jailers' conduct, the majority reaches a result heretofore unseen in an overdetention case. As best I can tell, our decision today puts us at odds with every circuit to consider the apportionment of blame between state courts and state jailers where a § 1983 plaintiff alleges that he or she was overdetained. *See Jauch*, 874 F.3d at 430, 436 (county's policy of indefinitely detaining arrestees until the court next convened was "the moving force" behind the constitutional injury); *Hayes v. Faulkner Cty.*, 388 F.3d 669, 674 (8th Cir. 2004) (county's policy of waiting for the court to schedule a hearing "ignore[d] the jail's authority for long-term confinement" and was "deliberately indifferent to detainees' due process rights"); *Armstrong v. Squadrito*, 152 F.3d 564, 579 (7th Cir. 1998) ("[J]ailers hold not only the keys to the jail cell, but also the knowledge of who sits in the jail and for how long they have sat there. They are the ones directly depriving detainees of liberty."); *Oviatt*, 954 F.2d at 1476–77 (holding that due process required sheriff to enact reasonable procedures for decreasing erroneous incarcerations).[7] The majority

[7] *Estate of Brooks ex rel. Brooks v. United States*, 197 F.3d 1245 (9th Cir. 1999), is not to the contrary. That case also involved an over-detention claim brought under § 1983 against a county, but there the county acted pursuant to an order from the United States Marshals Service. *Id.* at 1246. Distinguishing *Oviatt*, the Ninth Circuit held that "[w]hereas *Oviatt* was a case involving whether the left hand knew what the right hand was doing, this

distinguishes *Armstrong* and *Oviatt* because, in those cases, "a clerical error prevented the court from discovering the arrests and the need to schedule arraignments," so there would have been no basis for placing blame on the state court. Maj. Op. at 1165. And in our case, by contrast, "Mr. Moya and Mr. Petry do not allege a failure to tell the court of their arrests in sufficient time to conduct the arraignments within" the time required under state law. *Id.* at 1165. I agree with the majority that *Armstrong* and *Oviatt* are distinguishable. But that distinction does not change the underlying reasoning that the jailers are the ones directly depriving the detainees of their protected liberty interest in freedom pending trial. And, in any event, *Jauch* and *Hayes* are not so easily distinguished.

In *Jauch*, the plaintiff, Jessica Jauch, was indicted by a grand jury, arrested, and put in jail, where she waited for ninety-six days before she was brought before a judge. 874 F.3d at 428. She later brought suit under § 1983 against the county and the sheriff, alleging, *inter alia*, violations of both procedural and substantive due process. *Id.* The district court denied Ms. Jauch's motion for summary judgment and instead ordered judgment in favor of the defendants. *Id.* The Fifth Circuit reversed, holding that (a) the sheriff was not entitled to qualified immunity and (b) Ms. Jauch was entitled to judgment in her favor on her procedural due process claim. *Id.* at 429, 437.

The majority distinguishes *Jauch* on the ground that its causation analysis "rested on Mississippi law,"

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is a case involving whether *my* left hand knows what *your* right hand is doing." *Id.* at 1248. In this case, we consider only state actors, and so *Brooks* is easily distinguishable.

which "recognize[s] the responsibility of the sheriff to release an arrestee who has been detained too long without bail." Maj. Op. at 1166 (citing *Jauch*, 874 F.3d at 437). As the Fifth Circuit explained, however, it merely cited Mississippi law for the unremarkable propositions that (1) the sheriff is responsible for those incarcerated in his jail, *see Jauch*, 874 F.3d at 436–37 (citing Miss. Code. Ann. § 19-25-69), and (2) county sheriffs are responsible "to hold detainees in a manner consistent with their oaths to uphold the federal and state constitutions," *id.* at 437 (citing *Sheffield v. Reece*, 201 Miss. 133, 28 So.2d 745, 748 (1947)). New Mexico law does not differ on either point, except perhaps that it extends those responsibilities to its wardens as well. *See* N.M. Stat. Ann. § 33–3–1 ("The common jails shall be under the control of the respective sheriffs...."); *id.* § 33–1–2(E) (stating "'warden' ... means the administrative director of a correctional facility"); *Wilson v. Montano*, 715 F.3d 847, 856–57 (10th Cir. 2013) (relying on these provisions to conclude that, under New Mexico law, wardens and sheriffs share responsibility for the policies and customs at county jails and for any failure to adequately train their subordinates); *see also* N.M. Const. art. XX, § 1 (requiring "[e]very person elected or appointed to any office" to take an oath to support the federal and state constitutions).

Next, the majority finds *Jauch* of limited guidance because Mr. Moya and Mr. Petry expressly disavowed any argument that the sheriff and wardens could have or should have released them from custody without a valid court order. Maj. Op. at 1165-66. Respectfully, I am not persuaded. Mr. Moya and Mr. Petry argue there was "plenty Defendants could, and should, have done short of releasing Mr. Moya and Mr. Petry to

ensure that they received prompt bail determinations." Aplt. Br. at 29. For instance, they suggest, the sheriff and wardens could have reviewed court dockets to determine whether arraignments were being timely scheduled, and if not, they could have requested immediate arraignments. Or they could have physically brought Mr. Moya or Mr. Petry before a judicial officer at any time. But alas "we cannot know what ... could have [been] done to allow bail, because [the jailers] did nothing at all." *Jauch*, 874 F.3d at 437 n.10.[8] Even on the majority's view of Plaintiffs' alleged liberty interest, its causation analysis is "overly rigid." *Estate of Brooks ex rel. Brooks v. United States*, 197 F.3d 1245, 1250 (9th Cir. 1999) (Hawkins, J., dissenting) (noting that the county could have reminded the relevant authorities of the detainee's right to see a magistrate; thus, "the County was not helpless to avoid the injury to [the detainee] and so was a legal cause of his injury").

Nor does the majority meaningfully distinguish the Eighth Circuit's opinion in *Hayes*. In that case, the

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[8] The Fifth Circuit recently decided against rehearing *Jauch* en banc. *See Jauch v. Choctaw Cty.*, 886 F.3d 534 (5th Cir. 2018). Six judges voted in favor of rehearing; they would have held that qualified immunity applies. *Id.* at 540 (Southwick, J., dissenting from denial of rehearing en banc). But the dissenting judges seemingly were not in agreement as to whether *Jauch*'s holding as to Choctaw County also should have been reconsidered. *See id.* at 541. In any event, they were not blind to the possibility that jailers have the power to prevent constitutional violations in cases like these. *See id.* ("[A] county should not be allowing a prisoner's pretrial release to be unaddressed for extended periods. Judges and jailers could cooperate to minimize delays in consideration.... Even a sheriff, though not having the power to schedule a hearing, might rattle the cage on behalf of such a prisoner so that those who have the authority to do something will hear." (emphasis deleted)).

plaintiff, James M. Hayes, was ticketed for not having automobile tags and vehicle insurance. *Hayes*, 388 F.3d at 672. Mr. Hayes failed to appear at his municipal court hearing, and so bench warrants were issued for his arrest. *Id*. On April 3, 1998, he was stopped for a traffic violation, arrested on the warrants, given a court date of May 11, and jailed. *Id.* Mr. Hayes did not post a $593 cash-only bond and remained in jail until appearing before the court on May 11, thirty-eight days after his arrest. *Id.* He too brought suit under § 1983 against the county and sheriff. *Id.* The Eighth Circuit affirmed the district court's entry of judgment against the sheriff in his individual capacity, finding that a "law enforcement officer cannot reasonably believe that holding a person in jail for 38 days without bringing him before a judicial officer for an initial appearance is constitutional." *Id.* at 675. The majority explains that it cannot follow *Hayes* because the Eighth Circuit's approach, which "attributed responsibility to the jailers based solely on federal law, not state law," is "inconsistent" with Tenth Circuit precedent that "directs us to focus on state law when determining the scope of the defendants' responsibility to ensure prompt hearings." Maj. Op. at 1167 (emphasis deleted) (citing *Wilson*, 715 F.3d at 854).[9]

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[9] I agree with the majority that *Hayes* "attributed responsibility to the jailers based solely on federal law, not state law." Maj. Op. at 1167. And for that reason, the majority's comparative analysis of Arkansas and New Mexico criminal procedure rules is but a distraction. *See id.* at 1166-67. True, under New Mexico law, "[w]hen a warrant is issued in a criminal action, ... the defendant named in the warrant shall, upon arrest, be brought by the [arresting] officer before the court without unnecessary delay." N.M. Stat. Ann. § 31-1-4(C). The majority reads that rule and apparently concludes that, because the arresting officer is vested with statutory responsibility to ensure a prompt hearing, the arresting officer (and, one supposes, that officer's supervisors) is

Again, I differ with the majority, which in my view focuses on the wrong deprivation and thus the wrong actor.

Nothing in *Wilson* requires us to adopt the majority's analytical approach. Nor does *Wilson* preclude us from following our sister circuits' persuasive reasoning in comparable cases. In *Wilson*, the plaintiff, Michael Wilson Sr., was arrested without a warrant and booked into a New Mexico county jail. 715 F.3d at 850. He was detained for eleven days before he was released by order of a magistrate judge. *Id.* Because Mr. Wilson was arrested without a judicial finding of probable cause, his ensuing § 1983 action sounded in the Fourth Amendment, rather than the Fourteenth. *Id.* We held that the district court correctly denied the sheriff's and warden's motions to dismiss for failure to state a claim and for qualified immunity. *Id.* at 857–58. In reaching that conclusion, as the majority rightly notes, we "consider[ed] New Mexico state law insofar as it bears on the scope of [a defendant's] responsibility to ensure a prompt probable cause determination." *Id.* at 854. Likewise, here, we ought to consider New Mexico law insofar as it bears on the scope of Defendants' responsibility to ensure that detainees are not deprived of their right to freedom pending trial. The

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alone responsible for ensuring the state court promptly schedules a hearing. But § 31-1-4(C) does not make the arresting officer responsible for protecting a defendant's constitutional rights to the exclusion of anyone else's responsibility. Nor is it clear why the arresting officer would be the proximate cause of an *overdetention* violation, which will not ripen until some indeterminate amount of time has passed and in which, typically, the detainee will no longer be held under the arresting officer's authority. Under the majority's approach, there is no § 1983 remedy to be had, no matter how long an arrestee is unconstitutionally held without an arraignment.

majority puts it somewhat differently. My colleagues look to New Mexico law only insofar as it bears on the scope of the Defendants' responsibility to ensure a prompt bail hearing. Finding no such requirement in state law, the majority concludes the Defendants did nothing unconstitutional. But ensuring a prompt bail hearing is just one possible means of ensuring that Plaintiffs' constitutional rights are not violated. Other means will also suffice. Most obviously, the Defendants could have simply released Mr. Moya and Mr. Petry from custody.[10] To the extent doing so would have been inconsistent with Defendants' duties under state law, it is no matter, because federal constitutional law trumps. *See* U.S. Const. art. VI, cl. 2.

Wilson is not in tension with *Jauch* or *Hayes*. The New Mexico sheriff and warden in *Wilson* could no more force the state court to make a probable cause determination than the sheriffs in Mississippi (*Jauch*) or Arkansas (*Hayes*) could force their state courts to make a bail determination. Any reference in *Wilson* to a duty to "ensure" a state court proceeding must simply mean that state officials have a duty to seek the state court's cooperation. And should the state court fail to cooperate, it will be left to the sheriff and warden to desist from holding detainees when they lack continued constitutional authority to do so. *See Wilson*, 715 F.3d at 853 n.6 (noting that it is settled law that defendants "who effected the plaintiffs'

[10] I recognize that Plaintiffs have expressly disavowed that argument, *see* Maj. Op. at 1165-66 (citing Aplt. Br. at 29), but I comment on it anyway to acknowledge the reach of my reasoning. In any case, Plaintiffs identified tactics short of outright release that the defendants in this case could have adopted. *See supra*. In my view they have sufficiently alleged causation at this stage of the proceedings.

arrests and detentions[ ] could be held liable *for the plaintiffs' prolonged detentions* without probable cause" (emphasis added)). Again, in my view it is the "prolonged detentions," not the absence of a bail hearing or probable-cause hearing, that is the fundamental due process concern.

The majority's chosen approach, moreover, comes with troubling implications. By (a) looking to state law to determine the scope of state officials' responsibility to ensure prompt bail hearings, and (b) conceptualizing Plaintiffs' liberty interest as an interest in a state court proceeding, rather than in liberty itself, the majority sanctions a system by which states could regularly violate detainees' constitutional rights by holding them indefinitely on account of untimely state courts, without any fear of their collaborating municipalities or state officials ever incurring monetary penalties under § 1983. Such an outcome is not farfetched. We know from *Jauch* that, in at least one part of Mississippi, the only court empowered to set bail would sometimes go months between sessions. And, accepting Plaintiffs' allegations as true, as we must, we can infer that courts in Santa Fe County—New Mexico's third-most populous—routinely fail to schedule arraignments with any earnest.

The majority's causation analysis also lacks a logical endpoint. What if the state court had scheduled Mr. Moya's arraignment a month later than it did? What about a year later? As I read the majority opinion, even then Mr. Moya would have no actionable § 1983 claim. *See supra*, n.9. To be sure, I agree with the majority that New Mexico sheriffs and wardens are powerless to force New Mexico courts to schedule bail hearings in a timely fashion.

Only New Mexico courts can do that. But the solution is not to grant jailers refuge behind judges cloaked with absolute immunity, enabling the jailers to violate the Constitution with impunity.[11] The better solution is to hold state officials and municipalities responsible for the constitutional violations they themselves commit. True, the effect could be that New Mexico sheriffs and wardens respond by releasing pre-trial detainees, some of whom may have been arrested for alleged violent acts or pose a risk of flight, without the deterrence of bail. But it is our role to assure that New Mexico runs its criminal-justice system with the timeliness that the Fourteenth Amendment commands. If it does not, there should be consequences: either pre-trial detainees go free pending trial, or they will be entitled to civil damages against the state's officials and municipalities so that they may be compensated for the violations of their civil rights.

III. QUALIFIED IMMUNITY

As the Supreme Court recently reiterated, state officials "are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, —— U.S. ——, 138 S.Ct. 577, 589, 199 L.Ed.2d 453 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012)). "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly

[11] It is no answer to say that Plaintiffs' complaint was deficient for not alleging that they were arrested by officers subject to the defendants' supervisory authority, as the majority opinion could be read to suggest. *See* Maj. Op. at 1167 n.8. The arresting officer can no more force the court to act than can the sheriff or warden.

established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Becker v. Bateman*, 709 F.3d 1019, 1023 (10th Cir. 2013) (quotation omitted). The Supreme Court has "repeatedly stressed that courts must not define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Wesby*, 138 S.Ct. at 590 (internal quotation marks omitted). "This demanding standard protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* at 589 (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)).

In my view, the complaint plausibly alleges that Sheriff Garcia, Warden Caldwell, and Warden Gallegos violated Plaintiffs' constitutional rights. But I recognize that conclusion is not foretold. No opinion from this court or the Supreme Court has ever clearly established that a jailer violates the Constitution by detaining an individual lawfully arrested in anticipation of an untimely scheduled arraignment. That principle of law, to be sure, is clearly established in at least two of our sister circuits, but that is not enough for the law to be clearly established here. I would thus affirm the district court's order insofar as it dismissed Plaintiffs' claims against the sheriff and wardens on the basis of qualified immunity, and so I partially concur in the majority's result. But because municipalities are not entitled to qualified immunity, I would reverse and remand to the district court for further proceedings against the County.

Thus, as to the County, I respectfully dissent.

APPENDIX C

2017 WL 4536080

UNITED STATES DISTRICT COURT
D. NEW MEXICO

1:16-cv-01022-WJ-KBM

MARIANO MOYA and Lonnie Petry, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

ROBERT GARCIA, Santa Fe County Sheriff, Mark Caldwell, Warden of Santa Fe County Adult Correctional Facility, Mark Gallegos, former Warden of Santa Fe County Adult Correctional Facility, in their individual capacities, and Board of Commissioners of Santa Fe County,

Defendants.

Filed 02/13/2017

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS AND FOR QUALIFIED IMMUNITY IN LIEU OF AN ANSWER

WILLIAM P. JOHNSON, UNITED STATES DISTRICT JUDGE

THIS MATTER comes before the Court on Defendants' Rule 12(b)(6) Motion To Dismiss And For Qualified Immunity In Lieu Of An Answer (Doc. 7) filed October 17, 2016. Having reviewed the relevant pleadings and the applicable law, the Court finds Defendants' Motion is well-taken, and is therefore GRANTED.

BACKGROUND

This is a purported class action. The named Plaintiffs, Mariano Moya and Lonnie Petry, bring suit against Mark Gallegos, former Warden of the Santa Fe County Adult Correctional Facility ("SFCACF"), Mark Caldwell, current Warden of SFCACF, and Robert Caldwell, Santa Fe County Sheriff, (collectively "Individual Defendants"), as well as the Board of Commissioners of Santa Fe County (the "Board"). Plaintiffs claim Defendants violated their substantive and procedural due process rights under the Fourteenth Amendment by detaining them for longer than fifteen days before their arraignment hearings. Plaintiffs seek enforcement of the Fourteenth Amendment pursuant to 42 U.S.C. § 1983. Plaintiffs sue Individual Defendants in their individual capacities only, and bring a municipal liability claim against Board pursuant to *Monnell v. New York Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

Plaintiffs were originally indicted by grand juries on unrelated felony charges in First Judicial District

Court in Santa Fe, New Mexico ("District Court"). The District Court scheduled arraignments, but both Plaintiffs failed to appear at these initially scheduled arraignments.[1]

Specifically, on August 14, 2014, a Santa Fe County grand jury indicted Mr. Moya on criminal charges. On August 19, 2014, the District Court mailed a summons to Mr. Moya ordering him to appear for arraignment scheduled for August 25, 2014, eleven days after his indictment. Mr. Moya did not appear for his arraignment, so the District Court issued a bench warrant for his arrest. On September 15, 2014, Mr. Moya was arrested and booked into SFCACF.

On September 23, 2014, the District Court docket reflects that the court was notified the arrest warrant was served on Mr. Moya. On October 27, 2014, a request for a second arraignment hearing was filed. The following day, the District Court issued an order setting the second arraignment for November 17, 2014.[2]

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[1] Plaintiffs do not allege they did not receive notice of their first arraignments, or otherwise challenge any aspect of the first arraignments. *See* Doc. 1 ¶ 25.

[2] These facts are taken from court records Defendants attached to their Motion to Dismiss, which are subject to judicial notice as public records from the First Judicial District Court. Thus, the Court need not convert the motion to a motion for summary judgment. "Although a court generally must convert a motion to dismiss to one for summary judgment when the court considers "matters outside the pleadings," Fed. R. Civ. P. 12(d), a court need not do so if it takes "judicial notice of its own files and records, as well as facts which are a matter of public record." *Rose v. Utah State Bar*, 471 Fed.Appx. 818, 820 (10th Cir. 2012) (quoting *Tal v. Hogan*, 453 F.3d 1244, 1265 n. 24 (10th Cir. 2006) (quotation omitted) (emphasis added); *Van Woudenberg ex rel. Foor v. Gibson*, 211 F.3d 560, 568 (10th Cir. 2000), *abrogated on other*

On November 17, 2014, 63 days after his arrest, Mr. Moya was arraigned. The District Court set Mr. Moya's bond and entered an order that SFCACF release Mr. Moya from custody immediately.

On June 25, 2015, a Santa Fe County grand jury indicted Mr. Petry on criminal charges. On June 29, 2015, the District Court mailed a summons to Mr. Petry ordering him to appear for arraignment scheduled for July 17, 2015, twenty-two days after his indictment. Mr. Petry did not appear for his arraignment, so the District Court issued a bench warrant for his arrest. On July 22, 2015, Mr. Petry was arrested and booked into SFCACF.

On July 31, 2015, the District Court docket reflects that the court was notified the arrest warrant was served on Mr. Petry. On August 3, 2015, the District Court issued an order setting the second arraignment for August 21, 2015.[3]

On August 21, 2015, 30 days after his arrest, Mr. Petry was arraigned. The District Court set Mr. Petry's bond, set the conditions of release, and entered an order that SFCACF release Mr. Petry on those conditions.

The District Court docket shows that on August 25, 2014, prior to Mr. Moya's first scheduled arraignment, a public defender entered an appearance on Mr. Moya's behalf. Likewise, on July 16, 2015, prior to Mr.

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grounds by McGregor v. Gibson, 248 F.3d 946, 955 (10th Cir. 2001)). Facts subject to judicial notice may be considered in a Rule 12(b)(6) motion without converting the motion to dismiss into a motion for summary judgment. *See Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 n. 1 (10th Cir. 2004).

[3] *See supra* n. 2.

Petry's first scheduled arraignment, an attorney made an appearance on Mr. Petry's behalf.

Article II, Section 13 of the New Mexico Constitution provides that individuals accused of non-capital crimes are entitled to bail if a court has not entered an order denying bail within seven days of incarceration after providing notice and an opportunity to be heard.

Under NMSA 1978 31-1-5, "[e]very accused shall be brought before a court having jurisdiction to release the accused without unnecessary delay." Section 31-1-4 provides that "[w]hen a warrant is issued in a criminal action, it shall be directed to a law enforcement officer, and the defendant named in the warrant shall, upon arrest, be brought by the officer before the court without unnecessary delay." Section 31-1-3 states that criminal prosecutions in New Mexico "shall be commenced, conducted and terminated in accordance with Rules of Criminal Procedure."

New Mexico Rule of Criminal Procedure 5-303(A) provides that a "defendant shall be arraigned on the information or indictment within fifteen (15) days after the date of the filing of the information or indictment or the date of arrest, whichever is later." Further, "[a]t arraignment, upon request of the defendant, the court shall evaluate conditions of release considering the factors stated in Rule 5-401 NMRA. If conditions of release have not been set, the court shall set conditions of release." Rule 5-401 provides in part that a defendant must generally be released subject to the least onerous secured bond.

Mr. Moya and Mr. Petry argue that under these rules and statutes, detainees in New Mexico courts have a liberty interest in being released pretrial on the least restrictive set of conditions. This liberty interest

is effectuated by state law entitling them to an arraignment within fifteen days of their indictment or arrest, at which time the conditions of their release must be set or reviewed. Plaintiffs claim they were deprived of this liberty interest when they were detained for longer than fifteen days after their valid arrests but before their arraignment hearings.

Plaintiffs allege the Sheriff and Warden share responsibility to ensure that persons detained at SFACF are brought before a district court within fifteen days of indictment or arrest. Plaintiffs further allege the Sheriff and Warden share responsibility for promulgating policies on behalf of Santa Fe County to ensure detainees be brought before a court within fifteen days of arrest or indictment. Mr. Moya and Mr. Petry characterize their claims as "overdetention" under *Dodds v. Richardson*, 614 F.3d 1185, 1192 (10th Cir. 2010).

Defendants filed a Rule 12(b)(6) Motion To Dismiss And For Qualified Immunity In Lieu Of An Answer (Doc. 7) on October 17, 2016. Plaintiffs filed an Amended Response (Doc. 14) on November 14, 2016. Defendants filed a Reply (Doc. 16) on December 9, 2016.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) allows a party to move for dismissal of a case for failure to state a claim upon which relief can be granted. Rule 8(a)(2), in turn, requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Thus, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted 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 Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although a court must accept all the complaint's factual allegations as true, the same is not true of legal conclusions. *See id.* Mere "labels and conclusions" or "formulaic recitation [s] of the elements of a cause of action" will not suffice. *Twombly*, 550 U.S. at 555. "Thus, in ruling on a motion to dismiss, a court should disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if assumed to be true, plausibly suggest the defendant is liable." *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011).

DISCUSSION

Defendants move to dismiss Plaintiffs' Complaint for failure to state viable claims under Rule 12(b)(6), and in the alternative Defendants move for qualified immunity.[4] The Court thus first considers the viability

[4] "[G]overnment officials are not subject to damages liability for the performance of their discretionary functions when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quotation omitted). The Tenth Circuit employs a two-part test to analyze qualified immunity: "In resolving a motion to dismiss based on qualified immunity, a court must consider whether the facts that a plaintiff has alleged make out a violation of a constitutional right, and whether the right at issue was clearly established at the time of defendant's alleged misconduct." *Leverington v. City of Colorado Springs*, 643 F.3d 719, 732 (10th Cir. 2011). It is within this Court's discretion to determine which prong of the qualified immunity test should be addressed first. *Brown*, 662 F.3d at 1164; *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). If a plaintiff fails to demonstrate that a defendant's conduct violated the law, the court need not determine whether the law was clearly established. *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993).

of Plaintiffs claims. "The better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all." *DeAnzona v. City & Cty. of Denver*, 222 F.3d 1229, 1234 (10th Cir. 2000) (quoting *County. of Sacramento v. Lewis*, 523 U.S. 833, 841 n. 5 (1998)). The constitutional rights allegedly violated are Plaintiffs' substantive and procedural due process rights under the Fourteenth Amendment. More specifically, Plaintiffs state they have a constitutionally recognized liberty interest in appearing before a district court within fifteen days of their arrest in order to have their conditions of release set. Defendants were responsible for ensuring Plaintiffs were brought before the court, but caused Plaintiffs to be unlawfully detained in excess of fifteen days.

To sustain a claim under § 1983, a plaintiff must allege facts showing the "conduct complained of was committed by a person;" that the person was "acting under color of state law;" and that "this conduct deprived [the plaintiff] of rights, privileges or immunities secured by the Constitution or laws of the United States." *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). As to all of Plaintiffs' claims, the parties do not dispute Defendants are persons who acted under the color of state law. This case centers on whether Plaintiffs were deprived of a constitutional right guaranteed by the Fourteenth Amendment.

The Fourteenth Amendment states: "No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. The Due Process Clause encompasses two distinct forms of protection: (i) procedural due process, which requires a state to employ fair procedures when

depriving a person of a protected interest; and (ii) substantive due process, which guarantees that a state cannot deprive a person of a protected interest for certain reasons. *See, e.g.*, *Lewis*, 523 U.S. at 845–46. Plaintiffs allege both substantive and procedural due process violations. The Court addresses each argument in turn.

I. Substantive Due Process

The Court first considers whether the facts Plaintiffs have alleged state a violation of a constitutional right, and concludes Plaintiffs have not done so. Plaintiffs must allege facts showing that these specific Individual Defendants, either through personal participation in the untimely arraignments or the promulgation of a policy, violated Plaintiffs' Fourteenth Amendment rights. *See Brown v. Montoya*, 662 F.3d 1152, 1164 (10th Cir. 2011). Plaintiffs have not plausibly alleged such conduct pertaining to Individual Defendants.

In evaluating whether Plaintiffs stated claims under § 1983 for violations of their constitutional rights, the Court must examine these particular Defendants' actions to determine whether the facts show they participated in the alleged constitutional deprivation. Specifically, the question is to what degree Individual Defendants' conduct effectuated when the arraignment dates were set by the District Court. The Court concludes there is no viable § 1983 claim because there are no facts showing Individual Defendants had any involvement in the District Court setting Plaintiffs' arraignment hearings. Moreover, even if there were facts alleged that Individual Defendants were involved—such as an allegation that Individual Defendants failed to notify the District Court Plaintiffs were in custody or failed to inform

Plaintiffs that bail had been posted—Plaintiffs would still have had to allege facts showing Individual Defendants acted with culpability, which they have not done. There are no allegations Plaintiffs were detained without an arraignment hearing ever being scheduled, and there are no allegations Plaintiffs were misled about their bail status or detained past the point of bail being set.

The Supreme Court has held that "[t]he touchstone of due process is protection of the individual against arbitrary action of government." *Lewis*, 523 U.S. at 845. Substantive due process violations are so clearly devoid of any legitimate governmental purpose that they would offend the Constitution regardless of procedural protections. *See id.* at 839. To establish a substantive due process violation, Plaintiffs must show Defendants' behavior was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.* at 847 n. 8.

Defendants first contend Plaintiffs' substantive due process claims are precluded by the procedural due process claims. Defendants argue substantive due process claims are barred by the existence of a specific textual source of constitutional recourse. Defendants rely on *Shrum v. City of Coweta, Okla.*, 449 F.3d 1132, 1145 (10th Cir. 2006) (quoting *Graham v. Connor,* 490 U.S. 386, 395 (1989)), where the Tenth Circuit held "[w]here a plaintiff has recourse to an "explicit textual source of constitutional protection," a more general claim of substantive due process is not available." Defendants state that Plaintiffs correctly identified their procedural due process claims as the appropriate source of constitutional recourse for the alleged deprivation of process, so they cannot also state substantive due process claims.

Plaintiffs respond that Defendants' are incorrect because the Due Process Clause of the Fourteenth Amendment contains a substantive component and a procedural component, and neither provide for greater protection than the other. *See Zinermon v. Burch*, 494 U.S. 113, 125 (1990). The Court agrees with Plaintiffs in this regard, and concludes Plaintiffs' procedural due process claim does not preclude their substantive due process claim. *Graham* stands for the proposition that when a constitutional claim is covered by a specific constitutional provision, such as the Fourth Amendment, the claim must be analyzed under the standard that applies to that specific provision, not under the general standard of substantive due process. *See Graham*, 490 U.S. at 393–94. However, the Court in *Graham* limited this notion to situations where a plaintiff asserts a grievance under substantive due process generally, when the proper analytical framework for the claim really falls under a specific constitutional provision. *See id.*

Here, both of Plaintiffs' claims fall under the Fourteenth Amendment rather than a different constitutional source. Defendants have not suggested that Plaintiffs' claims fall under a source other than the Fourteenth Amendment. The substantive due process component and the procedural due process component of the Fourteenth Amendment each afford different rights to a plaintiff. *See Archuleta v. Col Dept. of Institutions*, 936 F.2d 483, 489 n.6, 490 (10th Cir. 1991) (citation omitted) ("Procedural due process ensures that a state will not deprive a person of life, liberty or property unless fair procedures are used in making that decision; substantive due process, on the other hand, guarantees that the state will not deprive a person of those rights for an arbitrary reason regardless of how fair the procedures are that are used

in making the decision."). Therefore, Plaintiffs' substantive due process claims are not precluded by their procedural due process claims.

However, the Court concludes Plaintiffs have not alleged a viable substantive due process claim against these particular Defendants. Plaintiffs rest their substantive due process claims on their pre-arraignment confinement, which they claim violated New Mexico Rule of Criminal Procedure 5-303(A) and NMSA 1978 §§ 31-1-3 to -5. Read together, these provisions require that an arrestee be brought before a district court without unnecessary delay and no later than fifteen days after arrest or indictment. The question is whether Plaintiffs' alleged prolonged detention after a valid arrest shocks the conscience. *See Lewis*, 523 U.S. at 846–47. In other words, prolonged pre-trial detention does not rise to the level of a constitutional violation unless Defendants' individual conduct shocks the conscience and these particular Defendants acted with sufficient culpability.

Defendants argue Plaintiffs have not alleged plausible substantive due process claims against Individual Defendants. "A § 1983 defendant sued in an individual capacity may be subject to personal liability and/ or supervisory liability. Personal liability 'under § 1983 must be based on personal involvement in the alleged constitutional violation.'" *Brown*, 662 F.3d at 1163 (quoting *Foote v. Spiegel,* 118 F.3d 1416, 1423 (10th Cir. 1997)) (footnote omitted). A plaintiff establishes supervisory liability "by demonstrating: (1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional

deprivation." *Dodds*, 614 F.3d at 1199. The Court considers each form of liability, and agrees with Defendants that Plaintiffs have not alleged a viable substantive due process claim.

A. Plaintiffs Have Not Sufficiently Alleged Personal Liability.

"Personal liability under § 1983 must be based on personal involvement in the alleged constitutional violation." *Brown*, 662 F.3d at 1163 (citation omitted). Defendants argue the Complaint fails to assert the Individual Defendants personally participated in the alleged deprivation of rights, which is the timing of the arraignments, so the claims against Individual Defendants should be dismissed. Defendants point out they notified the District Court of the need for an arraignment and the District Court promptly scheduled one for each named Plaintiff, reflected by the District Court docket that explicitly shows the District Court was aware Plaintiffs were in custody. That the District Court allegedly delayed the dates of the arraignments, or that the District Court did not schedule the arraignments as expeditiously as Plaintiffs would have liked, is not within Individual Defendants' control. *See Wilson v. Montano*, 715 F.3d 847, 854 (10th Cir. 2013) ("Individual liability under § 1983 must be based on personal involvement in the alleged constitutional violation.") (internal quotation marks and citation omitted);

Defendants further contend the Complaint does not sufficiently allege the type of participation required to establish individual capacity liability. *See* Compl. ¶¶ 23, 39–41, 55, 57, 69–71 (allegations referring to "Defendants" collectively but not parsing out the named individuals). Claims regarding Defendants' cumulative conduct do not establish individual

capacity personal participation. Defendants liken this case to *Brown*, 662 F.3d at 1165, where the Tenth Circuit held a complaint that referred to actions of "Defendants" did not sufficiently show the individual defendant's specific actions. The court noted that only one paragraph identified an individual defendant by name and reasoned the plaintiff needed to identify specific actions taken by particular defendants. *See id.* at 1165–66. The complaint did not sufficiently allege personal liability because it did not specifically recite how the defendant acted with regards to the plaintiff or even that the defendant knew about the alleged violation. *See id.* at 1165. The court explained, "it is particularly important in a § 1983 case brought against a number of government actors sued in their individual capacity ... that the complaint make clear exactly who is alleged to have done what to whom ... as distinguished from collective allegations." *Id.* (internal quotation marks and citation omitted). Defendants here argue the Complaint fails for similar reasons as in *Brown* because it lacks substantive allegations that the Individual Defendants deprived Plaintiffs of their constitutional rights.

Plaintiffs argue they have stated viable substantive due process claims of "overdetention" because they were imprisoned for longer than legally authorized. Plaintiffs argue they had a liberty interest in having bail set within fifteen days of their arrest, and the Tenth Circuit has widely recognized a substantive due process right of pretrial detainees to bail. Plaintiffs first rely upon *Gaylor v. Does*, 105 F.3d 572, 575–76 (10th Cir. 1997), where the plaintiff was arrested pursuant to a valid warrant, and the following day his bail was set. Despite the plaintiffs' and his friends' protests and attempts to post bail, the plaintiff was not released until several days after bail had been set. *See*

id. at 573–74. The city was following a policy of advising a detainee about his bail status only if he asked about it. *See id.* The Tenth Circuit reasoned the plaintiff "obtained a liberty interest in being freed of detention" once the judge set his bail. *Id.* at 576. Once bond was set, "the state's justification for detaining him faded." *Id.* The Court considered whether the city's policy of informing detainees of their bail status only if they asked punished detainees by unreasonably infringing his liberty interests in a manner unrelated to a legitimate goal. *See id.* at 576–77.

Similarly, Plaintiffs rely on *Dodds* for the proposition that Individual Defendants' lack of a policy ensuring timely arraignments deprived them of their substantive due process rights. In *Dodds*, an arrestee sued the sheriff in his individual capacity for violation of his Fourteenth Amendment rights in posting bail. 614 F.3d at 1189. The plaintiff was arrested pursuant to a valid warrant, booked, and a judge posted bond. *Id.* Two individuals asked the jail about posting bond on the plaintiff's behalf but the jail told them the plaintiff could not post the preset bail until after he was arraigned by a judge. *Id.* The county had a policy of not permitting an arrestee to post bond after hours. *Id.* at 1190. As in *Gaylor*, the court in *Dodds* emphasized a plaintiff has a "liberty interest in being freed of detention once his bail is set" and that a state may only interfere with such interest for legitimate reasons. *Id.* at 1192. The relevant question was whether the particular defendant deprived the plaintiff of this right. *Id.* at 1193. The court concluded the sheriff "may have deliberately enforced or actively maintained the policies in question at the jail" so the plaintiff sufficiently alleged personal involvement in the misconduct. *See id.* at 1204. Plaintiffs note that in *Gaylor* and *Dodds*, and unlike this case, bail had been

ordered in a fixed amount, but state the distinction is immaterial because Plaintiffs were entitled to release on bail pursuant to NMRA 5-401.

Plaintiffs also rely upon decisions from other Circuits in arguing extended detention without judicial first appearance constitutes a denial of substantive due process. In *Coleman v. Frantz*, 754 F.2d 719, 721 (7th Cir. 1985), a detainee repeatedly requested to be taken before the court after he was arrested and incarcerated for failure to make bail after bond was set. The Seventh Circuit held a constitutional violation occurs when a presumptively innocent person is incarcerated by the sheriff for 18 days without being taken before a judicial officer for an initial appearance. *Id.* at 731. However, the court held qualified immunity was proper for the sheriff, because "plaintiff's constitutional right to a first appearance before a judicial officer following arrest pursuant to a valid warrant based on a determination of probable cause, setting of bond and notification of charges was not clearly established." *Id.* (quotation omitted). Moreover, "defendant did what he could to secure an early first appearance for plaintiff" so he was shielded from § 1983 liability. *Id.*

In *Armstrong v. Squadrito*, 152 F.3d 564, 576 (7th Cir. 1998), the plaintiff was arrested and due to the sheriff's office misfiling papers, the plaintiff was detained for 57 days without an initial appearance, despite his repeated protests. The Seventh Circuit held such conduct shocked the conscience. *Id.* at 582. Similarly, in *Hayes v. Faulkner Cty., Ark.*, 388 F.3d 669, 672–74 (8th Cir. 2004), the Eighth Circuit considered a detainee who was held for 38 days pre-appearance based on a jail policy that simply submitted detainee names to the court to wait for the

court to schedule appearances. The court held the jailer was liable for substantive due process violations because he helped promulgate the policy of waiting for the court to schedule a hearing, and there were allegations he chose not to respond in light of the plaintiff's grievances. *See id.* at 674–75.

The Court finds Plaintiffs failed to sufficiently plead allegations pertaining to Individual Defendants. Personal liability under Section 1983 must be based on Individual Defendants' personal involvement in the deprivation. *Brown*, 662 F.3d at 1164. As in *Brown*, Plaintiffs have not plausibly alleged personal involvement by these Defendants, and they have not alleged any policy promulgated by Individual Defendants that caused the arraignments to be scheduled later than fifteen days after Plaintiffs were arrested and booked into SFCACF. The Complaint makes broad statements about actions of the collective "Defendants" but alleges no facts that show how Mr. Garcia, Mr. Caldwell, and/ or Mr. Gallegos individually participated in Plaintiffs' constitutional deprivations. *See Brown*, 662 F.3d at 1165. For example, Plaintiffs state:

- "Defendants have consistently failed to ensure that detainees are able to appear before a district court within the constitutionally required timeframe." Compl. ¶ 68.
- "Defendants' actions have frequently caused detainees to be held for days, weeks, and even months longer than allowed by law." *Id.* ¶ 70.
- "As a result of Defendants' unconstitutional actions, Plaintiffs and members of the class have suffered damages." *Id.* ¶ 73.

The only allegations specifically pertaining to Individual Defendants are that the Santa Fe County

Sheriff and Warden of SFACF "share responsibility for ensuring that persons detained at the SFCACF are brought before a district court within fifteen days" and they "share personal responsibility" for implementing policies to ensure detainees are arraigned within fifteen days of arrest. *Id.* ¶¶ 20, 21. Even assuming it is true that the Sheriff and the Warden share such responsibility, the allegation does not state personal participation in the District Court's scheduling of the arraignment hearings. Regardless of whether the Sheriff and Warden share duties, there are no facts alleged that they did anything to effectuate the District Court's decision as to when to schedule arraignments. Plaintiffs allege no facts that bear on any particular Defendant's specific conduct.

The Complaint contains no explanation of "who is alleged to have done what to whom" and to the contrary, the Complaint contains only collective allegations concerning the Defendants. *Id.* ¶¶ 68–74, 76–78. The Complaint fails because it does not specifically allege what Mr. Gallegos, Mr. Caldwell, or Mr. Garcia did with regards to each specific Plaintiff. *See Brown*, 662 F.3d at 1165. There are simply no facts stated with regards to any particular Defendant's personal involvement in the alleged deprivation.

Ultimately, the Complaint is devoid of allegations against the individual capacity defendants. Under *Iqbal*, blanket statements that the Sheriff and Warden "share responsibility for ensuring" detainees are brought before the court within fifteen days are conclusory and cannot survive a motion to dismiss. *See Iqbal*, 556 U.S. at 664. Notably, Plaintiffs have not even alleged that there was any order directing their release or determining their bond. Rather, the district court scheduled Plaintiffs' arraignments within a

matter of days after the bench warrants were served and Plaintiffs were booked into SFCACF. Mr. Moya's bench warrant was served September 15, 2014. Eight days later, on September 23, 2014, the District Court was notified that Mr. Moya was in custody. Mr. Petry's bench warrant was served July 27, 2015. Four days later, on July 31, 2015, the District Court was notified Mr. Petry was in custody.[5] On August 3, 2015, the District Court set Mr. Petry's second arraignment. Thus, these facts plausibly show the District Court was on notice Plaintiffs were awaiting pretrial process and Individual Defendants did what was required of them to get Plaintiffs in front of the District Court. Although the pleading standard of Fed. R. Civ. P. 8 "does not require detailed factual allegations ... it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 678. Such "unadorned" allegations are precisely what Plaintiffs make here.

Furthermore, the Court finds Plaintiffs have not stated a claim for "overdetention." *Gaylor* and *Dodds* and their progeny are distinguishable by the simple fact that in each of those cases, bail had already been set. In those cases, due to affirmative jail policies, the plaintiffs were deprived of their right to post bail. *Gaylor* and *Dodds* thus set forth the analysis to be used when an arrestee is detained too long after a judge sets bond. *See e.g.*, *Gaylor*, 105 F.3d at 576;

[5] Due to current electronic technology, such as e-mail, SFCACF presumably could have notified the District Court at an earlier time, or nearly immediately after their booking, that Plaintiffs were in custody. Despite this observation about more expeditious ways of notifying the District Court of Plaintiffs' arrests on the outstanding bench warrants, efficiency is not the standard the Court must use in considering whether Plaintiffs have alleged plausible due process violations.

Dodds, 614 F.3d at 1193. That is not the case here, and Plaintiffs attempt to offset this distinction fails. This is not a situation where Plaintiffs were denied bail. There are no allegations SFCACF had a bond order from the District Court and disregarded it, or refused to notify the District Court the Plaintiffs were awaiting process. Rather, Plaintiffs here protest the length of time they had to wait *until* bail was set in the first place.

This case is further unlike the *Coleman/Armstrong/Hayes* line of cases upon which Plaintiffs rely. Here, the facts show the District Court knew both Plaintiffs were in SFCACF custody because an arraignment was scheduled for Mr. Moya eight days after his arrest, and an arraignment was scheduled for Mr. Petry nine days after his arrest. There are no allegations Plaintiffs protested their confinement, and there are no allegations Plaintiffs were detained based on misfiled paperwork or according to affirmative county policies that resulted in arraignment hearings not being scheduled. Simply stated, there are no allegations in the Complaint that shock this Court's conscience regarding the scheduling of Plaintiffs' arraignments. Plaintiffs were arrested on valid warrants based on their failure to appear at their first arraignments. Had Plaintiffs appeared at the initial date and time for their arraignments, bench warrants would not have been issued by the District Court and conditions of pretrial release including bail amounts would have been set by the District Court at the date and time first set for Plaintiffs' arraignments. In any event, the bench warrants for failure to appear were served on Plaintiffs, they were booked into SFCACF, and the District Court was notified in less than ten days of the arrests that Plaintiffs were in custody. Second arraignment hearings were then scheduled thereafter.

Both Plaintiffs had counsel throughout these events as indicated by the notices of appearance by attorneys filed on Plaintiffs' behalf, and there are no allegations Plaintiffs ever protested their status or demanded to be brought before a court. In fact, if both Plaintiffs had criminal defense counsel at all relevant times, then the Court cannot help but ask the question why Plaintiffs' counsel didn't do something to effectuate earlier arraignment hearings for Plaintiffs. A simple motion for an expedited arraignment filed by criminal defense counsel on behalf of Plaintiffs would have probably alerted the District Court of the need to arraign Plaintiffs sooner. Individual Defendants are not responsible to ensure that Plaintiffs had effective assistance of counsel and if Plaintiffs' court appointed criminal defense counsel somehow failed to adequately protect the due process rights of the Plaintiffs, that is not the fault of the Individual Defendants. Under these circumstances, the alleged delays in the arraignments do not shock the Court's conscience.

Plaintiffs correctly summarize New Mexico law, which provides that Plaintiffs were entitled to the least restrictive bail options and conditions and that detainees are entitled to release on bail, subject to exceptions that do not apply here. *See* Rule 5-401 NMRA; *State v. Brown*, 2014-NMSC-038, ¶ 39, 338 P.3d 1276. But in this case bail had not yet been set and the responsibility for setting bail lies with the District Court and not with the Individual Defendants. Moreover, although Plaintiffs make vague challenges to a county policy that prevented Plaintiffs from receiving a bail determination, Plaintiffs never allege facts showing the existence of such a policy. Compl. ¶ 57. Therefore, Plaintiffs have failed to plausibly allege these particular Defendants did anything at all to effectuate the alleged deprivation. They do not

claim Defendants misled them about bail status, detained them beyond bail being posted, or violated a court order directing their release. Defendants appropriately point out is unclear why the District Court scheduled the arraignments when it did, but there are no allegations Defendants willingly extended the arraignment time and there are no allegations these Defendants played any role in the timing of the District Court's arraignment settings. Thus, if there was any violation here, the facts alleged show it was due to the District Court's scheduling delays and not Defendants' conduct.

B. Plaintiffs Have Not Sufficiently Alleged Supervisory Liability.

A plaintiff establishes supervisory liability against a warden or sheriff "by demonstrating: (1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation." *Dodds*, 614 F.3d at 1199; *See also Estate of Booker v. Gomez*, 745 F.3d 405, 435 (10th Cir. 2014). At a minimum, to demonstrate the requisite mental state, a plaintiff must establish "a deliberate and intentional act on the part of the supervisor to violate the plaintiff's legal rights." *Wilson*, 715 F.3d at 858. "Just as § 1983's plain language doesn't authorize strict liability, it doesn't authorize *respondeat superior* liability ... To establish a violation of § 1983 by a supervisor, as with everyone else, then, the plaintiff must establish a deliberate, intentional act on the part of the defendant to violate [the plaintiff's legal] rights." *Porro v. Barnes*, 624 F.3d 1322, 1327–28 (10th Cir. 2010) (internal quotation marks and citation omitted) (emphasis in original).

Defendants argue the Complaint fails to establish that Mr. Garcia, Mr. Caldwell, and/or Mr. Gallegos promulgated a defective policy, caused the alleged constitutional deprivation, or acted with the requisite state of mind. Defendants point out that Plaintiffs challenge the *absence* of a policy so the first element is not met. Second, Defendants claim Plaintiffs have not alleged facts showing causation. The District Court was aware the named Plaintiffs were arrested and detained, so any alleged over-detention was not caused by conduct of Defendants but rather was caused by the District Court's scheduling of the arraignments. Defendants point out that Plaintiffs have not alleged that they were deprived of a probable cause determination; instead, they have simply attacked the speed with which the District Court moved in arraigning them.

Regarding the third element, Defendants point out that Plaintiffs merely state the issue was "obvious to defendants" which does not sufficiently allege a culpable state of mind. Compl. ¶ 71. Merely stating that a violation was "obvious" does not state the Individual Defendants acted with the requisite level of knowledge to state a claim.

In response, Plaintiffs point to the allegation in the Complaint that the Sheriff and Warden of SFCACF "share personal responsibility for promulgating ... policies and procedures ... to ensure that detainees are brought before a court within fifteen days of arrest or indictment." *Id.* ¶ 21. Plaintiffs argue they have alleged personal involvement and that Individual Defendants acted with the requisite intent. Plaintiffs contend Individual Defendants never promulgated or implemented any policy to ensure Plaintiffs' constitutional rights were not violated and that

Individual Defendants share the responsibility to implement such a policy, thus they have sufficiently alleged causation.

Regarding the requisite intent prong, Plaintiffs point out they alleged Individual Defendants acted "intentionally, knowingly, and with deliberate indifference." *Id.* ¶ 57. Further, given the sheer number of violations alleged in the Complaint, Defendants' actions on named Plaintiffs and the putative class was "obvious." *See id.* ¶¶ 62, 64. Plaintiffs point out that in *Wilson*, the court emphasized the complaint alleged the individual defendant "acted with deliberate indifference to routine constitutional violations occurring at the" facility, which sufficiently alleged the requisite state of mind. 715 F.3d at 858. Similarly here, Plaintiffs have met their burden to plead culpable state of mind simply by alleging the number of violations was "obvious."

The Court finds Plaintiffs failed to sufficiently plead allegations pertaining to Individual Defendants in their supervisory roles. Supervisory liability must be based on a policy promulgated by Individual Defendants. *Brown*, 662 F.3d at 1164. The Court carefully combed through the factual statements in the Complaint, and concludes Plaintiffs make no allegations regarding any Santa Fe County policy that bears on the way in which arraignment hearings are scheduled. To the contrary, Plaintiffs focus on the absence of a policy, so the first element of supervisory liability is not met. *See* Compl. ¶¶ 41; *See also Dodds*, 614 F.3d at 1199 (plaintiff must allege "the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that caused the complained of constitutional harm"). Even if Plaintiffs had alleged the existence of a specific Santa

Fe County policy, which they have not, there are no allegations with regards to each specific Defendant and how he allegedly participated in the promulgation of such policy. *See supra* § I.A; *See also Brown*, 662 F.3d at 1164. Rather, the Complaint is rife with collective allegations that Defendants generally failed to ensure SFCACF detainees appear in court within fifteen days. *See* Compl. ¶¶ 53, 68. But unlike *Dodds*, here Plaintiffs have pointed to no County policies that operated in a way to deprive Plaintiffs of their liberty interest in a prompt arraignment. *See Dodds*, 614 F.3d at 1204.

This case contrasts with *Wilson*, where the Tenth Circuit held the plaintiff sufficiently alleged facts that the warden promulgated policies which caused the alleged constitutional harm. *Wilson*, 715 F.3d at 857. In *Wilson*, the plaintiff alleged a specific "policy or custom of holding citizens without pending criminal charges until the court filed orders of release *sua sponte*." *Id.* The complaint further alleged the warden's policy of holding citizens without court orders caused the violation of the plaintiff's Fourth Amendment right to a prompt probable cause determination. *Id.* These facts plausibly stated a due process claim because the allegations tied the individual warden's conduct to the precise harm complained of. In contrast, in this case there are no facts alleged that tie any specific Defendant's conduct to the harm complained of, which is the speed with which the District Court scheduled Plaintiffs' arraignment hearings.

Moreover, Plaintiffs failed to plead facts showing that any particular Defendant "acted with the state of mind required to establish the alleged constitutional deprivation." *Dodds*, 614 F.3d at 1199. Plaintiffs allege "when detainees are held longer than allowed by law,

that fact is obvious to Defendants because Defendants are aware of when detainees are booked and taken into detention." Compl. ¶ 71. Likewise, Defendants acted with "deliberate indifference" to Plaintiffs' liberty interests. *Id.* ¶¶ 72, 78. However, these conclusory and threadbare allegations simply recite the elements of a substantive due process claim and do not plausibly show how any named Defendant acted with requisite culpability. Under *Iqbal*, such conclusory statements cannot survive a motion to dismiss. *See Iqbal*, 556 U.S. at 664.

The Court concludes there is no viable 1983 claim against the Individual Defendants because there are no allegations of their personal involvement in when the District Court scheduled Plaintiffs' second arraignments. This would be a very different case if there were allegations the Defendants never notified the District Court that Plaintiffs were in custody, or if Defendants misinformed Plaintiffs of their bail status. Plaintiffs may very well have been deprived of a liberty interest by the District Court, but they have not alleged viable § 1983 claims against Mr. Garcia, Mr. Caldwell, or Mr. Gallegos individually. There are no facts alleged that these particular Defendants did anything to cause Plaintiffs' arraignments to be scheduled in an untimely manner, and there are no facts alleged showing any of these Defendants' conduct shocks this Court's conscience.

II. Procedural Due Process

Plaintiffs' procedural due process claims appear to overlap with their substantive due process claims. With regards to the procedural claims, Plaintiffs make the same broad statements of what the "Defendants" collectively did or did not do, for example:

- "Defendants have systematically failed to ensure that detainees are brought before a district court within fifteen days, thereby systematically violating detainees their due process rights ..." Compl. ¶ 55.
- "Defendants' actions in causing Plaintiffs and the members of the class to be deprived of their clearly established constitutional rights under the Fourteenth Amendment were objectively unreasonable, intentional, willful and wanton ..." *Id.* ¶ 58.

Thus, with regards to the procedural claims, the complained-of injury is virtually identical to the substantive due process claim: Plaintiffs were deprived of their constitutional right to a first appearance within fifteen days of arrest. Defendants make two principal arguments as to why Plaintiffs failed to allege a procedural due process claim. First, Plaintiffs have not alleged individual conduct, and second they have not alleged Defendants did anything to effectuate their alleged "overdetention." The Court agrees.

As explained above, Plaintiffs have not sufficiently alleged Individual Defendants' personal involvement in when their arraignments were scheduled. Inasmuch as Individual Defendants are responsible for notifying the District Court that Plaintiffs had been booked into detention and were awaiting arraignment, and there is every indication Individual Defendants did so. Plaintiffs are nevertheless unhappy with the length of time they waited until their arraignment hearings, where bond was posted and the Plaintiffs were ordered immediately released. Under *Brown*, Plaintiffs failed to plead allegations pertaining to Individual Defendants, which is particularly important in a multi-defendant § 1983 case. *See supra* § I.A.

In other words, Plaintiffs have alleged no facts showing that Individual Defendants participated in any deliberate, intentional acts that violated Plaintiffs constitutional rights. Plaintiffs are simply unhappy with the length of time they waited until their arraignment hearings but as previously noted, the District Court was responsible for setting the arraignment hearings, not the Defendants. All of the procedural due process allegations made in Plaintiffs' Complaint improperly lump the Defendants together without specifying who did what to whom. "[T]here is no concept of strict supervisor liability under section 1983." *Jenkins v. Wood*, 81 F.3d 988, 994 (10th Cir. 1996). Rather, "the plaintiff must establish a deliberate, intentional act by the supervisor to violate constitutional rights." *Id.* at 994-95. In other words, Plaintiffs must allege some personal involvement by Mr. Garcia, Mr. Gallegos, and Mr. Caldwell in the alleged constitutional violation to succeed under § 1983. *See Fogarty v. Gallegos*, 523 F.3d 1147, 1162 (10th Cir. 2008); *see also Snell v. Tunnell*, 920 F.2d 673, 700 (10th Cir. 1990) (plaintiffs must show that a defendant "expressly or otherwise authorized, supervised, or participated in the conduct which caused the constitutional deprivation"). Direct participation is not necessary, but Plaintiffs must have alleged some facts establishing a causal connection between the act and the injury. Yet here, Plaintiffs assert no facts alleging what Individual Defendants did to whom. As mentioned above, there are no allegations Mr. Garcia, Mr. Caldwell, and Mr. Gallegos have any ability to control the District Court's arraignment calendar. Therefore, Plaintiffs have no valid claims against Individual Defendants.

Finally and as previously noted, it does not escape the Court that Plaintiffs chose not to attend their first

arraignment hearings, and thus effectively chose not to use their first opportunity to be heard. *Boddie v. Connecticut*, 401 U.S. 371, 378–79 (1971) (holding that "the hearing required by due process is subject to waiver"); *Miller v. Campbell County*, 945 F.2d 348, 354 (10th Cir. 1991) (finding no procedural due process violation when plaintiffs were offered but did not use opportunity for hearing).

In sum, Plaintiffs received the process they were due by these particular Defendants. To the extent the New Mexico statutes create a federal liberty interest, those statutes guaranteed Plaintiffs the right to an arraignment. If there was any deprivation here, it was caused by the District Court's failure to schedule Plaintiffs' arraignments within fifteen days after their arrests. The Complaint simply fails to allege any facts remotely showing that Individual Defendants did anything to cause Plaintiffs' second arraignments to occur longer than fifteen days after their arrests.

III. Municipal Liability Claims Against The Board

The Court has concluded Individual Defendants did not commit any constitutional violations against these Plaintiffs, so the Court concludes the Board is also entitled to dismissal. Municipal liability may not be imposed on an entity defendant where individual defendants are found to have committed no constitutional violation. *See Butler v. City of Prairie Village*, 172 F.3d 736, 747 (10th Cir. 1999) ("Because our conclusion that the individual defendants are entitled to qualified immunity rests on the determination that none of them violated Plaintiff's constitutional rights, the City may not be found to have violated his rights."); *Wilson v. Meeks*, 98 F.3d 1247, 1255 (10th Cir. 1996) (quotation omitted) ("municipality may not be held liable where there was no underlying

constitutional violation by any of its officers."); *DeAnzona*, 222 F.3d at 1236 (to establish a *Monell* claim, plaintiff must show an underlying constitutional violation); *Dry v. U.S.*, 235 F.3d 1249, 1259 (10th Cir. 2000) ("In the absence of an underlying constitutional violation, there can be no derivative liability"); *City of Los Angeles v. Heller*, 475 U.S. 796, 798–99 (1986); *Thompson v. City of Lawrence, Kan.*, 58 F.3d 1511, 1517 (10th Cir. 1995).

IV. Qualified Immunity

In the alternative to seeking dismissal under Rule 12(b)(6), Defendants ask the Court to grant them qualified immunity because neither the Tenth Circuit, nor the Supreme Court, has placed any time limitations on how quickly an arrestee must be arraigned under the Fourteenth Amendment. The District Court docket illustrates it was on notice of the arrest and detention and actually set a second arraignment hearing for both Plaintiffs, which shows Defendants could not have known that they needed to do more to force the District Court to act more quickly, assuming they could do more to force the District Court to act more quickly. In other words, Individual Defendants could not have known that complying with the District Court's timeline violated Plaintiffs' civil rights. Plaintiffs respond that under *Dodds*, 614 F.3d at 1192, it was clearly established in the Tenth Circuit that Plaintiffs had a liberty interest in avoiding prolonged pretrial detention. However, as the Court explained at length above, the *Dodds* line of cases holds that a detainee has a liberty interest in being freed of detention once bail is set. *See supra* § I. The Court determined that the facts alleged here are unlike *Dodds* because Plaintiffs do not allege there was an order setting bail. The Court agrees with Defendants

that there is no clearly established case law requiring that, under the factual circumstances of this case, Individual Defendants must have somehow forced the District Court to arraign Plaintiffs more quickly. This is especially true in light of the fact that New Mexico law prohibited Defendants from releasing Plaintiffs without a court order. *See* NMSA 1978 §§ 33-3-12(B), 33-3-15.

V. Amendment Would Be Futile

The Court denies Plaintiffs' request to amend their Complaint. Plaintiffs have not formally moved the Court for leave to amend, so the Court has no proposed amended complaint on which to base its decision. Moreover, the Court finds even if Plaintiffs had properly moved to amend the Complaint, any amendment would be futile because Individual Defendants are entitled to qualified immunity. "A court properly may deny a motion for leave to amend as futile when the proposed amended complaint would be subject to dismissal for any reason...." *Bauchman for Bauchman v. West High School*, 132 F.3d 542, 562 (10th Cir. 1997) (citations omitted). Determining whether to grant leave to amend a pleading is an exercise in the Court's discretion. *State Distributor's, Inc. v. Glenmore Distilleries, Co.,* 738 F. 2d 405, 416 (10th Cir. 1984); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962).

Accordingly, the Court grants Defendants' Rule 12(b)(6) Motion To Dismiss And For Qualified Immunity In Lieu Of An Answer (Doc. 7). Plaintiffs' claims against Defendants are DISMISSED WITH PREJUDICE.

SO ORDERED.

APPENDIX D

United States Code Annotated
Constitution of the United States
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement
U.S.C.A. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way

abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX E

West's New Mexico Statutes Annotated
Chapter 31. Criminal Procedure
Article 1. Issuance of Process
and Warrants (Refs & Annos)
N. M. S. A. 1978, § 31-1-3

§ 31-1-3. Method of prosecution

A criminal prosecution shall be commenced, conducted and terminated in accordance with Rules of Criminal Procedure. All pleadings, practice and procedure shall be governed by such rules.

APPENDIX F

West's New Mexico Statutes Annotated
Chapter 31. Criminal Procedure
Article 1. Issuance of Process
and Warrants (Refs & Annos)
N. M. S. A. 1978, § 31-1-4

§ 31-1-4. Criminal actions; docketing action; service; return

A. Upon filing of the complaint of a law enforcement officer, the court shall docket the action. Upon the filing of the complaint of any other person, the court shall collect the docket fee from the person before docketing the action.

B. Upon the docketing of any criminal action, the court may issue a summons directing the defendant to appear before the court at a time stated in the summons.

C. When a warrant is issued in a criminal action, it shall be directed to a law enforcement officer, and the defendant named in the warrant shall, upon arrest, be brought by the officer before the court without unnecessary delay.

D. It shall be the duty of the clerk of the district court to issue process in criminal cases filed in the district court. It shall be the duty of the clerk of the magistrate court or the magistrate, if there is no clerk, to issue process in criminal cases filed in the magistrate court. It shall be the duty of the law enforcement officer to whom process is directed to execute process and return the same to the clerk of the court from which process is issued or, if there is no clerk of the court, to the judge thereof.

E. Except for criminal actions filed in municipal court, all police officers authorized to serve process issued in any criminal action have jurisdiction to serve such process in any county of this state.

APPENDIX G

West's New Mexico Statutes Annotated
Chapter 31. Criminal Procedure
Article 1. Issuance of Process
and Warrants (Refs & Annos)
N. M. S. A. 1978, § 31-1-5

§ 31-1-5. Procedures on arrest; reports

A. Following arrest, any person accused of a crime is entitled to have reasonable opportunity to make three telephone calls beginning not later than twenty minutes after the time of arrival at a police station, sheriff's office or other place of detention. Nothing in this subsection limits any right to make telephone calls at any time later than twenty minutes after the time of arrival at the police station.

B. Every accused shall be brought before a court having jurisdiction to release the accused without unnecessary delay.

C. Within eighteen hours after the arrest of any person accused with having committed a misdemeanor or a felony, the arresting law enforcement agency shall notify the district attorney of:

(1) the name of the accused; and

(2) the offense charged.

APPENDIX H

West's New Mexico Statutes Annotated
State Court Rules
5. Rules of Criminal Procedure for the District Courts
Article 3. Pretrial Proceedings
NMRA, Rule 5-303

RULE 5-303. ARRAIGNMENT

A. Arraignment. The defendant shall be arraigned on the information or indictment within fifteen (15) days after the date of the filing of the information or indictment or the date of arrest, whichever is later. The defendant may appear at arraignment as follows:

(1) through a two way audio-visual communication in accordance with Paragraph I of this rule; or

(2) in open court.

If the defendant appears without counsel, the court shall advise the defendant of the defendant's right to counsel.

B. Reading of Indictment or Information. The district attorney shall deliver to the defendant a copy of the indictment or information and shall then read the complaint, indictment or information to the defendant unless the defendant waives such reading. Thereupon the court shall ask the defendant to plead.

C. Bail Review. At arraignment, upon request of the defendant, the court shall evaluate conditions of release considering the factors stated in Rule 5-401 NMRA. If conditions of release have not been set, the court shall set conditions of release.

D. Pleas. A defendant charged with a criminal offense may plead as follows:

(1) guilty;

(2) not guilty; or

(3) no contest, subject to the approval of the court.

E. Refusal to Plead. If a defendant refuses to plead or stands mute, the court shall direct the entry of a plea of not guilty on the defendant's behalf.

F. Advice to Defendant. The court shall not accept a plea of guilty or no contest without first, by addressing the defendant personally in open court, informing the defendant of and determining that the defendant understands the following:

(1) the nature of the charge to which the plea is offered;

(2) the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered, including any possible sentence enhancements;

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made;

(4) that if the defendant pleads guilty or no contest there will not be a further trial of any kind, so that by pleading guilty or no contest the defendant waives the right to a trial;

(5) that, if the defendant pleads guilty or no contest, it may have an effect upon the defendant's immigration or naturalization status, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the immigration consequences of a plea;

(6) that, if the defendant is charged with a crime of domestic violence or a felony, a plea of guilty or no contest will affect the defendant's constitutional right

to bear arms, including shipping, receiving, possessing or owning any firearm or ammunition, all of which are crimes punishable under federal law for a person convicted of domestic violence or a felony; and

(7) that, if the defendant pleads guilty or no contest to a crime for which registration as a sex offender is or may be required, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the registration requirement under the Sex Offender Registration and Notification Act.

G. Ensuring that the Plea is Voluntary. The court shall not accept a plea of guilty or no contest without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire of the defendant, defense counsel and the attorney for the government as to whether the defendant's willingness to plead guilty or no contest results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

H. Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or no contest, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

I. Audio-visual Appearance. The arraignment or first appearance of the defendant before the court may be through the use of a two-way audio-video communication if the following conditions are met:

(1) the defendant and the defendant's counsel are together in one room at the time of the first appearance before the court;

(2) the judge, legal counsel and defendant are able to communicate and see each other through a two-way audio-video system which may also be heard and viewed in the courtroom by members of the public; and

(3) no plea is entered by the court except a plea of not guilty.

J. Waiver of Arraignment. With the consent of the court, a defendant may waive arraignment by filing a written waiver of arraignment and plea of not guilty with the court and serving a copy on the state in time to give notice to interested persons. A waiver of arraignment shall not be filed and is not effective unless signed by the district court judge. A waiver of arraignment and entry of a plea of not guilty shall be substantially in the form approved by the Supreme Court.

APPENDIX I

West's New Mexico Statutes Annotated
Constitution of the State of New Mexico
Article XX. Miscellaneous
Const. Art. 20, § 1

§ 1. Oath of office

Every person elected or appointed to any office shall, before entering upon his duties, take and subscribe to an oath or affirmation that he will support the constitution of the United States and the constitution and laws of this state, and that he will faithfully and impartially discharge the duties of his office to the best of his ability.

APPENDIX J

West's New Mexico Statutes Annotated
Constitution of the State of New Mexico
Article II. Bill of Rights (Refs & Annos)
This section has been updated.
Const. Art. 2, § 13

Effective: [See Text Amendments]
to November 7, 2016

<Version of section effective until adoption of Constitutional Amendment proposed by L. 2016, S.J.R. 1, § 1. See, also, version of Art. 2, § 13 effective upon adoption of amendment.>

§ 13. Bail; excessive fines; cruel and unusual punishment

All persons shall, before conviction be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great and in situations in which bail is specifically prohibited by this section. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Bail may be denied by the district court for a period of sixty days after the incarceration of the defendant by an order entered within seven days after the incarceration, in the following instances:

A. the defendant is accused of a felony and has previously been convicted of two or more felonies, within the state, which felonies did not arise from the same transaction or a common transaction with the case at bar;

B. the defendant is accused of a felony involving the use of a deadly weapon and has a prior felony conviction, within the state. The period for incarceration without bail may be extended by any period of time by which trial is delayed by a motion for a continuance made by or on behalf of the defendant. An appeal from an order denying bail shall be given preference over all other matters.

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

[Filed 09/13/16]

_____

No._____

_____

MARIANO MOYA and LONNIE PETRY, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

ROBERT GARCIA, Santa Fe County Sheriff, MARK CALDWELL, Warden of Santa Fe County Adult Correctional Facility, MARK GALLEGOS, former Warden of Santa Fe County Adult Correctional Facility, in their individual capacities, and BOARD OF COMMISSIONERS OF SANTA FE COUNTY,

Defendants.

_____

CLASS ACTION COMPLAINT
FOR DAMAGES AND INJUNCTIVE RELIEF

Plaintiffs Mariano Moya and Lonnie Petry, by and through their attorneys, Coberly & Martinez, LLLP, bring this Complaint for Damages and Injunctive Relief, on behalf of themselves and all others similarly situated, for being unconstitutionally detained without having their conditions of release set or reviewed within time limits mandated by law.

JURISDICTION AND VENUE

1. This suit seeks redress for violations of the United States Constitution under 42 U.S.C. § 1983. This Court's jurisdiction therefore arises under 28 U.S.C. §§ 1331 and 1343.

2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because all Defendants reside in this district and because all of the events giving rise to Plaintiffs' claims occurred in this district.

PARTIES

3. Plaintiff Mariano Moya is an individual who resides in Santa Fe County, New Mexico.

4. Plaintiff Lonnie Petry is an individual who resides in Santa Fe County, New Mexico.

5. Defendant Robert Garcia is an individual and a resident of the State of New Mexico. At all times relevant to this Complaint, Defendant Garcia was acting under color of state law as the Sheriff of Santa Fe County.

6. Defendant Mark Caldwell is an individual and a resident of the State of New Mexico. Since approximately November 2014, Defendant Caldwell has acted under color of state law as the Warden of the Santa Fe County Adult Correctional Facility ("SFCACF").

7. Defendant Mark Gallegos is an individual and a resident of the State of New Mexico. Between 2012 and 2014, Defendant Gallegos acted under color of state law as the Warden of the SFCACF.

8. Defendant Board of County Commissioners of Santa Fe County is a governmental entity and local public body. The Board is a "person" within the

meaning of 42 U.S.C. § 1983 and, at all times relevant to this Complaint, was acting under color of state law.

BACKGROUND

9. New Mexico state law provides pretrial detainees with certain liberty interests protected by the Fourteenth Amendment to the U.S. Constitution.

10. Article II, Section 13 of the New Mexico Constitution affords criminal defendants a right to pretrial liberty by ensuring that all persons, subject to two narrow exceptions, are entitled to bail by sufficient sureties, and that excessive bail shall not be required. If bailable, district courts may not condition a defendant's release on the posting of a high monetary bond for the purpose of preventing the defendant's pretrial release.

11. The only persons not entitled to bail under Article II, Section 13 of the New Mexico Constitution are: (1) persons charged with capital offenses where the "proof is evident or the presumption great," and (2) certain persons with prior felony convictions so long as the court enters an order within seven days of incarceration after providing notice and an opportunity to be heard.

12. Thus, all persons accused of non-capital crimes are entitled to bail under Article II, Section 13 of the New Mexico Constitution if a court has not entered an order denying bail within seven days of incarceration after providing notice and an opportunity to be heard.

13. Pursuant to NMSA 1978, § 31-1-5, "[e]very accused shall be brought before a court having jurisdiction to release the accused without unnecessary delay."

14. Pursuant to NMSA 1978, § 31-1-4, "[w]hen a warrant is issued in a criminal action, it shall be directed to a law enforcement officer, and the defendant named in the warrant shall, upon arrest, be brought by the officer before the court without unnecessary delay."

15. Pursuant to NMSA 1978, § 31-1-3, criminal prosecutions in New Mexico must be conducted in accordance with the New Mexico Rules of Criminal Procedure.

16. The New Mexico Rules of Criminal Procedure provide the mechanisms through which state actors honor defendants' constitutional and statutory rights to a determination of their conditions of pretrial release from detention.

17. New Mexico Rule of Criminal Procedure 5-303(A) provides that a defendant facing charges in district court "shall be arraigned on the information or indictment within fifteen (15) days after the date of the filing of the information or indictment or the date of arrest, whichever is later." At such arraignment, New Mexico Rule of Criminal Procedure 5-303(C) provides that the defendant is entitled to "[a] review of the conditions of release, or setting the conditions of release if they have not been set."

18. New Mexico Rule of Criminal Procedure 5-401 provides that district courts must release defendants entitled to bail without bond or subject to the least onerous secured bond which will reasonably assure the appearance of the defendant and the safety of any person and the community.

19. In summary, detainees charged in district courts in New Mexico, other than capital offenders and the narrow group of persons for whom courts have

denied bail within seven days of their detention, have a liberty interest in being released pretrial on the least restrictive set of conditions. This liberty interest is effectuated by state law entitling them to an arraignment within fifteen days of their indictment or arrest, at which time conditions for their release must be set or reviewed.

20. Under New Mexico law, the Santa Fe County Sheriff and the Warden of the SFACF share responsibility for ensuring that persons detained at the SFCACF are brought before a district court within fifteen days of indictment or arrest so that their right to pretrial release is honored.

21. Both the Santa Fe County Sheriff and the Warden of the SFCACF share personal responsibility for promulgating, implementing, and maintaining policies and procedures on behalf of Santa Fe County to ensure that detainees are brought before a court within fifteen days of arrest or indictment.

22. The Board of County Commissioners of Santa Fe County is ultimately responsible for ensuring that these policies and procedures are promulgated, implemented, and maintained, and that its employees are properly trained and supervised on such policies.

23. Defendants have never promulgated, let alone implemented or maintained, any policies or procedures to ensure that persons detained at the SFCACF appear in court within fifteen days of arrest or indictment to have their conditions of release reviewed or set.

FACTUAL ALLEGATIONS RELATED TO NAMED PLAINTIFFS

24. On August 14, 2014, a Santa Fe County grand jury indicted Mariano Moya on charges of residential burglary and larceny in case number D-101-CR-2014-00468.

25. On August 19, 2014, the First Judicial District Court mailed a summons to Mr. Moya ordering him to appear for an arraignment scheduled for August 25, 2014.

26. Because Mr. Moya did not appear at the August 25, 2014 hearing, the First Judicial District Court, on August 27, 2014, issued a bench warrant for Mr. Moya's arrest. The bench warrant commanded any authorized officer to "arrest Mariano Moya, and bring him forthwith before this court."

27. On September 15, 2014, Mr. Moya was arrested on the outstanding bench warrant and booked into the SFCACF.

28. Mr. Moya was not brought before the First Judicial District Court for his arraignment until November 17, 2014—some 63 days after his detention at the SFCACF.

29. At his arraignment, the First Judicial District Court entered an order setting Mr. Moya's bond at $5,000 secured by a signature, and entered another order directing the SFCACF to release Mr. Moya from custody immediately.

30. Mr. Moya was unconstitutionally detained by Defendants for at least 48 days.

31. On June 25, 2015, a Santa Fe County grand jury indicted Lonnie Petry on charges of battery on a peace

officer and resisting, evading, or obstructing an officer in case number D-101-CR-2015-00337.

32. On June 29, 2015, the First Judicial District Court mailed a summons to Mr. Petry ordering him to appear for an arraignment scheduled for July 17, 2015.

33. Because Mr. Petry did not appear at the July 17, 2015 hearing, the First Judicial District Court, on July 21, 2015, issued a bench warrant for Mr. Petry's arrest. The bench warrant commanded any authorized officer to "arrest Lonnie A Petry, and bring him forthwith before this court."

34. On July 22, 2015, Mr. Petry was arrested by Santa Fe City Police Officers for unlawfully drinking alcohol in a park and for resisting, evading, or obstructing an officer, and booked into the SFCACF. The Santa Fe City Police officers filed charges related to this incident in Santa Fe Municipal Court.

35. At the time of Mr. Petry's booking, the SFCACF knew, or should have known, of the outstanding bench warrant issued by the First Judicial District Court.

36. On July 27, 2015, Mr. Petry was being prepared to be released on the Santa Fe City charges on which he had been booked on July 22, 2015. Shortly before being released, however, a SFCACF or Santa Fe County officer served Mr. Petry with the bench warrant that had been issued by the First Judicial District Court on July 21, 2015. Accordingly, the SFCACF did not release Mr. Petry from the SFCACF on July 27, 2015.

37. Mr. Petry was not brought before the First Judicial District Court for his arraignment until

August 21, 2015—some 30 days after his detention at the SFCACF.

38. At his arraignment, the First Judicial District Court entered an order setting Mr. Petry's bond at $5,000 secured by a signature, with the conditions that he be placed on GPS and Soberlink monitoring devices. The First Judicial District Court entered a separate order directing Mr. Petry's release from custody on those conditions.

39. Defendants, working under color of state law, failed to ensure that Mr. Moya and Mr. Petry appeared in district court without unnecessarily delay, and certainly not within 15 days as mandated by New Mexico state law.

40. Mr. Moya's and Mr. Petry's unlawful detentions were caused by Defendants' policies, practices, and customs.

41. In fact, Defendants, acting under color of state law, have no policies or procedures in place to ensure that detainees appear for their arraignments in district court within fifteen days of the filing of their indictment or their arrests. Instead, Defendants knowingly and routinely unnecessarily delay detainees' appearance in district court.

CLASS ACTION ALLEGATIONS

42. Plaintiffs incorporate by reference the preceding paragraphs as though they were stated fully herein.

43. This civil action is brought by Mr. Moya and Mr. Petry on their own behalf and on behalf of a class of similarly situated persons pursuant to Fed. R. Civ. P. 23. The class for which Mr. Moya and Mr. Petry seek certification is defined as follows: all persons who, in

the period of three years prior to the date of the filing of the Class Action Complaint to the present and continuing until this matter is adjudicated and the practices complained of herein cease, were detained in the SFCACF on indictments or warrants arising out of a New Mexico district court, who were neither capital offenders nor persons for whom the court timely issued an order denying bail, and who were not brought before a district court within fifteen days of their indictment or arrest to have their conditions of release set or reviewed.

44. Mr. Moya and Mr. Petry are members of the class they seek to represent.

45. The precise size of the class is unknown. Based on Plaintiffs' initial summary review of publicly available booking and court records, however, it consists of over 150 individuals as of the date of the filing of this Complaint. Thus, the class is sufficiently numerous that joinder of all members herein is impracticable. The exact number of class members will be ascertained through appropriate discovery from records maintained by Defendants.

46. Questions of law and fact are common to the claims of Plaintiffs and the members of the class, including by not limited to:

a. whether Defendants have any policy or practice in place to ensure that detainees charged in New Mexico district courts are brought before a judge within fifteen days of indictment or arrest; and

b. whether the detention of detainees charged in district courts without providing them the opportunity appear before a judge

within fifteen days of indictment or arrest is unconstitutional.

47. Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

48. There is a well-defined community of interest amongst members of the class. The claims of Mr. Moya and Mr. Petry are typical of the claims of the members of the class. The factual bases of Defendants' misconduct are common to all class members and represent a common policy and practice of failing to ensure that detainees charged in district courts are afforded an opportunity to promptly appear in court so that they may have conditions for their release set or reviewed. Moreover, Mr. Moya and Mr. Petry's claims are based on the same legal theories as those of the other class members.

49. Mr. Moya and Mr. Petry will fairly and adequately protect the interests of the class. They are committed to prosecuting this action, and they have retained competent counsel capable of conducting civil litigation of this nature. Moreover, the interests of Mr. Moya and Mr. Petry are coincident with, and not antagonistic to, those of the other members of the class.

50. The common questions of law and fact herein predominate over questions affecting any individual class member, and class action treatment provides a superior method for the fair and efficient adjudication of the controversy.

CAUSES OF ACTION

Count I: Violations of Procedural Due Process Rights
(Defendants Garcia, Caldwell, and Gallegos in their individual capacities)

51. Plaintiffs incorporate by reference the preceding paragraphs as though they were stated fully herein.

52. Because detainees charged in New Mexico district courts, other than the narrow group of persons not entitled to pretrial release, are guaranteed the right under state law to have their conditions of release set at the least restrictive level to assure their appearance and the safety of any other person and the community within fifteen days of their indictment or arrest, they have a federally protected liberty interest in this right.

53. Defendants' failure to ensure that SFCACF detainees appear in district court within fifteen days of arrest or indictment has unconstitutionally caused detainees' the deprivation of this liberty interest.

54. Defendants were and are responsible for holding detainees in confinement, and for promulgating, implementing, and maintaining policies for bringing detainees before the district court to set and review conditions of release.

55. Defendants have systematically failed to ensure that detainees are brought before a district court within fifteen days, thereby systematically violating detainees their due process rights and proximately causing injury to Mr. Moya, Mr. Petry, and the other members of the class.

56. Defendants' failure to provide detainees with their constitutionally-protected right to appear before

a district court within fifteen days is not reasonably related to any legitimate government goal.

57. Defendants have, through their actions and policies, intentionally, knowingly, and with deliberate indifference caused Plaintiffs and members of the class to be deprived of their constitutionally protected liberty interests without affording them the process that was due under the circumstances.

58. Defendants' actions in causing Plaintiffs and the members of the class to be deprived of their clearly established constitutional rights under the Fourteenth Amendment were objectively unreasonable, intentional, willful and wanton, and done in gross and reckless disregard of the rights of Plaintiffs and class members.

59. As a result of Defendants' unconstitutional actions, Plaintiff and members of the class have suffered damages.

Count II: *Monell* Liability for Violations
of Procedural Due Process Rights
(Defendants Board of County Commissioners)

60. Plaintiffs incorporate by reference the preceding paragraphs as though they had been fully stated herein.

61. Defendant has a custom or practice of not ensuring that detainees are brought before a district court within fifteen days of their indictment or arrest.

62. Defendant has failed to train or supervise its employees, despite an obvious need to do so, to bring detainees before a district court within fifteen days of their indictment or arrest.

63. Defendant has acted with deliberate indifference to the liberty rights of detainees in following

its custom/practice and/or in failing to train its employees.

64. The plainly obvious consequence of Defendant's following its custom/practice and/or failing to train its employees was that detainees would regularly be deprived of their constitutional right to pretrial release.

65. As a result of Defendant's unconstitutional actions, Plaintiffs and members of the class have suffered damages.

Count III: Violations of Substantive Due Process Rights *(Defendants Garcia, Caldwell, and Gallegos in their Individual Capacities)*

66. Plaintiffs incorporate by reference the preceding paragraphs as though they had been fully stated herein.

67. Plaintiffs and other similarly situated detainees have a right under the Fourteenth Amendment to be free from deliberate government indifference to their welfare.

68. Defendants have consistently failed to ensure that detainees are able to appear before a district court within the constitutionally required timeframe.

69. Defendants have acted with utter disregard in failing to promulgate, implement, and maintain policies ensuring that detainees appear before a district court within fifteen days after indictment or arrest.

70. Defendants' actions have frequently caused detainees to be held for days, weeks, and even months longer than allowed by law.

71. When detainees are held longer than allowed by law, that fact is obvious to Defendants because

Defendants are aware of when detainees were booked and taken into detention. Thus, Defendants' deprivations of detainees' rights are knowing and deliberate.

72. Defendants' deliberate indifference to the rights of their detainees to appear in district court within the constitutionally mandated timeframe shocks the conscience.

73. Defendants' actions in causing Plaintiff and the members of the class to be deprived of their clearly established constitutional rights under the Fourteenth Amendment were objectively unreasonable, intentional, willful and wanton, and done in gross and reckless disregard of the rights of class members.

74. As a result of Defendants' unconstitutional actions, Plaintiffs and members of the class have suffered damages.

Count IV: *Monell* Liability for Violations of Substantive Due Process Rights *(Defendant Board of County Commissioners of Santa Fe County)*

75. Plaintiffs incorporate by reference the preceding paragraphs as though they had been fully stated herein.

76. Defendant has a custom or practice of not ensuring that detainees are brought before a district court within fifteen days of their indictment or arrest.

77. Defendant has failed to train or supervise its employees, despite an obvious need to do so, to bring detainees before a district court within fifteen days of their indictment or arrest.

78. Defendant has acted with deliberate indifference to the liberty rights of detainees in following its custom/practice and/or in failing to train their employees.

79. The plainly obvious consequence of Defendant's following its custom/practice and/or failing to train its employees is that detainees are regularly deprived of their right to pretrial release.

80. The fact that detainees are routinely held unconstitutionally for days, weeks, and even months at the SFCACF as a result of Defendant's failures to do anything to ensure the protection of their right to pretrial release shocks the conscience.

81. As a result of Defendant's unconstitutional actions, Plaintiff and members of the class have suffered damages.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs pray for judgment against Defendants as follows:

A. Injunctive relief requiring Defendants to institute policies to ensure that detainees are always brought before a court within fifteen days after being indicted or arrested on charges arising in New Mexico district courts;

B. An award for all special, general, and consequential damages incurred, or to be incurred, by Plaintiffs and members of the class as the direct and proximate result of the acts and omissions of Defendants;

C. An award of punitive damages as allowed by law;

D. An award of attorney's fees and costs as allowed by law;

E. Pre- and post-judgment interest as allowed by law;

F. An award for such other and further relief as the Court may deem necessary and appropriate under the circumstances.

Respectfully submitted,

COBERLY & MARTINEZ, LLLP

/s/ Todd A. Coberly

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