

APPENDICES

APPENDIX A

[PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 20-11310

KIRBY INGRAM,

Plaintiff-Appellant,

versus

LOUIS KUBIK,

BLAKE DORNING,

KEVIN TURNER,

Defendants-Appellees.

Appeal from the United States District Court

for the Northern District of Alabama

D.C. Docket No. 5:19-cv-00741-LCB

Before WILLIAM PRYOR, Chief Judge, JORDAN, Circuit Judge, and BROWN,* District Judge.

WILLIAM PRYOR, Chief Judge:

Kirby Ingram appeals the dismissal of his complaint for failure to state a claim, FED. R. CIV. P. 12(b)(6), against a sheriff's deputy and his supervisor for unlawful seizure and excessive force, *see* 42 U.S.C. § 1983; U.S. CONST. amends. IV, XIV, and against the Sheriff for vicarious liability under Title II of the Americans with Disabilities Act, *see* 42 U.S.C. § 12132. Ingram, an Iraq War veteran, suffers from post-traumatic stress disorder. Two Sheriff's deputies conducted a welfare check after a report that Ingram slit his wrist with a knife. When the deputies arrived, Ingram was calm and posed no threat to them. Although Ingram expressed his willingness to be arrested, one of the deputies suddenly body slammed him headfirst, causing him a serious neck injury. We affirm the dismissal of Ingram's claim for unlawful seizure but reverse the dismissal of his claim of excessive force and supervisory liability. And "[b]ecause vicarious liability is not available for claims under Title II," *Jones v. City of Detroit*, 20 F.4th

* Honorable Michael L. Brown, United States District Judge for the Northern District of Georgia, sitting by designation.

1117, 1118 (6th Cir. 2021), we affirm the dismissal of that claim.

I. BACKGROUND

This appeal is from a dismissal of a complaint for failure to state a claim, *see* FED. R. CIV. P. 12(b)(6), so we recount the factual allegations in the complaint, accept them as true, and construe them in the light most favorable to Ingram, *see Darrisaw v. Pa. Higher Educ. Assistance Agency*, 949 F.3d 1302, 1303 (11th Cir. 2020).

Ingram is an Iraq War veteran who suffers from post-traumatic stress disorder. In October 2017, while suffering from a mental-health crisis, Ingram cut his wrist with a knife at his home. His girlfriend called the Veterans Affairs suicide hotline, which contacted law enforcement. Deputy Louis Kubik and another deputy from Madison County, Alabama, were dispatched to assist Ingram.

When the deputies arrived, Ingram was calm. The deputies searched him multiple times. They confiscated the knife with which Ingram had cut himself. After the search, the deputies knew that he was unarmed.

“Ingram assured the deputies [that] he was no longer suicidal” and “never expressed any desire to harm

himself or any other person during his encounter with the deputies.” He “insisted that the deputies either arrest him or leave.” Both the deputies and Ingram’s mother “tried to convince Ingram to let them take him to a residential program through . . . [Veterans Affairs] that Ingram’s mother wanted him to attend.” When Ingram asked the deputies if he was under arrest, the “deputies told [him] . . . that he was not.” Ingram reiterated “that he would cooperate with any arrest if that [was] what they wanted to do.”

Because the deputies would not leave, Ingram left through the back door “on his third try.” “Ingram ran into a cotton field behind the house, and the deputies followed.” Ingram eventually stopped running and “let the deputies catch up to him.” “The deputies told Ingram that if he would go back to his house and refuse medical treatment,” the deputies would leave. “Ingram agreed to walk back to the house . . . and speak directly with [medical] personnel.” As they walked back, Ingram stated “multiple times that if he was being arrested, the [deputies] should . . . let him know and he would go voluntarily,” but “[t]he deputies repeatedly told Ingram he was not under arrest.”

When they reached the yard, “Ingram held his hands over his head and told [medical] personnel . . . that he was refusing medical treatment.” The deputies knew that Ingram was unarmed and posed no threat to them. “Without warning, Kubik then grabbed Ingram under his armpits, picked Ingram up, and slammed Ingram to the ground head first, causing Ingram to suffer a serious neck injury.” Ingram alleges that Kubik’s decision to body slam “Ingram was motivated by hostility toward Ingram due to Ingram’s mental illness.” Ingram was taken to the hospital. “A surgeon removed Ingram’s C-2 vertebra and replaced it with a metal rod. The surgeon also fused Ingram’s C-3 and C-4 vertebrae.”

“Despite widespread knowledge of th[is] incident up the chain of command” that included then-Sheriff Blake Dorning, “the incident was not . . . investigated, and the deputy was not disciplined.” Failure to investigate excessive force incidents “ha[d] been Dorning’s standard operating procedure”; “[e]ven obviously-unconstitutional . . . actions of his deputies [were] immune from investigation and discipline.” Ingram’s lawyer learned from discovery in other lawsuits “that formal internal investigations of officer misconduct were not conducted,”

and after he requested “records of internal investigations of deputy misconduct,” he was “told no such records existed.” During Dorning’s tenure, the Sheriff’s website “identified no person or division to contact with a complaint [against] a deputy.”

The complaint provides examples of excessive force that were allegedly not investigated. In one “well-publicized revenge beating,” “Dorning refused to investigate and discipline the deputies involved,” despite being “fully informed” of the incident, “including the revenge beating and cover-up.” “Dorning learned that numerous deputies of various ranks were involved in the beating or its planning, in the cover-up, or in both.” Despite that knowledge, and even though a policy and procedure manual required him to investigate, “Dorning took no action against any of the involved deputies” and “did not . . . initiate an internal affairs investigation.” Dorning similarly “refused to investigate serious allegations related to [six] deaths at the Madison County Jail.” And Ingram points to five other incidents that were “approved as a matter of routine through the chain of command without any investigation.”

Dorning's inaction was "a matter of routine and de facto policy" of "approv[ing] the force used and never initiat[ing] further investigation." "Thus, no officer was disciplined, let alone terminated, for excessive force or for otherwise violating a citizen's constitutional rights during Dorning's 16-year tenure." As a result of that policy, "[d]eputies under Dorning's command learned that their justifications for using force and other unlawful actions would never be questioned and that they could act with impunity." Ingram alleges that "[t]hrough explicit instruction and long-established custom, Dorning established a custom or policy that incidents of possible, likely, or known misconduct were not investigated, with the foreseeable result that deputies like Kubik believed they could get away with violating Ingram's rights." Kubik believed that "he would not have to face any investigation and that he could act with impunity."

Ingram filed a civil-rights action, *see* 42 U.S.C. § 1983, against Kubik and Dorning in their individual capacities, for an unlawful seizure and the use of excessive force in violation of Ingram's constitutional rights, *see* U.S. CONST. amends. IV, XIV. Ingram also sued the current Sherriff, Kevin Turner, in his official capacity, for violating

section 504 of the Rehabilitation Act, *see* 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act, *see* 42 U.S.C. § 12132. Ingram alleged that he “suffered from impairments that substantially limited one or more of his major life activities” and that he “had a disability within the meaning of” both Acts. He also alleged that “the Madison County Sheriff, through the actions of his officers, failed to accommodate Ingram, a disabled person, and discriminated against him by seizing and assaulting Ingram.” Later in the litigation, Ingram voluntarily dismissed his claim under section 504 and proceeded against Turner only under Title II.

After Dorning, Kubik, and Turner moved to dismiss the claims against them, the district court granted their motions. The district court held that there was no unlawful seizure because Kubik had probable cause to seize Ingram. On the excessive-force claim, the district court held that Kubik was entitled to qualified immunity because Ingram “ha[d] not shown that his constitutional right was clearly established at the time of the seizure,” so there was “no need to decide if his constitutional right was violated.” The district court held that Ingram had “failed to plausibly establish a causal connection between” Dorning’s actions

and the alleged excessive force to which Ingram was subjected. The district court reasoned that the examples of misconduct alleged in the complaint “at best indicate isolated events of alleged wrongdoing and do not suffice to indicate a ‘custom or policy’ in the department.” And the district court held that Ingram’s Title II claim against Turner requires that he allege “deliberate indifference”; that deliberate indifference requires having “actual knowledge of discrimination in the entity’s programs and fail[ing] adequately to respond,” *Silberman v. Miami Dade Transit*, 927 F.3d 1123, 1134 (11th Cir. 2019) (alteration adopted); and that Ingram “failed to allege that Turner had any actual knowledge of discrimination against people with disabilities in his department.” The district court did not decide whether Title II applies to police encounters or whether vicarious liability is available under Title II; it mentioned only that these questions have not been settled by this Court.

II. STANDARDS OF REVIEW

We review *de novo* an order dismissing a complaint. *Randall v. Scott*, 610 F.3d 701, 705 (11th Cir. 2010). We review *de novo* determinations that officers are entitled to

qualified immunity. *See Piazza v. Jefferson Cnty.*, 923 F.3d 947, 951 (11th Cir. 2019).

III. DISCUSSION

We divide our discussion in two parts. First, we explain that Kubik and Dorning are entitled to qualified immunity from Ingram's claim of an unlawful seizure but not from his claim of excessive force and supervisory liability. Second, we explain that Ingram's claim against Turner fails because vicarious liability is unavailable under Title II.

A. Kubik and Dorning Are Entitled to Qualified Immunity from Ingram's Claim of Unlawful Seizure But Not from His Claim of Excessive Force and Supervisory Liability.

A complaint must be dismissed if its factual allegations, on their face, establish an affirmative defense that bars recovery. *See Cottone v. Jenne*, 326 F.3d 1352, 1357 (11th Cir. 2003). If a defendant advances the affirmative defense of qualified immunity, the district court must dismiss any claims that fail to allege a violation of clearly established law. *See id.* Officers asserting qualified-immunity defenses have the burden to establish that they were acting within their discretionary authority. *Piazza*, 923 F.3d at 951. If the officers satisfy that burden,

the burden then shifts to the plaintiff to establish that the officers violated a constitutional right that was clearly established at the time of the alleged violation. *Id.* The officers are entitled to qualified immunity if the plaintiff fails to show either that there was some constitutional violation or that it was clearly established, and we may consider these two elements in either order. *Id.*

We divide this part in three subsections. First, we conclude that Kubik could lawfully seize Ingram because there was probable cause that Ingram was a danger to himself. Second, we conclude that the force Kubik used against Ingram during that otherwise lawful seizure was unconstitutionally excessive based on clearly established law. Finally, we conclude that the complaint states a claim of supervisory liability against Dorning for the violation of Ingram's clearly established right to be free from excessive force.

1. Kubik Had Probable Cause to Seize Ingram.

Ingram does not dispute that Kubik was acting within his discretionary authority. So, Ingram must establish that Kubik seized him in violation of his clearly established rights. *See id.* Ingram cannot satisfy that burden.

“The Fourth Amendment protects people from unreasonable . . . seizures.” *Roberts v. Spielman*, 643 F.3d 899, 905 (11th Cir. 2011). Mental-health seizures are reasonable under the Fourth Amendment when the officer has probable cause to believe that the seized person is a danger to himself or to others. *Id.* “[T]he correct legal standard to evaluate whether an officer had probable cause to seize a suspect is to ask whether a reasonable officer could conclude that there was a substantial chance,” *see Washington v. Howard*, 25 F.4th 891, 902 (11th Cir. 2022) (alteration adopted) (internal quotation marks omitted), “of dangerous behavior,” *Roberts*, 643 F.3d at 906 (internal quotation marks omitted).

Kubik had probable cause to believe that Ingram was a danger to himself. “Deputy [Kubik] was dispatched in response to a 911 call for a possible suicide attempt.” *Id.* By the time Kubik arrived, Ingram had cut his wrist with a knife. Ingram’s mother thought the situation perilous enough to warrant taking Ingram “to a residential program through . . . [Veterans Affairs].” And Ingram exhibited erratic behavior when he sought to evade the deputies and isolate himself in a cotton field.

In the light of those facts, Kubik was not required to believe Ingram’s innocent assurances that he no longer desired to harm himself. *See District of Columbia v. Wesby*, 138 S. Ct. 577, 588 (2018). Kubik “could have disbelieved” Ingram because “people normally do not” attempt to kill themselves by cutting their wrist if they lack a serious desire to do so. *Cf. id.* at 587. And Ingram’s argument that Kubik was “motivated by anger” is irrelevant because “[a]n officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force.” *Graham v. Connor*, 490 U.S. 386, 397 (1989). “[I]t was objectively reasonable for [Kubik] to believe that [Ingram] might still be in need of immediate aid even though” he was not actively trying to kill himself, *see Roberts*, 643 F.3d at 905, because he had recently attempted to do just that. Because Kubik had probable cause to seize Ingram, Kubik and Dorning are entitled to dismissal of the unlawful-seizure claim. *See Piazza*, 923 F.3d at 951.

2. Kubik is Not Entitled to Qualified Immunity from the
Claim for Excessive Force.

Although Kubik could lawfully seize Ingram, the way he allegedly did so was excessive. “A citizen’s Fourth Amendment right to be free from unreasonable . . . seizures

includes the right to be free from the use of excessive force in the course of an arrest.” *Weiland v. Palm Beach Cnty. Sheriff’s Off.*, 792 F.3d 1313, 1326 (11th Cir. 2015) (internal quotation marks omitted). But “[t]o deny qualified immunity at the motion to dismiss stage, we must conclude both that the allegations in the complaint . . . establish a constitutional violation and that the constitutional violation was clearly established.” *Sebastian v. Ortiz*, 918 F.3d 1301, 1307 (11th Cir. 2019) (internal quotation marks omitted). We conclude that both requirements are satisfied.

A determination that an officer used excessive force “requires careful attention to the facts and circumstances of each particular case” while “recogniz[ing] that the right to make an arrest . . . necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.” *Graham*, 490 U.S. at 396. We apply the “*Graham* framework” to mental health seizures even though they “do[] not involve a criminal arrest.” *Mercado v. City of Orlando*, 407 F.3d 1152, 1157–58 (11th Cir. 2005). Under that framework, the force used by an officer is reasonable only if it is “reasonably proportionate to the need for that force, which is measured by the severity of the crime, the

danger to the officer [or others], and the risk of flight.” *Lee v. Ferraro*, 284 F.3d 1188, 1198 (11th Cir. 2002); *see also Graham*, 490 U.S. at 396. “This Court also considers the need for application of force, the relationship between the need and amount of force used, and the extent of the injury inflicted by the arresting officer.” *Helm v. Rainbow City*, 989 F.3d 1265, 1273 (11th Cir. 2021) (citing *Lee*, 284 F.3d at 1198 & n.7).

Kubik argues that body slamming Ingram was justified because it “had the immediate effect of immobilizing him using nonlethal force and preventing any further threat from [Ingram], either to himself or to the officers.” Kubik also asserts that he “took advantage of an opportunity to physically detain [Ingram]—a former soldier experiencing a mental health crisis who had tried to commit suicide—after he had stopped running and the officers had caught up to him.” And Kubik maintains that he did not violate Ingram’s rights because of Ingram’s “aberrant and erratic conduct.” We disagree.

“All of the factors articulated in *Graham* weigh in favor of [Ingram].” *Mercado*, 407 F.3d at 1157. Although Kubik implies that “the use of force [was] justified because suicidal subjects sometimes make erratic moves that can

jeopardize the safety of the officers,” “viewing the [alleged] facts in the light most favorable to [Ingram],” there is “no indication that [Ingram] made any threatening moves toward the police.” *Id.* The deputies had searched Ingram and confiscated the knife with which he had cut himself, so they knew he was unarmed. Before Kubik body slammed him, Ingram had his hands over his head. And there was no sign that he sought to flee when he was seized. Accepting these allegations as true, Ingram “was not actively resisting arrest, and there is no [allegation] that he struggled with the police” at the time of the seizure. *Id.* Although Kubik could lawfully seize Ingram, the “extent of the injury [he] inflicted” was significant enough to confirm the already tenuous nature of the relationship between the “need for application of force” and the “amount of force used.” *See Helm*, 989 F.3d at 1273.

We conclude that the force used was not “reasonably proportionate to the need for that force.” *Lee*, 284 F.3d at 1198. “Because [Ingram] was not committing a crime, resisting arrest, or posing an immediate threat to the officers at the time he was [body slammed],” Kubik “used excessive force when apprehending [Ingram].” *Mercado*, 407 F.3d at 1157–58. So, Ingram has satisfied his burden

to show that “the officer violated a constitutional right.” *Piazza*, 923 F.3d at 951.

Ingram can establish that “the right was clearly established at the time of the alleged violation,” *id.*, “in any of three ways,” *see Patel v. City of Madison*, 959 F.3d 1330, 1343 (11th Cir. 2020). First, he can “point to a materially similar case that has already decided that what the police officer was doing was unlawful.” *Patel*, 959 F.3d at 1343 (alteration adopted) (internal quotation marks omitted). Second, if he “cannot find a materially similar factual case from the Supreme Court, our Court, or, in this case, the Supreme Court of Alabama,” Ingram can establish “that a broader, clearly established principle should control the novel facts in this situation.” *Id.* (internal quotation marks omitted). Third, Ingram can establish that the officer’s “conduct [was] so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the [officer], notwithstanding the lack of caselaw.” *Id.* (internal quotation marks omitted). We conclude “that a broader, clearly established principle” controls here. *See id.* (internal quotation marks omitted).

Our precedents “hold that gratuitous use of force when a criminal suspect is not resisting arrest constitutes excessive force.” *Hadley v. Gutierrez*, 526 F.3d 1324, 1330 (11th Cir. 2008); *see also id.* (holding that an officer “was not entitled to use *any* force” after handcuffing a suspect because the suspect “neither resisted arrest nor posed a danger” to the officer (emphasis added)). We have held that police officers cannot employ gratuitous and seriously injurious force against non-resisting suspects who are under control. *See, e.g., Saunders v. Duke*, 766 F.3d 1262, 1265 (11th Cir. 2014) (“We have repeatedly ruled that a police officer violates the Fourth Amendment, and is denied qualified immunity, if he or she uses gratuitous and excessive force against a suspect who is under control, not resisting, and obeying commands.”); *Lee*, 284 F.3d at 1200 (relying on “the clear and obvious principle that once an arrest has been fully secured and any potential danger or risk of flight vitiated, a police officer cannot employ . . . severe and unnecessary force”). And we have explained that “the same rationale applies to the use of gratuitous force when the excessive force is applied prior to the handcuffing but in the course of the investigation.” *See Stephens v. DeGiovanni*, 852 F.3d 1298, 1328 & n.33 (11th Cir. 2017); *see also Patel*, 959 F.3d at 1340 (citing

DeGiovanni, 852 F.3d at 1328 n.33) (rejecting the “argu[ment] that our precedent prohibiting the use of gratuitous and excessive force against non-resisting suspects applies only when the suspect is handcuffed”). Based on precedents that preceded Kubik’s conduct, we have explained that “our case law is clear that serious and substantial injuries caused during a suspect’s arrest when a suspect is neither resisting an officer’s commands nor posing a risk of flight may substantiate an excessive force claim.” *Sebastian*, 918 F.3d at 1310–11 (examining case law from 1997 to 2017); *see also Patel*, 959 F.3d at 1343 (“[O]ur cases establishing this principle date to at least 2000.”).

Smith v. Mattox, 127 F.3d 1416 (11th Cir. 1997), is instructive. There, “a police officer subjected a previously threatening and fleeing arrestee to nondeadly force after the arrestee suddenly became docile.” *Id.* at 1419. The suspect had “raised [a] baseball bat in a threatening posture” before the officer drew his firearm and “ordered [the suspect] to drop the bat.” *Id.* at 1418. The suspect then dropped the bat and ran from the officer, who pursued him. *Id.* When the officer caught up, the suspect “docilely submitted to arrest upon [the officer’s] request for him to

‘get down.’” *Id.* The officer then put his knee on the suspect’s lower back and, “with a grunt and a blow,” broke the suspect’s arm while trying to handcuff him. *Id.* Because the suspect “was offering no resistance *at all*, the considerable . . . force inferable from the grunt, [the suspect’s] sensation of a blow, and the broken arm was obviously unnecessary to restrain even a previously fractious arrestee,” so we concluded “that this case falls within the slender category of cases in which the unlawfulness of the conduct is readily apparent even without clarifying caselaw.” *Id.* at 1420. “*Smith* established that if an arrestee demonstrates compliance, but the officer nonetheless inflicts gratuitous and substantial injury using ordinary arrest tactics, then the officer may have used excessive force” even if the arrestee “was initially recalcitrant and even acted aggressively toward the officer.” *Sebastian*, 918 F.3d at 1311.

Mercado v. City of Orlando, 407 F.3d at 1154–58, is also instructive. There, officers were called to conduct a welfare check on a suicidal subject who had “wrapped a telephone cord around his neck” and “used a . . . knife to make multiple cuts on his arms.” *Id.* at 1154. When the officers arrived, the subject’s wife told the officers that he

“was armed with a knife and had threatened to commit suicide.” *Id.* The officers found the subject “sitting on the kitchen floor” while “holding the knife in both hands and pointing it toward his heart.” *Id.* The officers ordered him to “drop his knife at least two times,” “but he refused without making any threatening moves toward the officers.” *Id.* Within 30 seconds of giving that order and with no warning, an officer shot the subject in his head with a rubber projectile, “resulting in brain injuries.” *Id.* at 1154–55, 1155 n.3. After applying the *Graham* factors, we held that the use of force was excessive. *Id.* at 1157–58.

The facts that made the force used in *Mercado* excessive obtain here. In *Mercado*, we rejected “[t]he defendants[’] claim that the use of force [was] justified because suicidal subjects sometimes make erratic moves that can jeopardize the safety of the officers on the scene.” *Id.* at 1157. Despite the subject’s being armed and not under control, we reasoned that there was “no indication that [the subject] made any threatening moves toward the police,” and that he “was not actively resisting arrest,” “struggl[ing] with the police,” or “posing an immediate threat to [them]” before an officer used seriously injurious, lethal force. *Id.* at 1157–58. Most of these facts were true

of Ingram. But unlike the subject in *Mercado*, Ingram behaved less erratically, was compliant, was not an immediate threat to himself or to the deputies, and was known to be unarmed.

Our precedents clearly established that Kubik could not use grossly disproportionate, gratuitous, and seriously injurious force against a non-resisting, compliant, and docile subject like Ingram. Ingram was unarmed. He posed no threat to Kubik. He had his hands over his head. And he reiterated that he would cooperate with any arrest. When Kubik body slammed Ingram headfirst without warning and caused a severe neck injury, that force was “utterly disproportionate to the level of force reasonably necessary” in that circumstance. *See Oliver v. Fiorino*, 586 F.3d 898, 908 (11th Cir. 2009).

To be sure, Ingram behaved erratically when he ran into the cotton field. But using seriously injurious force against “even a previously fractious arrestee” is unlawful if at the time of arrest he “was offering no resistance *at all*.” *Smith*, 127 F.3d at 1420; *see also Mercado*, 407 F.3d at 1157. And it is of no moment that Ingram was not yet under physical control in that circumstance. *See DeGiovanni*, 852 F.3d at 1328 n.33. Kubik’s headfirst body slam was a

“gratuitous use of force” against someone who was “not resisting arrest” that our precedents have established “constitutes excessive force.” *Hadley*, 526 F.3d at 1330. We conclude that “our case law bars [Kubik’s] alleged actions with sufficient clarity to put any reasonable officer on notice” that the use of seriously injurious force against a compliant, docile, non-resisting, and unarmed subject like Ingram “constituted excessive force.” *Sebastian*, 918 F.3d at 1311. Kubik is not entitled to qualified immunity based on these allegations.

3. Dorning is Not Entitled to Qualified Immunity from Ingram’s Claim of Supervisory Liability.

Supervisory officials are not vicariously liable under section 1983 for the unconstitutional acts of their subordinates. *Hartley v. Parnell*, 193 F.3d 1263, 1269 (11th Cir. 1999). Plaintiffs must instead allege that the supervisor, through his own actions, violated the Constitution. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). Because Ingram does not allege that Dorning was present or involved in the altercation, Dorning is liable under section 1983 only if “there is a causal connection between [his] actions . . . and the alleged constitutional deprivation.”

Hartley, 193 F.3d at 1269 (internal quotation marks omitted).

Causation “may be established and supervisory liability imposed where the supervisor’s improper custom or policy results in deliberate indifference to constitutional rights.” *Id.* (alterations adopted) (internal quotation marks omitted). “A plaintiff can also show that the *absence* of a policy led to a violation of constitutional rights.” *Piazza*, 923 F.3d at 957. “Either way, though, to prove that a policy or its absence caused a constitutional harm, a plaintiff must point to multiple incidents, or multiple reports of prior misconduct by a particular employee.” *Id.* (citation omitted). And allegations of a single incident of unconstitutional conduct cannot state a claim for supervisory liability, even when the conduct involves several subordinates. *Id.* at 957–58.

Dorning makes two arguments. First, he argues that the allegations fail to state a claim for supervisory liability. Second, he argues that he is entitled to qualified immunity. We disagree with both arguments.

“A plaintiff survives a motion to dismiss only if his complaint alleges ‘sufficient factual matter, accepted as true, that states a claim to relief that is plausible on its

face.” *McCullough v. Finley*, 907 F.3d 1324, 1333 (11th Cir. 2018) (alterations adopted) (quoting *Iqbal*, 556 U.S. at 678). After ignoring conclusory allegations, “we assume any remaining factual allegations are true and determine whether those factual allegations ‘plausibly give rise to an entitlement to relief.’” *Id.* (quoting *Iqbal*, 556 U.S. at 679). We conclude that Ingram’s complaint states a claim against Dorning.

Ingram’s complaint alleges that there was a causal connection between Dorning’s conduct and the excessive force used against Ingram. The complaint alleges that Dorning established a policy that “incidents of possible, likely, or known misconduct were not investigated, with the foreseeable result that deputies like Kubik believed they could get away with violating Ingram’s rights.” *Cf. Hartley*, 193 F.3d at 1269 (finding relevant the lack of evidence that a supervisor “had any sort of policy in place prior to the [alleged misconduct] which could have led [the subordinate] to believe that [the misconduct] was permitted by [the supervisor]”). And Ingram’s complaint alleges that Kubik had that belief when he used excessive force.

The complaint alleges “multiple incidents, or multiple reports of prior misconduct by” officers, *Piazza*, 923 F.3d at 957 (citation omitted), that were not investigated by Dorning. One incident involved a “well-publicized revenge beating” that “Dorning refused to investigate” and in which he did not “discipline [the] deputies involved,” despite being “fully informed” of the beating and cover-up. Dorning knew that “numerous deputies of various ranks were involved in the beating” or its cover-up. Dorning allegedly took no action against any of the deputies involved and “did not . . . initiate an internal affairs investigation.” The complaint identifies five other incidents that were “approved as a matter of routine through the chain of command without any investigation.” In one of these incidents, “a deputy with a history of losing his temper with citizens punched a severely intoxicated misdemeanor arrestee twice in the face, causing an orbital fracture.”

Dorning allegedly “was copied on all use of force reports” and “approved of the excessive uses of force without having any of them investigated.” “[N]o officer was disciplined, let alone terminated, for excessive force or for otherwise violating a citizen’s constitutional rights during

Dorning's 16-year tenure." During that tenure, Dorning's website "identified no person or division to contact with a complaint [against] a deputy." In response to requests for "records of internal investigations of deputy misconduct," Ingram's lawyer was "told no such records existed," despite a "policy and procedure manual" that "requires thorough and prompt investigations" of allegations of misconduct. And "[d]espite widespread knowledge of the incident" involving Kubik and Ingram "up the chain of command (including Dorning)[,] . . . the incident was not . . . investigated."

Contrary to Dorning's argument, this case is not like *McCullough v. Finley*, where "we struggle[d] to find [any] factual allegations" in a complaint that alleged only "the [officials'] names and titles." 907 F.3d at 1334–35. In *McCullough*, there was "nothing about the significance of [the officials'] titles, their individual roles in the [policy], their personal interactions or familiarity with [the plaintiffs], their length of service, their management policies, or any other characteristics that would bear on whether they knew about the [policy] that they allegedly operated." *Id.* at 1334 (internal quotation marks omitted).

The allegations of “multiple reports of prior misconduct,” *Piazza*, 923 F.3d at 957, with no investigation by Dorning “allow[] the court to draw the reasonable inference,” *Iqbal*, 556 U.S. at 678, that there is a causal connection between Dorning’s failure to investigate any allegations of serious misconduct and Kubik’s belief that he could act with impunity. The factual allegations, if true, establish the “absence of a policy” of investigating excessive force violations, *see Piazza*, 923 F.3d at 957, of which Dorning had knowledge, *see Rivas v. Freeman*, 940 F.2d 1491, 1495–96 (11th Cir. 1991) (“[T]he district court’s findings regarding [the] Sheriff[’s] . . . failure to establish policies and procedures [were] supported” by “evidence at trial which established that [he] knew of prior instances of [misconduct], but allowed his deputies to [engage in that misconduct].”). And the complaint relies on more than the incident at issue to establish the custom or policy. *See, e.g., Piazza*, 923 F.3d at 957–58.

Dorning also is not entitled to qualified immunity. Because Ingram does not dispute that Dorning was acting within the scope of his discretionary authority, “the burden shifts to [Ingram] to show that (1) [Dorning] violated a constitutional right and (2) the right was clearly

established at the time of the alleged violation.” *Id.* at 951. Ingram has satisfied his burden.

A supervisor can be held liable for implementing or failing to implement a policy that causes his subordinates to believe that they can permissibly violate another’s constitutional rights if the subordinates then do so based on that belief. *See Hartley*, 193 F.3d at 1269. As we have explained, the complaint adequately alleges that one of Dorning’s subordinates used excessive force and that there is a causal connection between that excessive force and Dorning’s policy of allowing such force. And this Court has clearly established that “a custom of allowing the use of excessive force . . . provides the requisite fault[,] . . . as a persistent failure to take disciplinary action against officers can give rise to the inference that a [supervisor] has ratified conduct.” *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1443 (11th Cir. 1985). That “allegation would [also] provide the causal link between the challenged conduct and the . . . policy, because [the officer] would have been acting in accordance with the policy of allowing or encouraging excessive force.” *Id.* This principle applies both to municipalities and supervisors “responsible for disciplining police officers and setting police department

policy.” *Id.* It follows that Ingram’s complaint states a claim that Dorning violated his clearly established constitutional rights.

B. Vicarious Liability is Unavailable under Title II of the Americans with Disabilities Act.

Under Title II of the Americans with Disabilities Act, “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. “Given the textual similarities between” Title II and section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), “the same standards govern claims under both, and we rely on cases construing Title II and [section] 504 interchangeably.” *Silberman*, 927 F.3d at 1133 (alterations adopted) (internal quotation marks omitted). To state a claim under Title II, Ingram had to allege “(1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of a public entity’s services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination

was by reason of [his] disability.” *Id.* at 1134 (internal quotation marks omitted).

Ingram seeks compensatory damages for the alleged Title II violation. And “[t]o get damages—as [Ingram] seeks here—a plaintiff must clear an additional hurdle: he must prove that the entity that he has sued engaged in intentional discrimination, which requires a showing of deliberate indifference.” *Id.* (internal quotation marks omitted). To recover from Turner under this standard, Ingram must establish that Turner is “an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the entity’s behalf” and “had actual knowledge of discrimination in the entity’s programs and failed adequately to respond.” *Id.* (alterations adopted) (internal quotation marks omitted).

The district court applied the deliberate-indifference standard, held that Ingram “failed to allege that Turner had any actual knowledge of discrimination against people with disabilities in his department,” and concluded that Ingram “failed to state a claim for relief.” But Ingram seeks to evade that conclusion by arguing that Turner is vicariously liable. And we have explained that “the

availability of respondeat superior for Title II . . . claims remains an open question.” *Id.* at 1134 n.6.

Turner argues that vicarious liability is unavailable under Title II and that, in any event, Title II does not apply to police encounters. The latter argument may conflict with precedent. *See Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1084–85 (11th Cir. 2007) (explaining that a plaintiff can “attempt to show a[] . . . claim under . . . Title II” by establishing “that he was ‘subjected to discrimination’ by a public entity, *the police*, by reason of his disability” (quoting 42 U.S.C. § 12132) (emphasis added)). But we need not address that argument because we conclude that vicarious liability is unavailable under Title II.

The Supreme Court “ha[s] never decided whether” a public “entity can be held vicariously liable [under Title II] for money damages for the purposeful or deliberately indifferent conduct of its employees.” *City of San Francisco v. Sheehan*, 575 U.S. 600, 610 (2015). And the courts of appeals are divided. Some have held that vicarious liability is available under Title II. *E.g.*, *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1141 (9th Cir. 2001); *Delano-Pyle v. Victoria Cnty.*, 302 F.3d 567, 574–75 (5th Cir. 2002); *Rosen v. Montgomery Cnty.*, 121 F.3d 154, 157 n.3 (4th Cir. 1997).

The Sixth Circuit recently held the opposite. *Jones*, 20 F.4th at 1118. We agree with the Sixth Circuit.

Although Title II “prohibits discrimination against the disabled by public entities[, and section] 504 of the Rehabilitation Act prohibits discrimination against the disabled by recipients of federal funding, including private organizations,” *Barnes v. Gorman*, 536 U.S. 181, 184–85 (2002), both provisions incorporate the remedies available under other anti-discrimination statutes. The enforcement provision of Title II declares that “[t]he remedies, procedures, and rights set forth in [the Rehabilitation Act] shall be the remedies, procedures, and rights” Title II “provides to any person alleging discrimination on the basis of disability.” 42 U.S.C. § 12133. And the enforcement provision of section 504 declares that the “remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by any act or failure to act . . . under section [504].” 29 U.S.C. § 794a(a)(2). It follows that the remedies, procedures, and rights “for violations of [Title II] and [section] 504 . . . are coextensive with” those that are “available in a private cause of action brought under Title VI of the Civil Rights Act of 1964, which prohibits racial

discrimination in federally funded programs and activities.” *See Barnes*, 536 U.S. at 185 (citation omitted). So, “Title VI tells us whether vicarious liability is available under” Title II; if vicarious liability is unavailable under Title VI, it is unavailable under Title II. *Jones*, 20 F.4th at 1119.

Vicarious liability is unavailable under Title VI. *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), controls that question. In *Gebser*, the Supreme Court explained that Title IX “was modeled after Title VI of the Civil Rights Act of 1964, which is parallel to Title IX except that it prohibits race discrimination, not sex discrimination, and applies in all programs receiving federal funds, not only in education programs.” *Id.* at 286 (citations omitted). “The two statutes operate in the same manner” *Id.* The Court held that Title IX does not “permit a damages recovery against a school district for a teacher’s sexual harassment of a student based on principles of respondeat superior or constructive notice.” *Id.* at 285. The Court reasoned that both Title VI and IX “attach[] conditions to the award of federal funds,” *id.* at 287, under Congress’s spending power, U.S. CONST. art. I, § 8, cl. 1. The “contractual nature [of those statutes] has

implications for our construction of the scope of available remedies.” *Gebser*, 524 U.S. at 287. The “central concern” for courts is with ensuring that the entity receiving funds has “notice” that it will be liable for noncompliance with the condition. *Id.* (internal quotation marks omitted). And “[i]f a school district’s liability for a teacher’s sexual harassment rests on principles of constructive notice or respondeat superior, it will . . . be the case that the recipient of funds was unaware of the discrimination,” a result “that Congress did not envision.” *Id.* at 287–88. Instead, “in cases . . . that do not involve official policy of the recipient entity,” the Supreme Court “h[eld] that a damages remedy will not lie . . . unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures . . . has actual knowledge of [the] discrimination . . . and fails to adequately respond,” *id.* at 290—the standard the district court applied in this case.

Title IX, like Title II, “incorporates the remedies established by Title VI of the Civil Rights Act” and “uses the same remedial scheme.” *Jones*, 20 F.4th at 1120. “[T]he [Supreme] Court has interpreted Title IX consistently with Title VI.” *Barnes*, 536 U.S. at 185. And Title VI “shares all

of the[] features” on which the Supreme Court relied to hold that vicarious liability is unavailable under Title IX, so “[w]hat was true for Title IX in *Gebser* is true for Title VI today.” *Jones*, 20 F.4th at 1121. Because vicarious liability is unavailable under Title IX, *Gebser*, 524 U.S. at 285, “an entity cannot be held vicariously liable on a respondeat superior theory . . . under Title VI,” *United States v. Cnty. of Maricopa*, 889 F.3d 648, 652 (9th Cir. 2018). And “[b]ecause Title II . . . and the Rehabilitation Act import Title VI’s remedial regime,” vicarious liability is unavailable under Title II. *Jones*, 20 F.4th at 1121.

Ingram agreed to the dismissal of his Rehabilitation Act claim under section 504 because “*Gebser* . . . provides support for the position that there is not vicarious liability under [section] 504.” He decided to “proceed [instead] only under Title II.” But we have repeatedly explained that “the same standards govern claims under both, and we rely on cases construing Title II and [section] 504 interchangeably.” *Silberman*, 927 F.3d at 1133 (alterations adopted) (internal quotation marks omitted).

Ingram’s attempt to find daylight between them is unavailing. Ingram asserts that section 504 and Title IX “appl[y] only to recipients of federal financial assistance”

and correctly explains that they “ha[ve] a similar remedial scheme.” But, he argues, “Title II . . . [is] not linked to acceptance of federal funds.” The problem for Ingram is that his argument was foreclosed by the Supreme Court in *Barnes v. Gorman*, 536 U.S. at 189–90 n.3.

In *Barnes*, the Supreme Court rejected the argument that “Title VI does not carry over to the [Americans with Disabilities Act] because the latter is not Spending Clause legislation.” *Id.* at 189 n.3. The Court held that the provisions of Title II that expressly incorporate the remedies in the Rehabilitation Act “make discussion of the [Americans with Disability Act]’s status as a ‘non Spending Clause’ tort statute quite irrelevant.” *Id.* at 190 n.3. Although Title II is not Spending Clause legislation, its text expressly incorporates the remedies available under a statute that is—Title VI.

We conclude that “*Gebser* provides the correct standard” under Title II. *See Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 349 (11th Cir. 2012). Under Title II, vicarious liability is unavailable; instead, the “narrower approach [in *Gebser*] . . . requires the deliberate indifference of an *official* who at a minimum has *authority* to address the alleged discrimination and to institute

corrective measures on the [entity's] behalf and who has *actual knowledge* of discrimination in the [entity's] programs and fails adequately to respond.” *See id.* (alteration adopted) (internal quotation marks omitted).

The district court applied that standard, and it correctly dismissed Ingram’s Title II claim. As the district court concluded, Ingram “failed to allege that Turner had any actual knowledge of discrimination against people with disabilities in his department.”

IV. CONCLUSION

We **AFFIRM** in part, **REVERSE** in part, and **REMAND** for further proceedings.

APPENDIX B

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION**

KIRBY INGRAM,)	
)	
Plaintiff,)	
)	
v.)	Case No.: 5:19-cv-
		00741-LCB
)	
LOUIS KUBIK, et al.,)	
)	
Defendants.)	

MEMORANDUM OPINION

Plaintiff Kirby Ingram brought this case for injuries he allegedly suffered during a welfare check on October 22, 2017. (Doc. 26 at 2). Plaintiff claims that Defendant Louis Kubik slammed him against the ground outside his home, causing serious injuries to his neck. Before the Court are Defendants Dorning's, Turner's, and Kubik's Motions to Dismiss Plaintiff's Amended Complaint (Docs. 30, 32 & 34). For the reasons stated below, the Court finds Defendants motions are due to be granted.

I. FACTUAL BACKGROUND

On October 22, 2017, Plaintiff, a veteran who suffers from Post-Traumatic Stress Disorder (PTSD), was in the throes of a mental health crisis and cut one of his wrists. (Doc. 26 at 2). Plaintiff's girlfriend called the VA suicide hotline, and two sheriff's deputies, Defendant Kubik among them, were dispatched to the scene. (*Id.*). The deputies searched him for weapons and confiscated the pocketknife he had used to cut his wrist. (*Id.*). Although Plaintiff was now no longer suicidal, the deputies and Plaintiff's mother together tried to persuade him to let the deputies take him to a VA residential treatment program. (*Id.* at 3). Throughout this discussion, Plaintiff asked repeatedly whether he was under arrest, and repeatedly he was assured that he was not. (*Id.*). Plaintiff informed the officers that if they wanted to arrest him, he would cooperate. (*Id.*).

Plaintiff eventually concluded that the deputies were not going to leave and ran outside into a cotton field behind the house. (*Id.*). The deputies followed behind him. (*Id.*). Plaintiff soon stopped to let them catch up. (*Id.*). When they reached him, the deputies told Plaintiff that if he would go back to the house and refuse treatment from

HEMSI, the local medical services, the deputies would leave. (*Id.*). Plaintiff then agreed to walk back with the deputies to speak with HEMSI. (*Id.*). On the walk back, Plaintiff again asked whether he was under arrest, emphasizing that if he was, they should say so, and he would go voluntarily. (*Id.* at 3–4). Plaintiff was once again assured he was not under arrest. (*Id.* at 4). As they approached the yard, Plaintiff called out to HEMSI that he would be refusing treatment. (*Id.*).

Suddenly, Defendant Kubik grabbed Plaintiff under his armpits, picked him up, and slammed him into the ground head-first, seriously injuring Plaintiff's neck. (*Id.*). HEMSI took Plaintiff by ambulance to the hospital, where a surgeon fused his C-3 and C-4 vertebrae and replaced his C-2 vertebra with a metal rod. (*Id.* at 5).

For his injuries, Plaintiff now seeks damages under § 1983 against Defendant Kubik for his alleged use of excessive force and allegedly illegal seizure in violation of the Fourth and Fourteenth Amendment, and against Defendant Blake Dorning, former Sheriff of Madison County, for allegedly “establish[ing] a custom and policy of tolerating misconduct by his officers.” Plaintiff also seeks damages under Title II of the Americans with Disabilities

Act (ADA) against current Sheriff Defendant Kevin Turner in his official capacity only, for allegedly failing to provide adequate accommodations for Plaintiff's disability during the welfare check.[†] (Id. at 11–12).

II. LEGAL STANDARDS

Under Federal Rule of Civil Procedure 12(b)(6), a civil claim may be dismissed for failing “to state a claim upon which relief can be granted.” While the complaint need not include “detailed factual allegations” to survive, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), it must offer more than “a formulaic recitation of the elements of a cause of action.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To survive a motion to dismiss, a plaintiff must “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). A claim is facially plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. When reviewing a motion to dismiss, a court must “accept[] the allegations in the complaint as true and constru[e] them in the light most

[†] Plaintiff voluntarily dismissed his claim that Defendant Turner violated Section 504 of the Rehabilitation Act in his Reply Brief. (Doc. 42 at 2).

favorable to the plaintiff.” *Hunt v. Aimco Properties*, 814 F.3d 1213, 1221 (11th Cir. 2016). A party’s vague recitation “of the elements of a cause of action, supported by mere conclusory statements, do[es] not suffice.” *Iqbal*, 556 U.S. at 678.

III. DISCUSSION

A. Defendant Dorning’s Motion to Dismiss

(Doc. 30)

Defendant Dorning argues that Plaintiff has not stated a claim against him because he has not pled enough facts to satisfy the standards of supervisory liability under § 1983. (Doc. 31 at 4). Defendant Dorning also asserts qualified immunity. (*Id.* at 17).

“Supervisory officials cannot be held liable under § 1983 for unconstitutional acts by their subordinates based on respondeat-superior or vicarious-liability principles.” *Piazza v. Jefferson Cty., Ala.*, 923 F.3d 947, 957 (11th Cir. 2019). A supervisor that does not personally participate in the alleged wrongdoing can be held liable under § 1983 only “if there is a ‘causal connection’ between [the] supervisor’s actions and the alleged constitutional violation.” *Id.* (quoting *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003)).

A causal connection can be established “when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so.” *Cottone*, 326 F.3d at 1360 (quoting *Gonzalez v. Reno*, 325 F.3d 1228, 1234 (11th Cir. 2003)). A connection can also be established “when a supervisor’s ‘custom or policy’ . . . result[s] in deliberate indifference to constitutional rights.” *Id.* A government office or official’s “custom is a practice that is so settled and permanent that it takes on the force of law.” *Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 489 (11th Cir. 1997). Likewise, “a policy is a decision that is officially adopted by the municipality, or created by an official of such rank that he or she could be said to be acting on behalf of the municipality.” *Id.* The standard for holding a supervisor personally liable for the conduct of his subordinate is “extremely rigorous.” *Braddy v. Fla. Dept. of Labor and Emp’t Sec.*, 133 F.3d 797, 802 (11th Cir. 1998).

Plaintiff claims that Defendant Dorning’s “standard operating procedure” has been to ignore the alleged misconduct of his deputies and fail to investigate incidents of abuse. (Doc. 26 at 6). In support of his argument that this was Defendant Dorning’s custom or policy, Plaintiff

asserts that Dorning conducted “zero internal investigations of deputy misconduct and zero disciplinary actions against deputies for misconduct.” (Doc. 40 at 11). He also specifically lists five incidents from the Northern District of Alabama in which Defendant Dorning allegedly oversaw deputy misconduct and did not intervene.[‡]

Here, Plaintiff’s allegations against Defendant Dorning do not meet the “rigorous standards” to hold him liable as a supervisor for Kubik’s conduct. *See Braddy*, 133 F.3d at 802. Several of Plaintiff’s allegations against Defendant Dorning, such as his alleged refusal to investigate past incidents of deputy misconduct and his alleged cover-up (Doc. 26 at 7–8), are mere conclusory allegations and must therefore be disregarded. *Iqbal*, 556 U.S. at 678. Although Plaintiff cited five instances of alleged misconduct by Defendant Dorning’s deputies that led to out-of-court settlements, this does not equate to a “custom or policy” of indifference to constitutional violations. Assuming, *arguendo*, that each of these incidents was evidence of police misconduct, these five

[‡] These cases are: *Bryant v. Watson*, et. al., (No. 5:14 -cv-00414-CLS); *Johnson v. Jones*, (No. 5:09-cv-01940-IPJ); *Ratliff v. Pyle*, et. al., (No. 5:11-cv-03612-TMP); *Summers v. Martin*, (No. 5:12-cv-01816-CLS); and *Kennebrew v. Dejong*, et.al. (No. 5:15-cv-00372-CLS). (Doc. 26 at 9– 10; Doc. 40 at 8).

cases are not enough to establish that Defendant Dorning's custom or policy is to permit deputy misbehavior with no repercussions. These cases reference separate incidents that occurred respectively in 2008, 2009, 2010, 2012, and 2013. (Doc. 26 at 10). These occurrences at best indicate isolated events of alleged wrongdoing and do not suffice to indicate a "custom or policy" in the department. *See Depew v. City of St. Mary's, Ga.*, 787 F.2d 1496, 1499 (11th Cir. 1986) (holding "random acts or isolated incidents" are typically insufficient to establish a custom or policy). Because Plaintiff failed to plausibly establish a causal connection between Defendant Dorning and alleged constitutional violations, a qualified immunity discussion is unnecessary.

Accordingly, considering the facts in the light most favorable to Plaintiff, Plaintiff has failed to state a claim against Defendant Dorning. Defendant Dorning's Motion to Dismiss the Amended Complaint (Doc. 30) is therefore due to be **GRANTED**.

**B. Defendant Turner's Motion to Dismiss
(Doc. 32)**

Defendant Turner moves to dismiss Plaintiff's claims brought against him in the amended complaint for

failing to state a claim under Title II of the ADA. (Doc. 32 at 1). Specifically, Defendant Turner contends that Plaintiff has failed to plausibly allege that Turner had any discriminatory intent towards him (Doc. 33 at 3); that Plaintiff cannot prove that he was discriminated against because of his disability (*Id.* at 11); and that Title II of the ADA does not apply to Fourth Amendment seizures (*Id.* at 15).

Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. To state a claim under Title II of the ADA, a plaintiff must demonstrate

(1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of a public entity’s services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of the plaintiff’s disability.

Bircoll v. Miami-Dade Cty., 480 F.3d 1072, 1083 (11th Cir. 2007). Typically, a Title II claim would entitle a plaintiff

only to injunctive relief. *Silberman v. Miami Dade Transit*, 927 F.3d 1123, 1134 (11th Cir. 2019). However, a plaintiff may recover compensatory damages under the statute if he can “prove that the entity that he has sued engaged in intentional discrimination,” proof “which requires a showing of ‘deliberate indifference.’” *Id.* (quoting *Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 348 (11th Cir. 2012)). Proving deliberate indifference is an “exacting standard” and requires proof that “the defendant knew that the harm to a federally protected right was substantially likely and. . . failed to act on that likelihood.” *Id.* (quoting *Liese*, 701 F.3d at 344).

“[T]o hold a government entity liable, the plaintiff must demonstrate that an ‘official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the [entity’s] behalf’ had ‘actual knowledge of discrimination in the [entity’s] programs and fail[ed] adequately to respond.’” *Id.* (quoting *Gesber v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998)). In this context, an official is one “whose actions can be fairly said to represent the actions of the organization.” *Liese*, 701 F.3d at 350.

Here, Plaintiff has failed to state a claim against Defendant Turner in his official capacity.[§] Plaintiff contends that the correct standard of liability is respondeat superior. (Doc. 42 at 7). Indeed, Plaintiff correctly notes the availability of respondeat superior under Title II of the ADA “remains an open question” in the Eleventh Circuit. *Silberman*, 927 F.3d at 1134 n.6. However, until that question is resolved, the Court will follow the precedent established by *Liese* and apply the deliberate indifference standard for holding government entities liable for Title II violations.^{**} Accordingly, to succeed under Title II of the ADA at this stage of litigation, Plaintiff must not only allege facts sufficient to state a claim under *Bircoll*, he must also allege that Turner was an official that was deliberately indifferent with “actual knowledge of discrimination in the [entity’s] programs and fail[ed] to adequately respond.” *Id.* at 1134.

[§] As Defendant Turner is being sued in his official capacity, “this is deemed a suit against the entity that he represents.” *Brown v. Neumann*, 188 F.3d 1289, 1290 (11th Cir. 1999).

^{**} The Court also notes that the Eleventh Circuit “has never addressed whether police officers can violate Title II of the ADA.” *Estate of Osorio v. Miami Dade Cty.*, 717 F. App’x 957 (11th Cir. 2018) (per curiam). However, when confronted with this situation in *Estate of Osorio*, the Court applied the *Liese* “deliberate indifference” standard. *Id.*

Construing the facts in the light most favorable to Plaintiff, Plaintiff has failed to allege that Turner had any actual knowledge of discrimination against people with disabilities in his department. Because Plaintiff failed to show actual knowledge of discrimination, he cannot show that Turner was deliberately indifferent to his disability, thus has failed to state a claim for relief. As there is no claim, it is unnecessary to address Defendant Turner's remaining arguments. Defendant Turner's Motion to Dismiss the Amended Complaint (Doc. 32) is therefore due to be **GRANTED**.

**C. Defendant Kubik's Motion to Dismiss
(Doc. 34)**

Defendant Kubik moves to dismiss the amended complaint on the grounds that he had probable cause to effect a mental health seizure and did not use excessive force towards Plaintiff. (Doc. 35 at 10, 13). Additionally, he argues he is entitled to qualified immunity. (Id. at 16).

Qualified immunity protects government officials "sued in their individual capacities" if their actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would know." *Lee v. Ferraro*, 284 F.3d 1188, 1193–94 (11th Cir. 2002). To

receive qualified immunity, a defendant must establish that he was acting within his discretionary authority. *Id.* at 1194. If a defendant successfully asserts he was acting within his discretionary authority, the burden shifts to the plaintiff “to show that qualified immunity is not appropriate.” *Id.* Courts conduct a two-step analysis to determine if qualified immunity is appropriate. *Davis v. Williams*, 451 F.3d 759, 762 (11th Cir. 2006). First, construing the facts “in the light most favorable to the party asserting injury, do the facts show the officer’s conduct violated a constitutional right?” *Id.* If a party’s constitutional rights were violated, the court then “determine[s] ‘whether, at the time of the incident, every objectively reasonable police officer would have realized the acts violated clearly established federal law.’” *Id.* An officer is entitled to qualified immunity in excessive force cases “unless application of the standard would inevitably lead every reasonable officer [in a defendant’s position] to conclude the force was unlawful.” *Nolin v. Isbell*, 207 F.3d 1253, 1255 (11th Cir. 2000). When determining whether qualified immunity applies, the Court has the discretion to decide whether a constitutional violation exists and if it is clearly established in either order. *Wate v. Kubler*, 839 F.3d 1012, 1019 (11th Cir. 2016).

1. Unlawful Seizure

The Fourth Amendment guarantees freedom from unreasonable searches and seizures. U.S. Const. amend. IV. When a law enforcement agent “restrains the freedom of a person to walk away, he has seized that person.” *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). Generally, warrantless searches and seizures are prohibited. *Bates v. Harvey*, 518 F.3d 1233, 1243 (11th Cir. 2008). However, a warrantless seizure is allowed when exigent circumstances exist, such as when a suspect can potentially harm himself or others. *Id.* at 1244. For example, an officer may seize an individual to determine his or her mental state, consistent with the guarantees of the Fourth Amendment, if he has “probable cause to believe the person is dangerous either to himself or to others.” *Roberts v. Spielman*, 643 F.3d 899, 905 (11th Cir. 2011).

Construing the facts in the light most favorable to Plaintiff, the Court finds that on October 22, 2017, Defendant Kubik had probable cause to seize Plaintiff. Defendant Kubik and his fellow deputy arrived at Plaintiff’s home in response to his “mental health crisis.” (Doc. 26 at 2). By the time they had arrived, Plaintiff had already cut his wrist with a pocketknife. (*Id.* at 2). And

though he claimed he was no longer suicidal, (*Id.* at 2), his actions were unpredictable: Plaintiff tried three times to escape the deputies, and when he finally succeeded, he ran out back into a cotton field to be alone. (*Id.* at 3). Given Plaintiff's suicidal actions and his displays of erratic behavior, a reasonable officer could conclude that Plaintiff remained a danger to himself. Accordingly, Defendant Kubik had probable cause to seize Plaintiff. Because there was no constitutional violation, Defendant Kubik is entitled to qualified immunity for this claim.^{††}

2. *Excessive Force*

“The Fourth Amendment’s freedom from unreasonable searches and seizures encompasses the plain right to be free from excessive force in the course of an arrest.” *Lee*, 284 F.3d at 1197. Courts have “long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.” *Graham v. Connor*, 490 U.S. 386, 396 (1989). However, the force that an officer uses must be reasonable. *Id.* at 394. Determining whether use of force is reasonable in a situation “must be

^{††} That Defendant Kubik was acting within his discretionary authority is undisputed for purposes of a qualified immunity analysis.

judged from the prospective of a reasonable officer on the scene, rather than the 20/20 vision of hindsight.” *Id.* at 396. Typically, the Court will consider three factors to determine whether the use of force was objectively reasonable: “(1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the officer or others; and (3) whether he is actively resisting arrest or attempting to evade arrest by flight.” *Id.*

A constitutional right is clearly established if a law enforcement officer is “on notice that his conduct [is] clearly unlawful.” *Terrell v. Smith*, 668 F.3d 1244, 1255 (11th Cir. 2012). There are three ways for a plaintiff to prove that his constitutional right was “clearly established.” *Id.* First, a plaintiff can show “a materially similar case has already been decided.” *Id.* (quoting *Mercado v. City of Orlando*, 407 F.3d 1152, 1159 (11th Cir. 2005)). When deciding whether cases are “materially similar” courts will “ask whether the factual scenario that the official faced is ‘fairly distinguishable from the circumstances facing a government official’ in a previous case.” *Terrell*, 668 F.3d at 1256. Only the “binding decisions of the Supreme Court of the United States, the United States Court of Appeals, and the highest court of the pertinent state” are

controlling. *Wate*, 839 F.3d at 1018. Next, a plaintiff “can point to a ‘broader, clearly established principle [that] should control the novel facts [of the] situation.’” *Id.* Finally, he can demonstrate the right was clearly established by showing that the officer’s conduct “so obviously violates the constitution that prior case law is unnecessary.” *Id.* Cases rarely arise under “[t]he second and third methods. . . generally known as ‘obvious clarity’ cases.” *Gaines v. Wardynski*, 871 F.3d 1203, 1209 (11th Cir. 2017).

Plaintiff argues that Defendant Kubik’s actions were obviously unconstitutional, relying on *Landsman v. City of Vero Beach*, 621 F. App’x 559 (11th Cir. 2015).^{##} The Court in *Landsman* found “[t]here is a broad statement of principle ensconced in our case law that clearly establishes that the use of force against an arrestee who, inter alia, is not a threat, has not exhibited aggressive behavior, and has not actively resisted arrest is excessive.” *Id.* at 563. However, while Plaintiff was not resisting when the seizure happened, a reasonable officer could interpret his behavior as threatening. Deputies arrived after Plaintiff

^{##} The Court notes that the case cited by Plaintiff is persuasive, not binding, authority. See *Ray v. McCullough Payne & Haan, LLC*, 838 F.3d 1107, 1109 (11th Cir. 2016).

threatened to kill himself, had already cut his wrist, and ran into a cotton field because law enforcement would not leave. (Doc. 26 at 2, 3). Accordingly, this broad principle does not apply in this case.

Plaintiff also presents many cases he claims are materially similar in which officers were not granted qualified immunity. (Doc. 41 at 14–16). However, while these cited cases^{§§} establish the general proposition that applying more than de minimis force is excessive when a suspect is not resisting or poses minimal threat to law enforcement, they are not materially similar to this case. Construing the facts in the most favorable light to Plaintiff here, Plaintiff eventually cooperated with the deputies, but previously threatened suicide, cut his wrist, and ran into a

^{§§} The cases Plaintiff cited in support of his position are: *Scott v. City of Red Bay, Ala.*, 686 F. App'x 631 (11th Cir. 2017); *Stephens v. DeGiovanni*, 852 F.3d 1298 (11th Cir. 2017); *West v. Davis*, 767 F.3d 1063 (11th Cir. 2014); *Saunders v. Duke*, 766 F.3d 1262 (11th Cir. 2014); *Fils v. City of Aventura*, 647 F.3d 1272 (11th Cir. 2011); *Payton v. City of Florence, Ala.*, 413 F. App'x 126 (11th Cir. 2011); *Brown v. City of Huntsville, Ala.*, 608 F.3d 724 (11th Cir. 2010); *Oliver v. Fiorino*, 586 F.3d 898 (11th Cir. 2009); *Galvez v. Bruce*, 552 F.3d 1238 (11th Cir. 2008); *Reese v. Herbert*, 527 F.3d 1253 (11th Cir. 2008); *Walker v. City of Riviera Beach*, 212 F. App'x 835 (11th Cir. 2006); *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir. 2002); *Lee v. Ferraro*, 284 F.3d 1188 (11th Cir. 2002); *Priester v. City of Riviera Beach, Fla.*, 208 F.3d 919 (11th Cir. 2000); *Slicker v. Jackson*, 215 F.3d 1225 (11th Cir. 2000); and *Smith v. Mattox*, 127 F.3d 1416 (11th Cir. 1997). Three of these cases, *Scott*, *Payton*, and *Walker* are unpublished. Therefore, they are not binding on this Court.

cotton field after deputies arrived. (Doc. 26 at 2–3). While Plaintiff was no longer suicidal and eventually cooperative, a reasonable officer in Defendant Kubik’s position could find his behavior was unpredictable, and he posed a threat to the deputies and himself. This situation is “fairly distinguishable” and factually distinct from the cases Plaintiff presented. *Terrell*, 668 F.3d at 1256. Plaintiff has not adequately demonstrated his constitutional right was clearly established during the encounter, so Defendant Kubik was not “on notice that his conduct [was] clearly unlawful.” *Id.* at 1255. As Plaintiff has not shown that his constitutional right was clearly established at the time of the seizure, there is no need to decide if his constitutional right was violated. Accordingly, Defendant Kubik is entitled to qualified immunity on this claim. Defendant Kubik’s Motion to Dismiss the Amended Complaint (Doc. 34) is therefore due to be **GRANTED**.

IV. CONCLUSION

For the reasons stated above, Defendants Dorning’s, Turner’s, and Kubik’s Motions to Dismiss the Amended complaint (Docs. 30, 32 & 34) are due to be granted. An Order consistent with this Memorandum Opinion will be entered.

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DONE and **ORDERED** this March 12, 2020.

LILES C. BURKE
UNITED STATES
DISTRICT JUDGE