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COUNTY OF SANTA CLARA, SHERIFF
LAURIE SMITH and CONSUELO GARCIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

(San José Division)

DEVIN REGAL, E.R. a minor, and C.R., a minor, by and through their guardian ad litem, MICHAEL LEITCHMAN, individually and as successors in interest to FREDERICK INEA REGAL,

Plaintiffs,

v.

COUNTY OF SANTA CLARA, SANTA CLARA COUNTY SHERIFF'S OFFICE, SANTA CLARA VALLEY HEALTH AND HOSPITAL SYSTEM, LAURIE SMITH, CONSUELO GARCIA and DOES 1-30, in their individual capacities,

Defendants.

No. 22-CV-04321 BLF

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES; REQUEST FOR JUDICIAL NOTICE

Date: February 2, 2023
Time: 9:00 a.m.
Dept: Courtroom 3 – 5th Floor
Judge: Honorable Beth Labson Freeman

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 2, 2023 at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 3 – 5th Floor, United States District Court, located at 280 South 1st Street, San José, CA 95113, Defendants County of Santa Clara ("County"), Sheriff Laurie Smith, and Consuelo Garcia will move the Court pursuant to Federal Rule of Civil Procedure 12(b)(6) for an order dismissing Plaintiffs Devin Regal, E.R., and C.R.'s Complaint in its entirety. Plaintiffs have failed to state a claim (1) for deliberate indifference under the Fourteenth Amendment against Ms. Garcia and Sheriff Smith; (2) for familial loss under the First and Fourteenth Amendments against Ms. Garcia and Sheriff Smith; (3) under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), against the County; or (4) under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131 *et seq.*, against the County. Additionally, Sheriff Smith and Ms. Garcia are entitled to qualified immunity against Plaintiffs' deliberate-indifference and familial-loss claims.

Defendants' motion is based on this Notice, the Memorandum of Points and Authorities (including the Request for Judicial Notice therein), the Declaration of José L. Martinez filed herewith, the files and pleadings in this action, and on such other matters as the Court may deem necessary and proper.

RELIEF SOUGHT

Defendants move to dismiss Plaintiffs' Complaint in its entirety.

Dated: September 26, 2022

Respectfully submitted,

JAMES R. WILLIAMS
COUNTY COUNSEL

By: */s/ José L. Martinez*
JOSÉ L. MARTINEZ
Deputy County Counsel

Attorneys for Defendants
COUNTY OF SANTA CLARA, SHERIFF LAURIE SMITH and CONSUELO GARCIA

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The facts of this case are tragic. In July 2020, Frederick Inea Regal was arrested and brought to a County jail, where correctional staff promptly flagged him as someone with mental health issues and suicidal ideation. As a precaution, a therapist placed Mr. Regal on suicide watch, where he was observed by jail staff at intervals of no more than every 15 minutes. A day after Mr. Regal's intake, a correctional officer found him hanging from a bed sheet in his cell. Correctional staff succeeded in reviving Mr. Regal, but he died at the hospital approximately one week later.

Plaintiffs Devin Regal, E.R., and C.R. bring this lawsuit on behalf of Mr. Regal, asserting constitutional violations under 42 U.S.C. § 1983 and violations under the Americans with Disabilities Act. They seek to hold Consuelo Garcia, the therapist that handled Mr. Regal's case, and Sheriff Laurie Smith liable for deliberate indifference and familial loss. They also assert claims for municipal liability and disability discrimination against the County of Santa Clara ("County").[1] But Plaintiffs' sparse allegations only underscore that, at bottom, their claims are improperly predicated on what they perceive as the inadequate medical treatment their father received before he died by suicide. As a result, all of their causes of action are barred as a matter of law.

For the reasons set forth below, the Court should dismiss the Complaint in its entirety.

II. BACKGROUND

A. Factual Allegations

1. Mr. Regal's Arrest and Death.

For purposes of this motion only, Defendants assume the following allegations to be true. On July 28, 2020, San José police officers arrested Mr. Regal after observing that he appeared to be "under the influence of a controlled substance." Dkt. No. 1 ("Compl.") ¶ 20. Mr. Regal allegedly

[1] The Complaint initially named—in addition to the County, Sheriff Smith, and Ms. Garcia—the "Santa Clara County Sheriff's Office" and the "Santa Clara Valley Health and Hospital System," both of which are County entities. Dkt. No. 1. On August 22, 2022, Plaintiffs voluntarily dismissed those two defendants. Dkt. No. 18.

told police "he might be having delusions" and "requested to speak with a psychiatrist at the jail." *Id.* Police accordingly transferred him to the Santa Clara County jail, *id.* ¶ 21, where that same day, "a Mental Health Intake Assessment was conducted because [he] was referred by medical, had a history of mood swings and depression, and 'was currently thinking about' suicide," *id.* ¶ 22. Mr. Regal was also observed as "detoxing." *Id.* ¶ 22. He "was placed on 15-minute checks as a suicidal ideation precaution." *Id.*

The following day, Ms. Garcia, a County-employed licensed marriage and family therapist, "completed a Progress Note for a '15 min check evaluation' at 3:21 p.m., during which [she] quoted [Mr. Regal] as saying, 'Yes, I'm suicidal'; 'I'm depressed'; and 'personal things are going on in my life.'" *Id.* ¶ 23. Ms. Garcia filed her progress note at 3:35 p.m. *Id.* After assessing him and completing the progress note, Ms. Garcia did not modify Mr. Regal's housing or the 15-minute checks. Less than one hour later, at 4:31 p.m., "a correctional officer found [Mr. Regal] hanging from a bed sheet from the upper bunk of his cell." *Id.* ¶ 26. He was revived and placed on life support at the hospital. *Id.* ¶¶ 27–28. Mr. Regal died on August 5, 2020. *Id.* ¶ 28.

2. Request for Judicial Notice of County Policies Relating to Suicide Prevention and COVID-19 in Custodial Settings

The Court may take judicial notice of certain facts "not subject to reasonable dispute," Fed. R. Evid. 201(b), including "matters of public record," *Lee v. City of L.A.*, 250 F.3d 668, 688–89 (9th Cir. 2001) (cleaned up). Matters of public record include government policies. *See, e.g.*, *Hernandez v. Cnty. of Monterey*, 305 F.R.D. 132, 139 n.2 (N.D. Cal. 2015) (taking judicial notice of excerpts of county's Custody Operations Bureau manuals, rules, and policies); *People with Disabilities Found. v. Colvin*, No. 15-cv-02570-HSG, 2016 WL 2984898, at *3 (N.D. Cal. May 24, 2016) (internal procedures of Social Security Administration and Internal Revenue Service); *Karasek v. Regents of Univ. of Cal.*, No. 15-cv-03717-WHO, 2018 WL 1763289, at *1 n.1 (N.D. Cal. Apr. 12, 2018) (U.S. Department of Education policies).

To "provide some context" to Plaintiffs' claims, *see Karasek*, 2018 WL 1763289, at *1 n.1, Defendants request judicial notice of the following County policies, which were in effect at the time Mr. Regal died by suicide and which are attached to the concurrently filed Declaration of José L.

Martinez ("Martinez Decl."):

Department of Correction (DOC) Policy 12.03 provides that the County's Adult Custody Mental Health Services (ACMHS) is responsible for delivering mental health care to inmates. Martinez Decl., Ex. A §§ I–II. Relatedly, **DOC Policy 12.05** provides that during intake, "inmates shall be medically screened and shall be referred to Mental Health if there is an indication of any suicidal, self-destructive, psychotic, homicidal behavior, or a history of suicide attempts." *Id.*, Ex. B § III.B. If an inmate exhibits such behavior, "the Processing Officer shall immediately notify Mental Health Services and complete a Med/Psych Referral form." *Id.* § III.D.

There are also parallel ACMHS policies governing suicide prevention in the County's custodial settings. As relevant here, **ACMHS Policy 6.2.15** provides that "[a]ll inmates brought to Main Jail by an arresting agency will be screened by a registered nurse for suicide risk during the booking intake screening process." *Id.*, Ex C § I.A. Policy 6.2.15 further distinguishes between "close observation," which "is for the inmate who is not actively suicidal but expresses suicidal ideation" or "demonstrates other concerning behavior . . . indicating the potential for self-injury"; and "constant observation," which "is for the inmate who is actively suicidal (either by threatening or engaging in self-injury) and considered a high risk for suicide." *Id.* § IV.A–B. Under close observation, inmates "should be observed by custody bureau staff at staggered intervals not to exceed every 15 minutes." *Id.* § IV.A. Under constant observation, inmates should be observed "on a continuous, uninterrupted basis." *Id.* § IV.B.

Finally, the **COVID-19 Prevention and Control Plan for Jail and Juvenile Facilities** was meant to "prevent and/or minimize [the] spread [of COVID-19] in the County jail and juvenile facilities." *Id.*, Ex. D § I. In July 2020, the "spread of COVID-19 in the County jail . . . pose[d] a major threat to the residents of those facilities and to staff." *Id.* § II. Among myriad other provisions, the plan included housing recommendations for new arrestees, some of whom were to be placed in a single cell pending a 14-day quarantine. *See id.* § III.E. The plan was "based on the current information available about COVID-19, including current available information on disease severity, transmission efficiency, and shedding duration," and stated the County's "approach [would] be constantly refined and updated as more information [about COVID-19] becomes available and as

response needs and inventory changes in our County and throughout the United States." *Id.* § II.

3. Third-Party Consultancy's Incomplete Recommendations Regarding County Department of Correction

Plaintiffs devote much of their Complaint to an undated document titled "Overview of Recommendations of Suicide Prevention Expert Lindsay Hayes, Regarding Suicide Prevention Practices Within the Santa Clara County Department of Correction", which is attached to the Complaint. *See* Compl., Ex. A ("Recommendations"). The Recommendations are not the actual study prepared by Mr. Hayes. It is a summary prepared by a consultant. Although the Recommendations say that Mr. Hayes is an expert, it does not state that Mr. Hayes is a licensed healthcare provider in California or any state. The Recommendations, which focus on statistics pertaining only to December 2015 and earlier, came as a result of an agreement between the County Board of Supervisors and a third-party consultancy to "administer a comprehensive gap analysis to assess and evaluate the provision of health care within the Santa Clara County Department of Correction." *Id.* at 2. The gap analysis was meant to be conducted by five consultants, but was "still in progress" at the time the Recommendations were released. *Id.* The Recommendations attached to the Complaint thus include the findings of only one of the five consultants. *Id.*

B. Procedural Posture

Plaintiffs filed the Complaint on July 26, 2022. Dkt. No. 1. Against Ms. Garcia and Sheriff Smith, they assert claims under 42 U.S.C. § 1983 for deliberate indifference under the Fourteenth Amendment and loss of familial association under the First and Fourteenth Amendments. Against the County, they assert municipal liability claims and a claim under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131 *et seq.* ("ADA").

III. LEGAL STANDARD

A complaint that does not include "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a), is subject to dismissal under Federal Rule of Civil Procedure 12(b)(6), which tests the legal sufficiency of the claims alleged in a complaint, *Taylor v. Yee*, 780 F.3d 928, 935 (9th Cir. 2015). The Court should grant a Rule 12(b)(6) motion either when a complaint fails to state a cognizable legal theory or when it fails to allege facts sufficient to support

a cognizable legal theory. *Taylor*, 780 F.3d at 935. In evaluating the motion, the Court takes as true all the factual allegations in the complaint and construes them in the light most favorable to the plaintiff. *Lee*, 250 F.3d at 679. Conclusory allegations of law, however, are insufficient to defeat a motion to dismiss, *id.*, as are "formulaic recitation[s] of the elements of a cause of action," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The facts alleged in the complaint must state a plausible claim on its face, meaning they must allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556, 570).

IV. ARGUMENT

Except for Plaintiffs' ADA claim, Plaintiffs' claims arise under 42 U.S.C. § 1983, which requires a showing that (1) a defendant's conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States; and (2) the defendant committed the act under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

A. Plaintiffs Fail to State a Constitutional Claim Against Ms. Garcia or Sheriff Smith.

Plaintiffs lump Ms. Garcia and Sheriff Smith together as the "Individual Defendants," but because Sheriff Smith is ostensibly sued under a theory of supervisory liability pursuant to § 1983, Defendants separately address Plaintiffs' claims against each.

1. Plaintiffs fail to adequately allege deliberate indifference or familial loss against Ms. Garcia.

a. Plaintiffs' deliberate indifference claim under the Fourteenth Amendment fails as a matter of law because it is premised on a difference of medical opinion.

A pretrial detainee bringing a Fourteenth Amendment claim for inadequate medical care must satisfy the objective deliberate indifference standard and show that:

> (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures the defendant caused the plaintiff's injuries.

Gordon v. Cnty. of Orange, 888 F.3d 1118, 1125 (9th Cir. 2018). With regard to the reasonable available measures taken by a defendant to abate a risk, "the Ninth Circuit has explained that a plaintiff must prove 'more than negligence but less then subjective intent—something akin to reckless disregard.'" *Hernandez v. Cnty. of Santa Clara*, No. 19-cv-07888-EJD, 2020 WL 3101041, at *4 (N.D. Cal. June 11, 2020) (quoting *Gordon*, 888 F.3d at 1125) (dismissing deliberate indifference claim by mother of pretrial detainee who died by suicide).

In other words, "[d]eliberate indifference is a high legal standard." *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004).[2] "Even gross negligence can be insufficient to establish a constitutional violation." *Lozano v. Cnty. of Santa Clara*, No. 19-cv-02634, 2019 WL 6841215, at *11 (N.D. Cal. Dec. 16, 2019) (citing *Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990)) (dismissing with prejudice deliberate indifference claims brought against custodial medical staff by heirs of inmate who died by suicide). Critically, "a difference in medical opinion does not constitute deliberate indifference" as a general matter. *George v. Sonoma Cnty. Sheriff's Dep't*, 732 F. Supp. 2d 922, 937 (N.D. Cal. 2010) (citing *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989)); *see also Broughton v. Cutter Labs.*, 622 F.2d 458, 460 (9th Cir. 1980) ("Before it can be said that a prisoner's rights have been abridged, however, the indifference to his medical needs must be substantial. Mere 'indifference,' 'negligence,' or 'medical malpractice' will not support this cause of action."). Conversely, deliberate indifference "may be inferred when a doctor's treatment decisions are so far afield of accepted professional standards that no inference can be drawn that the decisions were actually based on medical judgment." *George*, 732 F. Supp. 2d at 937 (cleaned up). A difference in medical opinion also "may amount to deliberate indifference if the prisoner shows that the course of treatment was medically unacceptable under the circumstances and defendants chose this course in conscious disregard of an excessive risk to the prisoner's health." *Lozano*, 2019 WL 6841215, at

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[2] *Toguchi* involved a deliberate indifference claim brought under the Eighth Amendment, but it is well settled that the analysis is the same whether deliberate indifference claims arise under the Eighth or Fourteenth Amendment. *Russell v. Lumitap*, 31 F.4th 729, 739 (9th Cir. 2022).

*11 (quoting *Watson v. Veal*, 302 F. App'x 654, 655 (9th Cir. 2008) and *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996)).

Here, Plaintiffs' deliberate indifference claim is a medical malpractice claim in disguise and thus fails as a matter of law. Plaintiffs specifically contend that on July 29, 2020—after an unspecified person (or persons) conducted a "Mental Health Intake Assessment" of Mr. Regal—Ms. Garcia completed a "Progress Note" for one of Mr. Regal's 15-minute checks, in which she noted that Mr. Regal said, "Yes, I'm suicidal," "I'm depressed," and "personal things are going on in my life." Compl. ¶¶ 22–23. Plaintiffs then allege Ms. Garcia

> intentionally set[] a monitoring schedule [*i.e.*, as to Mr. Regal] that was inappropriate given [Mr. Regal's] unequivocal statements that he was suicidal, given the presence of other indicia of his suicidality, and given the recommendations of [Mr. Hayes] years earlier that inmates who were actively suicidal be continuously monitored and even inmates suffering with suicidal ideations or self-destructive behavior should be monitored at intervals not exceeding 10 minutes.

Id. ¶ 33.

As a threshold matter, Plaintiffs admit that Ms. Garcia was not indifferent to Mr. Regal's suicidal ideations because she, in fact, ***responded*** to those ideations by exercising her professional judgment and ordering 15-minute checks. Compl. ¶¶ 22–23, 33. Taking action in response to an inmate's suggestion that he is suicidal is not, on its own, "akin to reckless disregard." *See Hernandez*, 2020 WL 3101041, at *4 (quoting *Gordon*, 888 F.3d at 1125). That requires conduct that is much more egregious than what is alleged in this action. For instance, where "[d]eputies observed a rope hanging from [an inmate's] light on the night before his suicide"—but did not take any action in response—that was "a clear warning that [the inmate] presented an imminent suicide risk." *NeSmith v. Olsen*, 808 F. App'x 442, 445 (9th Cir. 2020) (affirming denial of deputies' motion for summary judgment). Similarly, two arresting officers' failure to notify "jail personnel that [an arrestee] had tried to choke herself or that she had threatened to commit suicide" two days before she died by suicide in custody was sufficient for a deliberate indifference claim to survive summary judgment. *Conn v. City of Reno*, 591 F.3d 1081 (9th Cir. 2010), *vacated*, 563 U.S. 915 (2011), *reinstated in relevant part*, 658 F.3d 897 (9th Cir. 2011).

Here, Plaintiffs do not (and cannot) allege Ms. Garcia ignored any signs of imminent suicidal

intent in Mr. Regal like the officials in *NeSmith* or *Conn*. To the contrary, their claim against Ms. Garcia is premised on the action she ***did*** take: namely, implementing 15-minute checks on Mr. Regal. Compl. ¶¶ 22–23, 33. Plaintiffs clearly believe that "intervals not exceeding 10 minutes" would have been more appropriate. *Id.* ¶ 33. But that is nothing more than a difference of medical opinion, which does not give rise to a claim for deliberate indifference. Plaintiffs must—but cannot—allege plausible facts that would establish that Ms. Garcia's course of action was "so far afield of accepted professional standards" that "no inference can be drawn that [her] decisions were actually based on medical judgment," or otherwise "grossly inadequate." *George*, 732 F. Supp. 2d at 937. That showing has been made where, for example, a doctor failed to treat 133 cuts on a suicidal inmate; where a doctor failed to diagnose an inmate's cancer even though he was experiencing "tremendous" pain and weight loss; and where prison staff twice failed to provide an inmate with an orthopedic consultation "even though consultations had been recommended" and the inmate was in "obvious pain." *Id.* (citing *Vann v. Vandenbrook*, 596 F. Supp. 2d 1238, 1243 (W.D. Wis. 2009); *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999); *Parzyck v. Prison Health Servs., Inc.*, 290 F. App'x 289, 291 (11th Cir. 2008)); *see also Steele v. Choi*, 82 F.3d 175, 179 (7th Cir. 1996) ("If the symptoms plainly called for a particular medical treatment—the leg is broken, so it must be set; the person is not breathing, so CPR must be administered—a doctor's deliberate decision not to furnish the treatment might be actionable under § 1983.").

But the facts of this case are nothing like those catalogued by the court in *George*. Ms. Garcia assessed Mr. Regal, noted his condition, and determined a course of action. That Ms. Garcia's actions were not consistent with the Recommendations—the sole, cherry-picked source to which Plaintiffs cite as support for their deliberate indifference claim against her—does not mean her decision was sufficiently "far afield" of accepted professional standards to give rise to a constitutional claim. It simply means that, rather than follow the five-year-old recommendations of a non-binding, incomplete report by an unlicensed third-party consultant, Ms. Garcia exercised her own professional judgment and adhered to the operative County policy—which at the time of Mr. Regal's intake, called for inmates who were not "actively suicidal but express[ing] suicidal ideation" to be placed under "close observation," at "staggered intervals not to exceed every 15 minutes."

Martinez Decl., Ex. C § IV.A–B. Even if that was an error in Ms. Garcia's judgment (it was not), negligence— "[e]ven gross negligence"—does not rise to the level of deliberate indifference as a matter of law. *See Lozano*, 2019 WL 6841215, at *11 (citing *Wood*, 900 F.2d at 1334).

Plaintiffs thus do not adequately allege their deliberate indifference claim under the Fourteenth Amendment because it is premised solely on their disagreement with Ms. Garcia's medical judgment. The Court should dismiss this claim as to Ms. Garcia without leave to amend.

b. Plaintiffs' familial loss claim under the First and Fourteenth Amendments fails with their deliberate indifference claim.

Children "may assert Fourteenth Amendment substantive due process claims if they are deprived in their liberty interest in the companionship and society of their . . . parent through official conduct." *Lemire v. Cal. Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1075 (9th Cir. 2013); *see also Keates v. Koile*, 883 F.3d 1228, 1236 (9th Cir. 2018) (holding that right to familial association is further protected by the First Amendment). For such a familial loss claim to be cognizable, the alleged official conduct must "shock[] the conscience," *Lemire*, 726 F.3d at 1075 (cleaned up), "which is a more demanding standard than deliberate indifference," *Hernandez*, 2020 WL 3101041, at *5. Thus, "[w]ithout conduct rising to the level of deliberate indifference, there can be no conduct that 'shocks the conscience,' as is required for a violation of substantive due process." *Lozano*, 2019 WL 6841215, at *12 (dismissing familial loss claim because plaintiff failed to plead deliberate indifference); *see also Crosby v. Wellpath, Inc.*, No. 20-cv-08529-MMC, 2021 WL 3053056, at *4 (N.D. Cal. July 20, 2021) (same); *Castillo v. City of Watsonville*, No. 20-cv-04395-EJD, 2020 WL 5798237, at *6 (N.D. Cal. Sept. 29, 2020) (same); *Hernandez*, 2020 WL 3101041, at *5 (same).

As a practical matter, Ms. Garcia's decision to respond to Mr. Regal's statements of suicidal ideation by complying with County policy and ordering jail staff to check on him at least every 15 minutes does not "shock the conscience." As a legal matter, because Plaintiffs fail to plead deliberate indifference for the reasons set forth in Section IV.A.1.a, their familial loss claim as to Ms. Garcia also fails as a matter of law and should be dismissed without leave to amend.

2. <u>Plaintiffs fail to state a claim for supervisory liability against Sheriff Smith</u>.

Plaintiffs also assert their deliberate indifference and familial loss claims against Sheriff

Smith, whom they purport to sue in her individual capacity.

a. To plead a supervisory liability claim, a plaintiff must specifically allege the supervisory defendant's purported wrongdoing.

"A county official sued in [her] individual capacity may be held liable as a supervisor under § 1983 'if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.'" *King v. Cnty. of L.A.*, 885 F.3d 548, 559 (9th Cir. 2018) (quoting *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011)). To prevail under a personal-involvement theory, a plaintiff must demonstrate the supervisor's "culpable action or inaction in the training, supervision, or control of his subordinates, his acquiescence in the constitutional deprivations of which the complaint is made, or conduct that showed a reckless or callous indifference to the rights of others." *Arceo v. Cnty. of Placer*, No. 2:20-cv-02334-TLN-DB, 2022 WL 605411, at *4 (E.D. Cal. Mar. 1, 2022) (quoting *Larez v. City of L.A.*, 946 F.2d 630, 645 (9th Cir. 1991)) (acknowledging "a supervisor will rarely be directly and personally involved in the same way as are the individual officers who are on the scene inflicting constitutional injury," and dismissing supervisory liability claims arising from incident where inmate with psychiatric issues pulled his right eye out with his hands) (cleaned up).

Alternatively, a plaintiff may prevail under a causation theory by showing that a supervisor "set[] in motion a series of acts by others," or "knowingly refus[ed] to terminate a series of acts by others, which the supervisor knew or reasonably should have known would cause others to inflict a constitutional injury." *Starr*, 652 F.3d at 1207–08. In *Hydrick v. Hunter*, the Ninth Circuit illustrated the pleading deficiencies in the supervisory liability claims before it by comparing them to the detailed allegations in *Starr*, where the same kind of claims survived. 669 F.3d 937, 941 (9th Cir. 2012) (citing *Starr*, 652 F.3d at 1207). In *Starr*, the Ninth Circuit concluded that the plaintiff had adequately alleged Sheriff Baca's supervisory liability because of his "detailed allegations" regarding—*inter alia*—a letter Baca received from the Department of Justice alerting him to patterns of abuse by subordinate deputies; weekly reports regarding deaths and injuries in his jails; a consent agreement in which Baca and L.A. County agreed to address constitutional violations in the jails; and an incident where Baca was informed of a physical attack on an inmate by a deputy but failed to

launch an investigation. *Id.* (citing *Starr*, 652 F.3d at 1209–11). For that reason, the *Starr* plaintiff had "plausibly suggested that Sheriff Baca acquiesced in the unconstitutional conduct of his subordinates, because there was no obvious alternative explanation for Sheriff Baca's inaction." *Id.* (citing *Starr*, 652 F.3d at 1216).

The supervisory liability allegations in *Hydrick*, in contrast, were "bald" and "conclusory" insofar as they did not include "any allegation of the specific wrong-doing by each Defendant" or identify a "***specific*** event or events instigated by Defendants that led to [the] purportedly unconstitutional" conduct. 669 F.3d at 941–42 (original emphasis). The "absence of specifics" was "significant because, to establish individual liability under 42 U.S.C. § 1983, 'a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'" *Id.* at 942 (quoting *Iqbal*, 556 U.S. at 676); *see also Chung v. Cnty. of Santa Clara*, --- F. Supp. 3d ---, 2022 WL 2704123, at *13 (N.D. Cal. 2022) (dismissing supervisory liability claim against district attorney where the FAC did not "state with any specificity how [the DA] was involved in the alleged constitutional violation . . . other than he 'authorized or ratified' a series of disciplinary actions"); *Arceo*, 2022 WL 605411, at *4–5 (same where plaintiff failed to identify nature of correctional supervisors' personal involvement in or causation of alleged constitutional violation); *Ochoa v. City of Hayward*, No. C-14-02385 DMR, 2014 WL 4088203, at *4–5 (N.D. Cal. Aug. 19, 2014) (same where complaint lacked "specific allegations" that police chief knew of officers' "history of use of excessive force, false arrests, or discriminatory behavior," or that chief had implemented "any specific policy" leading to such conduct).

b. Plaintiffs do not adequately allege that Sheriff Smith was personally involved or somehow "set in motion" Mr. Regal's death by suicide.

Plaintiffs' boilerplate allegations do not come close to stating a claim for supervisory liability against Sheriff Smith under either a personal-involvement or causation theory. In support of their deliberate indifference claim, Plaintiffs allege Sheriff "Smith and defendants named as Does 1–30 intentionally plac[ed Mr. Regal]—who stated unequivocally and repeatedly over time that he was suicidal, and who exhibited other indicia of suicidality—alone in a cell that was not suicide-resistant, that had low visibility, and that contained an upper bunk bed and bedsheets with which he could and

predictably would hang himself." Comp. ¶ 34. Plaintiffs further allege that Sherriff Smith and the Doe defendants "intentionally fail[ed] to implement a system of checks, and by failing to supervise those who should have been checking, to ensure that Defendant sufficiently frequently [sic] to prevent suicide." *Id.* ¶ 35. And, in support of their familial-loss claim, Plaintiffs allege that Ms. Garcia and Sheriff Smith "had access—for years—to specific information from an expert consultant hired by defendant County as to the substantial risk of inmates committing suicide by hanging themselves in the Santa Clara County jail," as well as to "specific, unequivocal knowledge that [Mr. Regal] was actively suicidal because he told them so in no uncertain terms"—but nevertheless placed Mr. Regal "in a law-visibility [sic] cell, with bedsheets and a bunk bed, checking on him, at most, at 15-minute intervals" and "gave him plenty of time in which to carry out the suicide he told him [sic] he was contemplating." *Id.* ¶ 45.

As an initial matter, to the extent Plaintiffs contend that Sheriff Smith ***herself*** placed Mr. Regal in his cell and/or ***herself*** made the decision to implement 15-minute checks given his suicidal ideations, they should say so. If that is their allegation, it conflicts with Plaintiffs' contention that ***Ms. Garcia*** set the monitoring schedule for Mr. Regal. *See id.* ¶ 33. Such an allegation would also be purely conclusory, as Plaintiffs aver no facts concerning Sheriff Smith's alleged involvement with Mr. Regal's placement and medical care specifically. Indeed, Plaintiffs tacitly acknowledge the lack of factual support for their allegation against Sheriff Smith in her individual capacity by asserting their deliberate indifference claim against her ***and*** the Doe defendants—without specifically delineating what Sheriff Smith is actually alleged to have done. *Id.* ¶ 34.

More likely, Plaintiffs stake their claim against Sheriff Smith on some alleged causal chain "between the supervisor's wrongful conduct and the constitutional violation." *See King*, 885 F.3d at 559 (cleaned up). But the Complaint remains devoid of any facts that suggest, let alone plausibly, that Sheriff Smith "set[] in motion a series of acts by others" or "knowingly refus[ed] to terminate a series of acts by others" which she "knew or reasonably should have known would cause others to inflict a constitutional injury." *See Starr*, 652 F.3d at 1207–08 (cleaned up). Setting aside Plaintiffs' conflicting allegations that both Ms. Garcia and Sheriff Smith are directly responsible for Mr. Regal's monitoring schedule, the allegations in this case are much more like those in *Hydrick*—

which were dismissed because they failed to identify specific supervisory conduct that led to the plaintiff's alleged constitutional deprivation—than the ones in *Starr*, which survived the pleading stage because their high level of detail made it plausible that Sheriff Baca had acquiesced to unconstitutional conduct.

Accordingly, Plaintiffs have failed to carry their pleading burden as to Sheriff Smith's supervisory liability, and the Court should dismiss those claims.

3. Even if Plaintiffs adequately alleged a constitutional violation against Ms. Garcia or Sheriff Smith, both defendants would be entitled to qualified immunity because they did not violate "clearly established" law.

Even if the Court concluded Plaintiffs adequately alleged their deliberate indifference and familial loss claims against Ms. Garcia and Sheriff Smith (they have not), both defendants would be entitled to qualified immunity. "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Accordingly, plaintiffs asserting § 1983 claims against government officials overcome qualified immunity only when they "demonstrate that (1) a federal right has been violated and (2) the right was clearly established at the time of the violation." *Horton by Horton v. City of Santa Maria*, 915 F.3d 592, 599 (9th Cir. 2019). When "properly applied," qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law." *Hernandez v. City of San José*, 897 F.3d 1125, 1132–33 (9th Cir. 2018) (cleaned up).

a. The issue of qualified immunity should be decided as early as possible.

As a threshold matter, the United States Supreme Court "repeatedly [has] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Pearson*, 555 U.S. at 232 (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)). Indeed, because "qualified immunity is an immunity from suit, rather than a mere defense to liability," *id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)) (cleaned up), it "gives government officials a right, not merely to avoid standing trial, but also to avoid the burdens of such pretrial matters as discovery," *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 44 F.4th 867, 892 (9th Cir. 2022). This Court therefore can and should resolve the issue of qualified immunity on the pleadings. *See, e.g.*,

Wang v. Cnty. of Santa Clara, No. 19-cv-07997-BLF, 2020 WL 5893394, at *5–8 (N.D. Cal. Oct. 5, 2020) (granting motion to dismiss deliberate indifference claims by survivor of decedent inmate who died by suicide on qualified immunity grounds); *Petrolino v. City & Cnty. of S.F.*, No. 16-cv-02946-RS, 2017 WL 67072, at *2–4 (N.D. Cal. Jan. 6, 2017) (same); *Miranda v. Swift*, No. 17-04000 BLF (PR), 2020 WL 6462396, at *3–5 (N.D. Cal. Nov. 2, 2020) (same for inmate's First-Amendment claims); *Malek v. Green*, No. 17-cv-00263-BLF, 2018 WL 2431437, at *5–10 (N.D. Cal. May 30, 2018) (same for plaintiff's unlawful-arrest claim).

b. No prior precedent holds that monitoring an inmate with suicidal ideations every 15 minutes instead of every 10 minutes violates "clearly established" law.

Courts may exercise their discretion "in deciding which of the two prongs of the qualified immunity analysis should be addressed first." *Horton*, 915 F.3d at 599. As set forth in Sections IV.A.1–2, Plaintiffs have failed to adequately allege that any "federal right has been violated" by Ms. Garcia or Sheriff Smith. *See Horton*, 915 F.3d at 599. Even if they had, however, they could not demonstrate that such "right was clearly established at the time of the violation." *See id.*

The Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam)) (ellipses in original). "The 'clearly established' standard . . . requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him"—*i.e.*, that the "rule's contours . . . be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). Put differently, "existing precedent must have placed beyond debate the unconstitutionality of the officials' actions, ***as those actions unfolded in the specific context of the case at hand.***" *Hamby v. Hammond*, 821 F.3d 1085, 1091 & n.3 (9th Cir. 2016) (noting the Supreme Court has "repeatedly stated that the 'clearly established' inquiry demands that courts train their attention on the particular facts under review") (emphasis added). It is the plaintiff's burden to identify that precedent, *Simmons v. Arnett*, --- F.4th ---, 2022 WL 3906207, at *5 (9th Cir. 2022), which in these circumstances, must come from either the Supreme Court or the Ninth Circuit, *see Evans v. Skolnik*,

997 F.3d 1060, 1066–67 (9th Cir. 2021).

Here, to overcome Ms. Garcia and Sheriff Smith's qualified immunity to Plaintiffs' deliberate indifference and familial loss claims, Plaintiffs must identify Supreme Court or Ninth Circuit precedent holding that a mental health worker in a jail (or her supervisor) violates the Constitution if the mental health worker responds to an inmate's suicidal ideation by ordering jail staff to monitor the inmate at least once every 15 minutes. In fact, Plaintiffs' allegations suggest that their position is anything less than 10-minute checks is constitutionally deficient. *See* Compl. ¶ 33. But there is no precedent that would have put Ms. Garcia or Sheriff Smith "on notice that [they] would be violating [Mr. Regal's] constitutional rights through the conduct alleged." *Simmons*, 2022 WL 3906207, at *6; *see also Horton*, 915 F.3d at 601 (finding "case law at the time of [plaintiff-inmate's] attempted suicide was simply too sparse, and involved circumstances too distinct from those in this case, to establish that a reasonable officer would perceive a substantial risk that [the inmate] would imminently attempt suicide"); *Hernandez v. Cnty. of Santa Clara*, No. 19-cv-07888, 2020 WL 7227158, at *8 (N.D. Cal. Dec. 8, 2020) (noting "sparse case law on correctional officers' obligation to prevent the suicides of inmates who have suicidal ideations").

That is particularly true given that Mr. Regal was arrested against the backdrop of the COVID-19 pandemic. "[T]he circumstances surrounding the COVID-19 pandemic [were] evolving rapidly," *Ahlman v. Barnes*, No. 20-55568, 2020 WL 3547960, at *5 (9th Cir. June 17, 2020), and especially in custodial settings, "posed challenges unlike any other in the modern era," *Ryan v. Nagy*, No. 2:20-cv-11528, 2021 WL 6750962, at *9 (E.D. Mich. Oct. 25, 2021) (cleaned up), *report and recommendation adopted in relevant part*, 2022 WL 260812 (E.D. Mich. Jan. 26, 2022). Courts undertaking the qualified immunity analysis for claims arising during the pandemic have frequently acknowledged that the novelty of COVID-19—and the rapidly evolving legal landscape and challenges that accompanied it—precludes a finding that a right is clearly established. *See, e.g.*, *N.M. Elks Ass'n v. Grisham*, --- F. Supp. 3d ---, 2022 WL 980245, at *6 (D.N.M. 2022) ("Indeed, courts around the country have addressed qualified immunity for government officials at the 12(b)(6) stage regarding COVID-19 measures and found government officials to be immune from suit in their personal capacities.") (collecting cases) (cleaned up); *Glow in One Mini Golf, LLC v.*

Walz, 37 F.4th 1365, 1374–75 (8th Cir. 2022) (granting governor qualified immunity on takings claim, noting that while it was "clearly established that just compensation is required for government takings," that did not mean the governor would have known his executive orders, "issued in response to an unprecedented pandemic, constituted a taking"); *Zellers v. Northam*, No. 7:21-cv-393, 2022 WL 3711892, at *11 (W.D. Va. Aug. 29, 2022) (granting jail officials qualified immunity on Eighth Amendment claims and noting that because COVID-19 pandemic "was a new and unusual issue" with "ongoing and changing guidance from health officials," it "would not have been apparent to any of the defendants that their alleged conduct would violate [plaintiff's] clearly established" rights). Sheriff Smith, Ms. Garcia, and the County at large faced the same sort of novel challenges in housing and caring for new arrestees. *See* Martinez Decl., Ex. D.

Accordingly, the Court should dismiss all of Plaintiffs' claims as to Ms. Garcia and Sheriff Smith without leave to amend on the ground of qualified immunity.

B. Plaintiffs Fail to State a Claim Against the County.

1. <u>Plaintiffs' barebones allegations do not support any of the three theories of municipal liability they advance</u>.

"A government entity may not be held liable under 42 U.S.C. § 1983, unless a policy, practice, or custom of the entity can be shown to be a moving force behind a violation of constitutional rights." *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011) (citing *Monell v. Dep't of Soc. Servs. of the City of N.Y.*, 436 U.S. 658, 694 (1978)). A plaintiff cannot establish *Monell* liability "solely because [a municipality] employs a tortfeasor." *Benavidez v. Cnty. of San Diego*, 993 F.3d 1134, 1153 (9th Cir. 2021). "[I]n other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.* There are three possible theories of *Monell* liability, all of which Plaintiffs assert but none of which they adequately plead.

***a.* Plaintiffs fail to identify any County policy or custom that could have caused their or Mr. Regal's purported constitutional injury.**

First, "a local government may be liable if execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicted the injury." *Rodriguez v. Cnty. of L.A.*, 891 F.3d 776, 802–03 (9th Cir.

2018) (cleaned up). Plaintiffs vaguely assert legal conclusions—namely, that the County had various "customs, practices, and/or policies" which "constituted deliberate indifference to the constitutional rights of suicidal inmates." Compl. ¶ 52.

To impose municipal liability based on a policy, practice, or custom, however, a plaintiff must show "(1) that the plaintiff possessed a constitutional right of which she was deprived; (2) that the municipality had a policy; (3) that this policy amounts to deliberate indifference to the plaintiff's constitutional right; and, (4) that the policy is the moving force behind the constitutional violation." *Plumeau v. Sch. Dist. No. 40 Cnty. of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997). Where plaintiffs predicate a *Monell* claim on a formal policy, they must identify that formal policy with specificity. *See, e.g.*, *Harper v. City of San Jose*, No. 21-cv-00519-BLF, 2021 WL 5865494, at *2 (N.D. Cal. Dec. 10, 2021) (dismissing *Monell* claim in part because plaintiff "identifie[d] no formal policy"); *Estate of Chivrell v. City of Arcata*, No. 22-cv-00019-HSG, 2022 WL 3691029, at *5 (N.D. Cal. Aug. 25, 2022) (same); *Jenkins v. Humboldt Cnty.*, No. C 09-5899 PJH, 2010 WL 1267113, at *3 (N.D. Cal. Mar. 29, 2010) (same where "plaintiff [did] not state what [the unlawful] policy or practice was—other than a policy or practice of permitting," or failing to investigate, "unlawful conduct") (collecting cases). Furthermore, when identifying the purported underlying policies, it is not enough for a plaintiff to "plead[] facts that are merely consistent with a defendant's liability." *Jenkins*, 2010 WL 1267113, at *3 (citing *Iqbal*, 556 U.S. at 678).

In contrast to claims based on formal policies, a *Monell* claim premised on a "practice or custom must consist of more than random acts or isolated events and instead, must be the result of a permanent and well-settled practice." *Schindler v. Contra Costa Cnty.*, No. 21-cv-029784-JSW, 2022 WL 1002464, at *4 (N.D. Cal. Apr. 4, 2022) (cleaned up). A plaintiff seeking to make this showing must instead establish that "the relevant practice is so widespread as to have the force of law." *Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1233 (9th Cir. 2011). "[L]iability for improper custom may not be predicated on isolated or sporadic incidents." *Id.* (cleaned up).

Plaintiffs do not say whether their *Monell* claim is staked on a policy, practice, or custom, but their assertion of this theory fails in any event. As a threshold matter, for the reasons set forth in Section IV.A, Plaintiffs have not pled that they or Mr. Regal "possessed a constitutional right of

which [they] were deprived." *Plumeau*, 130 F.3d at 438. That is dispositive, as there is no *Monell* liability without an "underlying constitutional violation" by an individual officer. *Lockett v. City of L.A.*, 977 F.3d 737, 741 (9th Cir. 2020) (citing *City of L.A. v. Heller*, 475 U.S. 796, 799 (1986)). But even if they had adequately alleged a violation, Plaintiffs further fail to specifically identify a formal policy. Instead, they impermissibly attempt to extrapolate the types of policies they believe the County ***might*** have that pertain to their allegations:

> Plaintiffs are informed and believed, and on that basis allege that the [County] had the following customs, practices, and/or policies, each of which individually, and also combined, constituted deliberate indifference to the constitutional rights of suicidal inmates, including [Mr. Regal], because they failed to mitigate and/or increased the substantial risk of self-harm: (i) placing suicidal inmates in cells alone; (ii) placing suicidal inmates in cells that have low visibility such that correctional officers would have to be close to the cell door to observe the inmate; (iii) placing suicidal inmates in cells with double bunks that could be used as anchoring devices; (iv) placing suicidal inmates in cells with bed linens; (v) not monitoring actively suicidal inmates continuously; (vi) monitoring suicidal inmates at intervals of greater than 10 minutes; (vii) conducting only observational checks, rather than communicating with suicidal inmates; (viii) lacking an audio intercom system for cells with suicidal inmates; and (ix) lacking closed circuit television or other video monitoring system for cells with suicidal inmates.

Compl. ¶ 52. The foregoing laundry list, however, does not meet the requirement that Plaintiffs ***identify*** the policies supporting their *Monell* claim. To the contrary, it is nothing more than an attempt to advance allegations that are "merely consistent" with the County's liability—but which do not actually identify the purportedly problematic policies. *See Jenkins*, 2010 WL 1267113, at *3 (citing *Iqbal*, 556 U.S. at 678); *see also Galban v. City of Fontana*, No. 5:19-cv-02474-MCS-SHK, 2021 WL 1307722, at *3 (C.D. Cal. Apr. 7, 2021) ("Plaintiffs allege that the City has a policy, custom or practice of permitting raids of homes without advance surveillance. No pleaded facts support this allegation other than the existence of the incident giving rise to this suit. That is not enough.") (cleaned up). And their allegations regarding causation—*i.e.*, that these unspecified policies are the "moving force" behind the alleged violation—are purely conclusory. Compl. ¶¶ 54–55 (alleging "these policies, practices, and customs of the [County] are the direct, proximate, and substantial cause of the constitutional violations [Mr. Regal] suffered" and "[a]s a direct and proximate result of these policies, practices, and customs," Mr. Regal "suffered great bodily harm,

severe and prolonged physical pain, severe pain and suffering, and ultimately death").

For similar reasons, Plaintiffs also fail to allege the existence of a "practice or custom," for which the pleading bar is higher. *Hunter*, 652 F.3d at 1233. For instance, Plaintiffs allege that, according to the Recommendations, as of December 2015, the County's Department of Correction had seen nine inmate suicides since 2011. Compl. ¶ 17. But they say nothing about the circumstances of those suicides, or how County jail personnel responded to the suicidal ideations (if any) of those inmates. Plaintiffs also allege that Sheriff Smith "faced calls to resign after concerns were raised about the treatment of mentally ill inmates over a period of years, including incidents in which mentally ill inmates were mistreated before [Mr. Regal's] death"—but, again, fail to describe the nature of the foregoing "concerns" or the circumstances of the alleged "treatment of mentally ill inmates over a period of years." *Id.* ¶ 19. Last, Plaintiffs mention two specific incidents involving inmate deaths in the County's jails: Michael Tyree, who "suffered from mental health issues" and in 2015 "was beaten to death in a jail cell" by correctional officers; and Andrew Hogan, a "mentally ill inmate" who "beat his head against a metal cage until he suffered a debilitating traumatic brain injury" and whom correctional officers "failed to assist." *Id.* But Plaintiffs do not allege those incidents involve suicides (they did not), and in fact, only mention all of the foregoing "isolated or sporadic" incidents—which are insufficient as a matter of law for purposes of *Monell* liability—in passing. *See Hunter*, 652 F.3d at 1233.

b. **Plaintiffs' bare assertions regarding the County's alleged failure to train do not survive the pleading stage.**

Under another theory of *Monell* liability, "a local government can fail to train employees in a manner that amounts to deliberate indifference to a constitutional right, such that 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 relevant policymakers "can reasonably be said to have been deliberately indifferent to the need." *Rodriguez*, 891 F.3d at 802 (cleaned up). Plaintiffs contend the County "failed to train individuals they employed or contracted with in how to mitigate the obvious and substantial risk of self-harm for suicidal inmates." Compl. ¶ 60.

"A municipality's culpability for a deprivation of rights is at its most tenuous where a claim

turns on a failure to train." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). To plead a failure to train, a plaintiff "must include sufficient facts to support a reasonable inference (1) of a constitutional violation; (2) of a municipal training policy that amounts to a deliberate indifference to constitutional rights; and (3) that the constitutional injury would not have resulted if the municipality properly trained their employees." *Benavidez*, 993 F.3d at 1153–54 (citing *Blankenhorn v. City of Orange*, 485 F.3d 463, 484 (9th Cir. 2007)). Plaintiffs can satisfy this standard "in one of two ways." *Hyun Ju Park v. City & Cnty. of Honolulu*, 952 F.3d 1136, 1141 (9th Cir. 2020). First, where a "policy is so facially deficient that any reasonable policymaker would recognize the need to take action," plaintiffs "need point only to the policy to establish that the municipality's policymakers were on notice that the plaintiff's federally protected rights would likely be violated if they failed to act." *Id.* at 1141–42. Otherwise, where the policy is "not obviously, facially deficient, a plaintiff must ordinarily point to a pattern of prior, similar violations of federally protected rights, of which the relevant policymakers had actual or constructive notice." *Id.*

Plaintiffs do neither. Again, they fail to satisfy the threshold requirement of alleging a constitutional violation, for the reasons set forth in Section IV.A. *See Benavidez*, 993 F.3d at 1153–54; *Lockett*, 977 F.3d at 741. But even if they had, they still fail to identify a "municipal training policy that amounts to a deliberate indifference to constitutional rights." *Id.* Instead, they vaguely allege that the County "failed to properly train [its] employees and/or contractors" regarding:

> (i) setting appropriate monitoring schedules for inmates identified as suicidal; (ii) not isolating suicidal inmates in cells alone; (iii) not placing suicidal inmates in cells that have low visibility such that correctional officers would have to be close to the cell door to observe the inmate[;] (iv) not leaving suicidal inmates with bedsheets or other obvious hazards for hanging; (v) monitoring actively suicidal inmates continuously; (vi) monitoring suicidal inmates at intervals of fewer than 10 minutes; and (vii) communicating with suicidal inmates, rather than conducting only observational checks.

Compl. ¶ 60. As explained in Section VI.B.1.a, these and the other allegations in the Complaint neither identify a policy nor "point to a pattern of prior, similar violations of federally protected rights, of which the relevant policymakers had actual constructive notice." *See Hyun Ju Park*, 952 F.3d at 1141–42.

Moreover, the Complaint implicates only two policies. The first involves the Mental Health

Intake Assessment, which they admit occurred here. Compl. ¶ 22; Martinez Decl., Ex. B. That assessment yielded information that implicated the second policy, which required 15-minute checks. Compl. ¶ 22; Martinez Decl., Ex. C. By keeping Mr. Regal on this schedule after she evaluated him, Ms. Garcia followed County policy. And, because County employees actually followed County policies, Plaintiffs cannot plausibly allege that their purported injury "would not have resulted if the municipality properly trained their employees." *Benavidez*, 993 F.3d at 1153–54. Instead, they rest on bare assertions of causation, which are facially insufficient. Compl. ¶¶ 62–63 (alleging "failures in training by [the County] are the direct, proximate, and substantial cause of the constitutional violations [Mr. Regal] suffered" and "[a]s a direct result of these failures in training by [the County]," Mr. Regal "suffered great bodily harm, severe and prolonged physical pain, severe pain and suffering, and ultimately death").

c. **There are myriad pleading deficiencies in Plaintiffs' *Monell* ratification claim.**

Under the third and final theory of *Monell* liability, "a local government may be held liable if the individual who committed the constitutional tort was an official with final policy-making authority or such an official ratified a subordinate's unconstitutional decision or action and the basis for it." *Rodriguez*, 891 F.3d at 802–03. Plaintiffs allege the County "ratified the actions" of Ms. Garcia and Sheriff Smith, which they argue "constituted deliberate indifference and reckless disregard of [Mr. Regal's] Fourteenth Amendment rights." Compl. ¶ 69.

"To show ratification, a plaintiff must show that the 'authorized policymakers approve a subordinate's decision and the basis for it." *Lytle v. Carl*, 382 F.3d 978, 987 (9th Cir. 2004). Affirmative action by a policymaker is required—*i.e.*, the "policymaker must have knowledge of the constitutional violation and actually approve it." *Id.* ("A mere failure to overrule a subordinate's actions, without more, is insufficient to support a § 1983 claim."). Allegations that "simply track the legal standard and do not provide sufficient detail for the Court to draw the reasonable inference that [a policymaker] is liable for the misconduct alleged" are insufficient to support a ratification theory at the pleading stage. *Chivrell*, 2022 WL 3691029, at *5; *see also Sweiha v. Cnty. of Alameda*, No. 19-cv-03098-LB, 2019 WL 4848227, at *5 (N.D. Cal. Oct. 1, 2019) (dismissing "conclusory"

ratification allegations); *Mondragon v. City of Fremont*, No. 18-cv-01605-NC, 2020 WL 1156953, at *4 (N.D. Cal. Mar. 10, 2020) (dismissing ratification allegations where complaint contained "vague conclusory statements rather than specific facts").

Plaintiffs do not come close to stating a *Monell* claim under a ratification theory. The extent of their allegations is an assertion that (1) the County entity "ratified the actions of" Ms. Garcia and Sheriff Smith; (2) the County entity "knew of and approved of the act and/or omissions of" Ms. Garcia and Sheriff Smith; and (3) "ratification constituted a conscious and deliberate choice to follow a course of action from among various alternatives," as well as "approval of the actions of [Ms. Garcia and Sheriff Smith] with knowledge of the circumstances under which [Mr. Regal] was left to commit suicide." Compl. ¶¶ 69–70. Those threadbare allegations do not even go so far as to "track the legal standard," *see Chivrell*, 2022 WL 3691029, at *5, given Plaintiffs' failure to allege the identity of a policymaker—let alone one who affirmatively approved a subordinate's decision that resulted in Mr. Regal's death, *see Lytle*, 382 F.3d at 987.

Accordingly, because Plaintiffs fail to adequately allege any of the three theories of *Monell* liability, the Court should dismiss their *Monell* claim.

2. Plaintiffs' ADA claim fails as a matter of law because it is premised on inadequate medical treatment, not disability discrimination.

Plaintiffs' remaining claim arises under the ADA. They assert that Mr. Regal was "suicidal and depressed," Compl. ¶ 78, and that by placing him "alone in a cell with the means to hang himself and without adequate monitoring," the County "denied [Mr. Regal] the benefit of medical and mental health services, and did not reasonably accommodate his mental health needs," *id.* ¶ 80. Plaintiffs, however, misapprehend the type of conduct giving rise to an ADA claim.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The ADA thus prohibits both discrimination against the disabled and exclusion of the disabled from participating in and benefitting from public programs "solely by reason of disability." *Lee*, 250 F.3d at 690–91. To state a claim under Title II, a plaintiff must generally show: (1) he has

a disability; (2) he is "otherwise qualified to participate in or receive the benefit of a public entity's services, programs, or activities"; (3) "he was either excluded from participation in or denied the benefits of" such services, programs, or activities; and (4) such exclusion or discrimination "was by reason of his disability." *Vos v. City of Newport Beach*, 892 F.3d 1024, 1036 (9th Cir. 2018) (quoting *Sheehan v. City & Cnty. of S.F.*, 743 F.3d 1211, 1232 (9th Cir. 2014)) (cleaned up). To show that discrimination under the ADA was intentional, the Ninth Circuit requires a showing of deliberate indifference by the defendant, "which requires both knowledge that a harm to a federally protected right is substantially likely and a failure to act upon that likelihood." *Updike v. Multnomah Cnty.*, 870 F.3d 939, 950–51 (9th Cir. 2017) (cleaned up).

The ADA applies to "jail[] services, programs, and activities for detainees." *See Pierce v. Cnty. of Orange*, 526 F.3d 1190, 1214 (9th Cir. 2008) (citing *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 209–10 (1998)). Critically, however, the ADA "prohibits discrimination because of disability, ***not*** inadequate treatment for disability." *Simmons v. Navajo Cnty., Ariz.*, 609 F.3d 1011, 1022 (9th Cir. 2010), *overruled on other grounds, Castro v. Cnty. of L.A.*, 833 F.3d 1060 (9th Cir. 2016) (en banc) (emphasis added); *see also Arreola v. Cal. Dep't of Corr. & Rehab.*, No. 16-cv-03133-JD, 2017 WL 1196802, at *2 (N.D. Cal. Mar. 31, 2017) (dismissing ADA claim by inmate who alleged that jail did not provide an ambulance or medical bed in holding cell, and stating that while such "allegations might point to indifference or negligence," they did not amount to disability discrimination); *Johnson v. CTF Soledad State Prison*, No. 16-05548 EJD (PR), 2022 WL 135166, at *4–5 (N.D. Cal. Jan. 14, 2022) (dismissing with prejudice inmate's ADA claim stemming from jail's alleged denial of a vision test); *Anthony v. Cnty. of Santa Clara*, No. 19-cv-08303, 2021 WL 1786338, at *10–11 (N.D. Cal. May 5, 2021) (dismissing ADA claims premised on inmate's claim that "County's medical care was inadequate"); *Bryant v. Madigan*, 84 F.3d 246, 249 (7th Cir. 1996) ("[T]he Act would not be violated by a prison's simply failing to attend to the medical needs of its disabled prisoners. . . . The ADA does not create a remedy for medical malpractice.").

Indeed, that an inmate receives medical care "***at all*** indicates there was no outright and deliberate denial of access to care." *Razon v. Cnty. of Santa Clara*, No. 17-cv-00869-LHK, 2018 WL 405010, at *10 (N.D. Cal. Jan. 12, 2018) (citing *Payne v. Ariz.*, No. CV-09-1195-PHX-NVW,

2010 WL 1728929, at *5 (D. Ariz. Apr. 26, 2010)) (dismissing ADA claim) (emphasis added); *cf. Palacios v. Cnty. of San Diego*, No. 20-cv-450-MMA (DEB), 2020 WL 4201686, at *13 (S.D. Cal. July 22, 2020) ("The ADA may be violated where there is an '***outright denial of medical services***' because the complete lack of services may be 'so unreasonable as to demonstrate that they were discriminating against [plaintiff] because of his disability.'") (original emphasis).

Plaintiffs' ADA claim—like their deliberate indifference claim—is in fact a cause of action for medical malpractice. They are seeking relief for what they believe is inadequate medical treatment provided to Mr. Regal, ***not*** discrimination or exclusion based on his disability. For purposes of this motion, the County accepts as true that Mr. Regal was disabled and otherwise qualified to participate in or benefit from the County jail's programs. Compl. ¶ 78 (alleging Mr. Regal had a "mental health impairment" because he was "suicidal and depressed"); 42 U.S.C. § 12102(1)(A) ("The term 'disability' means, with respect to an individual, a physical or mental impairment that substantially limits one or more major life activities of such individual."). But Plaintiffs do not allege—even in conclusory fashion—that the County denied Mr. Regal any benefit or any ability to participate ***because of*** his disability. Nor could they, given their admission that their ADA claim is, in fact, impermissibly predicated on the County's alleged "extremely inadequate treatment that amounted to an outright refusal to accommodate [Mr. Regal's] obvious mental health needs." Compl. ¶ 80. That assertion not only conflicts with their concession that the County conducted a "Mental Health Intake Assessment" and placed Mr. Regal "on 15-minute checks as a suicidal ideation precaution," *id.* ¶ 22—it bars their ADA claim as a matter of law because Title II "prohibits discrimination because of disability, not inadequate treatment for disability," *Simmons*, 609 F.3d at 1022; *see also Arreola*, 2017 WL 1196802, at *2; *Johnson*, 2022 WL 135166, at *4–5; *Anthony*, 2021 WL 1786338, at *10–11; *Bryant*, 84 F.3d at 249.

Plaintiffs' allegation that the County "acted intentionally and/or with deliberate indifference to [Mr. Regal's] need for reasonable accommodations for his mental health disability" likewise fails to carry the day. Compl. ¶ 81. As an initial matter, this contention is nullified by Plaintiffs' admission that the County provided Mr. Regal mental health care in accordance with its policy, notwithstanding their disagreement with that policy. *See* Compl. ¶ 22; Martinez Decl., Ex. C. This

is accordingly not a situation where there was an unreasonable "outright denial of medical services" amounting to an ADA violation. *See Palacios*, 2020 WL 4201686, at *13 (emphasis removed); *see also Razon*, 2018 WL 405010, at *10 (any provision of medical care cuts against allegations of "outright and deliberate denial of access to care"). Nor is it a situation where Plaintiffs have plausibly alleged that the County knew "that a harm to [Mr. Regal's] federally protected right [was] substantially likely" and failed "to act upon that likelihood." *Updike*, 870 F.3d at 950–51 (standard for intentional ADA discrimination). Their apparent theory of intentional ADA discrimination appears to rest on their allegation that the County "had notice of the risk of suicide by hanging" based on the Recommendations, "years before [Mr. Regal] hung himself in this case," but nevertheless placed Mr. Regal in a cell that did not conform to those Recommendations. Compl. ¶¶ 79–81. But bare, sweeping allegations that the County knew of an incomplete set of non-binding, third-party recommendations—which were based on data spanning from 2011 to 2015—do not give rise to a plausible inference that the County was aware of the risk that Mr. Regal would commit suicide in 2020, let alone that it was likely his constitutional rights would be harmed.

Plaintiffs' invocation of the ADA is an attempt to fit a square peg into a round hole. The Court should dismiss this claim without leave to amend.

V. CONCLUSION

There is no question that Mr. Regal's death is a tragedy. But even assuming Plaintiffs' account of the events leading to his death is true, it is equally clear that as a matter of law, Defendants are not liable for his death. Because Plaintiffs fail to state any claim, the Court should grant Defendants' motion to dismiss.

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Respectfully submitted,

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