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United States Court of Appeals
Tenth Circuit

September 4, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KATHY CONTRERAS, on behalf of her minor child A.L.,

Plaintiff - Appellant,

v.

DONA ANA COUNTY BOARD OF COUNTY COMMISSIONERS, d/b/a Dona Ana County Detention Center, et al.,

Defendants - Appellees.

No. 18-2176
(D.C. No. 2:18-CV-00156-GBW-GJF)
(D. N.M.)

ORDER

Before **TYMKOVICH**, Chief Judge, **BALDOCK**, and **CARSON**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

FILED
United States Court of Appeals
Tenth Circuit

July 20, 2020

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

KATHY CONTRERAS, on behalf of her minor child A.L.,

Plaintiff - Appellant,

v.

DOÑA ANA COUNTY BOARD OF COUNTY COMMISSIONERS, doing business as DOÑA ANA COUNTY DETENTION CENTER; PACO LUNA; JAIME CASADO; and SHAYLENE PLATERO,

Defendants - Appellees.

No. 18-2176

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D.C. NO. 2:18-CV-00156-GBW-GJF)

Katherine Wray (Margaret Strickland, McGraw & Strickland, Las Cruces, New Mexico, with her on the briefs) Wray & Girard, PC, Albuquerque, New Mexico, for Appellant.

Damian L. Martinez (Haley R. Grant with him on the brief), Holt Mynatt Martinez P.C., Las Cruces, New Mexico, for Appellees.

Before **TYMKOVICH**, Chief Judge, **BALDOCK**, and **CARSON**, Circuit Judges.

PER CURIAM

This appeal arises from allegations of deliberate indifference to violence among pretrial detainees at a juvenile detention facility in Doña Ana County, New Mexico. After A.L. was booked into the Doña Ana County Detention Center, three other detainees threatened him with physical harm. Corrections officers responded by imposing a highly-restrictive lockdown regime on all three aggressors. Despite these countermeasures, one of the aggressors—while temporarily permitted outside of his cell—accessed the touchscreen control panel that regulated access to cells within the juvenile pod. While corrections officers were distracted, he opened several cells simultaneously. The other two aggressors took this opportunity to physically assault A.L.

Kathy Contreras, A.L.'s mother, subsequently brought this lawsuit against the three corrections officers present during the attack, as well as the Doña Ana County Detention Center. She alleges the defendants violated A.L.'s Fourteenth Amendment right to substantive due process through deliberate indifference to the violence threatened by other detainees. The district court granted the defendants' motion for summary judgment on the basis of qualified immunity. On appeal, a majority of the court concludes the district court did not err. No legal authorities clearly establish a constitutional violation under these circumstances.

We accordingly affirm the judgment of the district court.[1] Chief Judge Tymkovich concurs, concluding that no constitutional violation occurred. Judge Carson concurs, concluding that he would dispose of this case without determining whether a constitutional violation occurred. Judge Baldock concurs in part and dissents in part. He concurs in the affirmance of summary judgment in favor of Defendants Jaime Casado and Shaylene Platero, but he dissents as to Defendants Paco Luna and Doña Ana County, concluding (1) Sergeant Luna violated A.L.'s clearly established constitutional right to protection from violence, and (2) Doña Ana County should also be liable for that violation.

[1] A majority of this court likewise affirms the district court's decision to grant summary judgment to the municipality. Chief Judge Tymkovich concurs on the basis that no constitutional violation occurred, which forecloses municipal liability entirely. Judge Carson concurs on the basis that—although qualified immunity only shields individuals—municipal liability for claims of deliberate indifference must follow only from clearly established constitutional violations.

18-2176, *Contreras v. Doña Ana Board of County Commissioners*

TYMKOVICH, Chief Judge, concurring.

In my view, Ms. Contreras has failed not only to demonstrate the violation of a clearly established constitutional right, but also the violation of a constitutional right at all.

I. Background

On the evening of May 3, 2016, A.L. was booked into the Doña Ana County Detention Center (DACDC) for violating terms associated with his probation. As A.L. was led to his cell, three other detainees—A.H., J.S., and J.V.—spontaneously began banging on their cell doors and yelling to A.L. that they "were gonna f**k him up."

In response, corrections officers placed all three aggressors on pre-disciplinary lockdown ("pre-disc"), which imposed a number of restrictions. While subject to pre-disc, A.H., J.S., and J.V. could only leave their cells for one of several enumerated purposes, and never at the same time. This regime also proscribed any contact with A.L. And it likewise sought to restrict communication among the three aggressors.

The next morning, Officer Casado, Cadet Platero, and Sergeant Luna were in the common area on the first floor of the juvenile pod. While A.L., J.S., and J.V. remained locked in separate cells on the second floor, A.H. obtained

permission to leave his cell for the permissible purpose of a shower. The shower room sat on the first floor, just adjacent to the common area.

Video indicates all three corrections officers watched television in the common area as A.H. finished his shower. Consistent with the restrictions imposed by A.H.'s pre-disc, no other detainee appeared outside of the locked cells. Upon exiting the shower room, A.H. entered the common area, which houses both the commissary kiosk and the touchscreen control panel. The record discloses that Officer Casado had left the control panel unlocked.

A.H. obtained permission from Sergeant Luna to use the commissary kiosk. But as he stands at the kiosk, the video suggests A.H. glances over his shoulder to check whether the corrections officers were paying attention. He then walks off-screen. Moments later, one of the corrections officers—evidently recognizing something amiss—stands suddenly as A.H. reappears onscreen. Around this same time, J.S. and J.V. flee their newly-unlocked cells.

They enter A.L.'s cell, closing the door behind them. J.S. and J.V. then begin assaulting A.L. As they do so, A.H. runs upstairs and locks himself inside his own cell, before Officer Casado can catch him. From downstairs, Cadet Platero re-opens A.L.'s cell. Sergeant Luna eventually subdues A.L.'s attackers with pepper spray. All of this transpires within twenty seconds.

II. Analysis

Ms. Contreras contends the district court erred in concluding the corrections officers' behavior did not violate a clearly-established constitutional right to protection from violence.[1]

We review *de novo* the district court's decision to grant summary judgment. *E.g.*, *Lindsey v. Hyler*, 918 F.3d 1109, 1113 (10th Cir. 2019) (citing *Trask v. Franco*, 446 F.3d 1036, 1043 (10th Cir. 2006) ("On appeal, we review the award of summary judgment based on qualified immunity *de novo*.")). Summary judgment becomes appropriate when there exists no genuine dispute of material fact, such that the moving party is entitled to judgment as a matter of law. *Id.* (citing Fed. R. Civ. P. 56(a)).

In conducting this exercise, we consider evidence and draw inferences in the manner most favorable to the non-moving party. *Id.* (citing *Schutz v. Thorne*, 415 F.3d 1128, 1132 (10th Cir. 2005)). But where, as here, a defendant asserts qualified immunity, the plaintiff must also demonstrate that (1) the defendant violated a constitutional right, and (2) the constitutional right was "clearly established" at the time the violation transpired. *Id.* (citing *Medina v. Cram*, 252

[1] I do not dispute that the officers acted negligently, but our precedent mandates that negligent conduct cannot form the basis for relief under § 1983. *See, e.g.*, *Davidson v. Cannon*, 474 U.S. 344, 347 (1986) (citing *Daniels v. Williams*, 474 U.S. 327 (1986)).

F.3d 1124, 1128 (10th Cir. 2001)). Unless the plaintiff can satisfy both requirements, the defendant will prevail.

We examine each requirement in turn.

A. Constitutional Violation

The Supreme Court has explained that "the treatment a prisoner receives . . . and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment."[2] *Helling v. McKinney*, 509 U.S. 25, 31 (1993). The Court has accordingly construed the Eighth Amendment's prohibition against "cruel and unusual punishments" to encompass certain "restraints on prison officials." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). For example, officials may not apply "excessive" physical force against inmates. *Id*. (citing *Hudson v. McMillian*, 503 U.S. 1 (1992)).

The Supreme Court has likewise held that the Eighth Amendment imposes certain affirmative obligations upon prison officials. Among these obligations are provisions for "adequate food, clothing, shelter, and medical care." *Id*. (citing

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[2] At the time of the assault, A.L. was a pretrial detainee, rather than a convicted prisoner. We accordingly consider this lawsuit under the Fourteenth Amendment's provision for due process, although the Eighth Amendment's prohibition against "cruel and unusual punishments" guides our analysis. *E.g.*, *Perry v. Durborow*, 892 F.3d 1116, 1121 (10th Cir. 2018) (citing *Lopez v. LeMaster*, 172 F.3d 756, 759 n.2 (10th Cir. 1999) ("Pretrial detainees are protected under the Due Process Clause rather than the Eighth Amendment. In determining whether [pretrial detainee's] rights were violated, however, we apply an analysis identical to that applied in Eighth Amendment cases . . .")).

Hudson v. Palmer, 468 U.S. 517, 526–27 (1984)). Most importantly for present purposes, the Court has held that prison officials "must take reasonable measures to guarantee the safety of [] inmates []." *Id*. (citing same).

To the extent prison officials manifest deliberate indifference to any of these affirmative obligations, injured parties may seek redress under § 1983. *E.g.*, *Estelle v. Gamble*, 429 U.S. 97, 104–06 (1976). But this cause of action does not imply that "every injury suffered by one prisoner at the hands of another will translate into constitutional liability for prison officials responsible for the victim's safety." *Farmer*, 511 U.S. at 834 (cleaned up).

To prevail on a constitutional claim for "deliberate indifference," a plaintiff must demonstrate both an objective and a subjective failure on the part of prison officials. *Id*; *see also Smith v. Cummings,* 445 F.3d 1254, 1258 (10th Cir. 2006) ("[T]he plaintiff must show that he is incarcerated under conditions posing a substantial risk of serious harm, the objective component, and that the prison official was deliberately indifferent to his safety, the subjective component.").

1. Objective Inquiry

Where a § 1983 action is premised "on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm." *See id*. (citations and internal quotation marks omitted); *see also Howard v. Waide*, 534 F.3d 1227, 1236 (10th Cir. 2008) ("First, the alleged

deprivation must be sufficiently serious under an objective standard. In cases involving a failure to prevent harm, this means that the prisoner must show that the conditions of his incarceration present an *objective substantial risk of serious harm*." (emphasis added) (citing *Smith,* 445 F.3d at 1258)).

And where the plaintiff alleges deliberate indifference to the threats inmates may pose to one another, he must demonstrate a connection between the conditions of incarceration and the substantial (and particularized) risk of serious harm. *See, e.g.*, *Verdecia v. Adams*, 327 F.3d 1171, 1175 (10th Cir. 2003) ("To establish a cognizable Eighth Amendment claim for failure to protect [an inmate from harm by other inmates], the plaintiff must show that he [was] incarcerated under conditions posing *a substantial risk of serious harm*[,] the objective component . . .") (emphasis added) (citations and quotation marks omitted)).[3]

To the extent any cognizable risk arose from the circumstances the corrections officers faced in this case, it was the possibility that A.H., J.S., and J.V. might make good on their threats to assault A.L., if given the opportunity. The record, however, discloses that corrections officers separated the detainees

[3] In analogous circumstances, we have held that substantial risk of serious harm may exist "where prison officials disregard *repeated* warnings of danger to a particular prisoner and *continually* refuse to make the situation safer, for example by [] separating the prisoner from other inmates who previously have attacked him on *multiple* occasions." *Grimsley v. MacKay*, 93 F.3d 676, 681 (10th Cir. 1996) (emphases added) (citations omitted).

from one another and from A.L. by imposing "pre-disc" requirements on A.H., J.S., and J.V. *immediately upon their first and only threats to* A.L. Corrections officers accordingly restricted the movements of A.H., J.S., and J.V., such that they were not permitted any contact with A.L., one another, or other detainees. Such defensive action on the part of the corrections officers cannot be characterized as objective disregard of substantial risk of serious harm.[4]

It is, of course, true that—despite these precautions—Officer Casado left the control panel unlocked when A.H. exited his cell to shower. And that doing so—whether consciously or not, and whether A.H. knew the panel was unlocked or not—created *some* risk that A.H. might access the control panel, despite the presence of two additional corrections officers nearby and the absence of any other detainees in the common area.

It is likewise true these circumstances created some risk that A.H. might somehow coordinate with J.S. and J.V.—who were segregated from one another upstairs—to unlock A.L.'s cell. And that none of the three corrections officers present would intervene before some combination of A.H., J.S., and J.V. made

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[4] Judge Baldock concludes the plaintiff has satisfied her burden to demonstrate an objective and substantial risk of serious harm. But in reaching that conclusion, he insists that reasonableness requires protective measures sufficient to "ensure A.L.'s safety." Concurring & Dissenting Op. at 14. The failure to prevent harm, however, cannot on its own establish an objective disregard of substantial risk. Put another way, Judge Baldock's conclusion relies on the fact of the assault to establish its likelihood.

good on their threats against A.L. In my view, however, this cascade of unlikely events should not overshadow the countervailing reality that corrections officers responded swiftly and decisively to the sole incidence of threats directed against A.L. by imposing "pre-disc" on A.H., J.S., and J.V.

Given the unlikelihood that A.H.—while subject to "pre-disc"—would successfully access the unlocked control panel in the presence of three corrections officers, I would describe the risk these circumstances posed to A.L. as attenuated, rather than substantial. I would accordingly conclude the plaintiff has failed to demonstrate the requisite substantial risk of serious harm to carry her burden under the objective component of our inquiry.

2. Subjective Inquiry

I would also conclude the corrections officers lacked awareness of the facts necessary to infer subjective knowledge of this risk. Our subjective inquiry requires that prison officials manifest *actual knowledge* of facts from which an inference could be drawn regarding the existence of a substantial risk. *Farmer*, 511 U.S. at 837. The Supreme Court has likewise emphasized that prison officials *must actually draw the appropriate inference*. *Id*. at 837–38 ("[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.").

As a threshold observation, the record discloses nothing to suggest the corrections officers *actually drew the inference* of substantial risk to A.L. To be sure, the record certainly suggests some level of negligence. Taken as a whole, however, the fact that three officers allowed A.H.—and *only* A.H.—outside of his cell while the control panel remains unlocked does not satisfy the subjective inquiry's requirement of actual knowledge.

As Judge Carson's concurring opinion acknowledges, and as Judge Baldock argues in his partial dissent, the case against Sergeant Luna is strongest, on account of his firsthand experience with at least one prior incident of unauthorized access.[5] But even if Sergeant Luna or the others were familiar with these incidents, I do not believe we can conclude they actually drew the inference of substantial risk to A.L. For one, all of these incidents transpired more than a

[5] The record discloses four incidents involving the control panel in the eighteen months that preceded this assault. Two of these cases—October 2014 and February 2015, respectively—apparently involved detainees taunting corrections officers. In the latter instance, the incident report lists Sergeant Luna as the supervising officer. Two other incidents—November 2014 and January 2015, respectively—bear greater similarity to the circumstances of this case. In November 2014, one detainee lured the sole corrections officer present to a nearby closet on the pretext of retrieving a mop so that a second detainee could access the control panel and unlock cells occupied by a third co-conspirator and their eventual victim. The third detainee then attacked the victim in his newly-unlocked cell. In January 2015, a single detainee somehow accessed the control panel to unlock another detainee's cell. It is not clear whether any of the cases involved detainees in pre disc.

year before the attack on A.L. Moreover, only two of them actually involved detainee-on-detainee violence.

From what best I can discern from the record, both incidents involved readily-distinguishable factual circumstances. In the first incident, one detainee lured the duty officer to a nearby closet on pretext of retrieving a mop so that a second detainee could access the control panel and unlock cells occupied by a third co-conspirator and their eventual victim. Notwithstanding a superficial resemblance, several significant differences undermine the connection between this incident and the assault on A.L. As a condition of "pre-disc," A.H. was the sole detainee permitted in the common area. And three corrections officers—as opposed to just one—observed his movements from their perch, just yards away from the commissary kiosk and the control panel.

The record discloses fewer specifics about the details of the second incident. But we know a single detainee somehow accessed the control panel to unlock another detainee's cell. And that he attacked the second detainee. The record does not disclose whether other detainees were present within the common area, or how many, if any, corrections officers might have been supervising the detainees. For these reasons, I would conclude the same logic that undermines the applicability of the previous incident to the assault on A.L. applies to this incident.

None of these distinctions should excuse the non-constitutional significance of these incidents. Whenever a detainee—particularly a juvenile—suffers violence at the hands of another detainee, it is important for the facility to identify and to address whatever underlying issues may have contributed to that harm. By the same token, we must acknowledge that not every wrong will sound in constitutional right and remedy. And—in part because these prior incidents present distinguishable factual circumstances—I cannot infer subjective knowledge of the supposed substantial risk these circumstances posed to A.L.

To the extent, moreover, that we did infer subjective knowledge, Ms. Contreras has provided no evidence to suggest the corrections officers actually reached that inference. Even if I shared the conviction that reasonable corrections officers should have inferred A.H.'s plans from two previous incidents that transpired more than a year prior to these events, the Supreme Court has emphasized that the Eighth Amendment requires more than ordinary recklessness: "[W]e cannot accept petitioner's argument . . . that a prison official who was unaware of the substantial risk of harm to an inmate may nevertheless be held liable under the Eighth Amendment if the risk was obvious and a reasonable prison official *would have* noticed it." *See Farmer*, 511 U.S. at 841–42 (emphasis added). Said simply, we do not require corrections officers to read minds.

Although the corrections officers sought to protect A.L. from harm, it seems likely that negligence undermined their efforts. Negligence offers much cause for concern here; but precedent tells us it cannot elicit constitutional intervention. *See, e.g.*, *Berry v. City of Muskogee*, 900 F.2d 1489, 1495–96 (10th Cir. 1990) (observing that deliberate indifference requires a greater degree of fault than negligence or gross negligence). To be clear, the facility likely could have addressed the risk of detainee-on-detainee violence more effectively. But we must abide by the Supreme Court's mandate to assess both objective risk and subjective awareness of that risk.

The subjective inquiry requires that we ask whether the officers knew of a substantial risk and consciously disregarded the dangers that risk posed to A.L. I cannot infer subjective knowledge of any substantial risk to A.L. from this record. And no evidence indicates the corrections officers manifested the requisite actual knowledge of this risk, in any event. I would accordingly conclude that Ms. Contreras has failed to carry her burden.

B. Clearly Established Law

Even if we were to conclude a constitutional violation had occurred, the circumstances of this case nonetheless cannot satisfy the rigorous standards the Supreme Court has articulated for clearly established law. A "clearly established right is one that is sufficiently clear that every reasonable official would have

understood that what he is doing violates that right." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (citations and quotation marks omitted).

We need not "require a case directly on point," but the Supreme Court has cautioned that "existing precedent must have placed the statutory or constitutional question beyond debate." *Id*. (citations and quotation marks omitted). This is because qualified immunity is meant to "protect[] all but the plainly incompetent or those who knowingly violate the law." *Id*. (citations and quotation marks omitted). The Supreme Court has repeatedly instructed lower courts "not to define clearly established law at a high level of generality." *Id*. (citations and quotation marks omitted).

As the Court has likewise emphasized "[t]he dispositive question is whether the violative nature of *particular* conduct is clearly established." *Id*. (citations and quotation marks omitted) (emphasis in original). Such an inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id*. (citations and quotation marks omitted) (emphasis added).

Ms. Contreras frames the constitutional violation at a high level of generality: "[A] known but disregarded threat to an inmate's physical safety, combined with evidence of prior assaults and information about a specific threat can establish deliberate indifference." Aplt. Br. 21. As a threshold matter, I

doubt this formulation can satisfy the rigorous standards for specificity required by the Supreme Court.[6] *See Mullenix,* 136 S. Ct. at 308.

But even if—for the sake of argument—we take this rule as given, the two Tenth Circuit authorities cited most extensively by Ms. Contreras, *Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990), and *Howard v. Waide*, 534 F.3d 1227 (10th Cir. 2008), do not yield fair notice of a constitutional violation in this case.

In *Berry*, we held that a reasonable jury could conclude corrections officers had manifested deliberate indifference to the prospect of violence when one inmate was murdered by two others he had testified against at trial. 900 F.2d at 1498. Several observations readily distinguish this case from *Berry*. For one, the corrections officers in *Berry* took *no* action upon learning of the potential threat posed by the inmate's co-defendants. In this matter, by contrast, corrections officers placed all three aggressors onto "pre-disc" immediately upon their first and only threats to A.L.

Moreover, in *Berry* the perpetrators freely roamed the facility to access the murder weapon—a wire from a broom stored in a common area—under the

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[6] As Judge Carson acknowledges, we have previously applied a "sliding scale" analysis to determine whether clearly established law prohibits official conduct. I share his reservations regarding the "sliding scale" approach, given recent guidance from the Supreme Court. *See also* Mark. D. Standridge, *Requiem for the Sliding Scale: The Quiet Ascent—and Slow Death—of the Tenth Circuit's Peculiar Approach to Qualified Immunity*, 20 Wyo. L. Rev. 43 (2020).

nominal supervision of just one corrections officer. *Id*. at 1497. In this case—on account of the "pre-disc" precautions we have already discussed—A.H. was permitted outside of his cell only when other detainees were locked securely within theirs. And only then when not one, but three officers were present to oversee his activities. In our view, *Berry* cannot clearly establish a constitutional violation under the circumstances we now consider.

In *Howard*, we reversed the district court's decision granting summary judgment to corrections officers who failed to intervene when a newly-transferred inmate complained that members of the same prison gang who sexually abused him at a prior facility once again had begun to threaten him. 534 F.3d at 1241–42. The inmate was sexually assaulted three times before corrections officers acted on his request to be relocated to a facility that did not contain members of this gang. *Id*. at 1233–34.

In my view, the same central observation that distinguished this case from *Berry* applies with equal force to *Howard*. Here, corrections officers placed all three aggressors onto "pre-disc" lockdown *as soon as they threatened A.L.* Of course, Sergeant Luna, Officer Casado, and Cadet Platero should have been *more* attentive. Perhaps *more* suspicious, too. And certainly *less* distracted by the television. But we cannot ascribe constitutional significance to their negligence.

Both *Berry* and *Howard* clearly establish that credible threats merit reasonable response. These authorities *do not*, however, demand perfection under the challenging circumstances that corrections officers often confront; for the Supreme Court has observed that "not . . . every injury suffered by one prisoner at the hands of another [will] translate into constitutional liability." *Farmer*, 511 U.S. at 834 (cleaned up).

The out-of-circuit authorities cited by Ms. Contreras fare little better. In *Erickson v. Holloway*, 77 F.3d 1078, 1080 (8th Cir. 1996), an inmate accessed an electronic control panel only after corrections officers left the room that housed the panel *entirely unattended for six minutes*. Given the Supreme Court's insistence that we contemplate "the specific context of [this] case," a world of difference separates the facts of *Erickson* from the situation we confront. *See Mullenix* 136 S. Ct. at 308. After all, Sergeant Luna, Officer Casado, and Cadet Platero never left the common room unattended for any period of time.

The same problem undermines Ms. Contreras' reliance upon *Street v. Corrs. Corp. of Am.*, 102 F.3d 810 (6th Cir. 1996). In that case, a corrections officer—using an electronic control panel—opened every door in the unit after one inmate had threatened to assault another. *See id*. at 813–14. The inmate made good on this threat, and the Sixth Circuit reversed the district court's decision granting summary judgment to the corrections officer. *Id*. at 816. In this

case, by contrast, Sergeant Luna, Officer Casado, and Cadet Platero imposed and enforced a regime of "pre-disc" lockdown against A.H. and his co-conspirators that sought to mitigate the risks all three aggressors might pose to A.L.

Nor does the final authority Ms. Contreras cites extensively, *Junior v. Anderson*, 724 F.3d 812 (7th Cir. 2013), clearly establish a constitutional violation under these circumstances. In that case, a corrections officer all but ignored the revelation that two cells that should have been secured remained unlocked. *See id*. at 813–14. After an inmate who should have been secured in one of these cells subsequently joined several others in attacking another prisoner, the Seventh Circuit reversed the district court's decision granting summary judgment to the corrections officer, *who had also abandoned her post for at least fifteen minutes*. *See id*. at 815.

In my view, the same differences that distinguish *Erickson* and *Street* from "the specific context of [this] case" also diminish the significance of *Junior*. *See Mullenix* 136 S. Ct. at 308. Although the record discloses that Officer Casado and Cadet Platero may have realized that the control panel remained unsecured, only *one* detainee—A.H., who was subject to "pre-disc" lockdown—was present in the common area. And all three corrections officers remained just steps away from their charge, as well as the electronic control panel.

It is, of course, true that some "constitutional violation[s] may be so obvious that similar conduct seldom arises in our cases," such that "it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt." *Lowe v. Raemisch*, 864 F.3d 1205, 1210–11 (10th Cir. 2017) (citations and quotation marks omitted). But we have construed this functional exception to the presumption against fair notice quite narrowly, as we must effectively conclude "our precedents render the legality of the conduct undebatable." *See id.* at 1211 (citing *Aldaba v. Pickens*, 844 F.3d 870, 877 (10th Cir. 2016)). This is not such a case.

In sum, no authorities clearly establish a constitutional violation under these circumstances.

III. Conclusion

For the reasons previously articulated, I would affirm the district court's decision to grant summary judgment in this matter.

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CARSON, J., Concurring in part and concurring in the judgment

Make no mistake. We expect corrections officers to protect those under their supervision—especially children. The officers here—more attuned to a television show than the juveniles in their charge—allowed violent inmates to brutally assault A.L. I find their failure to protect A.L. inexcusable. But 42 U.S.C. § 1983 provides no remedy to Plaintiff for unprofessional or negligent conduct. Instead, Plaintiff may only recover against the officers if they violated a clearly established constitutional right. We begin, therefore, by determining whether Plaintiff has met her burden.

Plaintiff credibly argues that the officers' conduct violated A.L's constitutional rights. She presents a strong case against the supervisor—Officer Luna. After all, he knew that inmates previously accessed the control panel to commit violence against one another. But the other officers did not share Luna's prior knowledge. So the case against them is not so clear.

Even so, I would not reach the constitutional question because, even if the officers violated A.L's constitutional rights, those rights were not clearly established. When our body of caselaw contains no case with remarkably similar facts, we look to a "sliding scale" analysis to determine whether clearly established law prohibited an officer's conduct. Casey v. City of Fed. Heights, 509 F.3d 1278, 1284 (10th Cir. 2007). Under the sliding scale, the worse the conduct given prevailing constitutional principles, the less specificity is required from prior caselaw to clearly establish the violation. Id.

Some recent decisions suggest the sliding scale approach may conflict with current Supreme Court authority, but no case has overruled it. See Lowe v. Raemisch, 864 F.3d 1205, 1211 n.10 (10th Cir. 2017) (noting our sliding scale approach may allow us to find a clearly established right even when a precedent is neither on point nor obviously applicable); Aldaba v. Pickens, 844 F.3d 870, 874 n.1 (10th Cir. 2016). With no case overruling it, the sliding-scale approach lives in this Circuit. But that said, we must apply it cautiously as contemporary Supreme Court cases require an ever-increasing level of factual similarity for prior decisions to place a statutory or constitutional question beyond debate.[1] Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (emphasizing that Court has repeatedly told lower courts not to define clearly established law at a high level of generality).

I view this case as exceedingly close on both prongs of the qualified immunity analysis. Ultimately, however, I conclude the precedents from this Circuit and the Supreme Court do not place the constitutional question beyond debate (even considering the sliding scale approach). Plaintiff's claims must therefore fail against the individual officers. So I join Chief Judge Tymkovich's opinion as far as it addresses the "clearly established" prong of the qualified immunity analysis. Because I would not reach the

[1] The Supreme Court has remanded at least one case we decided under the sliding scale approach for further consideration of whether the relevant body of law "clearly established" a constitutional question. Pickens v. Aldaba, 136 S. Ct. 479 (2015). Although we originally decided the sliding scale warranted finding a right "clearly established," on remand we determined our prior caselaw did not sufficiently mirror the factual circumstances of the case to sustain that finding. Aldaba, 844 F.3d at 879.

constitutional question, I join neither Judge Baldock's nor Judge Tymkovich's well-presented analysis of that issue.

That leaves Plaintiff's Monell claim against the Board. The district court determined that Plaintiff's claim against the Board failed as a matter of law because she did not satisfy the third element for municipal liability—deliberate indifference. The district court determined that the Board could not be *deliberately* indifferent to a constitutional right unless the right is clearly established. See, e.g., Arrington-Bey v. City of Bedford Heights, 858 F.3d 988, 994 (6th Cir. 2017). And because the district court found the right was not clearly established, it ruled the Board could not have been deliberately indifferent to A.L.'s rights. I agree.

Whether a municipal policymaker can be liable for deliberate indifference to a constitutional right that has not yet been established is an interesting one. And the answer depends on the type of claim alleged against the municipality. Consider first a claim based directly on a municipal act such as the termination of a municipal employee without due process. In that case, "the violated right need not be clearly established because fault and causation obviously belong to the city." Arrington-Bey, 858 F.3d at 994–95.

But then consider a claim based on a municipality's failure to properly train its employees. There, the theory stems from the municipality's failure to teach its employees not to violate a person's constitutional rights. In that posture, the "municipality's alleged responsibility for a constitutional violation stems from an *employee*'s unconstitutional act [and the municipality's] failure to prevent the harm must

be shown to be deliberate under 'rigorous requirements of culpability and causation.'" Id. at 995 (quoting Bd. of Cty. Comm'rs of Bryan Cty. v. Brown, 520 U.S. 397, 415 (1997)). Thus, the violated right in a failure to train case "must be clearly established because a municipality cannot *deliberately* shirk a constitutional duty unless that duty is clear. Id. The Second, Sixth, and Eighth Circuits have each reached this conclusion. Townes v. City of New York, 176 F.3d 138, 143–44 (2d Cir. 1999); Arrington-Bey, 858 F.3d at 995; Szabla v. City of Brooklyn Park, 486 F.3d 385, 393 (8th Cir. 2007) (en banc).

Judge Baldock believes that in application this means the district court inappropriately granted the Board qualified immunity. I agree that municipalities cannot invoke the doctrine of qualified immunity. Owen v. City of Independence, 445 U.S. 622, 624–25 (1980) (holding that municipalities cannot assert the doctrine of qualified immunity). But this case differs remarkably from Owen. Owen arose from a claim of deliberate municipal indifference where the municipality directly caused the constitutional injury. Id. at 633. Here, by contrast, Plaintiff advances a failure to train theory in which she "must show not only that an employee's act caused a constitutional tort, but also that the city's failure to train its employees caused the employee's violation *and* that the city culpably declined to train its 'employees to handle recurring situations presenting an obvious potential for such a violation.'" Arrington-Bey, 858 F.3d at 995 (citing Brown, 520 U.S. at 409). The Supreme Court's statement "obvious potential for such a violation" requires that the constitutional violation be obvious (i.e., clearly established). Requiring that the right be clearly established in this context does not give

qualified immunity to municipalities; it simply follows the Supreme Court's demand "that deliberate indifference in fact be deliberate." Arrington-Bey, 858 F.3d at 995 (citing Szabla, 486 F.3d at 394).

Plaintiff alleged the County engaged in deliberate indifference by failing to adequately train its correction officers. For the reasons discussed above, however, Plaintiff's claim must fail because she cannot show the right the Board violated was obvious. I would therefore affirm the district court's order granting summary judgment to the Board on the Monell claim. I thus concur in the judgment on the Monell claim, although on a different ground than Chief Judge Tymkovich who concluded no constitutional violation occurred.

For these reasons, I respectfully concur in part and concur in the judgment.

18-2176, *Contreras v. Doña Ana Board of County Commissioners*

BALDOCK, Circuit Judge, concurring in part, dissenting in part.[1]

Corrections officers cannot absolutely guarantee the safety of those in their care. Nor does the Constitution sweep so broadly as to require every cell in a detention center to always remain locked for the protection of its guests. But after violent threats have been made by a group of particularly violent detainees, any reasonable official cognizant of his duty to protect would know that the failure to secure the control panel while a would-be assailant is outside his cell is objectively unreasonable.

As my colleagues accurately point out, qualified immunity protects "all but the plainly incompetent." Concurring Op. at 13 (Tymkovich, C.J.) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam)). Because Sergeant Luna's conduct was plainly incompetent, qualified immunity should afford him no shelter. And because Doña Ana County Detention Center (DACDC) was deliberately indifferent to a pattern of tortious conduct by its employees, it cannot be shielded from liability on the ground that A.L.'s asserted constitutional right was not clearly established. For these reasons, I would reverse the district court's grant of summary judgment to Sergeant Luna and the DACDC and remand for further proceedings. I therefore respectfully dissent.

[1] The parties have my apologies for the delay in issuing this decision. Unfortunately, too many cases in our civil justice system today drag on for far too long. My colleagues and I strive to counteract this lamentable trend by efficiently resolving appeals. But sometimes we fail, and it is the parties who must bear the burden of our shortcomings.

I.

The historical facts relevant to this appeal, unlike the inferences to be drawn from them, are undisputed.[2] On the evening of May 3, 2016, officials booked A.L., then fourteen years old, into the DACDC after he allegedly violated his probation by disregarding his curfew. At the time of A.L.'s detention, the three juveniles responsible for the forthcoming attack on him, J.V., J.S., and A.H., were also detained at the DACDC. All three juveniles had exhibited disciplinary problems just days and hours prior to their attack on A.L.

On April 25, 2016, for example, J.S. attacked another juvenile detainee in the dayroom "by punching him several times in the face." Three other detainees were soon attacking the victim as well. J.S. stated he attacked the victim because he "had been talking shit the day before." DACDC officials placed J.S. on "pre-disciplinary lockdown" (pre-disc) for his aberrant behavior.

A.H was also placed on pre-disc on April 22. A DACDC caseworker's notes on A.H. indicate that on April 25 "[p]er Sgt. Luna[,] [A.H.] is not able to go to medical for lab draw due to inmate being aggressive and uncooperative with staff at this time. Per Sgt. Luna[,] 'it is not safe to take [A.H.] out of his cell.' Will continue to monitor." As reflected by a psychiatrist's evaluation report, A.H. believed he had an "anger problem" and that "people [were] wanting to get [him]." A.H. stated: "I go off on everyone when I get mad."

[2] To properly analyze whether Plaintiff has carried her burden to withstand the defense of qualified immunity at the summary judgment stage, one must begin by considering *all material facts* contained in the record. Chief Judge Tymkovich conspicuously discounts, among other things, recent past incidents in the DACDC juvenile pod where detainees accessed the control panel and the three assailants' known violent tendencies—in particular those of A.H.

When A.H. was taken off pre-disc on April 30 and allowed to leave his cell, he wasted no time in yelling out "it's time to get on lockdown again." Moments later, A.H. approached a table in the dayroom where J.V. sat with J.S. and said something to J.S. At this point, J.V. and A.H. began to argue. J.V. then stood up and "went towards [A.H.] and began punching him in the face and head with closed fists. [A.H.] . . . punched back with closed fists." After officers separated the two miscreants and medical staff cleared A.H., he returned to the dayroom. There, A.H continued his disruptive behavior by yelling "obscenities and gang slurs toward [J.V.]," causing yet another fight. J.V. reported the fight broke out because "[A.H.] kept talking 'shit' to him and . . . went after him." As a result of their altercation, both J.V. and A.H. were placed on pre-disc.

Following lockdown around 9:30 p.m. on May 3, the evening before the attack on A.L., the three soon-to-be assailants, all fresh off pre-disc, once again became disruptive. J.V. began banging on his cell door, broke his county-issued cup and deodorant stick, and covered his cell window with his mattress and sheets. Even after the officer on duty uncovered J.V.'s window, he continued to bang and kick on his door. Around 10:15 p.m., J.S. and A.H. joined J.V. and began kicking on their cell doors. The juveniles refused to discontinue their disruptive behavior.

Around 10:22 p.m., officials brought A.L. into the juvenile pod's dayroom. The dayroom is surrounded by two levels of individual cells. J.V., J.S., and A.H. were housed separately on the pod's second level. When A.L. entered the dayroom, the trio began yelling at A.L., telling him they were going to "fuck him up." A.L. was placed in a cell on

the second level near the others. As a result of their disruptive behaviors and threats, J.V., J.S., and A.H. were again placed on pre-disc. While on pre-disc, the three juveniles were to be confined to their cells except when they were individually permitted to engage in recreation time, shower, use the phone, and access the commissary kiosk. None of the three were allowed out of their cells while any one of the others or A.L. was out of his cell.

Shortly after 9:00 a.m. the next morning, A.H., still on pre-disc, was alone outside his cell. He had just finished showering in the shower room located on the north side of the dayroom. Consistent with their placement on pre-disc the night before, J.V. and J.S. remained locked in their cells, as did A.L. Defendants, Sergeant Luna, Officer Casado, and Cadet Platero, were sitting at tables in the juvenile pod's dayroom watching television. Officer Casado, who had been employed at the DACDC for just over a year, was the assigned dayroom officer. Sergeant Luna, the supervising officer, had been employed at the DACDC for twenty-three years. Cadet Platero had been employed at the DACDC for just over two months.

All three Defendants knew J.V., J.S., and A.H. had threatened to assault A.L. the night before and were on pre-disc as a result. The record is unclear as to whether Casado or Platero were aware of the precise nature of the trio's recent disciplinary problems at the DACDC, but Defendants' response brief tells us they knew the three were "generally violent." The brief also tells us Sergeant Luna knew the three had "histories of assault at DACDC." And Sergeant Luna specifically was aware, as illustrated by the caseworker's April 25 notes on A.H., that A.H. was a problem and *not to be trusted outside his cell*.

Located on the juvenile pod's west wall in front of where the individual Defendants were sitting was a commissary kiosk. Five to ten feet left of the kiosk, on a podium referred to as the "Officers' Platform Station," was a control panel used to electronically lock and unlock the juvenile pod's cell doors. The control panel is a touchscreen device that allows an officer to lock or unlock individual cell doors with the touch of a button after entry of a security code or password. Officers may log off or lock the panel with the touch of a button rendering it ineffective until someone with a security code once again logs in.

The closest thing in the record to a written DACDC policy about locking the control panel is found in a code of ethics contained in the "Standard Operating Procedures" manual for the DACDC. The code provides:

> A. If an officer is going to leave his workstation, it must either be locked or the officer must log off.
>
> B. If an officer happens to come upon a workstation that was left open and unlocked by another user, it is the officer's responsibility to log that user off and log in under their username and password if they are going to use it.

After showering, A.H. asked Sergeant Luna for permission to access the commissary kiosk. Sergeant Luna granted permission. On a security tape, one sees J.V. and J.S. standing in their second-level cells watching events transpire in the dayroom. As A.H. approached the kiosk, he looked over his shoulder to see if any of the Defendants were paying attention. They were watching TV. When A.H. sensed

his opportunity, he approached the control panel, which he obviously suspected might be unlocked (he was right), and proceeded to open J.V.'s, J.S.'s, and A.L.'s cell doors.

J.V. and J.S. immediately exited their cells and ran into A.L.'s neighboring cell, closing the door and causing it to lock behind them. Making good on their threats, J.V. and J.S. began to beat A.L. A.H. avoided Officer Casado's pursuit, ran up the stairs, and locked himself in his own cell while the chaos ensued. Sergeant Luna and Officer Casado ran upstairs to A.L.'s cell. Cadet Platero opened A.L.'s cell from the control panel down below. When J.V. and J.S. refused to stop beating A.L., Sergeant Luna doused the two with pepper spray. A.L. was transported to the hospital. As a result of the attack, he suffered a broken jaw, was rendered unconscious, and was left bleeding from both ears.

The day after the attack on A.L., Lieutenant Mendoza of the DACDC's Professional Standards Unit interviewed Sergeant Luna and Officer Casado. Officer Casado said this about securing the control panel in the juvenile pod:

> [Casado] did confirm that the control panel can be locked if needed but that he does not remember if he locked it in this instance. *He stated that he believes nobody on his shift logs off from the panel as normal practice when he walks away from the officers' podium. He stated that since he has been assigned to juvenile . . . he has never been directed to log off the panel*. He did confirm that he was the last person at the officers' podium before the incident occurred.

Sergeant Luna disagreed with Casado, however, when Mendoza questioned him about control panel procedures in the juvenile pod:

> I questioned [Sgt. Luna] regarding whether or not officers on his shift are locking the control panel when they locate themselves away from the podium. He stated that it is common practice for staff on his shift

> to lock the panel but that he was not watching to see if Casado locked it in this instance. He stated that he has to assume that Casado would have locked it as other officers do, but he does not stand next to all officers each time they move away from the podium. He stated that ever since juvenile had been moved to the adult side, *there was never a directive given to him about locking the panel although it was getting done*.

Rather than submitting to an interview the day after the incident, Cadet Platero drafted a memorandum in which she indicated that "when she observed Officer Casado get up from his post at the officers' podium to sit at the table, she noticed that he did not lock the control panel that opens each cell in the dayroom." During an interview with Lieutenant Mendoza about three weeks after the incident, Platero confirmed that she witnessed "Officer Casado walk away from the officers' podium without locking the control panel."

Notably, in an affidavit executed two months after the attack on A.L., Officer Casado changed his story. Casado now attests that during his training at the DACDC, he was "specifically" told (I wonder by whom) that the policy of the DACDC was to log out of the control panel after he used it, rendering the control panel ineffective until someone with a security code once again logged in. Casado says he was "never" instructed nor allowed to leave the control panel unlocked.

Cadet Platero similarly attests that during her training she was instructed (I wonder by whom) on the use of the control panel: "I was trained that I should always lock or log out of a control panel before leaving it. Before the incident, I saw Casado leave the control panel unlocked which I knew to be a policy violation, but I did not alert anyone." Sergeant Luna attests that he instructs all officers under his supervision "to lock

all pods' control panels, including the juvenile pod." Sergeant Luna states he has "never" instructed a cadet or detention officer to leave the control panel unlocked at the DACDC; nor is he aware of any other sergeants or supervising officers ever having done so.

Importantly, A.H.'s unauthorized use of the unlocked control panel was not the first time a detainee at the DACDC had improperly accessed the control panel in the juvenile pod's dayroom. Juvenile detainees had accessed the control panel on at least four prior occasions beginning in October 2014, or about eighteen months prior to the attack on A.L. On October 25, 2014, a detainee insisted on crossing his body over the "red line" in front of the control panel. After being warned, the detainee again crossed the red line and leaned his body against the control panel. As a result, DACDC officials placed him on pre-disc. The fourth incident was much like the first. On February 12, 2015, a juvenile detainee at the DACDC "kept crossing the red line and laying [his] hands on the control panel." When the detainee crossed the line and touched the control panel a second time, he too was placed on pre-disc. The incident report lists Sergeant Luna as the juvenile pod's supervising officer at the time of this infraction.

Unfortunately, the second and third incidents involving a juvenile detainee's unauthorized access to the control panel were not so harmless. The similarities between those two incidents and the incident at issue are substantial. Less than a month after the first incident, on November 23, 2014, a juvenile detainee asked the officer on duty to retrieve a mop from the dayroom closet. When the officer did so, a second detainee accessed the dayroom's control panel, which was unlocked, and opened the cells of a third and fourth detainee. The third detainee then ran from his unlocked cell into the unlocked

cell of the fourth detainee and attacked him. After order had been restored, an assisting officer was escorting the third detainee to booking when he saw him toss a white object toward the trash can. The object was a sharpened portion of a toothbrush designed for use as a weapon.

A third incident occurred on January 20, 2015. On that date, a juvenile detainee attacked another detainee in the latter's cell. The assailant told officials that "he went towards the officers' desk, crossed the red line and opened the other detainee's cell by pushing a button on the dayroom [control] panel." The assailant admitted he went into the victim's cell and threw the first punch because the victim had called him a "snitch." According to the incident report, both detainees were placed on pre-disc and the "dayroom panel was disabled due to this incident." When the control panel in the juvenile pod again became operational is unclear from the record—certainly too soon from A.L.'s perspective.

II.

To survive summary judgment as to Defendants' individual liability under § 1983, Plaintiff must show (1) sufficient evidence exists for a factfinder to conclude one or more of the individual Defendants violated A.L.'s constitutional right to due process by failing to protect him from violence at the hands of other detainees, and (2) this right was clearly established at the time of the violation. *Matthews v. Bergdorf*, 889 F.3d 1136, 1143 (10th Cir. 2018). Because the individual Defendants assert the defense of qualified immunity, the burden is on Plaintiff to establish her right to proceed against *each* Defendant individually. *Id.* at 1144–45. Plaintiff has undoubtedly carried this burden with respect to her claim against Sergeant Luna.

A.

In determining whether A.L.'s constitutional rights were violated, we must view the evidence in the light most favorable to Plaintiff and refrain from resolving factual disputes in favor of the individual Defendants (i.e., the parties seeking summary judgment). *See McCoy v. Meyers*, 887 F.3d 1034, 1044–45 (10th Cir. 2018). When *all* the evidence is properly considered under this standard, a reasonable jury could find Sergeant Luna was deliberately indifferent to the substantial risk of harm with which J.V., J.S., and A.H. had threatened A.L.

1.

The point of departure for our inquiry into whether any of the individual Defendants caused A.L. to suffer a constitutional deprivation is the Supreme Court's decision in *Farmer v. Brennan*, 511 U.S. 825 (1994). *Farmer* established that the Eighth Amendment's prohibition against cruel and unusual punishment imposes a duty on officials to provide prisoners with "humane conditions of confinement." *Id.* at 832. Prison officials who are aware of a substantial risk to an inmate's safety have a duty to protect the inmate from harm and therefore must take reasonable steps to guarantee his safety. *Id.* at 832–33.

But of course, absent a formal adjudication of guilt against A.L., the Eighth Amendment has no application. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). Nevertheless, "[i]n evaluating the constitutionality of conditions . . . of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, . . . the proper inquiry is whether those conditions amount to punishment of the detainee."

Id. at 535. To determine whether the evidence is sufficient for a jury to find any or all of the individual Defendants "punished" A.L. and deprived him of liberty without due process of law in violation of the Fourteenth Amendment, Tenth Circuit precedent requires us to employ an analysis identical to the analysis we employ in Eighth Amendment cases challenging a prisoner's conditions of confinement under a failure-to-protect theory. *Perry v. Durborow*, 892 F.3d 1116, 1121 (10th Cir. 2018); *cf. Wolfish*, 441 U.S. at 546 n.28 (finding "no reason" to distinguish between pretrial detainees and convicted inmates in reviewing a correctional center's security practices).

Before a jury may find an individual Defendant violated A.L.'s right to due process, Plaintiff must satisfy two elements: one objective and one subjective. *Farmer*, 511 U.S. at 834. To satisfy the objective component, Plaintiff must show A.L. was detained "under conditions posing a substantial risk of serious harm." *Id.* If Plaintiff satisfies this objective prong, she must then establish that at least one of the individual Defendants was deliberately indifferent to the substantial risk A.L. faced. *Id.* This is a subjective inquiry. *Id.*

While "deliberate indifference entails something more than mere negligence, . . . it is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Id.* at 835. "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837. "[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while

no cause for commendation, cannot . . . be condemned as the infliction of punishment."[3] *Id.* at 838. In short, "deliberate indifference is equivalent to recklessness in this context." *Smith v. Cummings*, 445 F.3d 1254, 1258 (10th Cir. 2006).

2.

On this record, viewing the evidence in the light most favorable to Plaintiff, a reasonable jury could conclude that A.L. faced an "objective 'substantial risk of serious harm.'" *Howard v. Waide*, 534 F.3d 1227, 1236 (10th Cir. 2008) (quoting *Farmer*, 511 U.S. at 834). When DACDC officials escorted A.L. to his cell the night before the attack, three juvenile detainees with very recent histories of disciplinary

[3] In *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), the Supreme Court held an objective reasonableness standard governs excessive force claims brought by pretrial detainees under the Fourteenth Amendment. In *Castro v. Cty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (en banc), the Ninth Circuit imaginatively interpreted *Kingsley* and held an objective standard also governs failure-to-protect claims of pretrial detainees raised under the Fourteenth Amendment. And In *Darnell v. Pineiro*, 849 F.3d 17 (2d Cir. 2017), the Second Circuit followed suit. For years, however, federal courts across the land, including the Tenth Circuit, have relied on *Wolfish* to apply *Farmer*'s subjective deliberate-indifference standard to claims that state actors failed to protect pretrial detainees in violation of the Fourteenth Amendment. *See, e.g.*, *Lopez v. LeMaster*, 172 F.3d 756, 759 n.2 (10th Cir. 1999); *Walton v. Dawson*, 752 F.3d 1109, 1117–18 (8th Cir. 2014). To suggest *Kingsley* overturned such long-standing precedent, uninvited and *sub silentio*, simply proves too much. Absent the Supreme Court overturning its own precedent or our own, we are bound by it. And I suspect the Court may never do so because, as Judge Ikuta ably points out in her dissent to *Castro*, a fundamental difference exists between the *action* underlying an excessive force claim and the *inaction* underlying a deliberate-indifference claim: "[A] person who unknowingly fails to act—even when such a failure is objectively unreasonable —is negligent at most. And the Supreme Court has made clear that 'liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.'" *Castro*, 833 F.3d at 1086 (Ikuta, J., dissenting) (quoting *Kingsley*, 135 S. Ct. at 2472).

problems involving violent encounters at the DACDC, and housed in close proximity to A.L., directly threatened to "fuck him up" while raising a ruckus. As a result, the three juveniles, each of whom could turn violent with little warning, had been placed on pre-disc *precisely to alleviate a substantial risk of serious harm to A.L., themselves, and others*.

According to Defendants and Chief Judge Tymkovich, these circumstances did not present a substantial risk of harm because the juvenile assailants were placed on pre-disc and three corrections officers were present—physically, at least—in the dayroom when the attack occurred. Based on these "precautions," Defendants maintain that an unsecured control panel cannot, as a matter of law, result in § 1983 liability for failure to protect A.L. What this conclusion conveniently fails to acknowledge is this: A.H. was one very troubled and volatile miscreant on the loose within easy reach of an unlocked control panel. That panel provided ready access to J.V.'s, J.S.'s, and A.L.'s cells. And those cells were located upstairs in close proximity to one another but at a distance from Defendants downstairs, who were charged with the duty to protect A.L.

Because the kiosk and control panel were in such close proximity, and J.V.'s, J.S.'s, and A.L.'s cells were far removed from the control panel, a dozen DACDC guards in the dayroom watching TV would not have prevented A.H. from rushing the control panel and pushing the few buttons necessary to unlock the cell doors and facilitate the attack on A.L. After all, what did A.H. have to lose? Another placement on pre-disc? The facts well illustrate that A.H. could not have cared less whether he was on pre-disc. He was on pre-disc repeatedly. Under these circumstances, branding the attack

on A.L. as the culmination of a "cascade of unlikely events" and labeling the risk he faced as "attenuated," *see* Concurring Op. at 7–8 (Tymkovich, C.J.), wholly ignores both the reality of the situation presented and the reality of involuntary detention.

Defendants further argue the fact the three assailants, after threatening A.L., had been placed on pre-disc with its accompanying restrictions illustrates reasonable measures were taken to avert the attack. The question, however, is not whether placing the three miscreants on pre-disc was a reasonable thing to do. It surely was given the trio's recent unruly and violent behavior at the DACDC. But pre-disc is nothing more than a label. Its terms must be enforced by reasonable and appropriate measures.

The central question here is whether the individual Defendants acted reasonably by leaving the control panel unsecured given the circumstances described above. Placing the three juveniles on pre-disc and "segregating" them from each other and A.L. could not alone ensure A.L.'s safety if such segregation was not maintained through the implementation of reasonable measures such as securing the cell doors. "In determining whether prison officials acted reasonably, we consider what actions they took, if any, as well as available alternatives that might have been known to them"—like securing the juvenile pod's control panel *precisely because* the assailants were on pre-disc for threatening A.L. with bodily harm. *Howard*, 534 F.3d at 1240.

A.H. was a known problem with a recent history of violent outbursts at the DACDC. In fact, just one week before the attack on A.L., Sergeant Luna reported it was not safe to take A.H. out of his cell. Half measures—such as sitting in the juvenile pod watching TV near an unlocked control panel while A.H. wandered the dayroom—availed A.L. nothing.

Defendants' delayed reactions when A.H. rushed the control panel, as the video of the incident shows, belies any claim that the corrections officers "observed his movements from their perch[.]" *See* Concurring Op. at 7–8 (Tymkovich, C.J.).

Just as the effectiveness of prison segregation depended on keeping cell door keys out of the hands of would-be assailants prior to advances in technology, the effectiveness of the segregation in this case depended on the control panel being locked and inaccessible—a wholly unremarkable proposition. As Defendants admit in their brief: "*Excluding* the unlocked control panel and [A.H.'s] access to it, DACDC's preventative discipline and supervision were reasonable." (emphasis added). With that much I agree. Thus, I would conclude that Plaintiff has created a triable issue as to whether the individual Defendants disregarded the substantial risk of serious harm A.L. faced "by failing to take reasonable measures to abate it." *See Farmer*, 511 U.S. at 847.

3.

The next question is whether a reasonable jury could find any of the individual Defendants recklessly disregarded the risk of serious harm to A.L when the control panel was left unlocked and accessible to A.H. on the morning of the attack. A jury cannot decide a detention center official's failure to protect a victim amounted to deliberate indifference if they preliminarily find he or she failed to perceive the significant risk of harm to the victim, no matter how objectively obvious. *Id.* at 838. Where the risk is obvious such that a reasonable person would realize it, a jury certainly may infer that a defendant did in fact realize it. *Id.* at 842. Such an inference cannot be conclusive, however, "for we know that

people are not always conscious of what reasonable people would be conscious of." *Id.* (quoting 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 3.7, p. 335 (1986)).

Although it is an extremely close call, I would conclude that Plaintiff has failed to carry her burden on the subjective prong with respect to Officer Casado and Cadet Platero. To be sure, sufficient evidence exists to conclude these Defendants knew they were required to keep the control panel locked when not in use. Cadet Platero also knew that Officer Casado's failure to secure the panel was a violation of DACDC policy because she was trained (who trained her she does not say) to lock the panel before leaving it. And of course, any reasonable person would realize it is unsafe to leave a control panel unlocked in a juvenile detention center at any point—much less after violent threats have been made.

But what is missing from the calculus is evidence that these junior officers were aware of facts from which the inference could be drawn, and also drew the inference, that leaving the control panel unlocked posed a serious risk of harm to A.L. *See id.* at 837–38. Nothing suggests, for example, that either of these corrections officers were aware of the past incidents at the DACDC where detainees accessed the unsecured control panel and opened the cell doors to attack other detainees. Although Officer Casado and Cadet Platero indisputably acted negligently—and, in my view, with gross negligence—their nonfeasance ultimately falls short of deliberate indifference.

The same cannot be said for Sergeant Luna, however. Based on the conflicting record evidence, a jury could infer that Sergeant Luna was aware the control panel was unlocked at the time of the attack on A.L because it was routinely unlocked. Such an inference arises from (1) Defendant Casado's statements (in direct conflict with Sergeant's

Luna's statements) that he believed nobody on his shift ever logged off the control panel in the juvenile pod and he had never been trained or directed to do so; (2) Defendant Platero's statement that she witnessed Casado move away from the control panel without locking it just prior to the attack but said or did nothing; (3) the "pervasive" factual dispute, as recognized by the district court, surrounding DACDC control panel protocol or lack thereof; and (4) A.H.'s decision to access the panel the morning of the attack.

A reasonable jury could further infer that, as a DACDC sergeant with supervisory responsibilities and direct knowledge of one prior incident, Luna was aware of past problems surrounding operation of the control panel in the juvenile pod. On two previous occasions within the past eighteen months, juvenile detainees accessed an unlocked control panel in order to precipitate attacks on other detainees—the same unfortunate scenario we face here. Notably, the second of these two incidents prompted DACDC officials to disable the control panel in the juvenile pod for an unspecified time period. Sergeant Luna must have known that the control panel in the juvenile pod was disabled for a time precisely because of these attacks given his supervisory position at the DACDC. Moreover, Sergeant Luna was the supervising officer in the juvenile pod on a subsequent occasion when a detainee approached the control panel and, as a result, was placed on pre-disc.

The past incidents involving the control panel at the DACDC cannot be dismissed as too remote from and dissimilar to the facts presented here to bear on Sergeant Luna's state of mind. It is true that the first incident involved two detainees outside their cells, whereas A.H. was the sole detainee permitted in the dayroom at the time of the attack on A.L. But this begs the question: How many juvenile detainees does it take to access an

unsecured control panel and push a button or two? If past incidents at the DACDC are any indication, two may be better, but one is enough.

Indeed, the January 20, 2015 incident involved a single detainee who accessed the control panel, opened another detainee's cell, and then proceeded to assault his fellow detainee in the latter's cell. Because the record does not provide any additional details, Chief Judge Tymkovich attempts to discount this incident by summarily "conclud[ing] the same logic that undermines the applicability of the previous incident to the assault on A.L. applies to this incident." Concurring Op. at 10 (Tymkovich, C.J.). Properly viewing the evidence in the light most favorable to Plaintiff, however, leads to the opposite conclusion—that is, the similarities between this incident and the incident at issue are substantial. *See McCoy*, 887 F.3d at 1044–45 (explaining we must consider the facts and all inferences in the light most favorable to the party asserting the injury).

Last, but not least, don't forget about Sergeant Luna's particular knowledge regarding A.H.'s violent propensities. Recall that Sergeant Luna specifically was aware, as illustrated by the DACDC caseworker's April 25 notes, that A.H. was especially dangerous and could not be trusted outside his cell. Yet, rather than keep an eye on A.H. while he roamed free in the dayroom, Sergeant Luna decided to watch TV. Based on Sergeant Luna's delayed reaction after A.H. accessed the control panel, there must've been a good show on that morning.

As John Adams once reminded us: "Facts are stubborn things; and whatever may be our wishes, inclinations, or the dictates of our passions, they cannot alter the state of the facts and evidence." John Bartlett, *Familiar Quotations* 380 (15th ed. 1980). Given

Sergeant Luna's knowledge of past incidents involving the control panel and the particular risk A.H. posed outside his cell—combined with all the other material facts in the record—Luna's mental state at the time of the attack is within the province of a jury, not this Court. For these reasons, I would conclude Plaintiff has carried her burden of demonstrating Sergeant Luna was deliberately indifferent to A.L.'s safety and violated his constitutional right to protection from violence.

B.

This brings me to the second part of our qualified-immunity analysis. My colleagues conclude that Sergeant Luna is entitled to qualified immunity even if he violated the Constitution because A.L.'s asserted constitutional right was not clearly established at the time of the violation. Respectfully, I remain unpersuaded.

1.

Whether Sergeant Luna may be held liable for his wrongdoing at this point turns on the "objective legal reasonableness" of his conduct assessed in light of (1) the factual context of this case and (2) the legal rules that were "clearly established" at the time of the attack. *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) (facts); *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (rules). Sergeant Luna has nothing to worry about if his "actions could reasonably have been thought consistent with the [rules] [he] [is] alleged to have violated." *Anderson*, 483 U.S. at 638.

In every case, we first look for a Supreme Court or Tenth Circuit decision on point to determine whether the legal rule under which a plaintiff seeks to hold a defendant liable is clearly established. *Cordova v. Aragon*, 569 F.3d 1183, 1192 (10th Cir. 2009). Absent

any such decision, we consider whether the clearly established weight of authority from our sister circuits holds the rule to be as the plaintiff maintains. *Id.* Neither the Supreme Court nor this Court, however, has ever required "the very action in question" to have "previously been held unlawful." *Anderson*, 483 U.S. at 640; *Halley v. Huckaby*, 902 F.3d 1136, 1149 (10th Cir. 2018) ("[A] prior case need not be exactly parallel to the conduct here for the officials to have been on notice of clearly established law."). Instead, "in the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640.

To be sure, prior decisions involving similar facts provide strong support for a conclusion that the law was clearly established. This is why, in most cases, "like" decisions are necessary before we reach such a conclusion. They are not necessary in every case, however, because the Supreme Court has told us that "general statements of the law are not inherently incapable of giving fair and clear warning" to reasonable persons. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)).

Hope recognized that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has not previously been held unlawful.'" *Id.* (quoting *Lanier*, 520 U.S. at 271). Such recognition was possible because, in *Hope*, the Court "shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional." *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004) (McConnell, J.).

Accordingly, qualified immunity should not be granted "if government defendants fail to make reasonable application of the prevailing law to their circumstances." *Id.* (internal quotations omitted).

While "like cases" undoubtedly bear upon "fair notice," the relevant standard in ascertaining "clearly established law" is the latter, not the former. The qualified-immunity standard simply does not call for a "single level of [rule] specificity sufficient in every instance." *Hope*, 536 U.S. at 740 (quoting *Lanier*, 520 U.S. at 271); *see also Cordova*, 569 F.3d at 1192. Rather, the precedent on which a court relies to conclude the law was clearly established need only "be *clear enough* that every *reasonable* official would interpret it to establish the particular rule the plaintiff seeks to apply." *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (emphasis added).

Throughout the development of the "clearly established law" standard, the Supreme Court has stressed that the specificity of the rule is especially important in Fourth Amendment cases. *See, e.g.*, *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (per curiam) (excessive force); *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam) (same); *Wesby*, 138 S. Ct. at 590 (unlawful arrest); *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (excessive force). The concerns associated with defining clearly established law "at a high level of generality" is most salient in the Fourth Amendment context due to the imprecise nature of the relevant legal standards and how such standards apply in rapidly evolving circumstances. *Mullenix*, 136 S. Ct. at 308; *see also Wesby*, 138 S. Ct. at 590. This is particularly true in excessive force cases because "officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and

rapidly evolving—about the amount of force that is necessary in a particular situation." *Kisela*, 138 S. Ct. at 1152 (citation omitted).

Because every § 1983 case does not sit at one end of a spectrum or the other, we have recognized, based on what the Supreme Court has told us, that the degree of specificity required from prior caselaw depends on the character of the challenged conduct. *Pierce*, 359 F.3d at 1298. Thus, in *Browder v. City of Albuquerque*, we explained that "[i]n deciding the 'clearly established law' question, [the Tenth Circuit] employs a 'sliding scale' under which 'the more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.'" 787 F.3d 1076, 1082 (10th Cir. 2015) (Gorsuch, J.) (quoting *Shroff v. Spellman*, 604 F.3d 1179, 1189–90 (10th Cir. 2010)).

My colleagues' reservations about our sliding-scale approach comes as no surprise given the Supreme Court's recent qualified-immunity decisions. The Court's slew of per curiam reversals in the past five years—nearly all of which concern the use of excessive force—appears to have most circuit courts tiptoeing around qualified immunity's clearly established prong. But as Judge Carson recognizes: "With no case overruling it, the sliding-scale approach lives in this Circuit." Concurring Op. at 2 (Carson, J.). Until either this Court or the Supreme Court sounds the death knell for our sliding-scale approach, we are bound to apply it rather than merely pay lip service to it.[4]

[4] In *Lowe v. Raemisch*, 864 F.3d 1205, 1211 n.10 (10th Cir. 2017), we questioned whether our sliding-scale approach conflicted with Supreme Court precedent post *Hope*. "The *possibility* of a conflict arises because the sliding-scale approach may allow us to find a clearly established right even when a precedent is neither on point nor obviously

2.

With this understanding of the applicable standard in mind, let's consider whether Sergeant Luna is entitled to qualified immunity. Four decades ago, this Court held that the Constitution imposes a duty on corrections officers to take reasonable measures to protect inmates under their charge from violence at the hands of other inmates. *Ramos v. Lamm*, 639 F.2d 559, 572–74 (10th Cir. 1980). Then in *Farmer*, decided in 1994, the Supreme Court clarified the contours of this rule, holding that a breach of this duty violates the Constitution where a corrections officer "knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." 511 U.S. at 847.

No one can reasonably dispute post *Farmer* and its progeny that once Sergeant Luna learned of the substantial risk of harm to A.L from the assailants' threats and subjectively perceived such threats, he had a duty to take reasonable measures to protect A.L. Thus, the rule under which Plaintiff seeks to hold Sergeant Luna liable is just this: When a detention center officer knows a detainee faces a substantial risk of serious harm from

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applicable." *Id.* (emphasis added) (citing *Aldaba v. Pickens*, 844 F.3d 870, 874 n.1 (10th Cir. 2016)). But this brings us back to the point we made in *Pierce*: Should the second prong of qualified-immunity analysis turn solely on the results of a "scavenger hunt" for prior cases with the same facts, or should it focus on the "*more relevant inquiry*" of whether the law put *reasonable* officials on *fair notice* that the described conduct was unconstitutional? 359 F.3d at 1298 (emphasis added). The majority apparently thinks the former. Only the Supreme Court, however, can definitively resolve this question. And as *Lowe* recognized, so far its precedents send us mixed signals. But one thing is certain: The Supreme Court has neither directly commented upon nor overruled our sliding-scale approach. The "possibility of a conflict" is simply not enough to conclude such an approach is no longer the law in this circuit.

another detainee yet fails to employ reasonable available measures to lessen the risk, the officer breaches his or her constitutional duty to protect the vulnerable detainee.

But the fact a constitutional duty to protect arises in the face of an officer's knowledge does not mean it is *necessarily* clear in every case, or even most cases, what reasonable measures consist of or, in other words, what such duty to protect specifically requires of the officer. *See, e.g.*, *Cox v. Glanz*, 800 F.3d 1231, 1247 (10th Cir. 2015) (holding an inmate's right to proper suicide screening procedures during booking was not clearly established). The salient question here is whether this rule was sufficiently specific *in the factual context of this case* to give Sergeant Luna fair warning that his failure to secure the control panel could give rise to constitutional liability. *Mullenix*, 136 S. Ct. at 308 (explaining courts must undertake the clearly established inquiry in light of the specific context of the case).

Here, viewing the facts in the light most favorable to Plaintiff, Sergeant Luna was aware: (1) J.V., J.S., and A.H. had been placed on pre-disc for collectively threatening A.L. less than twelve hours earlier; (2) the three assailants were generally unruly and willing to fight; (3) the three assailants were to be kept away from one another and from A.L. until further notice; (4) the three assailants would be allowed outside their cells daily but only with restrictions; (5) A.H. was outside his cell and in the dayroom just prior to the attack; (6) A.H. could not be trusted outside his cell; (7) the control panel securing the cells had been left unlocked; and (8) two incidents occurred in the juvenile pod in the past eighteen months where, to precipitate an attack, one detainee opened the cell door of another detainee from the unsecured control panel. *See Tolan v. Cotton*, 572 U.S. 650, 657 (2014)

(stressing need to view facts and draw inferences in favor of the nonmovant when deciding the clearly established prong). What Sergeant Luna effectively contests is whether a reasonable corrections officer under these circumstances would have understood the state of the law on the morning of the attack required him to ensure the control panel was locked.

The constitutional question here is beyond "beyond debate." *Wesby*, 138 S. Ct. at 589. Mindful that qualified immunity does not protect "the plainly incompetent," *Kisela*, 138 S. Ct. at 1152, the unlawfulness of Sergeant Luna's conduct in failing to secure the control panel follows immediately from the rule that corrections officers must employ reasonable measures to mitigate a known risk of serious harm to a threatened detainee.[5] "After all, some things are so obviously unlawful that they don't require detailed explanation . . . ." *Browder*, 787 F.3d at 1082.

The clearly established standard for determining whether an official has violated a detainee's right to reasonable protection from a known risk of serious harm "is not extremely abstract or imprecise under the facts alleged here, but rather is relatively straightforward and not difficult to apply." *A.N. ex rel. Ponder v. Syling*, 928 F.3d 1191,

[5] The circuit court case closest factually to the one at bar may be *Erickson v. Holloway*, 77 F.3d 1078 (8th Cir. 1996). There, the defendant jail guard left the dayroom control panel unattended for about six minutes to make a routine check of the cell block. *Id.* at 1080. Contrary to jail policy, the defendant had not disabled the control panel to prevent inmates from operating the locks. *Id.* While the defendant was away, an inmate opened the electronic lock to the recreation area allowing the assailant to access and beat the plaintiff. *Id.* Nearly two decades later, the Eighth Circuit, citing cases from the Third, Seventh, Eighth, and Eleventh Circuits, commented that "prison officials have an obligation, in a variety of circumstances, to protect non-violent inmates from violent inmates *by keeping cell doors locked*." *Walton v. Dawson*, 752 F.3d 1109, 1121 (8th Cir. 2014) (emphasis added).

1198–99 (10th Cir. 2019); *see also Pauly*, 137 S. Ct. at 552 (explaining the requirement that clearly established law be "particularized to the facts of the case" is intended to shield officers from liability based on alleged violations of "extremely abstract rights"). Put differently, this rule is sufficiently specific to have put Sergeant Luna on notice that his failure to ensure the control panel was secure violated A.L.'s constitutional right to protection from violence at the hands of J.V., J.S., and A.H. Because any reasonable corrections officer in Sergeant Luna's position would have known his conduct violated A.L.'s asserted right, Luna should not be entitled to qualified immunity.

III.

Finally, I turn to Defendant DACDC's "municipal" liability. Plaintiff focuses her constitutional claim of municipal liability on a failure-to-train theory. To prevail against the DACDC under this theory, Plaintiff must show (1) a municipal employee committed a constitutional violation against A.L. and (2) a DACDC policy or custom was the moving force behind such violation. *Cordova*, 569 F.3d at 1193. As noted above, a jury could conclude that Sergeant Luna violated A.L.'s Fourteenth Amendment right to substantive due process. The question that remains, then, is whether a DACDC policy or custom was the moving force behind the underlying constitutional violation.

A.

In *City of Canton v. Harris*, the Supreme Court held § 1983 permitted a factfinder to hold a municipality liable for its failure to train employees. 489 U.S. 378, 380 (1989). The "critical question" before the Court was: "Under what circumstances can inadequate training be found to be a 'policy' that is actionable under § 1983?" *Id.* at 383. Identifying

conduct, or lack thereof, properly attributable to the DACDC is hardly enough to impose municipal liability on it. "Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a . . . 'policy or custom' that is actionable under § 1983." *Id.* at 389. When, like here, a plaintiff does not claim the municipality has directly inflicted a constitutional injury, as in the case of a facially unconstitutional policy, but has caused an employee to do so, "rigorous standards of culpability and causation must be applied" to ensure the municipality is not held vicariously liable for its employees' actions."[6] *Bd. Of Cty. Commr's v. Brown*, 520 U.S. 397, 405 (1997).

To establish a municipality's deliberate indifference under a failure-to-train theory, a plaintiff usually must show a "pattern of tortious conduct." *Bryson v. City of Oklahoma City*, 627 F.3d 784, 789 (2010). Decisionmakers' "continued adherence to an approach they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the 'deliberate indifference'—necessary to trigger municipal liability." *Brown*, 520 U.S. at 407. In

[6] Based on the record—in particular Sergeant Luna's admission of supervisory authority in his personal affidavit and the failure of the DACDC to make any effort to rebut the same—Sergeant Luna was responsible for the operation of an unwritten discretionary policy in the juvenile pod regarding the securing of the control panel. Thus, at the time of the attack, Sergeant Luna possessed authority to establish municipal policy in the juvenile pod over use of the control panel. In *Pembaur v. City of Cincinnati*, the Supreme Court recognized that if a county board delegates its power to establish final policy to a delegatee, the delegatee's decisions would represent county policy and could give rise to municipal liability. 475 U.S. 469, 483 n.12 (1986). Notably, however, Plaintiff does not seek to hold the DACDC liable based on the theory that Sergeant Luna's alleged wrongdoing was the DACDC's wrongdoing.

addition, such a pattern "may tend to show that the lack of proper training, rather than a one-time negligent administration of the program or factors peculiar to the officer involved in a particular incident, is the 'moving force' behind the plaintiff's injury." *Id.* at 408.

In *Canton*, however, the Supreme Court acknowledged "the possibility that evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability." *Brown*, 520 U.S. at 1391; *accord Canton*, 489 U.S. at 390 & n.10. Violent encounters between detainees "may be a highly predictable or plainly obvious consequence" of the DACDC's failure to train its officials on the fundamentals necessary to address recurring situations like threats of violence or more specifically how, in the presence of such threats, to secure the control panel when not in use. *Bryson*, 627 F.3d at 789; *cf. Canton*, 489 U.S. at 396–97 (O'Connor, J., concurring in part) (recognizing a claim that officers were inadequately trained in diagnosing mental illness fell short of the kind of "obvious" need for training sufficient to show deliberate indifference). But we need not ask whether the attack on A.L., considered in a vacuum, is sufficient to sustain municipal liability. Here, we most certainly have a pattern of detainees improperly accessing the control panel in the juvenile pod sufficient to have placed the DACDC on notice that, sooner or later, its purported failure to train was "substantially certain to result in a constitutional violation." *Bryson*, 627 F.3d at 789.

The district court concluded Plaintiff failed to establish a pattern of tortious conduct surrounding the control panel and therefore DACDC officials would not have understood their failure to train officers on appropriate control panel protocol was substantially certain

to result in a constitutional violation. Nonsense. Detainees on four separate occasions within eighteen months of the attack on A.L. inappropriately accessed the control panel in the juvenile pod's dayroom. Fortunately, on the first and fourth occasions no harm resulted. Nonetheless, DACDC officials placed the culprits on pre-disc precisely because they realized such conduct was unacceptable and wrought with peril. On the second and third occasions, neither DACDC officials nor targeted detainees were so fortunate. Rather, targeted detainees were ruthlessly attacked and beaten *because the control panel had been left unlocked*. These four occasions considered in the aggregate were sufficient to place DACDC officials on notice that an unsecured control panel in the juvenile pod may result in problems of constitutional proportions for the DACDC, making the questions of causation and deliberate indifference in this case for the jury.

B.

One final point deserves clarification. Relying on cases from our sister circuits, the district court alternatively concluded that because a failure-to-train claim requires a showing of deliberate indifference on the part of the DACDC, Plaintiff must also show the asserted right was clearly established at the time of the attack. *See Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988 (6th Cir. 2017); *Szabla v. City of Brooklyn Park*, 486 F.3d 385 (8th Cir. 2007) (en banc); *Townes v. City of New York*, 176 F.3d 138, 143 (2d Cir. 1999). Judge Carson accepts this approach. I have my doubts.

To be sure, not all *Monell* claims are created equal. But neither are all failure-to-train theories. As explained above, the Supreme Court has distinguished deliberate-indifference claims based on "a pattern of tortious conduct by inadequately trained

employees" from those based on "evidence of a single violation of federal rights." *Brown*, 520 U.S. at 407–09; *Canton*, 489 U.S. at 390 & n.10. *Brown*'s statement regarding an "obvious potential for such a violation" concerned the latter. 520 U.S. at 409; *see also id.* at 402 ("We granted certiorari . . . to decide whether the county was properly held liable for respondent's injuries based on Sheriff Moore's *single decision* to hire Burns." (emphasis added)); *id.* at 415–16 (concluding that "Bryan County is not liable for Sheriff Moore's *isolated decision* to hire Burns without adequate screening" (emphasis added)).

As this Court has explained, "deliberate indifference may be found *absent a pattern of unconstitutional behavior* if a violation of federal rights is a highly predictable or *plainly obvious consequence* of a municipality's action or inaction." *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 771 (10th Cir. 2013) (emphasis added; citation and brackets omitted). Conversely, when a deliberate-indifference claim is based on a pattern of tortious conduct by inadequately trained employees, a plaintiff need not also prove the underlying violation was obvious (i.e., clearly established). This is because the pattern of unlawful behavior puts a municipal policymaker on sufficient "notice that its action or failure to act is substantially certain to result in a constitutional violation[.]" *Id.* Thus, a municipality can manifest deliberate indifference even when its employee (i.e., the individual defendant) did not violate clearly established law.

The out-of-circuit authorities Judge Carson cites do not compel a contrary conclusion. In each of these cases, the plaintiff's deliberate-indifference claim was based on evidence of a single violation of federal rights, not a pattern of past tortious conduct by municipal employees. *See, e.g.*, *Szabla*, 486 F.3d at 392–93 ("[T]his was a one-time

incident, and there is no evidence of a pattern of constitutional violations making it 'obvious' that additional training or safeguards were necessary."); *see also Arrington-Bey*, 858 F.3d at 990–92; *Townes*, 176 F.3d at 142. Indeed, Judge Colloton recognized this critical distinction in *Szabla*. 486 F.3d at 392–93.

Perhaps requiring the violated right to be clearly established is the proper approach when dealing with deliberate-indifference claims premised on an isolated constitutional violation. On the other hand, maybe not. Consider the following hypothetical, which is based on a recent Eleventh Circuit decision:

A municipal policymaker arms its police officers with firearms because it knows the officers will sometimes need to arrest dangerous individuals. Yet, the municipality fails to train the officers regarding the lawful use of deadly force. During an investigation, an officer shoots a ten-year-old child lying on the ground within arm's reach of the officer, while repeatedly attempting to shoot a pet dog that wasn't posing any threat. The child's mother sues the officer for excessive force and also brings a *Monell* claim against the municipality for its failure to train the officer. A court holds, as the Eleventh Circuit did, that the officer is entitled to qualified immunity because his actions did not violate any clearly established rights. *See Corbitt v. Vickers*, 929 F.3d 1304, 1323 (11th Cir. 2019) ("Because we find no violation of a clearly established right, we need not reach the other qualified immunity question of whether a constitutional violation occurred in the first place."), *cert. denied*, No. 19-679, 2020 WL 3146693 (U.S. June 15, 2020).

Applying the rule Judge Carson champions today, does this also "spell the end of th[e] *Monell* claim" against the municipality? *See Arrington-Bey*, 858 F.3d at 995. If the

answer is "yes," I fail to see how this deliberate-indifference standard doesn't effectively afford a form of vicarious immunity to municipalities. *Cf. Hagans v. Franklin Cty. Sheriff's Office*, 695 F.3d 505, 511 (6th Cir. 2012) ("Because Ratcliff did not violate a clearly established right, it follows that his employer, the Franklin County Sheriff's Office, is also entitled to summary judgment."). In my view, these are dangerous waters. *See Owen v. City of Independence*, 445 U.S. 622, 650 (1980) ("[W]e can discern no 'tradition so well ground in history and reason' that would warrant the conclusion that in enacting [§ 1983], the 42nd Congress *sub silentio* extended to municipalities a qualified immunity based on the good faith of their officers.").

Fortunately, we have no occasion in this case to lay down a categorical rule one way or the other because Plaintiff's deliberate-indifference claim against the DACDC is based on a pattern of tortious conduct by inadequately trained employees. Both the Supreme Court and this Court have unequivocally held such evidence may satisfy the deliberate-indifference element of a *Monell* claim. *Brown*, 520 U.S. at 407–08; *Schneider*, 717 F.3d at 771. Because that settles the issue before us, I would leave for another day the question whether a deliberate-indifference claim based on a single violation of federal rights necessarily requires the asserted right to be clearly established.

IV.

For the reasons stated above, I would affirm the district court's decision to grant summary judgment to Defendants Casado and Platero, but I would reverse the judgment with respect to Sergeant Luna and the DACDC and remand for further proceedings.

I respectfully dissent.

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

KATHY CONTRERAS, on behalf
of her minor child A.L.,

Plaintiff,

v. Civ. No. 18-156 GBW/GJF

DONA ANA COUNTY BOARD
OF COUNTY COMMISSIONERS,
d/b/a Doña Ana County Detention Center, *et al.*,

Defendants.

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendants' Motion and Supporting Memorandum for Qualified Immunity and Summary Judgment. *Doc. 47.* Having reviewed the Motion, the attendant briefing and oral argument (*docs. 52, 57, 60, 61, 64*), and being otherwise fully advised regarding relevant case law, the Court will GRANT Defendants' motion.

I. PROCEDURAL POSTURE

This case stems from events surrounding an assault on Plaintiff's minor child, A.L., in the juvenile pod of the Doña Ana County Detention Center ("DACDC"). *Doc. 1.* Plaintiff filed suit on behalf of A.L. in this Court on February 15, 2018. *Id.* In her Complaint, Plaintiff brings federal and state law claims against the Doña Ana County

Board of County Commissioners, doing business as DACDC, and on-duty guards Paco Luna, Jaime Casado, and Shaylene Platero ("the Individual Defendants"). *Id.* Particularly, Plaintiff brings (1) claims against the Individual Defendants in their individual capacities for violating A.L.'s Fourteenth Amendment due process right to reasonable safety under 42 U.S.C. § 1983, (2) a §1983 municipal liability claim against DACDC, (3) state law claims against Defendants for negligence and negligent operation of a building or equipment, and (4) claims against Defendants under the New Mexico Constitution for the alleged violation of humane conditions of confinement. *Id.*

On July 13, 2018, Defendants filed a Motion for Summary Judgment, which was fully briefed on August 21, 2018. *Docs. 47*, *52*, *57*, *60*. In the Motion, Defendants seek summary judgment on Plaintiff's § 1983 claims on the basis of qualified immunity.[1] *See doc. 47* at 7–17. The Court held oral argument on the Motion on August 28, 2018. *Doc. 64*. During the hearing, the Court permitted the parties an additional week to file supplemental case citations and parentheticals relevant to the "cross-pollination of Eighth and Fourteenth Amendment analyses" and the "delegation of policy" arguments discussed by counsel during the hearing. *Id.* In response, Plaintiff filed her Notice of Additional Authority on August 30, 2018. *Doc. 61*. Defendants similarly filed a Notice of Additional Authority on August 31, 2018. *Doc. 62*. Defendants' Motion for Summary Judgment is now before the Court.

[1] The Motion does not address Plaintiff's claims arising under state law.

II. LEGAL STANDARDS

A. QUALIFIED IMMUNITY & SUMMARY JUDGMENT

Under Federal Rule of Civil Procedure 56(a), this Court must "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears the initial burden of "show[ing] 'that there is an absence of evidence to support the nonmoving party's case.'" *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). Once the movant meets this burden, the non-moving party is required to designate specific facts showing that "there are . . . genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *see also Celotex*, 477 U.S. at 324.

Notably, however, summary judgment motions based upon the defense of qualified immunity are reviewed differently from other summary judgment motions. *Martinez v. Beggs*, 563 F.3d 1082, 1088 (10th Cir. 2009). "When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff to show that: (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established." *Id.* (*citing Pearson v. Callahan*, 555 U.S. 223, 231–32 (2009)). This is a "strict two-part test" that must be met before the defendant asserting qualified

immunity again "bear[s] the traditional burden of the movant for summary judgment—showing that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law." *Clark v. Edmunds*, 513 F.3d 1219, 1222 (10th Cir. 2008) (quoting *Nelson v. McMullen*, 207 F.3d 1202, 1205 (10th Cir. 2000)) (internal quotations omitted). The Court may address the two prongs of the test in any order. *Pearson*, 555 U.S. at 236.

"Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right." *Id*. at 232 (*citing Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Creighton*, 483 U.S. at 640). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Id*. (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). "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 established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Clark v. Wilson*, 625 F.3d 686, 690 (10th Cir. 2010) (quotation omitted).

In determining whether the plaintiff has met its burden, the Court still construes the facts in the light most favorable to the plaintiff as the non-moving party. *See Scott v.*

Harris, 550 U.S. 372, 377 (2007). In so doing, the Court must keep in mind three principles. First, the Court's role is not to weigh the evidence, but to assess the threshold issue of whether a genuine issue exists as to material facts requiring a trial. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986). "An issue is 'genuine' if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way. An issue of fact is 'material' if under the substantive law it is essential to the proper disposition of the claim." *Thom v. Bristol Myers Squibb Co*., 353 F.3d 848, 851 (10th Cir. 2003) (internal citation omitted). Second, the Court must resolve all reasonable inferences and doubts in favor of the non-moving party and construe all evidence in the light most favorable to the non-moving party. *See Hunt v. Cromartie*, 526 U.S. 541, 550–55 (1999). Third, the court cannot decide any issues of credibility. *See Liberty Lobby*, 477 U.S. at 255. "[T]o survive the . . . motion, [the nonmovant] need only present evidence from which a jury might return a verdict in his favor." *Id*. at 257. Nonetheless, at the summary judgment stage, "a plaintiff's version of the facts must find support in the record." *Thomson v. Salt Lake County*, 584 F.3d 1304, 1312 (10th Cir. 2009).

B. INDIVIDUAL LIABILITY

The Fourteenth Amendment's due process clause governs pre-adjudication detainee suits against jails. *Bell v. Wolfish*, 441 U.S. 520, 536 (1979). The Supreme Court has held

the following with respect to §1983 liability in cases that allege a failure to protect inmates from other inmates, such as the one at bar.

> [P]rison officials . . . must take reasonable measures to guarantee the safety of the inmates. [Particularly,] prison officials have a duty…to protect prisoners from violence at the hands of other prisoners. . . . It is not, however, every injury suffered by one prisoner at the hands of another that translates into constitutional liability for prison officials responsible for the victim's safety. . . . First, the deprivation alleged must be, objectively, sufficiently serious, [and] the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. [S]econd[,] a prison official must have a sufficiently culpable state of mind. . . .that [of] deliberate indifference to inmate health or safety. . . . [A]cting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk. We hold. . . that a prison official cannot be found liable. . . for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of the facts from which the inference could be drawn that a substantial risk of harm exists, and he must also draw the inference.

Farmer v. Brennan, 511 U.S. 825, 832–36 (1970) (internal quotations and citations omitted).

Turning to the liability of supervisors in particular, to meet his or her supervisory liability burden under §1983, a plaintiff must demonstrate that the supervisor:

> *[P]ersonally* violated [the plaintiff's] constitutional rights. To do that [the plaintiff must] show an affirmative link between [the supervisor] and [the violation.] And to demonstrate such an affirmative link, [the plaintiff must] establish (1) personal involvement, (2) causation, and (3) state of mind.
>
> [Plaintiff] could satisfy the personal-involvement requirement by showing that [the supervisor] was responsible for but failed to create and enforce policies to protect [the plaintiff] from the [violation]. To establish causation, [the plaintiff] had to show that [the supervisor] set in motion a series of events that [the supervisor] knew or reasonably should have

> known would cause others to deprive [the plaintiff] of [the plaintiff's] constitutional rights. Finally, in the context of a Fourteenth Amendment claim like this one, [the plaintiff] could establish the requisite state of mind by showing that [the supervisor] acted with deliberate indifference.
>
> In turn, the deliberate-indifference test itself has three requirements. [The plaintiff] had to show (1) that [the supervisor] was aware of facts from which the inference could be drawn that a substantial risk of serious harm existed; (2) that he actually drew that inference; and (3) that he was aware of and failed to take reasonable steps to alleviate that risk.

Perry v. Durborow, 892 F.3d 1116, 1121–22 (10th Cir. 2018) (internal quotations and citations omitted). "A supervisor's mere knowledge of his subordinate's conduct" falls short of meeting the standard. *Schneider v. City of Grand Junction Police Dept.*, 717 F.3d 760, 767 (10th Cir. 2013) (internal citation omitted).

C. MUNICIPAL LIABILITY

Municipalities cannot be held liable for the acts of their employees under 42 U.S.C. § 1983 on the basis of a *respondeat superior* theory. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691–94 (1978); *see also Bryson v. City of Okla. City*, 627 F.3d 784, 788 (10th Cir. 2010). Instead, "[a] plaintiff suing a municipality under section 1983 for the acts of one of its employees must prove: (1) that a municipal employee committed a constitutional violation, and (2) that a municipal policy or custom was the moving force behind the constitutional violation." *Myers v. Okla. Cty. Bd. of Cty. Comm'rs*, 151 F.3d 1313, 1316 (10th Cir. 1998). In order to meet this burden, a plaintiff must first "identify a government's policy or custom that caused the injury." *Schneider*, 717 F.3d at 769 (internal quotations and citation omitted). The plaintiff is then required to show "that

the policy was enacted or maintained with deliberate indifference to an almost inevitable constitutional injury." *Id.* The Tenth Circuit has distilled these requirements into three specific elements: "(1) official policy or custom[;] (2) causation[;] and (3) state of mind." *Id.*

An official policy or custom may take different forms. *See Cacioppo v. Town of Vail, Colo.*, 528 F. App'x 929, 931–32 (10th Cir. 2013) (unpublished). Specifically, "[a] challenged practice may be deemed an official policy or custom for § 1983 municipal-liability purposes if it is a formally promulgated policy, a well-settled custom or practice, a final decision by a municipal policymaker, or deliberately indifferent training or supervision." *Schneider,* 717 F.3d at 770. Proving an unlawful custom demands evidence of "a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167–68 (1970)) (internal quotation marks omitted). For liability to attach, the plaintiff must demonstrate a "direct causal link between the custom or policy and the violation alleged." *Hollingsworth v. Hill*, 110 F.3d 733, 742 (10th Cir. 1997) (internal citations omitted).

III. UNDISPUTED FACTS

Based on the facts presented by the movants and other facts gleaned from the record, the Court finds the following facts to be undisputed for the purposes of

Defendants' Motion:

1. On May 3, 2016, A.L., a fourteen-year-old juvenile, was arrested and booked into DACDC. *Doc. 47*-1 at 1.

2. When A.L. was escorted to his cell, three other detainees in the pod, Joaquin Solis, Jesus Vasquez, and Adan Herrera, shouted threats at A.L., including that they planned to "fuck [A.L.] up." *Doc. 47-2* at 1.

3. DACDC officer James Espana documented the threats against A.L. in an incident report. *Doc. 47-2*.

4. Defendants Luna, Casado, and Platero, guards within the pod, were made aware of these threats. *Doc. 47-3* at 1; *doc. 47-4* at 2; *doc. 47-5* at 1. In addition, Defendant Luna noted that Solis, Vasquez and Herrera had histories of assault at DACDC. *Id*. In fact, DACDC reported an assault involving Herrera and Vasquez as recently as April 30, 2016. *Doc. 52-1*, Attachment 5. Further, five previous "affrays" had been reported involving Solis, Herrera or Vasquez. *Id.*, Attachment 6. In addition, Luna recorded on April 25, 2016, that "it is not safe to take [Herrera] out of his cell." *Id.* A DACDC psychiatrist on April 29, 2016, also found that Herrera, who had been incarcerated ten times, is prone to anger and "risk taking activity," and suffers from auditory hallucinations. *Id.*

5. DACDC placed Solis, Vasquez and Herrera on pre-disciplinary status, meaning they were only allowed out of their cells to shower, use the phone, use the inmate kiosk, and

participate in a one-hour recreation period. *Doc. 47-3* at 1. Further, DACDC did not permit the three detainees to leave their cells during the same period as each other or A.L. *Doc. 47-4* at 2.

6. On the morning of May 4, 2016, Sergeant Luna was on duty as the supervisor. *Id.* Officer Casado and Cadet Platero joined Defendant Luna on the shift. Prior to 9:00 a.m. Herrera showered in the shower room. *Id*. Simultaneously, the Individual Defendants watched television in the middle of the juvenile pod's dayroom, a first-floor rectangular common room filled with circular tables and surrounded by two floors of cells. *Id*. Detainees Solis, Vasquez, and A.L. remained locked in their cells. *Id.*

7. When Herrera finished showering, he entered the dayroom and asked Defendant Luna for permission to check the detainee commissary account kiosk, which Defendant Luna granted. *Doc. 47-3* at 2.

8. The commissary account kiosk is on the south wall of the day room and is between five feet and several yards from the pod's control panel. *See docs. 47* at 3, *47-3* at 2, 7.

9. The control panel is a touchscreen device that allows the user to lock or unlock individual cells with the touch of a button. *See doc. 47-3* at 7. Users may similarly log off or lock the panel with the touch of a button. *Id.*

10. The control panel, at approximately 9:00 a.m. on May 4, 2016, was unlocked. *Doc. 47-4* at 3.

11. Defendant Casado, stationed at the control panel, had moved away from it without

locking it or logging off. *Id.*

12. Defendant Casado stated on one occasion that nobody on his shift logged off or locked the panel in the juvenile unit, and that he had never been directed to do so. *Doc. 47-3* at 4.

13. Defendant Platero knew that Defendant Casado had left the control panel unlocked but said nothing. *Doc. 47-3* at 5; *doc. 47-5* at 7.

14. Defendant Luna was not aware that Defendant Casado had failed to lock the control panel. *Doc. 47-3* at 2, 5. [2]

15. The Individual Defendants sat approximately ten to fifteen yards from the control panel, which they could view. *Doc. 64* at 2.

16. At approximately 9:07 a.m., after reviewing his commissary account, Herrera paced to the control panel, accessed it, and opened the cell doors of A.L., Solis, and Vasquez, as well as his own, all on the second floor. *Doc. 47-3* at 4.

17. Solis and Vasquez immediately exited their cells, entered A.L.'s cell, closed the door

[2] In in a later-made affidavit, Casado acknowledges that he was told that the policy of DACDC was to log out of the control panel after use. *Doc. 47-4* at 3. Similarly, in her own affidavit, Platero says that she was trained to always lock or log out of the control panel. *Doc. 47-5* at 2-3. In addition, Defendant Luna, in his affidavit, contends that he had instructed Defendant Casado to lock all control panels, and similarly instructs all officers under his supervision to do so. *Doc. 47-3* at 2. In the same vein, Defendant Luna contends that he never instructed a subordinate to leave a control panel unlocked, nor is he aware of any other supervising officers having done so. *Id.* at 3. However, Defendant Luna does acknowledge that DACDC never issued to him a directive to lock the control panel. *Id.* at 5. The Court merely notes these points to underscore the pervasiveness of the factual dispute surrounding DACDC control panel protocol. However, construing the evidence in the light most favorable to Plaintiff, the Court concludes that DACDC did not have or enforce an express policy regarding locking of the control panel.

behind them, and began to beat A.L. *Doc. 47-4*, Attachments 2-3.

18. Herrera ran upstairs, entered his cell and closed the door behind him. *Doc. 47-4* at 3.

19. Defendants Casado and Luna rushed upstairs and attempted but failed to open the door to A.L.'s cell, which had locked after Solis and Vasquez entered. *Id.*

20. An officer unlocked A.L.'s door by means of the control panel. *Doc. 47-3* at 4, 7.

21. After approximately twenty seconds from its initiation, Defendant Luna stopped the attack by using OC spray. *Doc. 47-4*, Attachments 2-3.

22. The attack left A.L. unconscious, bleeding from both ears, and with a broken jaw. *Doc. 1* at 4.

23. Beginning in 2014, until the date of the assault on Plaintiff, four incidents involving a detainee's illicit use of the control panel in the juvenile pod had been previously reported. *Doc. 52-1*, Attachment 6; *doc. 57-1*. Only two of them involved an attempt to assault another inmate. On October 25, 2014, a detainee opened his own door with the access panel. *See doc 57-1* at 2. On February 12, 2015, a detainee touched the panel in defiance of contemporaneous orders to step away from the panel. There is no evidence that he opened any door and thus it is not clear that the access panel was unlocked. *Id*. at 3. However, on January 20, 2015, a detainee did use the control panel to open the cell of another inmate whom he then assaulted. *Doc. 57-1* at 1. In addition, on November 23, 2014, a detainee used the control panel to open two cells resulting in a brawl involving four other detainees. *Id*. at 4.

IV. ANALYSIS

1. THE INDIVIDUAL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY, BECAUSE PLAINTIFF HAS NOT MET HER BURDEN OF SHOWING THAT THE RIGHT THAT THE INDIVIDUAL DEFENDANTS ALLEGEDLY VIOLATED WAS CLEARLY ESTABLISHED.

Plaintiff, in her Complaint, brings § 1983 claims against the Individual Defendants for alleged violations of A.L.'s Fourteenth Amendment due process right to humane conditions of confinement, including his right to reasonable safety while in detention. *Doc. 1* at 6. In response, in their Motion for Summary Judgment, the Individual Defendants assert a qualified immunity defense. *Doc. 47*.

Specifically, the Individual Defendants argue that they did not violate A.L.'s constitutional rights under the Fourteenth Amendment because A.L. was not detained under conditions posing a substantial risk of harm, the Individual Defendants were not deliberately indifferent to A.L.'s safety, and Plaintiff cannot prove the existence of an affirmative link between the Individual Defendants' conduct and the assault on A.L. *Id*. In the alternative, they argue that, even if a constitutional violation did occur, Plaintiff fails to demonstrate that the violation was clearly established. *Id.*

In response, Plaintiff contends that the Individual Defendants personally violated A.L.'s Fourteenth Amendment due process right to reasonable safety for the following reasons. First, she notes that Defendant Casado's decision to leave the control panel unlocked, Defendant Platero's failure to report the decision despite her knowledge, and

Defendant Luna's failure to instruct his subordinates to lock the panel and correct actions contrary to this instruction placed A.L. at a substantial risk of harm at a time when he faced threats from three detainees with assault records in the juvenile pod, the control panel had been used in the past by detainees to open cells and attack fellow detainees, and Herrera stood within a short distance of the unlocked control panel while accessing his commissary account. *Doc. 52* at 5–8. Second, she underscores that each individual defendant was deliberately indifferent to A.L.'s safety, and advocates for an application of the objective standard introduced in *Kingsley* in the context of excessive force.[3] *Id.* at 8–10; *see Kingsley v. Hendrickson*, 135 S.Ct. 2466 (2015). Third, Plaintiff argues that the weight of authority has clearly established the violation, citing to cases from the Third, Seventh, Eighth, Tenth, and Eleventh Circuits, discussed below.[4] *Doc. 52* at 10–13.

When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff to show that (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established. *Pearson*, 555 U.S. at 231–32.

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[3] Despite encouraging the Court to apply the objective standard, Plaintiff argues that even if the Court chooses to apply the subjective deliberate indifference standard, the standard is met here because the Individual Defendants were aware of the facts from which the inference could be drawn that a substantial risk of harm existed, they actually drew that inference, and they failed to take reasonable steps to alleviate that risk. *Id.* at 9–10.

[4] *See Walton v. Dawson*, 752 F.3d 1109, 1121 (8th Cir. 2014); *Irving v. Dormire*, 519 F.3d 441, 447 (8th Cir. 2008); *Newman v. Holmes*, 122 F.3d 650 (8th Cir. 1997); *Marsh v. Butler Cnty., Ala.*, 283 F.3d 1014 (11th Cir. 2001); *Pavlick v. Mifflin*, 90 F.3d 205 (7th Cir. 1996); *Riley v. Jeffes*, 777 F.2d 143 (3d. 1985); *Berry v. Muskogee*, 900 F.2d 1489 (10th Cir. 1990); *Howard v. Waide*, 534 F.3d 1227 (10th Cir. 2008).

Therefore, the Court must determine whether Plaintiff met her burden here. Regarding the first prong, while the Court is skeptical that the Individual Defendants possessed the deliberately indifferent state of mind required to find that they violated a constitutional right, the Court refrains from addressing that question because Plaintiff has failed to meet her second prong burden of showing that the right at issue was clearly established.

Qualified immunity protects officials as long as their actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (citations and quotations omitted). A clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards,* 566 U.S. 658, 664 (2012) (internal quotation marks and alteration omitted). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Al–Kidd,* 563 U.S. at 741. "This demanding standard protects 'all but the plainly incompetent or those who knowingly violate the law.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

"Importantly, the Supreme Court has recently and frequently reminded [lower courts] that we can't 'define clearly established law at a high level of generality.'" *Bishop v. Szuba*, 2018 WL 3409907, *3 (10th Cir. July 12, 2018) (unpublished) (citations and quotations omitted). Instead, the "'clearly established' standard requires that the

legal principle clearly prohibit the officer's conduct in the particular circumstances before him. … This requires a high 'degree of specificity.' … A rule is too general if the unlawfulness of the officer's conduct "does not follow immediately from the conclusion that [the rule] was firmly established." *Wesby*, 138 S. Ct. at 590 (citations omitted). Consequently, the clearly established inquiry is conducted in light of the specific factual context of the case, not as a broad general proposition. *See Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015); *see also White*, 137 S. Ct. at 552.

To put this approach into concrete terms, it is useful to consider the proper framing of the inquiry in a few recent cases. In *Mullenix*, the "Fifth Circuit [had] held that [the officer] violated the clearly established rule that a police officer may not "use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." 136 S. Ct. at 308-09. The Supreme Court emphatically rejected this formulation of the right as far too general. *Id*. Instead, the Court presented the correct formulation as follows:

> In this case, [the officer] confronted a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer at Cemetery Road. The relevant inquiry is whether existing precedent placed the conclusion that [the officer] acted unreasonably in these circumstances "beyond debate."

Id. at 309. The importance of the factual context to the formulation can also be seen in *Sause v. Bauer*, 859 F.3d 1270, 1275 (10th Cir. 2017) (*rev'd on other grounds in* 138 S. Ct.

2561 (2018))[5], where the Tenth Circuit framed the relevant inquiry as involving "a scenario in which (1) officers involved in a legitimate investigation obtain consent to enter a private residence and (2) while there, ultimately cite an individual for violating the law but (3) in the interim, interrupt their investigation to order the individual to stop engaging in religiously-motivated conduct so that they can (4) briefly harass her before (5) issuing a citation." *See also Bishop*, 2018 WL 3409907 at *3 (formulation of the right cannot "fail[] to discuss the 'particularized' facts of th[e] case.").

After laying out the factual circumstances in a sufficiently specific fashion, the court must determine whether the official's conduct violated a clearly established rule. "To make this determination, we consider 'either if courts have previously ruled that *materially similar conduct* was unconstitutional, or if a general constitutional rule already identified in the decisional law applies with *obvious clarity* to the specific conduct at issue." *Estate of Reat v. Rodriguez*, 824 F.3d 960, 964-65 (10th Cir. 2016) (emphasis in original) (quotation and citation omitted). In this circuit, the relevant precedent must come from the Supreme Court, the Tenth Circuit, or from the clearly established weight of authority from other courts. *See Clark v. Wilson*, 625 F.3d 686, 690 (10th Cir. 2010); *see also Wesby*, 138 S. Ct. at 589-90 (To be clearly established, a legal principle must be

[5] The Supreme Court did not take issue with the Tenth Circuit's formulation as it related to the First Amendment claim. Instead, the Court reversed the grant of qualified immunity because the Tenth Circuit failed to address the Fourth Amendment claim inextricably intertwined with the plaintiff's First Amendment claim. *Sause v. Bauer*, 138 S. Ct. 2561, 2562-63 (2018).

"dictated by controlling authority or a robust consensus of cases of persuasive authority.") (internal quotations omitted). When relying on authority from other courts, the Tenth Circuit "generally looks to whether a 'majority of courts' have adopted the rule in question." *Sandberg v. Englewood, Colorado*, 727 F. App'x 950, 962 (10th Cir. 2018) (citing *Panagoulakos v. Yazzie*, 741 F.3d 1126, 1131 (10th Cir. 2013)); *see also Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1117-18 (10th Cir. 2004) (en banc) (somewhat analogous cases from two other circuits and two district court opinions with very similar facts insufficient to establish law in this circuit); *cf. Mayfield v. Bethards*, 826 F.3d 1252, 1259 (10th Cir. 2016) (consistent holdings from seven other circuits sufficient to establish law in this circuit). Moreover, "it is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Wesby*, 138 S. Ct. at 590.

With these standards in mind, the material facts in the instant case are as follows: (1) after plaintiff was threatened by three other juvenile detainees, (2) they were immediately segregated from each other in cells which were locked and properly functioning, but (3) a guard did not digitally lock an touchscreen panel which controlled the locks on the cell doors in the cell block, and (4) despite the fact that the control panel was monitored visually by several guards who were seated nearby, (5) one of the juveniles who had threatened plaintiff succeeded in accessing the panel and using it to

open the cell doors of plaintiff and two other threatening juveniles, (6) enabling the two other threatening juveniles to assault plaintiff.

Plaintiff was a pretrial detainee and therefore his claim is governed by the Fourteenth Amendment's due process clause. *Bell*, 441 U.S. at 536. The Supreme Court has undeniably held that prison officials have a duty to take reasonable measures to protect prisoners from violence committed by fellow prisoners. *Farmer*, 511 U.S. at 832. "It is not, however, every injury suffered by one prisoner at the hands of another that translates into constitutional liability for prison officials responsible for the victim's safety." *Id.* at 834. "In determining whether pretrial detainee's rights were violated, we apply an analysis identical to that applied in Eight Amendment cases brought pursuant to § 1983." *Perry v. Durborow*, 892 F.3d 1116, 1121 (10th Cir. 2018) (quoting *Lopez v. LeMaster*, 172 F.3d 756, 759 n.2 (10th Cir. 1999)). "For a claim (like the one here) based on a failure to prevent harm, the [plaintiff] must show that he is incarcerated under conditions posing a substantial risk of serious harm." *Farmer*, 511 U.S. 834. Second, a plaintiff must establish that the defendant possessed a "sufficiently culpable state of mind. [In a case such as this one,] that state of mind is 'deliberate indifference' to inmate health or safety." *Id*. (citations omitted). In both Eighth and Fourteenth Amendment cases, the deliberate-indifference test itself has three requirements: (1) that the defendant "was 'aware of facts from which the inference could be drawn that a

substantial risk of serious harm existed'; (2) that he actually drew that inference;[6] and (3) that he was 'aware of and failed to take reasonable steps to alleviate that risk.'" *Perry*, 892 F.3d at 1122 (quoting *Keith v. Koerner*, 843 F.3d 833, 848 (10th Cir. 2016)).

Knowing the legal requirements to show a constitutional violation and the material facts of the instant case, the Court now turns to the relevant inquiry: does existing precedent place the conclusion that the Individual Defendants violated Plaintiff's constitutional rights in these circumstances "beyond debate." Looking to the cases cited by Plaintiff and those discovered *sua sponte*, the Court finds that it does not.

Before conducting a close review of the relevant precedent, the Court must first address Plaintiff's argument that this is "an obvious case." As noted above, the clearly-established hurdle can be cleared "if a general constitutional rule already identified in the decisional law applies with *obvious clarity* to the specific conduct at issue." *Estate of Reat*, 824 F.3d at 964-65 (emphasis in original) (quotation and citation omitted). The

[6] In *Perry*, the court noted that the Supreme Court's decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2016) may have undermined the application of this "subjective" deliberate indifference requirement in Fourteenth Amendment cases. *Perry*, 892 F.3d 1116, 1122 n.1 (10th Cir. 2018). In *Kingsley*, the Supreme Court held that a pre-trial detainee bringing a Fourteenth Amendment excessive force case need only show force used was objectively unreasonable. *Kingsley*, 135 S. Ct. at 2473. Nonetheless, the *Perry* court applied the subjective deliberate indifference standard to a Fourteenth Amendment protection from harm claim. *Perry*, 892 F.3d at 1121-26. Were this court addressing the first prong of the qualified immunity analysis, it would be necessary to resolve this issue because Plaintiff has raised it. *Compare id*. at 1122, n.1 (noting the absence of briefing on the issue by either party). However, in the context of the clearly-established prong of the analysis, it suffices to say that, as of May 4, 2016, the impact of *Kingsley* on a protection from harm claim as brought here was not clearly established. As such, the lower objective standard cannot be applied at this stage. *Id*. (noting that to overcome qualified-immunity defense, "plaintiff must demonstrate ... that the right was clearly established *at the time of the alleged unlawful activity*") (quoting *Riggins v. Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009)).

Supreme Court has hypothesized "the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *Wesby*, 138 S. Ct. at 590 (quotation omitted). While the obviousness of a violation is a vague standard, this Court finds this case to be far from an obvious case of deliberate indifference (by any of the Individual Defendants) to the safety of Plaintiff. The prison officials responded appropriately to the original threats toward Plaintiff made by the three inmates. They segregated the three detainees from each other and Plaintiff – each in a separate locked cell. The locks on the cells were engaged and functional. Only one detainee was permitted outside their cell at a time, and only for limited time and for limited purposes. No fewer than three guards were present inside the pod at the relevant time. From their position, they could observe the cells of the three detainees, Plaintiff and the panel controlling the door locks.

Essentially, the officials made two errors. First, Defendant Casado walked away from the access panel without digitally locking it. Second, Defendant Luna authorized detainee Herrera to utilize the detainee account kiosk, which was a few yards away from the control panel. These two actions permitted the detainee Herrera– who had apparently conspired with detainees Vasquez and Solis – to reach the control panel and unlock the relevant cell doors before the guards could react and stop him. While these errors make a strong case for negligence, they fall well short of an obvious case of reckless indifference. *See, e.g., Davidson v. Cannon*, 474 U.S. 344, 345-48 (1986) (where

prison officials failed to address the petitioner's note reporting a fellow inmate's threats and indicating that he feared attack and the threatening inmate attacked the petitioner two days after receipt of the note, officials were at most negligent and not liable pursuant to § 1983); *Perry*, 892 F.3d at 1120-27 (no finding of reckless indifference on the part of the supervisor where male guard raped female inmate even though supervisor was aware male officers regularly entered and remained in female pod in violation of jail's emergency-only policy, and was aware that the jail's surveillance system did not monitor the female pod's individual cells, its showers, or its mechanical rooms); *Patton v. Rowell*, 678 F. App'x. 898 (11th Cir. 2017) (unpublished) (no finding of reckless indifference where officials knowingly failed to lock the attacker's slide bolt and did not check the corresponding cell door lock, because they did not know that the inmate had stuck tissue paper into the lock to prevent it from functioning, enabling the inmate to escape and attack the plaintiff); *Lesley v. Whetsel*, 110 F. App'x 851 (10th Cir. 2004) (finding mere negligence where officer simultaneously opened the cells of inmate and his attacker, in violation of prison rules, resulting in an assault).

Because this case is not an "obvious" one, the Court must review precedent to determine if the Supreme Court, the Tenth Circuit or the clearly established weight of authority from other courts "ha[s] previously ruled that *materially similar conduct* was unconstitutional[.]" Estate *of Reat*, 824 F.3d at 964-65; s*ee Clark*, 625 F.3d at 690. Plaintiff has cited a number of cases and the Court has considered several others in which

guards permitted the assault of an inmate (or pre-trial detainee) by a fellow inmate (or pre-trial detainee). Where important similarities exist, comparison to the instant case will be done in categories.

In the first category of cases, fellow inmates or detainees assaulted the plaintiff after an on-duty guard unlocked cells. *See Irving v. Dormire*, 519 F.3d 441, 447 (8th Cir. 2008) (finding that the correction officer's conduct in opening cell doors in order to allow an inmate to attack the plaintiff was sufficiently serious to support a failure to protect claim); *Pavlick*, 90 F.3d at 205 (inmates attacked the plaintiff after an officer unlocked the door to the plaintiff's cell and walked away); *Newman*, 122 F.3d at 650 (an inmate assaulted the plaintiff after an officer hit an override button on a control panel, thereby unlocking cells). These cases are easily distinguished from the case at bar, because the attack on A.L. did not result from any individual defendant's act of unlocking the cells; rather, detainee Herrera unlocked the cells by means of unsanctioned access to the control panel coupled with a conspiracy with two other detainees. This material distinction means that these cases cannot clearly establish a constitutional violation in the instant case. *See, e.g., Sandberg*, 727 F. App'x at 963 (First Amendment right for subject of police action to record the police in public was not clearly established by precedent establishing right of bystander or third party to do so).

In the second category of cases, the assault occurred because the cell locks themselves were defective or not utilized. *See Junior v. Anderson*, 724 F.3d 812 (7th Cir.

2013) (reversing grant of summary judgment where inmates attacked the plaintiff by entering his cell, which a prison guard had previously noted was not securely locked); *Marsh v. Butler Cty., Ala.*, 268 F.3d at 1024 (abrogated on other grounds) (reversing 12(b)(6) dismissal on basis of qualified immunity where inmates succeeded in attacking the plaintiffs because the locks to the doors of the inmates' cells did not work and guards did not monitor the cells by means of any visual or audio surveillance system); *Walton v. Dawson*, 752 F.3d 1109, 1114–15 (8th Cir. 2014) (affirming denial of summary judgment based on qualified immunity on Fourteenth Amendment claim where a jailer never locked the cells at night, enabling a detainee to enter the plaintiff's cell unobserved and rape him); *Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990) (affirming judgment in favor of plaintiff on Eighth Amendment claim whose husband was killed by fellow inmates in jail where (i) all "federal" prisoners were housed in one section where their cells remained unlocked at all times, (ii) no policy existed for segregating cooperating defendants from their co-defendants, (iii) jail officials had been advised that decedent had cooperated against other defendants housed in the section, and (iv) only one guard was on duty to supervise the entire prison); *Martin v. White*, 742 F.2d 469 (8th Cir. 1984) (reversing directed verdict for prison officials on Eighth Amendment violation based on inmate assault where assailant was able to enter plaintiff's cell because (i) guards were stationed where they could provide little protection to inmates, (ii) plaintiff's cell lock was defective such that it was easy to

"pick" with only a paperclip, (iii) the prison had no procedure by which to discover defective locks which were so prevalent as to "allow[] violent inmates to freely enter other inmates' cells, and (iv) the Superintendent's policies as a whole appeared to "actually encourage[] inmates to attack others with impunity"); *Byron v. Dart*, 825 F. Supp. 2d 958 (N.D. Ill. 2011) (denying a motion to dismiss a Fourteenth Amendment claim where officials failed to repair a known faulty cell door that could be popped open, resulting in an attack on the plaintiff by fellow detainees). In the instant case, however, this material fact is missing. In fact, the locks on each relevant cell door was completely functional and engaged just moments before the attack. Admittedly, one could argue that using the control panel was a digital version of lockpicking and that, by leaving the panel unlocked, the guard had rendered it functionally defective. The Court would reject this putative analogy. In the cases above, the locks were unused or mechanically defective such that the cells remained effectively unlocked hour after hour and day after day. The risk of an inmate assault inherent in such a circumstance is quite different than the risk resulting from the Individual Defendants' conduct here. Moreover, the cases listed above differed in at least one other material way. In addition to the cell doors not being effectively locked, the cells were not meaningfully surveilled by guards for significant periods, including the time of the assault. *See id*. Coupled with the unlocked cells, this fact virtually guaranteed inmate on inmate assaults. The present case lacks this key aggravating component. Instead, three guards were

physically present and supervising the pod at the time. These material distinctions mean that this category of cases cannot clearly establish a constitutional violation in the instant case.[7] *See, e.g., Estate of Reat*, 824 F.3d at 964-67 (state-created danger not clearly established for 911 operator based on precedents applying it to police officers, firefighters and other similar first responders).

While it does not fit perfectly into the second category above, *Riley v. Jeffes* is also materially distinct from the instant case. *Riley*, 777 F.2d 143 (3d Cir. 1985). In *Riley*, prison officials gave security lock keys to inmates for fourteen hours of every day. *Id*. at 146. This extraordinary practice "allow[ed] dangerous inmates to have control and possession of keys and to keep cell block doors open." *Id*. at 145. The clear risk of this practice was dramatically aggravated because "often times no correctional officer [was] around" and significant portions of the cell block "[were] completely cut off from the central desk vision, observation and view [.]" *Id.* at 146. As the court explained, "[t]he tension and danger to prisoners must be particularly intensified and pervasive where an overpopulated prison is occupied by aggressive felons prone to violence … who also have ready access to cells when the occupants are asleep and unprotected by prison

[7] It is also questionable that *Martin v. White*, 742 F.2d 469 (8th Cir. 1984) can add its heft to the weight of authority from other courts when considering whether the law is clearly established because it was premised on a rule that required a lesser showing than *Farmer* later demanded. *See Jensen v. Clarke*, 73 F.3d 808, 811 (8th Cir. 1996) (recognizing abrogation of *Martin* by *Farmer*). This same deficiency may also apply to *Berry v. City of Muskogee*, 900 F.2d 1489, 1494-96 (10th Cir. 1990) which pre-dated *Farmer* and does not appear to have applied the subjective deliberate indifference standard of *Farmer*. Notably, under the apparently objective deliberate indifference standard applied in *Berry*, the court still noted that "it [wa]s a somewhat close call" whether the facts established deliberate indifference. *Id*. at 1498.

guards." *Id*. at 145. Consequently, the court reversed the trial judge's dismissal of the plaintiff's Eighth Amendment claim under Rule 12(b)(6) because the "plaintiff ha[d] alleged a pervasive risk of harm to inmates from other prisoners and that the prison officials have failed to exercise necessary care to protect the safety of the inmates." *Id*. at 148.[8] Even though the locks in *Riley* may have mechanically worked, the cell doors were effectively unlocked for fourteen hours of every day. Worse yet, the control over the status of the cell doors during that period was held by inmates. And finally, based on the allegations in the complaint, the cells were almost completed unsupervised either by line of sight or video surveillance. These circumstances resulted in prisoners living in almost constant fear of assault from fellow inmates. Therefore, the distinctions between *Riley* and the instant case are so stark that it cannot be considered in the weight of authority to clearly establish a violation here.

Two final relevant Tenth Circuit cases remain to be considered. In *Lopez v. LeMaster*, the court reversed a grant of summary judgment to the sheriff where the plaintiff, a pre-trial detainee, was assaulted by other inmates. *Lopez*, 172 F.3d 756 (10th Cir. 1999). The events began when the plaintiff was threatened by another inmate and immediately notified the jailer on duty. *Id*. at 758. After taking the plaintiff's statement and the plaintiff advising him that "he was afraid to go back to the general population

[8] It should be noted that *Riley* is also a pre-*Farmer* case. Therefore, it did not appear to utilize the subjective deliberate indifference standard laid out therein. *See Riley v. Jeffes*, 777 F.2d 143, 147 n.8 (3d Cir. 1985).

cell because he thought the inmates there would jump him[, the] jailer … returned [plaintiff] to the cell." *Id*. at 758-59. Five minutes later, the plaintiff was attacked by two cellmates. *Id*. at 759. Clearly demonstrating the lack of supervision by the jailer, the assault lasted between five and ten minutes (during which two additional cellmates joined in) without any intervention by the jailer. *Id*. Plaintiff argued that the assault occurred due to "constitutionally inadequate conditions at the jail which may have prevented the jailer from acting, such as understaffing, lack of monitoring equipment or lack of a means by which inmates could contact the guards."[9] *Id*. at 760. The court reversed the grant of summary judgment on this claim for the sheriff. *Id*. at 762. In short, the court held that, where (i) plaintiff was returned to a cell containing individuals who had threatened him, (ii) the jail was woefully understaffed such that he was the only jailer on duty, (iii) there was no video surveillance to assist the on-duty staff to supervise, and (iv) the sheriff was aware on the dire staffing and surveillance issues from previous critical reports noting "deficiencies in staff and backup, training, and supervision of inmates," the plaintiff "supplied sufficient evidence to survive summary judgment on his [Fourteenth Amendment] claim against [the sheriff] for failure to protect him from assault by his fellow inmates." *Id*. at 761-62. Again, the

[9] The plaintiff also presented an argument based only on the fact that he was injured because his jailer returned him to the cell after being threatened. *Lopez v. LeMaster*, 172 F.3d 756, 760 (10th Cir. 1999). Summary judgment on this basis was granted because the claim was brought against the sheriff (not the jailer) and plaintiff failed to show a lack of relevant training by the sheriff. *Id*. at 760.

instant case is materially different from these facts. On top of a complete failure to even attempt to segregate the *Lopez* plaintiff from those who had just threatened him, the endemic lack of staffing and reasonable surveillance of the prisoners virtually guaranteed that the *Lopez* plaintiff would be assaulted. In contrast, the guards in the instant case immediately segregated Plaintiff from the juveniles who had threatened him. They did so in cells that were locked and completely functioning. Moreover, at the time of the assault, three guards were present in and supervising a relatively small pod. While they may have been negligent in permitting one of the co-conspirators to reach and access the unlocked control panel, the deficiencies fall well short of those in *Lopez*.

The final important case for comparison is *Howard v. Waide* in which the court reversed a grant of summary judgment on an Eighth Amendment claim of failure to protect. 534 F.3d 1227 (10th Cir. 2008). In *Howard*, the plaintiff was "a non-violent offender who [was] openly homosexual, of slight build, and unusually vulnerable to predators[.]" *Id*. at 1230. At the prison where he was originally housed, he was sexually and physically assaulted on numerous occasions by members of the "2-11" prison gang. *Id*. at 1230-31. Because of these assaults, he was transferred to a different prison. *Id*. at 1231. Plaintiff repeatedly advised the prison officials there of his prior problems with and continued fear of the "2-11" prison gang. *Id*. Initially, plaintiff was placed in a high security housing unit. *Id*. However, some months later, he was moved to a different

housing unit which provided relatively less supervision and fewer restrictions on contact between inmates. *Id*. There, plaintiff encountered a "2-11" prison gang member who told plaintiff that "Ghost," the "2-11" gang member who had been responsible for the assaults at the previous prison, "has a friend here[.]" *Id*. The plaintiff reasonably interpreted this statement as a threat, informed prison officials and asked to be moved to another housing unit. *Id*. The request was denied, and plaintiff pursued the matter through the grievance process. *Id*. at 1232. During this process, prison officials told him that "he would 'have to learn to live with' threats of violence [and] that 'crime just doesn't pay.'" *Id*. Despite the denials of transfer based upon his expressed fear, prison officials did transfer him to another housing unit (at the same security level) "because he 'filed too many grievances.'" *Id*. at 1232-33. In this new housing unit, he was quickly approached by a "2-11" gang member who extorted him for money and threatened him on behalf of "Ghost." *Id*. at 1233. Within a matter of weeks, plaintiff was sexually assaulted on two separate occasions. *Id*. Under these facts, the Tenth Circuit held that the plaintiff had "presented adequate evidence to survive summary judgment" on his failure to protect claim. *Id*. at 1241. As with the cases above, the facts in *Howard* are so materially different from the instant case that they do not put the issue of deliberate indifference in the instant case "beyond debate." *Howard* involved repeated refusals over an extended time to even attempt to segregate an inmate from those who threatened him harm. Moreover, the threats ignored by prison officials in *Howard* were

not merely words – they were continuations of actual physical and sexual assaults by the same prison gang against the *Howard* plaintiff of which the prison officials were well aware. As noted before, the guards in the instant case immediately segregated Plaintiff from the juveniles who had threatened him even when those threats were merely verbal. They did so in cells that were locked and completely functioning. While the segregation failed because of their momentary failure in permitting one of the co-conspirators to reach and access the unlocked control panel, the deficiencies fall well short of those in *Howard*.

In conclusion, the relevant inquiry is whether existing precedent (either from the Supreme Court, Tenth Circuit or the weight of authority from other courts) places the conclusion that Defendants acted with deliberate indifference to Plaintiff's well-being in these circumstances "beyond debate." Reviewing the applicable cases and the material facts, the Court finds that this case is neither an obvious case of reckless indifference nor has adequate authority previously ruled that materially similar conduct was unconstitutional. As such, Plaintiff fails to meet his burden that to show that the individual Defendants' conduct violated a clearly established constitutional right. Thus, the individual Defendants are entitled to qualified immunity.

2. PLAINTIFF CANNOT SHOW THAT DACDC ACTED WITH DELIBERATE INDIFFERENCE AS REQUIRED TO PREVAIL ON THE MUNICIPAL LIABILITY CLAIM.

The Court now turns to Plaintiff's municipal liability claim. Plaintiff, in her Complaint, brings a municipal liability claim under § 1983 against Doña Ana County Board of County Commissioners, doing business as DACDC, for propagating a policy of "failing to properly guard [] detainees" and neglecting to train detention officers to safeguard the control panel in the juvenile unit, resulting in the violation of A.L.'s Fourteenth Amendment due process right to reasonable safety. *Doc. 1* at 7.[10] To establish municipal liability, Plaintiff must prove three elements: "(1) official policy or custom, (2) causation, and (3) state of mind." *Schneider*, 717 F.3d at 769. The Court need not address each element because Plaintiff fails to establish the third element as a matter of law.

With respect to the third element, the "prevailing state of mind standard for a municipality is deliberate indifference regardless of the nature of the underlying

[10] Although neither party discusses the claim that DACDC failed to implement adequate policies to document threats against the juveniles they housed, the Court will address this issue briefly. *See doc. 1*, ¶60. Of course, municipal liability can only follow if its conduct (either through policy, practice or failure to train) was the "moving force" behind the constitutional violation. *See City of Canton v. Harris*, 489 U.S. 378, 388-89 (1989). Here, it is undisputed that DACDC immediately documented the first threats made by Herrera, Solis, and Vasquez against A.L. and quickly placed Herrera, Solis and Vasquez on pre-disciplinary status in order to avoid future confrontations. *Doc. 47-2*. The incident that occurred following Officer Espana's documentation of the threat could not have been prevented by adoption of a more elaborate system to document the threats made by detainees. As such, no reasonable jury could find municipal liability on this basis.

constitutional violation." *Id*. at 771, n.5; *see also Ware v. Unified School Dist*., 902 F.2d 815, 819 (10th Cir. 1990); *Gonzalez v. Ysleta Indep. Sch. Dist*., 996 F.2d 745, 757 (5th Cir.1993) ("The circuits have uniformly interpreted *Canton*'s 'deliberate indifference' requirement, announced in the context of a 'failure to train' claim, to apply to all cases involving facially constitutional policies."). "But 'a municipal policymaker cannot exhibit fault rising to the level of *deliberate* indifference to a constitutional right when that right has not yet been clearly established.'" *Arrington-Bey v. City of Bedford Heights, Ohio*, 858 F.3d 988, 994 (6th Cir. 2017); *see also Szabla v. City of Brooklyn Park, Minn*, 486 F.3d 385, 393 (8th Cir. 2007) ("[W]e agree with the Second Circuit and several district courts that a municipal policymaker cannot exhibit fault rising to the level of deliberate indifference to a constitutional right when that right has not yet been clearly established.") (citing *Townes v. City of New York*, 176 F.3d 138, 143-44 (2d Cir. 1999) and other cases). As other courts have explained, this rule does not impermissibly grant municipalities qualified immunity:

> In *Owen* and *Pembaur*, it's true, the Court held that municipalities may not invoke the qualified immunity hurdle of clearly established rights. But that was because neither case arose from claims of deliberate municipal indifference. The municipalities themselves directly caused each constitutional injury. *See Owen v. City of Indep.*, 445 U.S. 622, 633 (1980); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). That contrasts with a deliberate-indifference case, where the causal link between the city's failure to train and the injury is more attenuated. In a deliberate-indifference case, the claimant must show not only that an employee's act caused a constitutional tort, but also that the city's failure to train its employees caused the employee's violation *and* that the city culpably declined to train its "employees to handle recurring situations presenting

> an obvious potential for such a violation." *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 409 (1997); *see Szabla*, 486 F.3d at 393. "[O]bvious potential for such a violation" has two elements: It must be obvious that the failure to train will lead to certain conduct, *and* it must be obvious (i.e., clearly established) that the conduct will violate constitutional rights. As Judge Colloton pointed out in his opinion for the en banc Eighth Circuit in *Szabla*, requiring that the right be clearly established does not give qualified immunity to municipalities; it simply follows *City of Canton*'s and *Brown*'s demand that deliberate indifference in fact be deliberate. *Szabla*, 486 F.3d at 394.

Arrington-Bey, 858 F.3d at 995 (emphasis in original). Here, as in *Arrington-Bey*, Plaintiff raises a deliberate-indifference training claim, because she "does not point to any allegedly unconstitutional express policy or municipal act, but instead relies on the *absence* of a policy and the failure of [the defendant] or its final policymakers to train [] jailers about [the security risk at issue]." *Id.* With a deliberate indifference claim, Plaintiff is required to show that the allegedly violated right was clearly established, and without such a showing, her claim fails.[11] *Id.*; *see also Townes v. City of New York*, 176 F.3d 138, 143 (2d. 1999) ("municipal liability under a failure to train theory requires, in part, that municipal employees violate or are likely to violate a clearly established federal constitutional right."); *Williamson v. City of Virginia Beach*, 786 F. Supp. 1238,

[11] Plaintiff concedes that DACDC and its municipal policymakers had not implemented any policy related to safeguarding the control panel, but instead delegated the decision whether to log off or lock the panel to the discretion of the individual guards. *Doc. 60*. The Court rejects Plaintiff's argument that DACDC's delegation of discretion to individual guards gave *each* individual guard policymaking authority. *See Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986) ("The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion."). Therefore, this case falls into the category of cases in which the plaintiff relies on the absence of a policy and the failure of the defendants or its final policymakers to train jailers about the security risk at issue.

1264–65 (E.D. Va. 1992) ("[even if] the constitutional rights alleged by plaintiff did exist, the conclusion that they were not clearly established negates the proposition that [the defendant] acted with deliberate indifference"), *aff'd*, 991 F.2d 793 (4th Cir. 1993). Because the right at issue has not been clearly established, Plaintiff cannot show that DACDC was deliberately indifferent.

While the Court is persuaded by the approach of the Second, Sixth and Eighth Circuits, the Tenth Circuit has not had an occasion to expressly address it. Alternatively, even if the Tenth Circuit were to conclude that a right need not be clearly established to prove deliberate indifference by a municipality, DACDC would be entitled to summary judgment. As the Tenth Circuit has explained,

> The deliberate indifference standard may be satisfied when the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm. In most instances, notice can be established by proving the existence of a pattern of tortious conduct. In a narrow range of circumstances, however, deliberate indifference may be found absent a pattern of unconstitutional behavior if a violation of federal rights is a highly predictable or plainly obvious consequence of a municipality's action or inaction.

Schneider, 717 F.3d at 771 (quotations and citations omitted). Based on the summary judgment record, no reasonable jury could find that Plaintiff satisfies this high bar.

The Supreme Court has emphasized the rarity of the "narrow range of circumstances" exception:

> In *Canton*, the Court left open the possibility that, "in a narrow range of circumstances," a pattern of similar violations might not be necessary to

> show deliberate indifference. The Court posed the hypothetical example of a city that arms its police force with firearms and deploys the armed officers into the public to capture fleeing felons without training the officers in the constitutional limitation on the use of deadly force. Given the known frequency with which police attempt to arrest fleeing felons and the "predictability that an officer lacking specific tools to handle that situation will violate citizens' rights," the Court theorized that a city's decision not to train the officers about constitutional limits on the use of deadly force could reflect the city's deliberate indifference to the "highly predictable consequence," namely, violations of constitutional rights. The Court sought not to foreclose the possibility, however rare, that the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations.

Connick v. Thompson, 563 U.S. 51, 63-64 (2011) (citations omitted). "Accordingly, single-incident liability is predicated on (1) the likelihood that a police officer will be confronted with a specific situation and (2) the predictability that an officer, when confronted with that situation, will violate a person's constitutional rights." *Davis v. City of Montgomery*, 220 F. Supp. 3d 1275, 1284 (M.D. Ala. 2016). It seems clear that the failure, in the instant case, to establish a policy or training about digitally locking the control panel does not meet these prerequisites. Certainly, Plaintiff has not provided any evidence that a violation was "highly predictable" in this context.

Consequently, Plaintiff must show a "pattern of tortious conduct" such that DACDC's failure to train on digitally locking the control panel was "substantially certain to result in a constitutional violation." *Schneider*, 717 F.3d at 771. Based on the summary judgment record, no reasonable jury could make that finding. In the twenty-eight months prior to the assault on Plaintiff by his fellow juvenile detainees, there have

been only two other instances where an assault resulted from a detainee accessing the control panel and opening a cell door. The event closest in time to the assault on Plaintiff was fifteen months earlier. These two incidents do not establish a pattern of tortious conduct adequate to demonstrate deliberate indifference. *See, e.g. Malone v. City of Fort Worth*, 297 F. Supp. 3d 645, 655 (N.D. Tex. 2018) ("A single violation or even a handful of violations likely will not be enough for a court to conclude that a municipality maintained the policy with deliberate indifference to the rights of persons within its jurisdiction."). Thus, even without considering the lack of a clearly established right, Plaintiff cannot prove deliberate indifference by DACDC.

For each of these independent reasons, DACDC is entitled to summary judgment on the municipal liability claim.

V. RESOLUTION OF REMAINING CLAIMS

The rulings above dispose of Count I and Count II of Plaintiff's Complaint. *See doc. 1*. The remaining claims are based on state law and no diversity jurisdiction is alleged. *See docs. 1, 4*. Consequently, any jurisdiction over this claim would be an exercise of the Court's supplemental jurisdiction. *See* 28 U.S.C. § 1367. Upon dismissal of Plaintiff's federal claims, this Court must decide whether or not it will adjudicate any remaining state law claims. See 28 U.S.C. § 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction."). When all federal claims

have been dismissed from a case, supplemental state claims will ordinarily be dismissed without prejudice. *Roe v. Cheyenne Mountain Conference Resort*, 124 F.3d 1221, 1237 (10th Cir. 1997). As the Court sees no reason to depart from the ordinary rule, it will decline to exercise jurisdiction over Plaintiff's remaining state law claims and dismiss them without prejudice.

VI. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' Motion for Summary Judgment. *Doc. 47*. Therefore, Plaintiff's federal claims brought under 42 U.S.C. § 1983 are DISMISSED WITH PREJUDICE. Finally, the Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state claims, and they are DISMISSED WITHOUT PREJUDICE.

IT IS SO ORDERED.

GREGORY B. WORMUTH
UNITED STATES MAGISTRATE JUDGE
Presiding by consent