No. 21-____

IN THE
Supreme Court of the United States

GARY HEIDEL, ET AL.,

Petitioners,

v.

SHERIFF ANTHONY MAZZOLA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether pursuant to *Kingsley v. Hendrickson*, 135 S.Ct. 2466 (2015), jail officials violate a pretrial detainee's Fourteenth Amendment right to medical treatment by being reckless to, without actually knowing of, the detainee's substantial risk of suicide.

2. Whether the Tenth Circuit erred by concluding, contrary to other jurisdictions, that suicide is not a highly predictable consequence of a detention center's failure to enforce a suicide prevention program.

Rule 14(b)(i) Statement

The Plaintiffs-Petitioners are as follows:

> Gary Heidel, Individually; Michelle Aschbacher, individually; Camille Rowell, individually; Kersten Heidel, individually; and Michael Rowell, individually and as the personal representative of the Estate of Catherine Rowell.

The Defendants-Respondents are as follows:

> Sherriff Anthony Mazzola, in his individual and official capacity; Sergeant Jeremy Muxlow, in his individual capacity; Deputy Kim Cook, in his individual capacity; Deputy Clinton Kilduff, in his individual capacity; and Deputy Johnny Murray, in his individual capacity.

Rule 14.1(b)(iii) Statement

This case directly relates to these proceedings:

Heidel, et. al., v. Mazzola, et. al., (D. Colo. No. 1:18-cv-00378-REB-GPG, January 28, 2020).

Heidel et. al. v. Mazzola, et. al. (10th Cir. No. 20-1067, March 23, 2021).

Heidel, et. al., v. Mazzola, et. al., (Colorado, Adams County Court No. 2020CV30602, no judgment, filed to pursue state-law claims after the grant of summary judgment on the federal claims).

Heidel, et. al., v. Mazzola, et. al., (Colorado, Rio Blanco County Court No. 2020CV1, no judgment yet, transferred to this court from Adams County court).

Heidel, et. al., v. Mazzola, et. al., (Colorado Court of Appeals No. 2021CA370, no judgment yet, interlocutory appeal from the Rio Blanco County case).

No other proceedings in state or federal trial or appellate courts, or in this Court, directly relate to this case.

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The Tenth Circuit's decision is reproduced at Petition Appendix ("Pet. App.") 1a to 9a. The district court's order granting summary judgment on the federal claims is reproduced at Pet. App. 10a to 44a.

Jurisdiction

The Tenth Circuit entered issued its opinion on March 23, 2021. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1), in combination with this Court's 7/19/2021 order, *available at* https://www.supremecourt.gov/orders/courtorders/071921zr_4g15.pdf.

Constitutional and Statutory Provisions Involved

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides, in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

The statutory provision involved is 42 U.S.C. § 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the

> District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

Introduction

The Rio Blanco County Jail provided its officers with no training on how to identify suicidal inmates. Opening Brief in Tenth Circuit (hereinafter, "OB"), 6–7. The jail's officers, in turn, made no effort to identify whether Catherine Rowell was suicidal. *Id.* at 8–12, 14. The officer who booked her did not ask her if she was suicidal. *Id.* at 8–12. Once booked, she spent most of three days sleeping, refusing food, and refusing exercise. *Id.* at 12–13. Still the officers did not inquire about whether she might be suicidal. *Id.* at 14. And they checked on her only infrequently, sometimes at intervals more than two hours long, despite housing her in a cellblock that had no video or audio monitors and that had a thirty-three inch armored cable. *Id.* at 15–16. She hung herself with the cable and died. *Id.* at 24.

Rowell's estate brought a section 1983 claim against Sheriff Anthony Mazzola in his official capacity, but the Tenth Circuit affirmed the grant of summary judgment on this claim. Pet. App. 1a–9a. The Tenth Circuit concluded that because the officers did not actually know that Rowell was at a substantial risk of suicide, the officers did not violate the Fourteenth Amendment rights of this pretrial detainee. *Id.* at 4a–8a & n.3.

However, after *Kingsley v. Hendrickson*, 135 S.Ct. 2466 (2015), the circuits split on whether such actual knowledge must be proven in a case like this one. Specifically, in *Kingsley*, this Court observed that an inmate held on mere criminal charges is different from an inmate held on a criminal conviction: unlike convicted inmates, pretrial detainees "cannot be punished at all, much less maliciously and sadistically." *Id.* at 2475 (quotations omitted). Thus, unlike convicted inmates, pretrial detainees' rights are violated by an officer's objectively unreasonable use of force, even if the officer did not subjectively know of the unreasonableness. *Id.* at 2473. After this holding in *Kingsley*, three circuits held that a pretrial detainee's rights are also violated by an officer's objectively unreasonable indifference to serious medical needs regardless of the officer's subjective knowledge of that unreasonableness. *See Strain v. Regalado*, 977 F.3d 984, 990 n.4 (10th Cir. 2020) (collecting cases). But four circuits disagree, concluding that *Kingsley*'s legal standard only applies in excessive force cases, not in cases involving deliberate indifference to serious medical needs. *See id.* at 990 n.4, 993 (collecting cases).

Like the present petition for certiorari, another petition for certiorari also asks this Court to resolve this circuit split. *See Strain v. Regalado*, (U.S. Sup. Ct. No. 20-1562, cert petition filed May 7, 2021). As a vehicle for addressing the circuit split, the present case is as good as or better than *Strain*, for two reasons.

First, unlike *Strain*, the present case involves an inmate's suicide, and inmate suicide cases are dramatically impacted by the present circuit split.

Suicide is most common among the inmate population least likely to be convicted, because suicide risk is greatest in jails (not prisons) and greatest shortly after confinement begins. Christopher J. Mumola, *Suicide and Homicide in State Prisons and Local Jails*, U.S. Dep't of Just., at 8–9 (Aug. 2005), https://www.bjs.gov/content/pub/pdf/shsplj.pdf. There are over a hundred federal circuit cases addressing the civil liability of prisons and jails for self-inflicted injuries or deaths of their prisoners. *See generally* Jane M. Draper, *Civil liability of prison or jail authorities for self–inflicted injury or death of prisoner*, 79 A.L.R.3d 1210 (1977 & 2021 Supp.) (collecting cases). Yet this Court's primary or only case on that legal issue reached only a narrow holding. *See Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015). In contrast, when this Court resolves the circuit split presently at issue, the holding will have a dramatic impact on jail suicide cases. *See* Darrell L. Ross, *The Liability Trends of Custodial Suicide*, Mag. Am. Jail Ass'n, Mar.–Apr. 2010, at 39 fig. 1 (analyzing how this Court's previous resolution of a similar circuit split dramatically impacted the success rate of civil cases based on jail suicide).

Second, this particular jail suicide case is an ideal vehicle for resolving the circuit split. The split is over what state of mind an officer must possess to violate a pretrial detainee's right to medical treatment. In some circuits, the state of mind requirement is satisfied only if the officer "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and she must also draw the inference." *Strain*, 977 F.3d at 990 (quotations omitted). In other circuits, the state of mind

requirement may also be satisfied if the officer "recklessly failed to act with reasonable care to mitigate the risk that the [medical] condition posed to the pretrial detainee, even though the defendant-office knew, or should have known, that the condition posed an excessive risk to health or safety." *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017).

The present case makes clear why officers should be held liable for recklessness that results in the suicide of a pretrial detainee. No officer ever even asked Rowell the simple question of whether she was depressed or suicidal. OB, 8–12, 14. The officers just ignored any suicidal mood she might have, because they received no suicide prevention training. *Id.* at 6–12, 14. This was reckless behavior, especially given her display of suicide risk factors and the high prevalence of jail suicides. *See id.* 4, 12–13. Thus, this is the optimal case to set a floor on what jail officers must do, under Fourteenth Amendment, to protect against the suicide of those individuals who are being held on mere criminal charges without a conviction.

Finally, after concluding (incorrectly) that there was no deliberate indifference, the Tenth Circuit said that there was no municipal liability because there was "not a pattern of conduct that would establish actual notice of a substantially high risk of suicide." Pet. App. 8a. However, it appears that every published opinion to address the issue has reached the opposite conclusion: inmate suicide is so pervasive and common among jails and prisons that those entities are always on actual notice of a substantially high risk of inmate suicide. *See, e.g., Woodward v. Corr. Med. Servs*, 368 F.3d 917, 929 (7th Cir. 2004); *Perry for Brooks v. St. Louis*, 399 F. Supp. 3d 863, 882 n.15 (E.D. Mo. 2019). Indeed, prior to the

opinion at issue, the Tenth Circuit itself held that even when there had not been a pattern of tortious conduct, a violation of federal rights may have been a fairly obvious consequence of a jail's failure to train its officers to recognize and appropriately handle inmates with mental illness. *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1320 (10th Cir. 2002). Furthermore, in this particular case, there actually were two prior suicide attempts at the Rio Blanco County Jail, one of them occurring just a year prior to Rowell's suicide and the other resulting in another inmate's death-by-hanging in the jail. Pet. App. 8a; OB, 4.

For these reasons, if this Court grants certiorari on the first question presented to resolve the circuit split, then this Court should also grant certiorari on the second question presented to correct the Tenth Circuit's error. Alternatively, if this Court grants certiorari to resolve the circuit split in *Strain*, then this Court should ultimately vacate the judgment below and remand this case, giving the Tenth Circuit an opportunity to reconsider its reasoning on both questions presented here.

Statement of the Case

A. Factual Background

The Rio Blanco County Jail (the "Jail") did not require its officers to undergo any suicide prevention training. Pet. App. 3a; OB, 6. Rather, as part of "on the job" training, the Jail gave officers a questionnaire to administer to inmates during booking, which included only a single question about suicide: "Are you or have you been suicidal?" Pet. App. 3a; OB, 6. If an inmate said that he or she was suicidal, then Jail

officers would put that inmate in a safety gown and a safe cell. OB, 6.

The Jail's manual said that every hour or less, officers were supposed to conduct a "jail check," walking up to each cellblock, looking in through the window, and checking on the safety of each inmate. Pet. App. 3a; OB, 15.

The Jail installed a video camera in a hallway, but did not install any video or audio monitoring equipment in any of the cells or cellblocks. OB, 15. Each cellblock had a pay phone with a thirty-three-inch armored telephone cable. *Id.* at 16. Officer Tim Cook and other Jail workers knew that these cords could be used to commit suicide, yet they took no action to eliminate this suicide risk. *Id.* at 16–17.

On February 12, 2016, Katherine Rowell was brought to jail on a charge of violating a protection order. Pet. App. 1a–2a; OB, 12. She was not convicted of that crime. OB, 12.

Officer Cook booked her into the Jail. OB, 8. He left the booking questionnaire blank. *Id.* at 8–9. He did not make any notation of Rowell's missing teeth, even though the booking questionnaire instructed him to ask both "Missing body parts[?]" and "False teeth or removable bridges[?]" *Id.* at 10. He did not make any notation of Rowell's high blood pressure, even though the booking questionnaire instructed him to ask, "Are you diagnosed with high blood pressure[?]" *Id.* at 11. At his deposition, he did not remember booking Rowell in and was "entirely reliant on what the paper trail [was] saying." *Id.* Thus, a reasonable jury could conclude that he did not administer the booking questionnaire to Rowell and

did not ask her if she was suicidal. *Id.* at 12; *see also* Pet. App. at 6a, 16a (the district court and the Tenth Circuit each assumed that Officer Cook did not ask Rowell the booking question on suicide).

Thereafter, she and other inmates were overseen by Officers Johnny Murray and Clinton Kilduff during the day, and Officer Jeremy Muxlow and another officer at night. OB, 12. From February 12 to 15, 2016, Officer Murray, as well as Officers Kilduff and/or Muxlow, knew the following:

- Officers Murray and Muxlow knew that Rowell was going through difficulty in her romantic relationship. *Id.*
- Officer Murray knew that Rowell used methamphetamine and alcohol as "an integral part" of her life and people go through withdrawal when they stop using these drugs. *Id.* at 13.
- Officer Murray and Muxlow knew that Rowell slept most of the time that she was there. *Id.*
- Officers Murray, Kilduff, and Muxlow knew that Rowell never went out for recreation. *Id.*
- Officers Murray, Kilduff, and Muxlow knew that Rowell experienced loss of appetite. *Id.*
- Officers Murray, Kilduff, and Muxlow knew that Rowell lost interest in communicating. *Id.*
- Officers Murray, Kilduff, and Muxlow knew that Rowell was socially isolated. *Id.*
- Officer Murray knew that Rowell was withdrawn. *Id.*

As Plaintiffs' experts opined, reasonable officers trained in suicide prevention would have recognized that Rowell was suicidal from her obvious display of suicide risk factors. *Id.*

Despite their observations, Officers Murray, Kilduff, and Muxlow had only brief interactions with Rowell, such as asking her if she wanted food or exercise. *Id.* at 14. In these interactions, they made no effort to find out Rowell's mood, mental health, depression, or whether she was feeling suicidal. *Id.*

From Rowell's booking through her suicide, even according to the officers' own Jail logs, they often failed to perform a jail check every hour or less. Pet. App. 3a; OB, 18. Of the sixty-nine jail checks that they performed, a third of the time they waited longer than an hour, eleven times they waited longer than an hour and a half, six times they waited longer than two hours, and one time they waited nearly three hours. OB, 18.

The hallway video reveals that the jail checks were even less frequent than what the officers entered into the logs. *See id.* at 18–19, 22. Specifically, at 1:55 pm on February 15, 2016, Officers Kilduff and then Murray discovered that Rowell had hung herself. *Id.* at 19. Thereafter, Officers Kilduff and Murray repeatedly said that Officer Murray had conducted a jail check at 1:00 pm that day. *Id.* at 20–22. They indicated this in the Jail's logs, in typewritten reports, in interviews with the Colorado Bureau of Investigation, and at their depositions. *Id.* But the video evidence, combined with jail layout maps that Officer Murray wrote at his deposition, revealed that in reality, Officer Murray had not checked on Rowell's safety at 1:00 pm. *Id.* at 22; *see also id.* Pet. App. 3a, 20a, 37a (the district court and the Tenth Circuit each assumed that no officer checked on Rowell's safety at or around 1:00 pm on February 15, 2016).

Thus, prior to discovering Rowell's hanging body, the most recent time that any officer checked on her safety was at 12:05 pm. Pet. App. 3a, 20a, 37a; OB, 24. When Officer Kilduff finally checked on her again nearly two hours later, at 1:55 pm, he discovered that she had hung herself with a thirty-three inch armored telephone cable. Pet. App. 3a, 20a, 37a; OB, 24. The cable was so long, she was able to wrap it around her neck two times. OB, 24. She died from her injuries. Pet. App. 3a.

B. Procedural Background

Based on Rowell's death, her Estate brought, as pertinent here, a section 1983 claim against Sheriff Mazzola in his official capacity based on the underlying constitutional violations by Officers Muxlow, Cook, Kilduff, and Murray. OB, 24.

The defendants moved for summary judgment on all claims. *Id.* In response, the Estate argued that for their official capacity claim, they did not have to show that any particular officer actually knew that Rowell had a substantial risk of suicide. *Id.* at 25. Rather, officers violate the Fourteenth Amendment rights of a pretrial detainee when the officers' actions are objectively unreasonable. *See Kingsley*, 135 S.Ct. at 2473; OB, 25.

The Estate further argued that for three reasons, the Jail was liable for its officers' violations of Rowell's constitutional rights. OB, 25. First, the Jail never trained its officers in suicide prevention, which caused the officers' total failure to ever inquire about Rowell's mental health, depression, or suicidal tendencies. *Id.* Second, this deficient training also caused Jail officers to wait longer than an hour

between jail checks, despite inmates having access to 33-inch long armored cables. *Id.* Third, even if neither theory supported liability when analyzed individually, the two theories, collectively, supported imposing liability on the Jail. *Id.* at 26.

In the summary judgment order, the district court decided that the Jail was not liable on the official capacity claim. Pet. App. 40a. As pertinent here, the court reasoned that the Jail could not be liable for failing to train its officers, because none of the officers had actually known that Rowell had a substantial risk of suicide. *Id.* at 36a–38a.

The plaintiffs appealed from this summary judgment order. *Id.* at 2a. After the case was fully briefed, the Tenth Circuit held that *Kingsley*'s objective standard should not be extended to pretrial detainees' claims that defendants were deliberately indifferent to their serious medical needs. *See Strain*, 977 F.3d at 990–93; Pet. App. 5a & n.3.

Based on *Strain*, the Tenth Circuit reasoned that *Kingsley*'s objective standard does not apply in this case. Pet. App. 5a n.3. The Tenth Circuit then concluded that the plaintiffs "cannot establish an underlying constitutional violation by any of the jail's officers because they did not have subjective awareness of Ms. Rowell's risk of suicide." *Id.* at 5a. The Tenth Circuit also reasoned that despite a prior suicide-by-hanging at the Jail and a recent suicide attempt there, the Jail did not have actual notice of a substantially high risk of suicide among the Jail's inmates. *Id.* at 8a–9a. The Tenth Circuit then affirmed the grant of summary judgment on the section 1983 claim. *Id.* at 9a.

Reasons for Granting the Petition

I. After *Kingsley*, the Circuits are Split on Whether Jail Officials Violate a Pretrial Detainee's Fourteenth Amendment Rights by Being Reckless To, Without Actually Knowing of, the Inmate's Serious Medical Need

Prior to the filing of this petition for certiorari, this Court received very good briefing on the circuit split at issue: it was well briefed in the petition for certiorari in *Strain v. Regalado*, (U.S. Sup. Ct. No. 20-1562, cert petition filed May 7, 2021) (hereinafter, the "*Strain* cert petition"). The arguments presented in this Part I are simply intended to supplement the very fine briefing on this issue by the petitioner in *Strain*.

When a convicted prisoner is denied medical treatment, his or her section 1983 claim is based on the Eighth Amendment's Cruel and Usual Punishments Clause. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). He must prove "deliberate indifference," proving both an objective component, which is an unreasonable risk of harm to health, and a subjective component, which is the state of mind of the prison officers alleged to have committed the violation. *Helling v. McKinney*, 509 U.S. 25, 30–31 (1993). Death by suicide satisfies the objective component. *Cox v. Glanz*, 800 F.3d 1231, 1240 n.3 (10th Cir. 2015) (collecting cases). The subjective component is satisfied if the prison officer actually knew of and disregarded a substantial risk to an incarcerated inmate's health or safety. *Farmer v. Brennan*, 511 U.S. 825, 844 (1994).

In contrast to a convicted prisoner, when a pretrial detainee is denied medical treatment, his or her section 1983 claim is based on the Fourteenth Amendment's Due Process Clause. *See Bell v. Wolfish*, 441 U.S. 520, 545 (1979). Prior to 2015, federal circuits held that such a claim was subject to the same two-part "deliberate indifference" test as a convicted prisoner's Eighth Amendment claim. *Caiozzo v. Koreman*, 581 F.3d 63, 71 n.4 (2d Cir. 2009) (collecting cases), *overruled by Darnell*, 849 F.3d 17.

In 2015, however, this Court held that a pretrial detainee's Fourteenth Amendment claim is subject to a different test. *See Kingsley*, 135 S.Ct. at 2473. Specifically, to prove an excessive force claim, "a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable." *Id.* The *Kingsley* Court reached this conclusion because the Due Process Clause is different from Cruel and Unusual Punishments Clause: "The language of the two Clauses differs, and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less maliciously and sadistically." *Id.* at 2475 (quotations omitted).

The circuits split on whether *Kingsley*'s objective standard applies to pretrial detainees' other Fourteenth Amendment claims, including claims of inadequate medical treatment. Specifically, the Second, Seventh, and Ninth Circuits have held that *Kingsley*'s objective standard applies beyond just excessive force claims, applying to other Fourteenth Amendment claims by pretrial detainees. *See Miranda v. Cty. of Lake*, 900 F.3d 335, 353–54 (7th Cir. 2018); *Darnell*, 849 F.3d at 35–36; *Castro v. Cty.*

of Los Angeles, 833 F.3d 1060, 1070 (9th Cir. 2016). Each of those three circuits also applies *Kingsley*'s objective standard to pretrial detainees' claims of inadequate medical care. *See Charles v. Orange Cty.*, 925 F.3d 73, 87 (2d Cir. 2019); *Miranda*, 900 F.3d at 353–54; *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1124–25 (9th Cir. 2018). In contrast to those three circuits, the Fifth, Eighth, Tenth, and Eleventh circuits hold that *Kingsley*'s objective standard only applies to pretrial detainee's claims of excessive force. *See Strain*, 977 F.3d at 993; *Whitney v. City of St. Louis, Missouri*, 887 F.3d 857, 860 n.4 (8th Cir. 2018); *Nam Dang v. Sheriff, Seminole Cty. Fla.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017); *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 420 n.4 (5th Cir. 2017). At least two circuits have observed the split without yet taking a position. *See Mays v. Sprinkle*, 992 F.3d 295, 301–02 & n.4 (4th Cir. 2021); *Beck v. Hamblen Cty., Tennessee*, 969 F.3d 592, 601 (6th Cir. 2020).

The circuits are hopelessly deadlocked. Viewed chronologically, there is no trend among the decisions, but instead just vacillation among the circuits: the Ninth Circuit applied *Kingsley*'s objective standard beyond excessive force claims (*Castro*, 833 F.3d at 1070), then the Fifth Circuit did not (*Alderson*, 848 F.3d at 420 n.4), then the Second Circuit did (*Darnell*, 849 F.3d at 35–36), then Eleventh Circuit did not (*Nam Dang*, 871 F.3d at 1279 n.2), then the Eighth Circuit did not (*Whitney*, 887 F.3d at 860 n.4), then the Seventh Circuit did (*Miranda*, 900 F.3d at 353–54), then the Tenth Circuit did not (*Strain*, 977 F.3d at 993).

Although the Tenth Circuit is the most recent circuit to pick a side, the reasoning in *Strain* is not

any more bulletproof than the reasoning in previous decisions on that side. Indeed, each portion of *Strain*'s reasoning is expertly and concisely countered in the *Strain* cert petition, 21–22.

For three additional reasons, the Tenth Circuit is wrong and the circuits that reach the contrary conclusion are right. First, *Kingsley*'s holding is broad: the *Kingsley* Court described its holding as applying to "the challenged governmental action" generally, not just excessive force claims specifically. 135 S.Ct. at 2473–74, *quoted in Gordon*, 888 F.3d at 1124.

Second, because any state-of-mind requirement arises under the Constitution and not under section 1983, logically *Kingsley*'s holding must extend to all pretrial detainees' Fourteenth Amendment claims. *Gordon*, 888 F.3d at 1124; *Miranda*, 900 F.3d at 352. As the Seventh Circuit reasoned, "We see nothing in the logic the Supreme Court used in *Kingsley* that would support . . . dissection of the different types of claims that arise under the Fourteenth Amendment's Due Process Clause." *Miranda*, 900 F.3d at 352.

Third, "the Supreme Court has treated medical care claims substantially the same as other conditions of confinement violations . . . ." *Gordon*, 888 F.3d at 1124. For example, this Court reasoned:

> [W]e see no significant distinction between claims alleging inadequate medical care and those alleging inadequate "conditions of confinement." Indeed, the medical care a prisoner receives is just as much a "condition" of his confinement as the food he is fed, the

> clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates.

Wilson v. Seiter, 501 U.S. 294, 303 (1991), *quoted in Gordon*, 888 F.3d at 1124.

For these reasons, the Tenth Circuit fell on the wrong side of a split among the Circuits, and this Court should take up the issue to resolve that split.

II. The Circuit Split is Especially Important in Cases Involving a Pretrial Detainee's Suicide

Although the *Stain* cert petition both asks this Court to address the circuit split, neither of those cases involves a pretrial detainee's suicide. The circuit split at issue, however, will have a dramatic impact on cases involving pretrial detainee's suicides, as history teaches us.

In 1976, this Court concluded that "deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain, proscribed by the Eighth Amendment." *Estelle*, 429 U.S. at 104 (quotations and citation omitted). Thereafter, the circuits applied differing standards of deliberate indifference to prisoners' Eighth Amendment claims, with some applying a recklessness standard and others applying a negligence standard. *See Farmer*, 511 U.S. at 832 (comparing *McGill v. Duckworth*, 944 F.2d 344, 348 (7th Cir. 1991) (recklessness standard), with *Young v. Quinlan*, 960 F.2d 351, 360–361 (3rd Cir. 1992) (negligence standard)).

However, in 1994, this Court decided *Farmer v. Brennen*, a section 1983 case involving the failure to protect a convicted prisoner from attack by other inmates. 511 U.S. at 831–32, 841. In *Farmer*, this Court held that the prison officers violated the Eighth Amendment only if they actually knew of and disregarded an excessive risk to inmate health or safety. *Id.* at 847.

The federal circuits decided that this holding extended to (1) pretrial detainee's Fourteenth Amendment claims, *Caiozzo*, 581 F.3d at 71 n.4 (collecting cases); and (2) cases involving an inmates' suicide, Kyla Magun, *A Changing Landscape for Pretrial Detainees? The Potential Impact of Kingsley v. Hendrickson on Jail-Suicide Litigation*, 116 Colum. L. Rev. 2059, 2072 n.96 (2016) (collecting cases). Thus, after *Farmer*, to prove a section 1983 claim based on the suicide of a pretrial detainee or convicted inmate, claimants had to prove that an officer or officers actually knew of and disregarded a substantial risk of suicide. Magun, *supra*, 2072 & n.96 (collecting cases).

The federal circuits' expansion of *Farmer* had a dramatic impact. Before *Farmer*, civil claims based on jail suicide were successful 29% of the time. Ross, *supra*, at 39 fig. 1. After *Farmer*, they were successful only 17% of the time, a 41.4% drop. Ross, *supra*, at 39 fig. 1.

Furthermore, in the years since *Farmer*, people are increasingly held in jail on mere criminal charges, not convictions. In 1995, jails held over 500,000 inmates, with about half of them (56%) pretrial detainees. Patrick M. Harrison & Allen J. Beck,

Ph.D., *Prison and Jail Inmates at Midyear 2005*, U.S. Dep't of Just., at 8 Tbls. 9 & 10 (May 2006), https://www.bjs.gov/content/pub/pdf/pjim05.pdf. After fairly steady increase over the years, by 2019, jails held over 700,000 inmates, with about two-thirds of them (65%) pretrial detainees. *Id.* (statistics from 1995 to 2005); Zhen Zeng, Ph.D. & Todd D. Minton, *Jail Inmates in 2019*, U.S. Dep't of Just., at 5 Tbl. 3 (Mar. 2021), https://www.bjs.gov/content/pub/pdf/ji19.pdf (statistics from 2005 to 2019).

Suicide is a much greater problem among pretrial detainees than it is among convicted inmates, as scholars have observed and as is evident from U.S. Department of Justice data. *See, e.g.,* David E. Patton, Fredrick E. Vars, *Jail Suicide by Design*, 68 UCLA L. Rev. Discourse 78, 86–87 (2020). Specifically, prisons, of course, hold no pretrial detainees. And in prisons, suicide accounts for about 5% of deaths. E. Ann Carson, Ph.D., *Mortality in State and Federal Prisons, 2001–2018*, U.S. Dep't of Just., at 7 Tbl. 2 (Apr. 2021), https://www.bjs.gov/content/pub/pdf/msfp0118st.pdf. But in jails, suicide accounts for about 30% of deaths. E. Ann Carson, Ph.D., *Mortality in Local Jails, 2000–2018*, U.S. Dep't of Just., at 6 Tbl. 2 (April 2021), https://www.bjs.gov/content/pub/pdf/mlj0018st.pdf. Indeed, in jails, unlike prisons, suicide is the leading cause of death. *Id.* at 1.

Furthermore, suicides are most likely to happen among the inmates least likely to be convicted, namely, the inmates who have been in jail for the least amount of time: 13.7% of jail suicides occur within a day of admission, 22.7% occur within two days of admission, and nearly half occur within a

week of admission. Mumola, *supra*, at 8. In prisons, in contrast, just 7% of suicides occur within a month of admission. *Id.* at 9.

As Judge Posner put it, "[T]he risk [of suicide] is concentrated in the early days and even hours of being placed in jail, before the inmate has had a chance to adjust to his dismal new conditions." *Boncher v. Brown Cty.*, 272 F.3d 484, 486 (7th Cir. 2001). Apparently, the conditions are even more dismal if the inmate is being held without having been convicted of a crime.

Accordingly, after *Farmer*, the federal courts have been inundated with civil claims based on inmate suicide or inmate self-harm. *See* Draper, *supra*, 79 A.L.R.3d 1210 (2021 Supp.) (collecting cases). Specifically, after 1995, eleven federal circuits have published over one-hundred opinions addressing the civil liability of prison or jail authorities for the self-inflicted injuries or deaths of those in their custody. *See id.*

There is only one such case from this Court, and its holding was narrow. In *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015), this Court held that in 1997, inmates did not have a clearly established right to the proper implementation of suicide prevention protocols. But the *Taylor* Court did not address whether such a right actually existed, even if not yet clearly established. *Id.* And *Taylor* did not give this Court an opportunity to address a question much more central to civil claims based on inmate suicide: when an inmate is being held without yet being convicted, will a jail officer be held liable only if he actually knew that the inmate was at a substantial

risk of suicide, or is it enough that the officer was reckless to the substantial risk of suicide?

In light of everything that has happened after *Farmer*, many scholars have argued for returning to a standard of civil liability more favorable to claimants in inmate suicide cases. *See* Magun, *supra*, 2085–2086 & nn. 169–174 (collecting scholarly articles).

And as the Second Circuit has observed, adopting the *Kingsley* recklessness standard in such cases by pretrial detainees will not open the floodgates to litigation. *Darnell*, 849 F.3d at 36. Rather, prior to *Farmer*, some courts already applied a recklessness standard, or even a negligence standard, in all jail and prison cases involving deliberate indifference to serious medical needs. *See Farmer*, 511 U.S. at 832 (citing *McGill*, 944 F.2d at 348 (7th Cir. 1991) (recklessness standard) and *Young*, 960 F.2d at 360–361 (negligence standard)). Returning to a recklessness standard for just a portion of those cases, the ones involving pretrial detainees, will simply ensure that the federal circuits apply a standard of liability consistent with *Kingsley*. *Darnell*, 849 F.3d at 36 (endorsing this reasoning).

Thus, in light of *Kingsley* and the resultant circuit split, this Court should consider whether a recklessness standard applies at least in those inmate suicide cases where the inmate who died had not even been convicted of a crime.

III. In the Present Case Involving a Pretrial Detainee's Suicide, Jail Officers Were Reckless in Numerous Ways, Making This Case an Ideal Vehicle for Addressing the Circuit Split

In the circuit split presently at issue, four circuits have concluded that if a pretrial detainee's medical needs are not met, his or her Fourteenth Amendment rights are violated only if a jail officer "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and she must also draw the inference." *Strain*, 977 F.3d at 990 (quotations omitted); *accord Alderson*, 848 F.3d at 419–20; *Whitney*, 887 F.3d at 860; *Nam Dang.*, 871 F.3d at 1280.

Three other circuits, in contrast, have concluded that if a pretrial detainee's medical needs are not met, her or she can show a violation of Fourteenth Amendment rights simply by showing that an officer "recklessly failed to act with reasonable care to mitigate the risk that the [medical] condition posed to the pretrial detainee, even though the defendant-officer knew, or should have known, that the condition posed an excessive risk to health or safety." *Darnell*, 849 F.3d at 35–36 & n. 16; *accord Miranda,* 900 F.3d at 353–54; *Castro*, 833 F.3d at 1070–71. Even in those three circuits, however, mere negligence is not enough to show a Fourteenth Amendment violation. *Miranda,* 900 F.3d at 353–54; *Darnell*, 849 F.3d at 36; *Castro*, 833 F.3d at 1071.

Concerning recklessness, even in jail or prison suicide cases that result in a lawsuit, the arresting or

booking officer usually at least administers a questionnaire that asks the inmate whether he or she is suicidal, and the inmate usually responds in some way that at least suggests that he or she is not. *See, e.g., Est. of Bonilla v. Orange Cty., Texas*, 982 F.3d 298, 303 (5th Cir. 2020); *Greenway v. S. Health Partners, Inc.*, 827 F. App'x 952, 956–57 (11th Cir. 2020); *Est. of Downard v. Martin*, 968 F.3d 594, 597, 601 (6th Cir. 2020); *Pulera v. Sarzant*, 966 F.3d 540, 551, 545 (7th Cir. 2020); *Baker-Schneider v. Napoleon*, 769 F. App'x 189, 190 (6th Cir. 2019); *A.H. v. St. Louis Cty., Missouri*, 891 F.3d 721, 724 (8th Cir. 2018); *Nallani v. Wayne County*, 665 F. App'x 498, 507–08 (6th Cir. 2016); *Matos ex rel. Matos v. O'Sullivan*, 335 F.3d 553, 554 (7th Cir. 2003); *Baker-Schneider v. Napoleon*, 769 F. App'x 189, 190 (6th Cir. 2019); *Nallani v. Wayne Cty.*, 665 F. App'x 498, 501 (6th Cir. 2016); *Carroll v. Lancaster Cty.*, 301 F. Supp. 3d 486, 493, 501 (E.D. Pa. 2018); *Hill v. Las Vegas Metro. Police Dep't*, 197 F. Supp. 3d 1226, 1229 (D. Nev. 2016), *aff'd,* 705 F. App'x 616 (9th Cir. 2017); *cf. generally* 79 A.L.R.3d 1210 (in case descriptions, most references to intake, booking, or screening involve a suicide question being asked and suicidal feelings being denied).

Indeed, questionnaires about mental health and suicide, administered and filled out by jail officers, are so important that Judge Posner recently chose to reproduce photocopies of them at the end of his opinion. *Belbachir v. Cty. of McHenry*, 726 F.3d 975, 981 (7th Cir. 2013). In that case, an officer may have been deliberately indifferent to the inmate's suicide risk, partly because the suicide question had

originally been marked "yes" but then scratched out and marked "no." *Id.* at 981–82.[1]

Indeed, when jail officers may not have ever asked a pretrial detainee whether he was suicidal, a court held that they may have recklessly violated his Fourteenth Amendment rights. *Stidimire v. Watson*, 2018 WL 4680666 (S.D. Ill. No. 17-CV-1183, Sept. 28, 2018) (unpublished order). Specifically, in *Stidimire*, an arresting officer administered a Field Booking Form which indicated that Stidimire was not suicidal. *Id.* at *1. However, the arresting officer made errors on that form. *Id.* Thereafter, the booking officer, Officer Toth, observed that Stidimire was disturbed and scared, yet Officer Toth did not inquire about his mental health, instead relying on the error-filled form. *Id.* Over the next four days, the officers in charge of the cellblock, Officers Knyff and Ripperada, ignored Stidimire's risk factors for suicide, such as his fear, distress, periods of inconsolable crying, and periods being withdrawn and quiet. *Id.* at *2. On the day of Stidimire's suicide, Officer Ripperda checked Stidimire's cellblock at around 5:30 pm, but he rushed through the block and failed to observe Stidimire in his cell. *Id.* At around 6:30 pm, Officer Ripperda checked the cellblock again and discovered that Stidimire had hung himself with a bed sheet. *Id.* On these facts, the Court concluded that Officers Toth,

[1] Of course, an officer could avoid such errors by deciding not to administer a suicide questionnaire at all. But such behavior would be even more reckless than making mistakes on the suicide questionnaire. And a jail should not be allowed to escape section 1983 liability by telling its officers to bury their heads in the sand and decline to administer any suicide questionnaires at all. If that were the law, it would be absurd. *Cf.* OB, 40–42 (raising a similar absurdity argument in the Tenth Circuit).

Knyff, and Ripperada each may have been at least reckless to the Stidimire's risk of suicide. *Id.* at *4.

The facts here are remarkably similar to, and in many ways worse than, the facts in *Stidimire*. In *Stidimire*, the booking officer, Officer Toth, at least relied on a filled-out questionnaire which suggested, despite its errors, that Stidmire was not suicidal. *Id.* at *1. Here, in contrast, the booking officer, Officer Cook, left the booking questionnaire entirely blank, which was erroneous for many of the questions. OB, 8–12. Thus, unlike Officer Toth, Officer Cook did not rely on any mental health questioning at all. *See* Pet. App. 6a, 16a; OB, 12. And unlike Stidimire, Rowell was never asked any questions concerning her mental health during the period from her arrest to her death. *See* Pet. App. 6a, 16a; OB, 12, 14.

In *Stidimire*, Stidimire displayed the suicide risk factors of fear, distress, crying, withdrawal, and silence. 2018 WL 4680666, at *2. Here, Rowell displayed even more suicide risk factors, because she was going through difficulty in her romantic relationship, experiencing methamphetamine withdrawal, slept most of the time, refused recreation, lost appetite, lost interest in communicating, was socially isolated, and was withdrawn. OB, 12–13.

In *Stidimire*, during Officers Knyff's and Ripperada's shift, Officer Ripperada at least walked through Stidimire's cellblock at 5:50 pm and 6:30 pm, even if he rushed through and failed to observe Stidmire until seeing him hanging by a bedsheet. 2018 WL 4680666, at *2. Here, Officers Murray, Kilduff, and Muxlow repeatedly waited longer than an hour between safety checks, doing so a third of the time during Rowell's confinement. Pet. App. 3a; OB,

18. And during the final hours of that confinement, Officers Murray and Kilduff waited nearly two hours, from 12:05 pm to 1:55 pm, without checking on Rowell's safety. Pet. App. 3a, 20a, 37a; OB, 22. When Officer Kilduff finally checked on her at 1:55 pm, she had hung herself, not with a bed sheet, but with a 33-inch armored cable that presented an obvious risk of inmate suicide. OB, at 16–17, 24.

Thus, for two reasons, the particular facts of this case warrant granting certiorari. First, Officers Cook, Murray, Kilduff, and Muxlow were exceedingly reckless in numerous ways, both by failing to ask Rowell if she was suicidal and by failing to check on her despite her obvious display of suicide risk factors. *Id.* at 16–24. Their conduct was so reckless that, after a grant of certiorari, this Court can focus on developing the law rather than parsing the facts. That is, the conduct here is so exceedingly reckless that the precedent set by this case can provide a mere floor for what officers must do: they must at least ask a pretrial detainee if he or she is suicidal, and they must at least check on him or her regularly, especially if he or she is displaying obvious suicide risk factors. Alternatively, if this Court feels that any one officer here was not reckless, then this Court can still consider the recklessness of the other officers, because each officer was reckless in slightly different ways (e.g., failing a booking question as opposed to failing to conduct timely safety checks).

Second, justice demands granting certiorari on the particular facts here. Officer Cook did not just fail to ask Rowell if she was suicidal when booking her. Pet. App. 6a, 16a; OB, 12. He did so even though, as he conceded at his deposition, he had previously thought that an inmate could use the 33-inch armored

cable to commit suicide. OB, 21–22. Officers Murray and Kilduff did not just wait nearly two hours without checking on Rowell's safety, ultimately discovering that she had hung herself. Pet. App. 3a, 20a, 37a; OB, 22. In addition, after they did that, they misrepresented that fact over and over again, telling the Colorado Bureau of Investigation and undersigned counsel that Murray had checked on Rowell's safety less than an hour before discovering her hanging. OB, 19–22.

Despite the egregiousness of the officers' conduct, the Tenth Circuit just glossed over it. Pet. App. 2a–3a, 5a–6a. That is not justice. Rowell's family deserves more. This Court should grant this petition and take a hard look at whether Officers Cook, Murray, Kilduff, and Muxlow violated Rowell's Due Process rights, causing her untimely death.

IV. Concerning the Second Question Presented, this Court Should Either Correct the Tenth Circuit's Error or Give the Tenth Circuit the Opportunity to Do So

The Tenth Circuit devoted the bulk of its opinion to analyzing whether any particular officer acted with deliberate indifference to Rowell's risk of suicide. *Id.* at 6a–8a. After concluding (incorrectly) that there was no deliberate indifference, the Tenth Circuit said, "We also note that the Estate cannot show state of mind, an essential element of a municipal-liability claim." *Id.* at 8a. Without citing any authority that would support its position, the Tenth Circuit reasoned that there was "not a pattern of conduct that would establish actual notice of a substantially high risk of suicide." *Id.* at 9a.

However, as was cited to the Tenth Circuit below, the courts addressing this legal issue appear to have all reached the opposite conclusion. *Woodward* 368 F.3d at 929; *Perry for Brooks*, 399 F. Supp. 3d at 882 n.15; *accord J.K.J. v. Polk*, 960 F.3d 367, 381 (7th Cir. 2020); OB, 44; Reply Brief in the Tenth Circuit (hereinafter, "RB"), 22. It does not matter whether a particular jail or prison has had suicides or suicide attempts in the past. *Woodward*, 368 F.3d at 929. Rather, inmate suicide is so pervasive and common among jails and prisons in general that those entities are always on actual notice of a substantially high risk of inmate suicide. *Id.* As one court put it, a detention center "does not get a 'one free suicide' pass." *Id.*

Indeed, as was cited below (RB, 22), a previous, published opinion by the Tenth Circuit had reached an even broader conclusion than the one reached in *Woodward* and its progeny. *See Olsen*, 312 F.3d at 1320. Specifically, even when there had not been a pattern of tortious conduct, the *Olsen* Court held that a violation of federal rights may have been a fairly obvious consequence of a jail's failure to train its officers to recognize and appropriately handle inmates with mental illness. *Id.*

In the present case, the panel did nothing to address the pertinent reasoning in *Woodward*, its progeny, or *Olsen*. *See* Pet. App. at 8a–9a.

Furthermore, in this particular case, numerous inmates ***had*** attempted suicide at the Rio Blanco County Jail prior to Rowell's suicide, and one of those inmates had died from the attempt. Pet. App. 8a; OB, 4. Specifically, a previous inmate had committed suicide by hanging and then, just a year prior to

Rowell's suicide, another inmate had attempted suicide by drowning. Pet. App. 8a; OB, 4.

Accordingly, if this Court grants certiorari on the first question presented, then this Court should also grant certiorari on the second question presented to correct the Tenth Circuit's error.

Alternatively, if this Court grants certiorari to resolve the circuit split in *Strain*, then this Court should ultimately vacate the judgment below and remand the case, giving the Tenth Circuit an opportunity to reconsider its reasoning on both questions presented.

On the second question presented, the Tenth Circuit did not make clear that it was expressing a wholly independent ground for its decision. *See* Pet. App. 8a–9a. Indeed, it would have been very peculiar for the Tenth Circuit to have decided, in an unpublished opinion, that its decision was wholly supported by a minimally-analyzed ground that was contrary to every published opinion addressing the issue (i.e., *Woodward* and its progeny), as well as contrary to a prior, published opinion by the Tenth Circuit, namely, *Olsen*. Indeed, the panel here lacked the power to overrule *Olsen*: "absent an intervening Supreme Court or en banc decision justifying such action, [a panel of the Tenth Circuit] lack[s] the power to overrule prior Tenth Circuit precedent." *Barnes v. United States*, 776 F.3d 1134, 1147 (10th Cir. 2015) (quotations and emphasis omitted).

As this Court has observed, it is appropriate to grant certiorari, vacate the judgment below, and remand the case when "'intervening developments reveal a reasonable probability that the decision

below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome' of the matter." *Wellons v. Hall*, 558 U.S. 220, 225 (2010) (quoting *Lawrence v. Chater,* 516 U.S. 163, 167 (1996)).

In *Wellons*, this Court reasoned, "The Eleventh Circuit's opinion is ambiguous in significant respects. It would be highly inappropriate to assume away that ambiguity in respondent's favor." *Id.* The same reasoning applies here. On the second question presented, it is at least ambiguous whether the Tenth Circuit viewed its reasoning as a separate and independent ground for its decision. *See* Pet. App. 8a–9a. It would be highly inappropriate to assume away that ambiguity. Rather, at the very least, this Court should remand the second question to the Tenth Circuit so that it may consider that ground in depth, including considering whether that ground, standing alone, would or would not support granting summary judgment on the section 1983 claim.

Conclusion

For these reasons, the petitioners respectfully request that this Court grant the present petition for certiorari. In the alternative, the petitioners respectfully request that this Court hold the present petition until after this Court resolves *Strain* (No. 20-1562), thereafter instructing the Tenth Circuit to reconsider its decision here in light of *Strain*.

Respectfully submitted,

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AUGUST 2021

APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED MARCH 23, 2021

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

March 23, 2021, Filed

No. 20-1067
(D.C. No. 1:18-CV-00378-REB-GPG) (D. Colo.)

GARY HEIDEL, INDIVIDUALLY; MICHELE ASCHBACHER, INDIVIDUALLY; CAMILLE ROWELL, INDIVIDUALLY; KERSTEN HEIDEL, INDIVIDUALLY; MICHAEL ROWELL, INDIVIDUALLY AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF CATHERINE ROWELL,

Plaintiffs-Appellants,

v.

SHERIFF ANTHONY MAZZOLA, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; SERGEANT JEREMY MUXLOW, IN HIS INDIVIDUAL CAPACITY; DEPUTY KIM COOK, IN HIS INDIVIDUAL CAPACITY; DEPUTY CLINTON KILDUFF, IN HIS INDIVIDUAL CAPACITY; DEPUTY JOHNNY MURRAY, IN HIS INDIVIDUAL CAPACITY,

Defendants-Appellees.

Appendix A

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **KELLY**, and **PHILLIPS**, Circuit Judges.**

Plaintiffs-Appellants Gary Heidel, Michele Aschbacher, Camille Rowell, Kersten Heidel, and Michael Rowell (collectively, "the Estate"), appeal from the district court's grant of summary judgment in favor of Defendants-Appellees in their civil rights action. Plaintiffs' decedent, Catherine Rowell, committed suicide while a pretrial detainee at the Rio Blanco County Detention Center. On appeal, the Estate argues there is ample evidence showing the jail officials' deliberate indifference, in violation of the Fourteenth Amendment, toward Ms. Rowell's risk of suicide. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

Background[1]

On February 12, 2016, Ms. Rowell was arrested in Rangely, Colorado, and booked into the Rio Blanco

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

1. Because the parties are familiar with the case, we provide only a limited factual recitation.

County Detention Center ("the jail"). Ms. Rowell had also been confined at the jail a few days earlier as well as in February and August of 2015. Ms. Rowell spent most of her time sleeping and refused to go outside during recreation time. Although she ate some of her meals, Ms. Rowell showed signs of a loss of appetite by either refusing to eat or not finishing her meals. Officers believed this behavior was consistent with their previous interactions with Ms. Rowell. On February 15, an officer checked on Ms. Rowell around 1:55 p.m. and discovered her in the day room with a 33-inch armored telephone cord wrapped around her neck. They were unable to revive her.

Sheriff Mazzola was in charge of the jail. For its part, the jail's suicide policy largely consisted of moving suicidal inmates for more frequent observation and contacting a mental health organization that provided services. Jail officers received on-the-job suicide training but nothing more formal than that. The policy manual also instructed officers to conduct cell checks every hour, but the evidence shows they occasionally waited longer. In fact, the parties contest whether officers checked on Ms. Rowell at 1:00 p.m. — an hour before her suicide — and the district court appeared to accept that they did not check on her for the purpose of its analysis. *See* 5 Aplt. App. 1295.

The Estate brought this action against the sheriff in his individual and official capacities and the other officers in their individual capacities, raising federal and state-law claims. The district court granted Defendants' motion for summary judgment on the federal claims concluding, *inter alia*, that the Estate failed to establish an underlying

constitutional violation or deliberate indifference by Sheriff Mazzola.[2] The district court dismissed the supplemental state law claims without prejudice.

Discussion

We review the district court's grant of summary judgment de novo, "drawing all reasonable inferences and resolving all factual disputes in favor of [the Estate]." *Murphy v. City of Tulsa*, 950 F.3d 641, 643 (10th Cir. 2019) (citation omitted). The Estate's claim against Sheriff Mazzola in his official capacity is equivalent to a suit against a governmental entity; thus, our municipal-liability cases apply. *See Cox v. Glanz*, 800 F.3d 1231, 1254 (10th Cir. 2015). For the Estate to succeed against Sheriff Mazzola, it must show (1) an official government policy or custom, (2) that caused a constitutional injury, and (3) requisite state of mind. *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 769 (10th Cir. 2013).

Claims based on a jail suicide usually implicate an alleged "failure of jail officials to provide medical care for those in their custody." *Cox*, 800 F.3d at 1248 (citation omitted). Therefore, recovery requires a showing of deliberate indifference, *id.*, which requires establishing an

2. After Defendants filed their motion for summary judgment, the Estate voluntarily withdrew all of its claims except the official-capacity claim against Sheriff Mazzola and the individual-capacity claim against Sergeant Jeremy Muxlow. 5 Aplt. App. 1283. In its order, the district court also granted summary judgment in favor of Sergeant Muxlow. *Id.* at 1299. The Estate did not appeal that decision.

objective and subjective component. *Strain v. Regalado*, 977 F.3d 984, 989 (10th Cir. 2020).[3] Suicide satisfies the objective component. *Collins v. Seeman*, 462 F.3d 757, 760 (7th Cir. 2006); *see Martinez v. Beggs*, 563 F.3d 1082, 1088 (10th Cir. 2009). For the subjective component, the Estate must show that jail officials "knew [Ms. Rowell] faced a substantial risk of harm and disregarded that risk, by failing to take reasonable measures to abate it." *Quintana v. Santa Fe Cnty. Bd. of Comm'rs*, 973 F.3d 1022, 1029 (10th Cir. 2020) (citation omitted).

On appeal, the Estate argues that various jail officers were deliberately indifferent because they failed to inquire about Ms. Rowell's suicidal tendencies, and they failed to regularly check on her despite the risk of suicide. The Estate also contends that, when viewed collectively, the officers' actions and other deficiencies at the jail are enough to establish its deliberate-indifference claim. We disagree.

To start, the Estate cannot establish an underlying constitutional violation by any of the jail's officers because they did not have subjective awareness of Ms. Rowell's risk of suicide. Although excessive sleeping, signs of diminished appetite, and refusing to go outside for recreation time can arguably be viewed as suicidal characteristics, they can

3. The Estate argued that only the objective component needs to be established under *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S. Ct. 2466, 192 L. Ed. 2d 416 (2015). Aplt. Br. at 31-35. As the parties recognize in their supplemental authority letters, this argument has been foreclosed by our recent decision in *Strain. See* 977 F.3d at 989-91.

be "susceptible to a number of interpretations." *See Cox*, 800 F.3d at 1253. Officers viewed this behavior as common among inmates and consistent with Ms. Rowell's previous time at the jail. No evidence suggests that Ms. Rowell mentioned her suicidal thoughts to an officer. Although the Estate argues that the subjective component can be shown by a risk of harm to the inmate population as a whole, our cases have typically required knowledge about a specific inmate's risk of suicide. *Id.* at 1249-51.

Moreover, the officers' failure to follow jail procedures does not equate with a constitutional violation. The Estate alleges that the booking questionnaire was not properly administered and that officers failed to conduct hourly cell checks. However, an officer's failure to follow internal jail policies does not automatically mean he or she acted with deliberate indifference. *See Hovater v. Robinson*, 1 F.3d 1063, 1068 n.4 (10th Cir. 1993). Especially when considering the lack of evidence regarding the officers' subjective awareness, the alleged deviations from timely cell checks and proper booking do not amount to deliberate indifference in these circumstances.

The Estate's comparison of the officers in this case to the defendants in *Lemire v. Cal. Dep't of Corrs. and Rehab.*, 726 F.3d 1062 (9th Cir. 2013), is not persuasive because *Lemire* is readily distinguishable. In that case, defendants violated jail policy by pulling all floor staff from a unit to attend a staff meeting. *Id.* at 1070-71. The unit — which housed mentally-ill patients taking psychotropic medication — was left unmonitored for three-and-a-half hours, which resulted in an inmate's suicide. *Id.* There

was a triable issue on deliberate indifference because the defendants knew the specific risks posed to the inmates and they knew it was the "primary" duty of floor staff to prevent suicide attempts. *Id.* at 1078-79. Thus, the *Lemire* defendants had far more specific knowledge about the risks posed by inadequate supervision of inmates.

The Estate next attempts to show a cognizable injury by aggregating every officers' conduct with various other shortcomings at the jail to show a systemic failure. Even recognizing that combined actions or omissions pursuant to a governmental policy or custom may violate constitutional rights, *see Garcia v. Salt Lake Cnty.*, 768 F.2d 303, 310 (10th Cir. 1985), the fact remains that the officers lacked knowledge of Ms. Rowell's risk of suicide. As for any deficiencies in the jail's training and policies, we do not think that they amount to a systemic failure given the reasonable efforts to "protect the prisoners' safety and bodily integrity." *Cox*, 800 F.3d at 1248 (citation omitted). The Estate's arguments about the jail's facilities "all sound remarkably like the tort of negligent design, a state remedy, not a constitutional violation." *Bame v. Iron Cnty.*, 566 F. App'x 731, 740 (10th Cir. 2014); *see Farmer v. Brennan*, 511 U.S. 825, 835, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) ("[D]eliberate indifference entails something more than mere negligence . . . .").

The Seventh Circuit decision relied upon by the Estate is readily distinguishable. *See Woodward v. Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917 (7th Cir. 2004). In *Woodward*, the court upheld a jury verdict that a defendant was deliberately indifferent to an inmate's risk of suicide.

Id. at 919. But there, the defendant failed to train staff, condoned violating policies meant to help suicidal inmates, and ignored the inmate's explicit warnings about his mental health and thoughts of suicide. *Id.* at 927-29.

We also note that the Estate cannot show state of mind, an essential element of a municipal-liability claim. *See Schneider*, 717 F.3d at 770-71. In the context of an official-capacity claim, a plaintiff must show:

> 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[.]

Id. at 771 (quoting *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998)).

Here, the jail has had one suicide-by-hanging from decades ago and one recent attempted suicide-by-drowning. While tragic, this is not a pattern of conduct that would establish actual notice of a substantially high risk of suicide. Nor is this one of those rare circumstances

where the jail's operating procedures were so deficient, or the risk of the telephone cord was so obvious, that it would "be liable under § 1983 without proof of a pre-existing pattern of violations." *Connick v. Thompson*, 563 U.S. 51, 64, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011).

AFFIRMED.

Entered for the Court

/s/_____
Paul J. Kelly, Jr.
Circuit Judge

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, FILED JANUARY 27, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Action No. 18-cv-00378-REB-GPG

GARY HEIDEL, INDIVIDUALLY, MICHELE ASCHBACHER, INDIVIDUALLY, CAMILLE ROWELL, INDIVIDUALLY, KERSTEN HEIDEL, INDIVIDUALLY, AND MICHAEL ROWELL, INDIVIDUALLY AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF CATHERINE ROWELL,

Plaintiffs,

v.

SHERIFF ANTHONY MAZZOLA, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; SERGEANT JEREMY MUXLOW, IN HIS INDIVIDUAL CAPACITY; DEPUTY KIM COOK, IN HIS INDIVIDUAL CAPACITY; DEPUTY CLINTON KILDUFF, IN HIS INDIVIDUAL CAPACITY; DEPUTY JOHNNY MURRAY, IN HIS INDIVIDUAL CAPACITY,

Defendant(s).

Appendix B

ORDER CONCERNING MOTION FOR SUMMARY JUDGMENT

Blackburn, J.

The matter before me is the **Defendants' Motion for Summary Judgment** [#91][1] filed September 6, 2019. The plaintiffs filed a response [#101], and the defendants filed a reply [#114]. I grant the motion in part and deny it in part.

I. JURISDICTION

I have jurisdiction over this matter under 28 U.S.C. § 1331 (federal question) and § 1367 (supplemental jurisdiction).

II. STANDARD OF REVIEW

The purpose of a summary judgment motion is to assess whether trial is necessary. *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). Summary judgment is proper when 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); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A dispute is "genuine" if the issue could be resolved in favor of either party. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Farthing v. City of Shawnee*, 39 F.3d

1. "[#91]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's case management and electronic case filing system (CM/ECF). I use this convention throughout this order.

1131, 1135 (10th Cir. 1994). A fact is "material" if it might reasonably affect the outcome of the case. *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 248 (1986); Farthing, 39 F.3d at 1134. Summary judgment may be granted if the court concludes that no "rational trier of fact" could find for the nonmoving party based on the showing made in the motion and response. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

A party who does not have the burden of proof at trial must show the absence of a genuine fact issue. *Concrete Works, Inc. v. City & County of Denver*, 36 F.3d 1513, 1517 (10th Cir. 1994), *cert. denied*, 115 S.Ct. 1315 (1995). Once the motion has been properly supported, the burden shifts to the nonmovant to show, by tendering depositions, affidavits, and other competent evidence, that summary judgment is not proper. *Id.* at 1518. All the evidence must be viewed in the light most favorable to the party opposing the motion. *Simms v. Oklahoma ex rel. Department of Mental Health and Substance Abuse Services*, 165 F.3d 1321, 1326 (10th Cir.), *cert. denied*, 120 S.Ct. 53 (1999).

III. FACTS

Unless noted otherwise, the facts outlined below are undisputed. On Friday, February 12, 2016, Catherine Rowell was arrested in Rangely, Colorado. She was arrested for the state crime of violation of a protective order. Allegedly, Ms. Rowell had contact with her purported common-law husband, Gary Heidel, a protectee under the protective order.

Appendix B

Following her arrest, Ms. Rowell was booked into the Rio Blanco County Detention Center (Jail), located in Meeker, Colorado. Three days later, on Monday, February 15, 2016, jail staff checked on Ms. Rowell. They discovered Ms. Rowell seated in what appeared to be an unusual position. Jail staff entered the cell and discovered a telephone cord wrapped around Ms. Rowell's neck. Jail staff immediately undertook life saving measures and called for an ambulance. They were unable to revive Ms. Rowell. The in-jail suicide of Ms. Rowell forms the basis for the claims of the plaintiffs.

The Booking Report for Ms. Rowell, dated February 12, 2016, shows Ms. Rowell was held on a charge of violation of a protection order. *Motion* [#91], Exhibit A [#92–1], CM/ECF pp.10-12 (Booking Report, February 12, 2016). On that basis, she was charged with a class I misdemeanor under §18-6-803.5, C.R.S. *Id.*, CM/ECF p. 11. The February 12, 2016, Booking Report does not show any other basis for holding Ms. Rowell in custody.

Two days prior to her arrest on February 12, 2016, Ms. Rowell had been released from the Jail. That release took place on February 10, 2016, after Ms. Rowell had spent a week in the Jail. In 2015, Ms. Rowell had been confined in the jail in February and August. Some of the defendants were familiar with Ms. Rowell from these previous confinements.

The Jail had four small pods, one of which was dedicated to female inmates only. The female pod had two cells for sleeping and an adjacent day room. The two cells

and the day room were interconnected but could be locked and isolated from one another. The day room had a sink, a counter with bench, a television mounted on the wall, a shower, and a telephone with a 33 inch long armored cord.

Between the evening hours of February 12, 2016, and Monday, February 15, 2016, Ms. Rowell was the only female inmate housed at the Jail. As a result, she was allowed to move freely in the pod between her cell and the day room.

Jail staff delivered meals to Ms. Rowell and offered her outside recreation time. Jail staff routinely checked on Ms. Rowell, although the frequency of those checks is disputed.

Between February 12 and February 15, 2016, Ms. Rowell spent much of her time sleeping. She often refused food, but the frequency of her refusal of food is disputed. When offered the opportunity for outdoor exercise, she always refused. At the time, daytime temperatures were in the 30s, and other Jail inmates refused outdoor exercise as well. *Reply* [#114], Exhibit JJ [#115-11] (Second *Murray Deposition*), 181:21-25; *Response* [#101], Exhibit 17, p. 17.

Deputy Kim Cook booked Ms. Rowell into the Jail on February 12, 2016. Deputy Cook did not return to work until February 16, after the death of Ms. Rowell. On February 17, 2016, agent Rosa Perez of the Colorado Bureau of Investigation (CBI) interviewed Deputy Cook. *Motion* [#91], Exhibit K [#92-11] (Cook CBI Interview). During the CBI interview, Deputy Cook was asked if Ms.

Rowell was cooperative when Deputy Cook booked her into the jail. *Id.*, p.1. Deputy Cook said Ms. Rowell was cooperative but also was very angry with Tina Gonzales, a woman who was arrested with Ms. Rowell. *Id.* According to Deputy Cook, Ms. Rowell was answering his questions appropriately. *Id.* Deputy Cook observed nothing to indicate that Ms. Rowell was impaired by either alcohol or drugs. *Id.*

Deputy Cook said there was a list of specific medical questions asked of each inmate entering the jail. *Id.* He said if an inmate answered yes to any of the medical questions, it would show up on their booking form. *Id.*, pp. 1-2. Deputy Cook said he believed Ms. Rowell told him she did not have any medical issues. *Id.*, p. 2. Deputy Cook said he expected that because Ms. Rowell did not have any medical issues the previous week when she was housed at the Jail. *Id.*

The CBI investigator took a picture of the computer screen in the Jail showing the booking questions for Ms. Rowell on the form used by Deputy Cook on February 12, 2016. *Response* [#101], Exhibit 10 [#101-12] (Booking Questions Form). The Booking Questions Form contains a list of visual observations by the booking officer and a list of questions concerning medical information. There is a single checkbox next to each observation and question. According to Deputy Cook, the checkbox would be marked only if the inmate answered yes to any of the medical questions or the officer made any of the listed visual observations. On the Booking Questions Form used for Ms. Rowell on February 12, 2016, none of the

check boxes are marked. *Id.* Under the list captioned visual observations, there is a box for "Visual Observation Notes." *Id.* On the form used for Ms. Rowell, this box says "NO COMMENTS." *Id.* Under the list captioned medical information, there is a box for "Medical Detail." On the form used for Ms. Rowell, this box says "NO MED ISSUES." *Id.* The list of questions in the medical information column includes a question which asks "are you or have you been suicidal." *Id.* On the form used for Ms. Rowell, the box next to this question is not checked.

In his deposition, Deputy Cook said he does not have an independent recollection of this particular booking, but the documents reflect that he asked Ms. Rowell if she was suicidal. *Motion* [#91], Exhibit G [#92-7] (*Cook Deposition*), 100:12-102:2. The plaintiffs contend that the Booking Questions Form, containing almost no information concerning Ms. Rowell, tends to show that Deputy Cook did not ask any of these questions of Ms. Rowell when she was booked. Booking Questions Forms concerning earlier incarcerations of Ms. Rowell, in early 2015 and on February 2, 2016, both noted that Ms. Rowell had high blood pressure for which she was not taking any medication. *Response* [#101], pp. 6-7 and exhibits cited there.

Sgt. Jeremy Muxlow worked two evening shifts at the jail, Saturday, February 13, 2016, and Sunday, February 14, 2016. On both evenings, Sgt. Muxlow worked from 7:00 p.m. to 7: 00 a.m. Previously, when working as a patrol officer rather than a jail officer, Sgt. Muxlow had prior encounters with Ms. Rowell. Her reserved demeanor

during the evening shifts worked by Sgt. Muxlow on February 13 and February 14 was consistent with his prior encounters with Ms. Rowell in a non–jail setting. In his deposition, Sgt. Muxlow testified that, working in a jail setting, few inmates are happy to be there. *Reply* [#114], Exhibit DD (*Muxlow Deposition*), 250:22-250:25. In his logs for his shifts on February 13 and February 14, Sgt. Muxlow noted that Ms. Rowell sleeps a lot. Although he noted this fact in his log, Sgt. Muxlow said he did not find this to be unusual. *Muxlow Deposition*, 247:11-15. Asked if Ms. Rowell appeared to be apathetic during the evening shifts of February 13 and February 14, Sgt. Muxlow said her apathy was "nothing out of the norm." *Muxlow Deposition* [#115-5], 248:3-248:5. Sgt. Muxlow knew Ms. Rowell was incarcerated for a protection order violation and that the protection order concerned her common law husband, Gary Heidel.

Sgt. Muxlow received some suicide prevention training from his prior employment in Gunnison, Colorado. *Muxlow Deposition* [#115-5], 118:23-119:7. Sgt. Muxlow testified in his deposition that he received "(a)t least a few hours" of training in suicide prevention when he worked in Gunnison. *Id.*, 120:18-120:22. The evidence in the record does not show anything about the specific topics covered in this training, other than the general topic of suicide prevention.

Deputy Johnny Murray worked the day shifts on February 12, 13, 14, and 15, 2016. *Motion* [#91], Exhibit B [#92-2] (*Murray Deposition*), 46:13-49:9; Exhibit J [#92-10]. On February 15, Deputy Murray checked on Ms.

Rowell at 8:00 a.m., 10:30 a.m. when brunch was served, 11;00 a.m. when he collected her food tray, and 1:00 p.m. *Motion* [#91], Exhibit N [#92-15] (Kilduff CBI Interview), p. 2; Exhibit L-1 [#92-13]; Exhibit P [#92-17] (Murray 2-15-16 Written Statement). On Saturday, Sunday, and Monday (February 13, 14, and15), Deputy Murray did not interact with Ms. Rowell a lot. Deputy Murray had noticed Ms. Rowell had not eaten a lot and asked her why she wasn't eating, to which she responded that she was "just not hungry." Ms. Rowell slept most of the time while he was working. Murray only recalls having routine conversations with Ms. Rowell. She spent most of her time in bed as she had done during prior incarcerations, and as is typical for a many inmates. *Murray Deposition* [#92-2], 210:3-13.

Deputy Clinton Kilduff worked the day shifts (7:00 a.m. to 7:00 p.m.) on February 13, 14, and 15, 2016. *Motion* [#91], Exhibit B [#92-2] (*Murray Deposition*), 46:13-49:9; Exhibit J [#92-10]. Each day, Deputy Kilduff offered Ms. Rowell one hour of outside recreation time, and Ms. Rowell declined each day. Outside recreation time was usually offered after lunch. *Motion* [#91], Exhibit N [#92-15] (Kilduff CBI Interview), p. 1. In addition to speaking with Ms. Rowell on February 15 about recreation time, Deputy Kilduff had spoken earlier with Ms. Rowell about brunch being served that day instead of breakfast because it was a holiday (President's Day). *Id.* Ms. Rowell ate most of the egg casserole, all of her cottage cheese, and two pieces of sweet bread, but did not eat her pears or potatoes. Id ., p.4. On February 15 at approximately 12:07 p.m., Deputy Kilduff found Ms. Rowell asleep, and he woke her up to ask

if she wanted her recreation time, to which she responded "No, thank you," and then rolled back over to sleep. Ms. Rowell was on her bunk during this exchange, not in the dayroom. *Id.*, p. 2.

Sheriff Anthony Mazzola began working as the elected Sheriff of Rio Blanco County in January 2015. *Motion* [#91], Exhibit D [#92-4] (*Mazzola Deposition*), 79:4-80:23. Sheriff Mazzola did not work February 12-15, 2016. *Motion* [#91], Exhibit B [#92-2], 46:13-49:9; Exhibit J [#92-10], line 301. When Sheriff Mazzola became Sheriff, he began working to update policy and procedures for the Jail. *Id.*, *Mazzola Deposition* [#92-4], 183:6-184:2. As of February 2016, Sheriff Mazzola was aware that Sgt. Muxlow had received some suicide prevention training in the basic academy. *Id.*, 234:7-234:20. In his deposition, Sheriff Mazzola testified that Deputy Cook, Deputy Murray, and Deputy Kilduff had on-the-job training concerning suicide. *Id.*, 234:21-235:8. Other than on-the-job training, Sheriff Mazzola did not know of any other formal training in suicide prevention received by Deputy Cook, Deputy Murray, and/or Deputy Kilduff between January 2015, when Sheriff Mazzola became Sheriff, and February 15, 2016. *Id.*, 235:9-236:10. The record contains no evidence that Sheriff Mazzola was aware that Ms. Rowell had been incarcerated previously in the Rio Blanco County jail between February 12 and February 15, 2016.

The plaintiffs contended that not all of the jail checks indicated in the jail logs and other evidence actually were performed. *Response* [#101], pp. 9-13. The plaintiffs claim the Jail had a custom of allowing officers to wait much more than one hour between jail checks. In addition, the

plaintiffs contend that video evidence shows that not all of the jail checks shown in the jail logs were performed.

On February 15, 2016, at approximately 12:07 p.m., Deputy Kilduff found Ms. Rowell asleep, and he woke her up to ask if she wanted her recreation time. Ms. Rowell responded "No, thank you," and rolled back over to sleep. *Motion* [#91], Exhibit N [#92-15] (Kilduff CBI Interview), P. 2. Deputy Murray says he checked on Ms. Rowell at 11:03 a.m. and 1:00 p.m. *Motion* [#91], Exhibit P [#92-17] (Murray Written Statement), p. 1. The plaintiffs contend the evidence shows that the 1:00 p.m check by deputy Murray did not actually occur. At 1:55 p.m., Jail staff discovered Ms. Rowell in the day room with the armored telephone cord wrapped around her neck. They were unable to revive her.

The plaintiffs are Gary Heidel, the common law husband of Ms. Rowell, Michael Rowell, a son of Ms. Rowell, Michelle Aschbacher, a daughter of Ms. Rowell, Camille Rowell, a daughter of Ms. Rowell, and Kirsten Heidel, a daughter of Ms. Rowell. I will refer to these plaintiffs as the individual plaintiffs. In addition, the Estate of Catherine Rowell also is a plaintiff, with Michael Rowell acting as the Personal Representative of the estate. The plaintiffs assert the following claims:

1. Wrongful death based on negligence - (individual plaintiffs against all defendants).

2. Wrongful death based on premises liability to invitee – §13-21-115, C.R.S. - (individual plaintiffs against all defendants).

3. Wrongful death based on premises liability to licensee – §13-21-115, C.R.S. - (individual plaintiffs against all defendants).

4. 42 U.S.C. § 1983 Fourteenth Amendment – deliberate indifference to a substantial risk of suicide (Estate of Catherine Rowell against Sgt. Jeremy Muxlow in his individual capacity).

5. 42 U.S.C. § 1983 Fourteenth Amendment – entity liability (estate of Catherine Rowell against Sheriff Anthony Mazzola in his official capacity).

Proposed Final Pretrial Order [#120], CM/ECF p. 6.

IV. § 1983 CLAIMS

The estate of Ms. Rowell asserts a claim under § 1983 against Sgt. Jeremy Muxlow in his individual capacity. Sgt. Muxlow was on duty in the Jail between 7 p.m. and 7 a.m. on the two nights prior to the death of Ms. Rowell. In addition, the estate of Ms. Rowell asserts a claim under § 1983 against Sheriff Anthony Mazzola in his official capacity. The estate of Ms. Rowell alleges that Sheriff Mazzola failed to train and supervise his employees in the jail concerning suicide screening, suicide prevention, and the treatment of those who are suicidal. *Second Amended Complaint* [#54], ¶ 132. The estate cites other alleged failures of the Sheriff in support of this claim. These failures, the estate alleges, are the moving and proximate cause of the death of Ms. Rowell. *Id.*, ¶ 134.

Appendix B

Claims based on a jail suicide are treated as claims based on the failure of jail officials to provide medical care for those in their custody. *Cox v. Glanz*, 800 F.3d 1231, 1248 (10th Cir. 2015). Under the Due Process Clause of the Fourteenth Amendment, pretrial detainees are entitled to the same degree of protection against denial of medical care as that afforded to convicted inmates under the Eighth Amendment. *Frohmader v. Wayne*, 958 F.2d 1024, 1028 (10th Cir.1992). The claim of the estate based on allegedly inadequate medical attention must be judged against the "deliberate indifference to serious medical needs" test of *Estelle v. Gamble*, 429 U.S. 97 (1976). *Martin v. Board of County Comm'rs*, 909 F.2d 402, 406 (10th Cir.1990).

The estate asserts that Sgt. Muxlow and Sheriff Mazzola were deliberately indifferent to the risk of suicide in the Jail and the risk of suicide presented by Ms. Rowell. "Deliberate indifference" has both an objective and a subjective component. "The objective component of the test is met if the harm suffered is sufficiently serious to implicate the Cruel and Unusual Punishment Clause." *Kikumura v. Osagie*, 461 F.3d 1269, 1291 (10th Cir. 2006) (quotations and citations omitted). The defendants concede that the risk of suicide involves a serious medical need for purposes of the objective prong of this test. *Motion for Summary Judgment* [#91], p. 11. "The subjective component is met if a prison official knows of and disregards an excessive risk to inmate health or safety." *Kikumura*, 461 F.3d at 1291. It is not enough for an official merely to be aware of facts from which an inference could be drawn that a substantial risk of serious harm exists.

Rather, the official must also draw the inference. *Matta v. Saiz*, 427 F.3d 745, 751 (10th Cir. 2005). In the context of an individual capacity § 1983 claim based on a jail suicide, the defendant must have had "actual knowledge . . . of an individual inmate's substantial risk of suicide." *Cox v. Glanz*, 800 F.3d 1231, 1249 (10th Cir. 2015). A plaintiff can succeed on such a claim only by presenting evidence suggesting that the jail staff had knowledge of the specific and substantial risk that the deceased inmate would commit suicide. *Id.* at 1249-1250.

A. QUALIFIED IMMUNITY - SGT. MUXLOW

The only individual capacity § 1983 claim asserted by the estate is its claim against Sgt. Muxlow. The estate has withdrawn its individual capacity § 1983 claims against the other defendants. *Response* [#101], p. 28. In the motion for summary judgment [#91], Sgt. Muxlow contends he is entitled to qualified immunity as to the § 1983 claim brought against him.

A motion for summary judgment asserting qualified immunity must be reviewed differently from other summary judgment motions. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled in part*, *Pearson v. Callahan*, 555 U.S. 223, 236 (2009); *Holland v. Harrington*, 268 F.3d 1179, 1185 (10th Cir. 2001), *cert. denied*, 535 U.S. 1056 (2002). After a defendant asserts qualified immunity, the burden of persuasion shifts to the plaintiff. *Scull v. New Mexico*, 236 F.3d 588, 595 (10th Cir. 2000). When faced with a motion for summary judgment asserting qualified immunity, a plaintiff bears the onus to demonstrate after

a review of the evidence in the light most favorable to the plaintiff "(1) that the [defendant] official violated a statutory or constitutional right,[2] and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011); *Felders ex rel. Smedley v. Malcom*, 755 F.3d 870, 877 (10th Cir. 2014). The "plaintiff must articulate the clearly established constitutional right and the defendant's conduct which violated the right with specificity." *Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir. 1996 (*quoting Romero v. Fay*, 45 F.3d 1472, 1475 (10th Cir.1995)). A court may decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009); *Quinn v. Young*, 780 F.3d 998, 1004 (10th Cir. 2015). As with any motion for summary judgment, the court must view the facts and draw reasonable inferences in the light most favorable to the plaintiff as the party opposing the motion for summary judgment. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

For a constitutional right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that constitutional right. *Quinn*, 78 F.3d at 1004 - 1005. "A plaintiff may satisfy this standard by identifying an on-point Supreme Court or published Tenth Circuit decision; alternatively, the clearly established

2. In the context of a motion for summary judgment, the court must determine if the facts shown by the plaintiff through evidence in the record make out a violation of a constitutional right. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

weight of authority from other courts must have found the law to be as the plaintiff maintains." *Id.* at 1005 (citation and internal quotation omitted); *see also Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Absent binding Supreme Court or Tenth Circuit authority, the plaintiff must show a "robust consensus of cases of persuasive authority" in the Courts of Appeals. *Taylor v. Barkes*, ____U.S. ____, ___, 135 S.Ct. 2042, 2044 (2015) (*quoting City and Cnty. of San Francisco v. Sheehan*, ___U.S. ___, ___, 135 S.Ct. 1765, 1778 (2015)). *See also al-Kidd*, 563 U.S. at 741. The existence of one out-of-circuit decision and several district court decisions holding that the right at issue exists is not sufficient to put every reasonable officer on notice that the law is clearly established. *Woodward v. City of Worland*, 977 F.2d 1392, 1387 (10th Cir. 1992).[3]

The plaintiff must demonstrate also a substantial correspondence between the conduct in question and prior law establishing that the defendant's actions clearly were prohibited. *Hilliard v. City & Ctny. of Denver*, 930 F.2d 1516, 1518 (10th Cir. 1991) (citing *Hannula v. City of Lakewood*, 907 F.2d 129, 131 (10th Cir. 1990)). However, the plaintiff need not establish a "precise factual

3. *See also Davis v. Holly*, 835 F.2d 1175, 1182 (6th Cir. 1987) ("A single idiosyncratic opinion from the court of appeals for another circuit was hardly sufficient to put the defendants on notice of where this circuit or the Supreme Court might come out on the issue in question."); *Higginbotham v. City of New York*, ___F.Supp.3d ___, ___, No. 14–cv–8549 (PKC)(RLE), 2015 WL 2212242 (S.D.N.Y. May 12, 2015) (holding that three circuit courts and numerous district courts concluding that the right at issue existed were sufficient to demonstrate a "robust consensus of persuasive authority").

correlation between the then-existing law and the case at hand . . . ." *Patrick v. Miller*, 953 F.2d 1240, 1249 (10th Cir.1992) (internal quotations omitted). Government officials can still be on notice that their conduct violates established law even in novel factual circumstances. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *Quinn*, 78 F.3d at 1005. For example, the existence of unreasonable seizure is a fact-specific inquiry and, therefore, "there will almost never be a previously published opinion involving exactly the same circumstances." *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007). "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." *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004). Still, the Supreme Court has "repeatedly told courts ... not to define clearly established law at a high level of generality." *al-Kidd*, 563 U.S. at 742 (citations omitted); *see Tolan v. Cotton*, 572 U.S. 650, 657 (2014) ("[W]e have instructed that courts should define the clearly established right at issue on the basis of the specific context of the case." (internal quotation marks omitted)).

In short, although the court must review the evidence in the light most favorable to the plaintiffs, an assertion of qualified immunity may be overcome only when the record demonstrates clearly that the plaintiffs have satisfied this heavy two-part burden. If the plaintiffs satisfy this enhanced burden, then the burden shifts to the defendants. Unless the defendants demonstrate that there is no disputed issue of material fact relevant to the immunity analysis, a motion for summary judgment based

on qualified immunity must be denied. *Salmon v. Schwarz*, 948 F.2d 1131, 1136 (10th Cir.1991).

The estate cites *Cox v. Glanz*, 800 F.3d 1231 (10th Cir. 2015) as stating the clearly established law relevant to the § 1983 claim against Sgt. Muxlow. *Cox* is the only case cited by the estate to show the clearly established law relevant to their § 1983 claim against Sgt. Muxlow. As noted above, the *Cox* court held that a plaintiff asserting a claim under § 1983 based on a jail suicide must present evidence suggesting that the jail staff had knowledge of the specific and substantial risk that the deceased inmate would commit suicide. *Id.* at 1249-1250. Viewing the evidence in the record in the light most favorable to the estate, I find that no reasonable fact finder could conclude that Sgt. Muxlow had knowledge prior to the suicide of Ms. Rowell which led him to conclude that Ms. Rowell presented a substantial risk of suicide. Further, no reasonable fact finder could conclude that Sgt. Muxlow deliberately disregarded such a risk.

The estate contends Sgt. Muxlow knew Ms. Rowell was going through difficulty in her romantic relationship, slept most of the time, refused recreation, lost her appetite, lost interest in communicating, was socially isolated, and was withdrawn. *Response* [#101], p. 28. According to the estate, "(f)rom this obvious display of suicide risk factors, combined with some training on suicide, a jury could infer that [Sgt.] Muxlow actually knew that [Ms.] Rowell was at a substantial risk of suicide and that he failed to abate that risk." *Id.* The estate of Ms. Rowell cites no evidence which shows Sgt. Muxlow knew or concluded that Ms. Rowell

presented a substantial risk of suicide. So, the estate relies on the factors cited above to support its contention that it was obvious to Sgt. Muxlow that Ms. Rowell presented a substantial risk of suicide. Knowledge of a suicide risk can be inferred when the suicide risk factors are both substantial and pervasive. *See Estate of Hocker by Hocker v. Walsh*, 22 F.3d 995, 1000 (10th Cir. 1994).

To some extent, the factors cited by the estate are consistent with a risk of suicide. However, those factors are also consistent with other conditions. The evidence in the record shows that, from the perspective of Sgt. Muxlow, the quiet demeanor of Ms. Rowell was the norm for Ms. Rowell – in jail and out of jail. The evidence indicates also that it was not unusual for some inmates in the jail to sleep frequently, as Ms. Rowell did. Obviously, this would be particularly true during the two night shifts worked by Sgt. Muxlow between 7:00 p.m. and 7:00 a.m. When Ms. Rowell was in the Jail, outdoor temperatures were below freezing, and Ms. Rowell was not the only inmate to refuse outdoor recreation. The evidence shows that Ms. Rowell ate some, but not all, of the food which she was offered. Considered individually and collectively, these factors do not demonstrate suicide risk factors that are so substantial and pervasive that a reasonable fact finder could infer that Sgt. Muxlow knew Ms. Rowell presented a substantial risk of suicide.

This conclusion is consistent with *Cox v. Glanz*, 800 F.3d 1231 (10th Cir. 2015). In *Cox*, the inmate in question indicated that he felt paranoid, heard voices, or saw things that others do not see. *Id.*, 800 F.3d at 1237. He indicated

also that he had felt nervous or depressed in recent weeks and was taking medication for an emotional or mental health problem. *Id.* Jail employees were aware that he had been treated for paranoid schizophrenia. *Id.* The inmate denied that he was currently thinking of committing suicide. *Id.* The *Cox* court concluded that the "observable symptoms" of the inmate "were susceptible to a number of interpretations; suicide may well have been one possibility, but the facts known to those with whom he interacted did not establish that it was a substantial one." *Id.*, 1253.

The *Cox* court cited two cases from other circuits in which those courts concluded that when the inmate denied suicidal ideation during booking, the behavior of the inmate did not show that jail employees had actual knowledge that the inmate posed a serious risk of suicide. In *Hott v. Hennepin County, Minnesota*, 260 F.3d 901, 906 (8th Cir. 2001), the inmate denied suicidal ideation but was placing his hands around his neck, possibly as an allusion to hanging himself. *Id.* When being booked into the jail, the inmate indicated that he was suffering neck and back pain from her recent car accident. There was no evidence that jail personnel interpreted his gestures as a threat of suicide. A request for a late-night phone call was reasonably explained as a desire of the inmate to check on the health of his infant son. The inmate also was visibly glum. Even these behaviors were not sufficient to demonstrate actual knowledge of a risk of suicide by jail employees.

Similarly, in *Estate of Novack ex rel. Turbin v. County of Wood*, 226 F.3d 525 (7th Cir. 2000), the inmate had been prescribed medication for obvious psychiatric problems

and exhibited strange behavior, such as pounding on the walls of his cell and giggling. *Id.* at 530. The *Novack* court concluded "strange behavior alone, without indications that [the] behavior has a substantial likelihood of taking a suicidal turn, is not sufficient to impute subjective knowledge of a high suicide risk to jail personnel." *Id.*

Given the holding on this point in *Cox* and the cases on which the *Cox* court relied, I conclude that no reasonable fact finder could conclude that Sgt. Muxlow had subjective knowledge of a specific and substantial risk that Ms. Rowell would attempt or commit suicide. The behavior exhibited by Ms. Rowell and known to Sgt. Muxlow did not present a substantial and pervasive set of suicide risk factors such that a reasonable fact finder properly could infer that Sgt. Muxlow was aware of a specific and substantial risk that Ms. Rowell would commit suicide. Absent awareness of such risk, it cannot be said that Sgt. Muxlow deliberately disregarded the risk. This is true even when the facts in the record are viewed in the light most favorable to the plaintiff on this claim. Thus, the evidence in the record, viewed in the light most favorable to the plaintiff, does not support the claim of the plaintiff that Sgt. Muxlow violated the rights of Ms. Rowell under the Due Process Clause of the Fourteenth Amendment.

Viewing the facts in the record in the light most favorable to the estate of Ms. Rowell, I also cannot conclude that the right asserted by Ms. Rowell was clearly established at the time of her death. The decision of the Tenth Circuit in *Cox v. Glanz*, 800 F.3d 1231 (10th Cir. 2015) shows that the right asserted by Ms. Rowell was

not clearly established at the time of her death. *Cox* is the only authority on which the estate of Ms. Rowell relies to show the clearly established law relevant to the individual capacity § 1983 claim against Sgt. Muxlow.

It is important to note one other point on the issue of clearly established law. The estate contends that, with regard to a pretrial detainee, a plaintiff jail inmate need not show deliberate indifference to a serious medical need on the part of defendant jail employees. Rather, the estate contends such a plaintiff need show only that the actions of defendant jail employees were objectively unreasonable. In support of this position, the estate cites the opinion of the Supreme Court of the United States in *Kingsley v. Hendrickson*, ___U.S. ___, 135 S. CT. 2466, 2473 (2015).

In *Kingsley*, the Court addressed an excessive force claim by a pretrial detainee. The *Kingsley* Court wrote:

> In deciding whether the force deliberately used is, constitutionally speaking, "excessive," should courts use an objective standard only, or instead a subjective standard that takes into account a defendant's state of mind? It is with respect to this question that we hold that courts must use an objective standard. In short, we agree with the dissenting appeals court judge, the Seventh Circuit's jury instruction committee, and Kingsley, that a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable.

Kingsley, ___U.S. at ___, 135 S.Ct. at 2472–73. The estate contends that the Second, Seventh, and Ninth Circuits have held that *Kingsley* overrules their precedents. After Kingsley, these courts have held, an objective standard applies to all Fourteenth Amendment claims brought by a pretrial detainee, including claims based on inadequate medical treatment. *Darnell v. Pineiro*, 849 F.3d 17, 35 (2nd Cir. 2017); *Miranda v. Lake*, 900 F.3d 335, 352–54 (7th Cir. 2018); *Gordon v. Orange*, 888 F.3d 1118, 1124-1125 (9th Cir. 2018). On the other hand, the Eighth, Eleventh, and Fifth Circuits have chosen to confine *Kingsley* to its facts and limit the *Kingsley* standard to claims under the Fourteenth Amendment for excessive-force in a pretrial setting. *Miranda*, 900 F.3d at 352.

The Tenth Circuit has not addressed this issue in a published case. In *Cox v. Glanz*, 800 F.3d 1231, 1248 (10th Cir. 2015), the Tenth Circuit wrote:

> "[C]laims based on a jail suicide are considered and treated as claims based on the failure of jail officials to provide medical care for those in their custody." *Barrie v. Grand Cty.*, 119 F.3d 862, 866 (10th Cir.1997). Therefore, such claims "must be judged against the 'deliberate indifference to serious medical needs' test." *Estate of Hocker ex rel. Hocker v. Walsh*, 22 F.3d 995, 998 (10th Cir.1994) (*quoting Martin v. Bd. of Cty. Comm'rs*, 909 F.2d 402, 406 (10th Cir.1990)). As the district court noted, the claims at issue here implicate the subjective component of the deliberate-indifference

> rubric, under which the defendant must "both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and ... also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

This is the clearly established law in the Tenth Circuit. The plaintiff has not cited any Tenth Circuit case which alters this law significantly. Clearly, there is much debate among the circuits about how the *Kingsley* standard should be applied. However, the Tenth Circuit has yet to weigh in. Therefore, application of the *Kingsley* standard to a claim by a pretrial detainee based on a jail suicide is not the clearly established law of the Tenth Circuit.

In sum, Sgt. Muxlow is entitled to summary judgment on the § 1983 individual capacity claim against him for two reasons. First, the estate has not presented evidence sufficient to support the conclusion that Sgt. Muxlow knew Ms. Rowell presented a substantial risk of suicide and deliberately disregarded that substantial risk. Second, the estate has not shown that the alleged actions of Sgt. Muxlow violated clearly established law. Thus, Sgt. Muxlow is entitled to the protection of qualified immunity and to summary judgment on this claim.

Appendix B

B. OFFICIAL CAPACITY CLAIM - SHERIFF MAZZOLA

The estate of Ms. Rowell asserts a claim under § 1983 against Sheriff Mazzola in his official capacity. The estate alleges that, as Sheriff, Sheriff Mazzola had a duty to provide constitutionally adequate medical care for inmates in the jail. *Amended Complaint* [#54], ¶ 132. The estate alleges that Sheriff Mazzola failed to train and supervise his employees in the jail concerning screening, prevention, and treatment of those who are suicidal. *Id.*

A suit against Sheriff Mazzola in his official capacity is, in essence, a suit against Rio Blanco County.

> (L)ocal governing bodies can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where ... the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision making channels.

Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658, 690-91 (1978). Official municipal or county policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law. These are the actions for which the municipality is actually responsible. *Connick v. Thompson*, 131 S.Ct. 1350, 1359 (2011). The county may be liable for harm caused to Ms. Rowell by the policies, practices, and customs of Sheriff Mazzola, if the policies, customs, and/or practices were a moving force behind an underlying constitutional deprivation suffered by Ms. Rowell. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

To establish municipal liability under § 1983, the plaintiff must present evidence that (1) there was a policymaker; (2) a policy or custom existed; (3) such custom or policy was the cause in fact or moving force behind an underlying constitutional violation; and (4) the municipal action was taken with "deliberate indifference" to its known or obvious consequences. *See, e.g., Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) (assembling cases); *Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 407 (1997) (discussing deliberate indifference requirement). "(R)igorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employees." *Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 405 (1997). 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 and deliberately chooses to disregard the risk of harm." *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir.1999).

Municipal liability can be predicated on an unconstitutional municipal policy, custom, or practice, *Monell*, 436 U.S. at 694, or on a municipality's failure to train adequately or adequately to supervise its employees. *City of Canton v. Harris*, 489 U.S. 378, 380 (1989); *Brown v. Reardon*, 770 F.2d 896, 902 (10th Cir. 1985). A municipality may be liable under § 1983 for inadequate supervision or training of its employees "only where the failure to train [or supervise] amounts to deliberate indifference to the rights of persons with whom the [employees] come in contact." *City of Canton*, 489 U.S. at 388. Such deliberate indifference arises where "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the [municipality] can reasonably be said to have been deliberately indifferent to the need." *City of Canton,* 489 U.S. at 390. Stated differently, "municipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-484 (1986).

As discussed above, the estate has not presented evidence which would permit a reasonable fact finder to conclude that there was an underlying constitutional violation by Sgt. Muxlow. Absent an underlying

constitutional violation, the official capacity claim against Sheriff Mazzola also fails. "[I]n order to hold a municipality liable for an employee's constitutional violation, a plaintiff must show not only that a constitutional violation occurred, but also that some municipal policy or custom was the moving force behind the violation." *Myers v. Oklahoma County Bd. of County Comm'rs*, 151 F.3d 1313, 1320 (10th Cir.1998).

In its response [#101], the estate contends a reasonable jury could find an underlying constitutional violation based on the actions of Deputy Murray and Deputy Kilduff. *Response* [#101], pp. 25-26. The estate contends that the failure of Deputy Murray and Deputy Kilduff to perform a jail check for nearly two hours, between 12:05 p.m. and 1:55 p.m. on February 15, 2016, posed a substantial risk that Ms. Rowell "would come to harm and not receive swift medical treatment." *Id.*, p. 25. The estate cites no law to show that, under the circumstances present in the Jail, the claimed failure to perform a jail check between 12:05 p.m. and 1:55 p.m. constitutes a constitutional violation. The estate cites also the specific facts known about Ms. Rowell which the estate noted concerning the alleged deliberate indifference of Sgt. Muxlow. As with Sgt. Muxlow, knowledge of these facts does not demonstrate suicide risk factors that are so substantial and pervasive that a reasonable fact finder properly could infer that Deputy Murray and Deputy Kilduff knew Ms. Rowell presented a substantial risk of suicide. On this issue, knowledge of a substantial risk of suicide is required to demonstrate an underlying constitutional violation by these two deputies.

Finally, the estate contends a reasonable fact finder could infer that Ms. Rowell was "more likely to harm [herself] because of the long armored [telephone] cable to which [she] had access." *Response* [#101], p. 26. Without citation to the evidentiary record, the state contends Deputy Cook admitted he knew of the danger of suicide presented by the armored telephone cable. *Id.* The estate contends the danger presented by the cable was so obvious that knowledge of the risk of suicide properly can be inferred for all jail officers. *Id.* Viewing the facts in the light most favorable to the estate, these facts may (or may not) demonstrate negligence or even gross negligence. However, the facts in the record of this case fall well short of demonstrating that any defendant was aware of facts from which the inference can reasonably be drawn that the armored cable presented a substantial risk of suicide and that any defendant actually drew the inference with regard to Ms. Rowell. On this record, there is no basis to conclude that the estate has shown an underlying constitutional violation by Deputy Murray, Deputy Kilduff, Deputy Cook, or Sgt. Muxlow.

Even if I assume, *arguendo*, that there was an underlying constitutional violation, the evidence in the record is not sufficient to support an official capacity claim against Sheriff Mazzola. The estate contends Sheriff Mazzola was deliberately indifferent to the substantial risk of suicide created by the failure of Sheriff Mazzola adequately to train Jail officers. The estate contends Sheriff Mazzola failed to update the Jail manual, failed to employ medical staff for the Jail, discouraged Jail officers from contacting outside mental health workers, failed to

give Jail officers formal training on identifying suicidal inmates, and failed to give Jail staff detailed suicide questionnaires to administer to inmates.

The estate contends Sheriff Mazzola was aware of the substantial risk of suicide in the Jail because that risk was well known in February 2016. *Response* [#101], p. 24. The estate contends Sheriff Mazzola was aware of a prior suicide at the jail and a prior attempted suicide. Nowhere, however, does the estate cite evidence to support the contentions that (1) Sheriff Mazzola was aware that the alleged failures to train were substantially certain to result in a constitutional violation, in the form of a preventable suicide; and (2) he consciously and deliberately chose to disregard that risk. Such evidence, which is totally lacking, is necessary to establish an official capacity claim against Sheriff Mazzola.

In addition, the estate contends Sheriff Mazzola was deliberately indifferent to a substantial risk of suicide when he failed to update the Jail facility by installing video cameras and intercoms and by removing the long armored telephone cables. The estate contends constant video and audio surveillance, which was not present in the Jail, "improves inmate safety and diminishes the likelihood of a successful suicide attempt." *Response* [#101], p. 24. The estate contends also that the long armored telephone cables presented a risk of suicide so obvious that it must have been known to Sheriff Mazzola. No doubt, there was substantial room for improvement in the inmate monitoring equipment present in the jail. The armored telephone cable presents a means for suicide – as

do other items routinely present in a jail, such as sheets and clothing. As to these issues, the estate does not cite evidence to support the contentions that (1) Sheriff Mazzola was aware that flaws in the inmate monitoring equipment and the armored telephone cables were substantially certain to result in a constitutional violation, in the form of a preventable suicide; and (2) he consciously and deliberately chose to disregard those risks. However, such evidence is necessary to establish an official capacity claim against Sheriff Mazzola.

In sum, Sheriff Mazzola is entitled to summary judgment on the official capacity claim against him for two reasons. First, the estate has not presented evidence sufficient to show an underlying constitutional violation. Second, assuming *arguendo* that there was an underlying constitutional violation, the estate has not presented evidence sufficient to show that (1) Sheriff Mazzola was aware that the flaws cited by the estate were substantially certain to result in a constitutional violation, in the form of a preventable suicide; and (2) he consciously and deliberately chose to disregard those risks.

V. STATE LAW CLAIMS

For the reasons detailed above, I grant summary judgment on the two claims under § 1983. Those two claims are the only claims over which I have original jurisdiction. When a federal court has original jurisdiction over claims under federal law, the court may exercise supplemental jurisdiction over a state law claim which "forms part of the same case or controversy . . . ." 28 U.S.C. § 1367(a). When

a federal district court "has dismissed all claims over which it has original jurisdiction," the court may decline to exercise supplemental jurisdiction over the remaining state law claims. § 1367(c)(3).

When § 1367(c)(3) is implicated, courts are advised to dismiss pendent state law claims "'absent compelling reasons to the contrary.'" *Brooks v. Gaenzle*, 614 F.3d 1213, 1230 (10th Cir. 2010) (*quoting Ball v. Renner*, 54 F.3d 664, 669 (10th Cir.1995) (reversing the district court's grant of summary judgment on state law claims); *Endris v. Sheridan Cnty. Police Dep't*, 415 Fed.Appx. 34, 36 (10th Cir.2011) ("any state-law claims for assault and battery or mental and emotional injury were inappropriate subjects for the exercise of pendent jurisdiction where all federal claims had been dismissed"). *But see Henderson v. Nat'l R.R. Passenger Corp.*, 412 Fed.Appx. 74, 79 (10th Cir.2011) (finding no abuse of discretion in trial court's decision to retain jurisdiction over state law claims after plaintiff voluntarily dismissed claims arising under federal law).

Finding no compelling reason to retain supplemental jurisdiction in this case, I exercise my discretion and decline to exercise supplemental jurisdiction over the remaining state law claims. Thus, I will dismiss those claims, but without prejudice. Under § 1367(d), "(t)he period of limitations for any claim asserted under subsection (a) [state law claims] . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." This provides the plaintiffs a brief window of time in which they can re-file their claims in state court. In

addition, §13-80-111, C.R.S., appears to provide a window of time in which the plaintiffs can re-file their claims in state court.

VI. CONCLUSION & ORDERS

Sgt. Muxlow is entitled to the protection of qualified immunity concerning the claim under § 1983 asserted against him in his individual capacity. Thus, the motion for summary judgment [#91] is granted as to this claim.

Viewing the undisputed facts in the record in the light most favorable to the estate of Ms. Rowell, no reasonable fact finder could find in favor of the estate on the claim under § 1983 asserted against Sheriff Mazzola in his official capacity. The motion for summary judgment [#91] is granted as to this claim.

Under 28 U.S.C. § 1367(c)(3), I decline to exercise supplemental jurisdiction over the remaining state law claims. As to those claims, the motion for summary judgment [#91] is denied as moot.

THEREFORE IT IS ORDERED as follows:

1. That the **Defendants' Motion for Summary Judgment** [#91] is granted as to the claim under 42 U.S.C. § 1983 asserted against defendant, Sergeant Jeremy Muxlow, in his individual capacity;

2. That the **Defendants' Motion for Summary Judgment** [#91] is granted as to the claim under 42

U.S.C. § 1983 asserted against defendant, Sheriff Anthony Mazzola, in his official capacity;

3. That the claims brought under 42 U.S.C. § 1983 are dismissed with prejudice;

4. That the claims asserted by the plaintiffs under Colorado state law are dismissed without prejudice;

5. That the **Defendants' Motion for Summary Judgment** [#91] is denied as moot as to the claims asserted by the plaintiffs under Colorado state law;

6. That judgment shall enter in favor of the defendants and against the plaintiffs on the claims under 42 U.S.C. § 1983 asserted against the defendant, Sergeant Jeremy Muxlow, in his individual capacity and against the defendant, Sheriff Anthony Mazzola, in his official capacity;

7. That judgment shall enter dismissing the claims of the plaintiffs under Colorado state law without prejudice;

8. That the **Plaintiffs' Motion to Strike an Exhibit** [Doc. 115-3] to the **Summary Judgment Reply** [Doc 115] or for a **Summary Judgment Surreply** [#118] is denied without prejudice;

9. That the combined Final Pretrial Conference and Trial Preparation Conference, set for January 29, 2020, and the trial, set to begin February 18, 2020, are vacated;

10. That on all claims dismissed with prejudice, the defendants are awarded their costs, to be taxed by the clerk in the time and manner prescribed by Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1; and

11. That this case is closed.

Dated January 27, 2020, at Denver, Colorado.

BY THE COURT:

/s/_____
Robert E. Blackburn
United States District Judge