No. 22-15282

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Ashenafi Aberha,

Plaintiff-Appellee,

v.

Eric Delafontaine,

Defendant-Appellant.

On appeal from the United States District Court
for the District of Nevada
Case No. 3:19-cv-606-MMD-CSD
Hon. Miranda M. Du

APPELLEE ASHENAFI ABERHA'S RESPONSE BRIEF

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STATEMENT OF JURISDICTION

This Court's jurisdiction over this appeal is limited. True, the district court had jurisdiction and Appellant Eric Delafontaine timely appealed. Opening Brief (OB) 1–2. But Delafontaine seeks review of a *denial* of summary judgment—a type of order from which appeal is normally prohibited. *Ortiz v. Jordan*, 562 U.S. 180, 188 (2011). Because the district court denied qualified immunity, a limited interlocutory appeal is permitted here. *Id.* But it extends only to "abstract issues of law," and not questions about "the existence, or nonexistence, of a triable issue of fact." *George v. Morris*, 736 F.3d 829, 835 (9th Cir. 2013) (quoting *Johnson v. Jones*, 515 U.S. 304, 316–17 (1995)).

This limit on the Court's jurisdiction is further developed below at pp. 9–20.

ISSUES PRESENTED

Ashenafi Aberha's cellmate sexually assaulted him. He told Officer Delafontaine right away, but Delafontaine discounted his report and left him in his cell—where his cellmate raped him again. When Aberha brought suit, Delafontaine disputed his account and claimed he never mentioned the first assault. The district court found that this dispute was genuine, resolved it in Aberha's favor, and denied summary judgment. Delafontaine's interlocutory appeal raises three questions:

1. **Jurisdiction.** This Court has interlocutory jurisdiction only over legal issues. Whether Aberha told Delafontaine about the first assault is a factual issue. May Delafontaine challenge the district court's interlocutory finding that it was genuinely disputed?

2. **Merits.** Resolving that dispute in Aberha's favor, Delafontaine knew Aberha was in serious danger from his cellmate. He left Aberha confined with him anyway. Was that reasonable?

3. **Immunity.** Qualified immunity protects officers when the law is unclear. A decade before the events at issue, this Court held that a guard who knows a prisoner is in imminent danger from his cellmate may not walk away without intervening. Would a reasonable officer in Delafontaine's position have understood that he couldn't leave Aberha confined with a cellmate who had just sexually assaulted him?

STATEMENT OF THE CASE

1. Aberha's cellmate sexually assaults him; Delafontaine declines to intervene.

In September 2018, Ashenafi Aberha's cellmate, Daniel Booker, sexually assaulted him three times in a single day. ER-26. After the first assault, Aberha reported to the guard on duty, Eric Delafontaine, that he'd just been sexually assaulted. *Id.* But Delafontaine laughed at Aberha and discounted the situation. *Id.* Then he "stepped out for count," leaving Aberha stranded in his cell with Booker. ER-72.

After Delafontaine left, Booker pulled down his underwear, threw Aberha against a wall, choked him, and inserted his finger into Aberha's anus. ER-26. Aberha managed to reach the intercom button to call for help. *Id.* After thirty minutes, an officer responded: "It's count time." *Id.* Booker warned Aberha that if he said anything, he'd kill him. *Id.*

Almost an hour after Aberha talked to Delafontaine, a caseworker came by the cell. *Id.*; *see* OB 30. Booker was screaming and yelling at Aberha. ER-26. The caseworker told Booker to stop, but to no avail: Booker pushed Aberha onto a bed, pulled his shorts down, choked him, and punched him repeatedly. *Id.*; *see* ER-75. He pressed his penis against Aberha's leg and threatened to rape him again. ER-26. The caseworker called for help, but Booker continued to assault Aberha until prison guards arrived. *Id.* Aberha has suffered pain in his testicles ever since. ER-27.

2. The district court denies summary judgment, finding that Delafontaine knew Aberha was in serious danger.

Aberha filed suit. As relevant here, he brought an Eighth Amendment claim against Delafontaine for failing to protect him despite knowing that Booker had just sexually assaulted him. ER-5–6; ER-25–26. Delafontaine moved for summary judgment, asserting that Aberha had told him only that "it was not working with his cellmate" and that they "needed to be separated." ER-72.

The magistrate judge accepted this argument. ER-15–16. He reasoned that Aberha had not filed "his own declaration," and thus could point to no "*evidence*" showing that Delafontaine "knew [he] faced a substantial risk of serious harm from his cellmate Booker." *Id.* On that basis, he recommended that the district court deny summary judgment. ER-17.

Reviewing de novo, the district court disagreed. It pointed out that Aberha's complaint was "verified"—that is, he had "attested to the allegations in [it] under penalty of perjury." ER-21; *see* ER-31 (verification page). Applying long-settled law, it held that Aberha's verified complaint was, in fact, evidence—the equivalent of a declaration. ER-21.[1]

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[1] Delafontaine does not dispute this point and thus concedes it. *See* OB 10–11, 19–20; *cf. Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004) (explaining that when a pro se litigant attests to the contents of a pleading under penalty of perjury, the facts within it are evidence).

In his verified complaint, Aberha declared:

> I was sexually assaulted 3 times by inmate Daniel Booker . . . . [W]hen this incident happened and I reported to [Delafontaine,] he was made fun of me.
>
> So when I got off the bed to use the bathroom [Booker assaulted me a second time]. . . .
>
> Caseworker Travis came to the cell, she witnessed inmate Booker [assault me for a third time].

ER-26. Construing this evidence in the light most favorable to Aberha, the district court found that it showed that "Booker sexually assaulted [Aberha] three times"; that Aberha "reported the first incident" to Delafontaine; and that Delafontaine "made fun of" him. ER-21.

Based on this evidence, the district court denied summary judgment. Drawing reasonable inferences in Aberha's favor, it reasoned that "[Aberha's] sworn allegations create a genuine issue of material fact as to whether [Delafontaine] was aware of a substantial risk of harm to [Aberha], from his continued sharing of the cell with Booker." *Id.* It held that a rational jury could reasonably find that Delafontaine "knew of a serious risk of harm to [Aberha] because of [Aberha's] report that Booker had raped him." *Id.* And it concluded that if Delafontaine had that knowledge and left Aberha confined with Booker anyway, he had violated Aberha's clearly established Eighth Amendment right to protection from other inmates. ER-21–22.

Delafontaine now seeks interlocutory review.

STANDARD OF REVIEW

Summary judgment. In ruling on a motion for summary judgment, courts construe the evidence and draw all reasonable inferences in favor of the party opposing summary judgment. *Davis v. United States*, 854 F.3d 594, 598 (9th Cir. 2017). Inmates litigating pro se get additional solicitude: Courts "construe liberally [their] motion papers and pleadings" and "avoid applying summary judgment rules strictly." *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010); *Wilk v. Neven*, 956 F.3d 1143, 1147 (9th Cir. 2020). Summary judgment lies only when the evidence, so construed, presents "no genuine dispute as to any material fact" and the moving party prevails "as a matter of law." Fed. R. Civ. P. 56(a).

Appellate review. Because this is an interlocutory appeal, the standard of review is mixed. The Court lacks jurisdiction to review whether a factual dispute is *genuine*; instead, resolving such disputes in favor of the nonmoving party, this Court has jurisdiction to review only whether they are *material*. *Infra*, pp. 9–20. Put differently, the Court is bound by the district court's factual or evidentiary findings but reviews de novo its legal conclusions. *See Johnson*, 515 U.S. at 313–14.

SUMMARY OF ARGUMENT

The district court correctly denied Delafontaine's motion for summary judgment. Its decision should be affirmed.

1. Delafontaine seeks interlocutory review. In that posture, he is bound by the district court's factual conclusions.

a. On interlocutory appeal, this Court has jurisdiction only over issues of law. It lacks jurisdiction to revisit the district court's finding of a genuine dispute of fact. Instead, taking such disputes "as given" and resolving them in favor of Aberha, this Court may review only the "purely legal" question of whether, under those facts, Delafontaine was entitled to qualified immunity. *Johnson*, 515 U.S. at 319.

b. Delafontaine asks the Court to reassess the evidence on appeal. OB 19–22. This he may not do. The district court held that a reasonable jury might believe Aberha's testimony that he reported Booker's first sexual assault on him to Delafontaine. ER-21–22. For purposes of this interlocutory appeal, Delafontaine must accept that version of events. *George*, 736 F.3d at 838.

2. Under that version of events, leaving Aberha confined with Booker violated the Eighth Amendment.

a. Objectively, Aberha faced a substantial risk of serious harm. Delafontaine concedes this. OB 18.

b. Subjectively, once Aberha told Delafontaine that Booker had just sexually assaulted him, Delafontaine knew Aberha was in serious danger. Delafontaine argues (on appeal) that because

Aberha's report was "uncorroborated," he wasn't required to believe it. OB 23–28. He failed to make this argument below and thus forfeited it. Besides, this Court has held many times that officials who receive such reports and ignore them have the subjective knowledge needed for deliberate indifference under the Eighth Amendment. *See, e.g.*, *Clem v. Lomeli*, 566 F.3d 1177, 1180, 1183 (9th Cir. 2009); *Wilk*, 956 F.3d at 1149. So too with Delafontaine.

c. Delafontaine argues that the Eighth Amendment was satisfied when he asked a caseworker to investigate. OB 28–31. He forfeited this argument, too. And in any event, this Court has held that officials may not discharge their duty of protection by delegating it to others who—like the caseworker—lack the power to protect. *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1073 (9th Cir. 2016) (en banc). Delafontaine failed to protect Aberha and is liable for the harm Aberha suffered as a result.

3. Delafontaine is not entitled to qualified immunity.

a. A prisoner's right to protection from other prisoners "has been clearly established since the Supreme Court's decision in *Farmer* [*v. Brennan*, 511 U.S. 825 (1994)]." *Wilk*, 956 F.3d at 1150. And in 2009, *Clem* applied *Farmer* to facts materially identical to those here. 566 F.3d at 1180, 1183.

b. Delafontaine left Aberha exposed to Booker's attack in September 2018—nearly a decade after *Clem*. Any reasonable officer would have understood that he couldn't leave Aberha confined with a cellmate who had just sexually assaulted him. Because Delafontaine did so anyway, he is not entitled to qualified immunity.

ARGUMENT

In this interlocutory appeal, the controlling facts are that Delafontaine knew Aberha was in serious danger from his cellmate and failed to protect him. Aberha's right to protection was clearly established, so Delafontaine is not entitled to qualified immunity.

1. This Court lacks jurisdiction to revisit the district court's factual conclusions.

Delafontaine's main argument rests on a factual premise: When he left Aberha confined with Booker, he didn't know—because Aberha hadn't told him—that Booker had just sexually assaulted Aberha. But the district court found[2] that a reasonable jury could conclude

[2] Formally, a conclusion that the nonmoving party has presented enough evidence to dispute a factual issue is not a "finding of fact." *Cf.* Fed. R. Civ. P. 52(a)(1). But this Court's decisions use that shorthand in this context, and this brief follows the Court's lead. *Cf., e.g.*, *Isayeva v. Sacramento Sheriff's Dep't*, 872 F.3d 938, 947 (9th Cir. 2017) ("Remaining within the bounds of our jurisdiction, we accept the

otherwise. This Court should not revisit that finding in this interlocutory appeal.

1.1. In an interlocutory appeal, the Court has jurisdiction only over "purely legal" issues.

The federal courts of appeals have jurisdiction over "final decisions of the district courts." 28 U.S.C. § 1291. Denials of summary judgment, however, are "by their terms interlocutory." *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976). The courts of appeals do not normally have jurisdiction to review such decisions. *Ortiz*, 562 U.S. at 188.

The collateral-order doctrine is a limited exception to this general rule. It allows a court of appeals to hear an interlocutory appeal of a denial of qualified immunity—but only "to the extent that it turns on an issue of law." *Villanueva v. California*, 986 F.3d 1158, 1164 (9th Cir. 2021) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)). Put differently, the final-judgment rule in qualified-immunity cases is not a jurisdictional bar but a jurisdictional screen. "[P]urely legal" issues get through; issues of fact do not. *Johnson*, 515 U.S. at 313.

At the pleading stage, this jurisdictional screen reduces to the ordinary Rule 12(b)(6) standard: The court of appeals must assume the plaintiff's allegations are true and determine whether the defendants'

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district court's findings that these factual disputes are genuine and supported by the record.").

conduct, as alleged, violated clearly established law. *Hernandez v. City of San Jose*, 897 F.3d 1125, 1132 (9th Cir. 2018). But at the summary-judgment stage, the jurisdictional screen is less straightforward; what gets through depends on the difference between "genuineness" and "materiality." *George*, 736 F.3d at 834–35.

When a district court denies summary judgment, it necessarily decides that the parties' evidence presents at least one "genuine dispute as to a[] material fact." Fed. R. Civ. P. 56(a). A dispute is "genuine" if "there is enough evidence in the record for a jury to conclude that certain facts [that the movant denies] are true." *George*, 736 F.3d at 835 (quotation marks omitted). A dispute is "material" if, under the governing law, changing the outcome of the dispute would change the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

So genuineness is an evidentiary question and materiality is a legal question. From that distinction flows the jurisdictional rule: A court of appeals hearing an interlocutory appeal from a denial of summary judgment has jurisdiction to review whether the disputes identified by the district court are legally material, but not whether they are evidentiarily genuine. *George*, 736 F.3d at 834–35; *Johnson*, 515 U.S. at 307, 313.

George illustrates this rule in action. Sheriff's deputies had killed an old man on his back patio. 736 F.3d at 832. They claimed he had

raised his gun and pointed it directly at them. *Id.* at 833 n.4. But the district court held that a jury could reasonably disbelieve their story, so it denied summary judgment. *Id.* at 835. On appeal, this Court limited its review to whether, *if* the deputies had lacked "objective provocation" when they shot the man, they used excessive force. *Id.* at 838–39. That is, this Court accepted the district court's view of the facts and decided only the "purely legal" question of whether the deputies were entitled to qualified immunity under those facts. *Johnson*, 515 U.S. at 313; *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996). It rejected the deputies' (and the dissent's) invitation to review "the sufficiency of [the plaintiff's] evidence." *George*, 736 F.3d at 834.

Other cases are similar. In *Pauluk v. Savage*, this Court declined to review the appellants' arguments that the record contained "insufficient evidence" to create a genuine dispute of material fact. 836 F.3d 1117, 1121 (9th Cir. 2016). Likewise, in *Isayeva*, this Court explained that it "must accept" the district court's finding that "factual disputes are genuine and supported by the record." 872 F.3d at 945, 947. It resolved those disputes in favor of the plaintiff and applied the law to that factual universe. *Id.* at 948.

The upshot is that appellate courts performing interlocutory review "simply take, as given, the facts that the district court assumed when it denied summary judgment." *Johnson*, 515 U.S. at 319. They do not conduct exacting "scrutin[y] of the record." *George*, 736 F.3d at

835. When a district court finds that a nonmoving party has presented enough evidence to dispute a point of fact, the court of appeals "categorically" lacks jurisdiction to reach a different conclusion. *Id.* at 834 (quotation marks omitted).

1.2. Delafontaine's interlocutory appeal hinges on disputing the facts.

Delafontaine's main argument for summary judgment is that he didn't subjectively know that Aberha was in any danger from Booker. OB 18–22. "Contrary to the district court's findings," he argues, "Aberha did not report the alleged rape by inmate Booker to Officer Delafontaine." OB 18–19 (capitalization altered). The only thing Aberha told him, he insists, was that "it was not working with his cellmate and that they needed to be separated." *Id.* (quoting ER-72). He argues that his declaration to that effect is "undisputed." OB 20.

But Aberha does dispute it. According to his sworn testimony, he "reported" the first "incident" of sexual assault to Delafontaine, but Delafontaine "made fun of" him and "discounted" the situation. ER-26. And the district court found that a jury could believe his version of events over Delafontaine's:

> Plaintiff's sworn allegations create a genuine issue of material fact as to whether Defendant was aware of a substantial risk of harm to Plaintiff, from his continued sharing of the cell with Booker. A rational jury could reasonably find that Defendant knew of a

> serious risk of harm to Plaintiff because of Plaintiff's report that Booker had raped him.

ER-21 (citations omitted). Later, it stated again: "[T]he allegations of Plaintiff's report of rape to Defendant, as alleged in his verified Complaint, create[] a material issue of fact[.]" ER-22. And so it denied summary judgment. *Id.*

These findings put this case on all fours with *George*. Just as here, the district court there found that the parties genuinely disputed a material fact (whether the decedent had pointed his gun at the deputies). 736 F.3d at 833. Just as here, the deputies there asked this Court to "credit [their own] testimony" over the plaintiff's evidence. *Id.* at 838. And just as here, the Court there lacked jurisdiction to exercise "plenary review." *Id.* at 835, 833 n.4. So just as there, this Court should decline here to "decide at this interlocutory stage if the district court properly [assessed the evidence]." *Id.* at 835; *see also, e.g.*, *Isayeva*, 872 F.3d at 947–48 (similar); *Pauluk*, 836 F.3d at 1121 (similar). Instead, adopting the district court's view of the evidence, this Court should review only the legal conclusions the district court drew. *Johnson*, 515 U.S. at 313, 319.

Still, Delafontaine urges the Court to credit his account, "contrary to the district court's findings." OB 19–22 (capitalization altered). He argues that because Aberha didn't transcribe his "report"

to Delafontaine verbatim, Delafontaine's claim that Aberha never reported the sexual assault must control. OB 20 ("Aberha never declared what he reported to Officer Delafontaine."); *cf.* ER-26. That argument is misplaced thrice over.

First, of course, Delafontaine is simply prohibited from raising it on interlocutory review. The district court found that Aberha had genuinely disputed Delafontaine's declaration; that finding binds Delafontaine here. *George*, 736 F.3d at 834–35.[3]

Second, even on plenary review, his argument would turn the summary-judgment standard on its head. This Court is "required to view the evidence in the light most favorable to [Aberha]," *Cortez v. Skol*, 776 F.3d 1046, 1053 (9th Cir. 2015), so it must do as the district court did and resolve any ambiguity in Aberha's favor, not Delafontaine's. *Thomas*, 611 F.3d at 1149. Not that there's much ambiguity. Aberha declared: "I was sexually assaulted . . . . [W]hen this incident happened and I reported to [Delafontaine] he was made

[3] Delafontaine alludes to *Scott v. Harris* to try to evade the restrictions on interlocutory review. OB 11, 24 (citing *Scott*, 550 U.S. 372 (2007)). But as this Court has held, *Scott* did not announce an exception to the limits on interlocutory jurisdiction. *George*, 736 F.3d at 835–36. It is simply a case about how the ordinary summary-judgment standard applies to video evidence. *See Scott*, 550 U.S. at 380–81. And even if it applied here, Delafontaine cites no relevant video evidence, much less video that "blatantly contradict[s]" or "utterly discredit[s]" Aberha's testimony. *Cf. id.*

fun of me." ER-26. From that testimony, it is at least a reasonable inference that Aberha reported the first incident of sexual assault to Delafontaine. ER-21. Delafontaine can tell his story to a jury, but on summary judgment, Aberha's account controls. *See Cortez*, 776 F.3d at 1052–53.

And third, Delafontaine's argument is mistaken because it fails to afford Aberha's testimony the solicitude due to an inmate litigating without the benefit of counsel. *See Thomas*, 611 F.3d at 1150; *Wilk*, 956 F.3d at 1147. When he wrote his complaint, not only was Aberha pro se, he was a foreign national. ER-124. Two years later, when he objected to the magistrate judge's recommendation, he was much clearer: "Mr. Aberha reported to Defendant that he had been sexually assaulted and the Defendant made fun of him." ER-122.[4] So even if the Court is inclined to "scrutiniz[e] the record," *cf. George*, 736 F.3d at 835, it should hold that the district court correctly found a genuine dispute of material fact.

In arguing to the contrary, Delafontaine relies on *Labatad v. Corr. Corp. of Am.*, 714 F.3d 1155 (9th Cir. 2013). OB 21–22. The facts

[4] The district court was allowed to consider Aberha's clarification. *See Serrano v. Francis*, 345 F.3d 1071, 1082 (9th Cir. 2003); ER-21 n.4. A district court's review of a magistrate judge's recommendation is de novo, meaning that it "freely considers the matter anew, as if no decision had been rendered below." *Dawson v. Marshall*, 561 F.3d 930, 933 (9th Cir. 2009) (cleaned up).

there are superficially similar: Labatad, too, was attacked by his cellmate after asking for a cell reassignment. 714 F.3d at 1157, 1161. But unlike Aberha, he had not reported a completed attack, or even articulated a "specific threat." *Id.* at 1161. He had told a guard only that he "should not be housed" with his cellmate. *Id.* The Court held that asking for a cell reassignment without more—and Labatad provided no evidence he had said anything more—could not confer the subjective knowledge required for deliberate indifference. *Id.*

So *Labatad*'s holding is that officers need not infer from an inmate's unadorned cell-reassignment request that the inmate is in danger from his cellmate. *Id.* That is a rule about the substantive requirements of the Eighth Amendment. It does not alter the ordinary evidentiary standards and rules of inference at summary judgment. *Cf.* OB 22. It offers no reason to adopt Delafontaine's version of events. And under Aberha's version of events, which controls for all the reasons canvassed above, *Labatad* does not help Delafontaine.

Delafontaine also relies on *Sullivan v. Dollar Tree Stores, Inc.*, in which this Court affirmed summary judgment for a defendant who had rebutted the plaintiff's vague testimony with much more specific testimony. 623 F.3d 770, 779–80 (9th Cir. 2010); OB 20–21. *Sullivan* wasn't an interlocutory appeal, 623 F.3d at 774, so it offers little aid to Delafontaine. And in any event, the part of *Sullivan* on which he relies has been abrogated by rule.

When *Sullivan* was decided, the text of Federal Rule of Civil Procedure 56(e) included language requiring a party opposing summary judgment to "set out *specific facts* showing a genuine issue for trial." 623 F.3d at 779 (quoting Fed. R. Civ. P. 56(e)(2) (2009) (repealed 2010)).[5] That was the basis for *Sullivan*'s holding. Three months later, though, a completely overhauled Rule 56 went into effect. Order Amending Federal Rules of Civil Procedure, 559 U.S. 1141, 1147–49 (2010).[6] Among its many changes, it deleted the specificity requirement. Instead, the new rule required litigants to cite "*particular parts* of materials in the record" to establish the presence or absence of a genuine dispute. Fed. R. Civ. P. 56(c)(1)(A) (emphasis added). But that doesn't help Delafontaine: Aberha cites his verified complaint. *See* ER-26.

Even if *Sullivan* were good law, it wouldn't apply here. Consider the dueling testimonies in that case: The plaintiff asserted that "most" of a store's employees kept working there after Dollar Tree took over, while Dollar Tree specified which employees remained at the store and

[5] The repealed Rule 56 is available in full at https://www.federalrulesofcivilprocedure.org/wp-content/uploads/2015/03/civilprocedure2009_20150318_122045_stamp.pdf#page=93.

[6] This order is unavailable on Westlaw, but can be viewed here: https://www.supremecourt.gov/opinions/boundvolumes/559bv.pdf#page=1151.

for how long. 623 F.3d at 779. The plaintiff's statement was so vague that the Court was uncertain whether she even "intend[ed] to dispute" Dollar Tree's evidence. *Id.* Here, by contrast, both federal judges who have reviewed Aberha's complaint so far have interpreted it to mean that he "reported the first incident" of sexual assault to Delafontaine. ER-6 (magistrate judge);[7] ER-21 (district judge). Of course, Delafontaine insists otherwise. ER-72. But that just underscores that unlike *Sullivan*, here "there is a huge dispute of facts." ER-122.

In brief, Delafontaine argues from *Sullivan* that the Court should scrutinize a pro se complaint using an exacting interpretation of an out-of-date rule, all in service of reversing a district court's factual determination on interlocutory review. The Court should decline.

All in all, Delafontaine's argument for summary judgment is that Aberha "could not prove at trial" that he told Delafontaine that Booker had just sexually assaulted him. *George*, 736 F.3d at 834 (cleaned up). But the district court found that he could. ER-21–22. (Of course it did: Aberha can take the stand and testify to that effect.) That finding binds Delafontaine here. *George*, 736 F.3d at 834–36; *see also Pauluk*, 836 F.3d at 1121. So the question for the Court is whether, after Aberha told Delafontaine his cellmate had just sexually assaulted him,

[7] The magistrate judge recommended granting summary judgment not because he read Aberha's complaint as Delafontaine does, but because he overlooked that it was verified. ER-21.

the Eighth Amendment allowed Delafontaine to laugh off the danger and leave Aberha trapped with his assailant.

2. Because he knew Aberha was in serious danger and failed to protect him, Delafontaine violated the Eighth Amendment.

The Eighth Amendment "does not mandate comfortable prisons, but neither does it permit inhumane ones." *Farmer*, 511 U.S. at 832 (cleaned up). Prison officials must "take reasonable measures to guarantee the safety of the inmates," including "protect[ing them] from violence at the hands of other prisoners." *Id.* at 832–33 (quotation marks omitted). Being violently assaulted in prison is "simply not part of the penalty that criminal offenders pay for their offenses against society." *Id.* at 834 (quotation marks omitted).

Prison officials violate the Eighth Amendment if they're "deliberately indifferent" to a prisoner's safety—if they subjectively know of "a substantial risk of serious harm to an inmate" and "disregard[] that risk by failing to respond reasonably." *Wilk*, 956 F.3d at 1147 (quoting *Farmer*, 511 U.S. at 837, 844–45). This inquiry has three elements:

- Objectively, the inmate must be exposed to a substantial risk of serious harm. *Lemire v. Cal. Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1076 (9th Cir. 2013).

- Subjectively, the official must know of the risk or the risk must be obvious. *Id.* at 1078.
- And finally, the official must fail to "take reasonable measures to abate" the risk. *Clem*, 566 F.3d at 1182 (quoting *Farmer*, 511 U.S. at 847) (emphasis deleted).

As the district court held, Aberha has enough evidence to show that he was in serious danger, that Delafontaine knew of the danger, and that Delafontaine failed to abate it. So Delafontaine was deliberately indifferent, and Aberha was forcibly raped as a result.[8] This Court should let him try his case to a jury.

2.1. Leaving Aberha with his attacker exposed Aberha to a substantial risk of serious harm.

Aberha was sexually assaulted by Booker. ER-26. That much is undisputed. He then asked Delafontaine to separate him from Booker. ER-26; ER-72. That, too, is undisputed. Delafontaine did not separate him from Booker. ER-26; ER-72. That is also undisputed. The only factual dispute is over what Aberha told Delafontaine. ER-21. But that goes to the subjective prong—what Delafontaine knew when he left Aberha locked in his cell with Booker. Objectively, the question is whether doing so exposed Aberha to a substantial risk of serious harm.

[8] Booker forcibly inserted a finger into Aberha's anus. ER-26. Under the Prison Rape Elimination Act's definition of "rape," Booker raped Aberha. 34 U.S.C. § 30309(9)(A),(10).

Leaving an inmate locked with a cellmate who has *threatened* to attack him exposes him to a substantial risk of serious harm. *Wilk*, 956 F.3d at 1148 (summarizing *Clem*, 566 F.3d at 1180). Leaving an inmate locked with an inmate who has *in fact* attacked him exposes him to still greater risk of serious harm. *See id.* at 1149. Perhaps because of the obviousness of this proposition, Delafontaine concedes that "Aberha faced an objectively substantial risk of serious harm." OB 18. So Aberha has satisfied this element.

2.2. Delafontaine knew Aberha faced a substantial risk of serious harm.

Aberha must show that Delafontaine subjectively knew of the danger he was in, either because it was "obvious" or through "other circumstantial or direct evidence." *Lemire*, 726 F.3d at 1078. This is a fact-intensive inquiry that "typically should not be resolved at the summary judgment stage." *Id.* (citing *Farmer*, 511 U.S. at 842).

The district court determined that a reasonable jury could find that Aberha told Delafontaine that Booker had just sexually assaulted him. ER-21–22. That factual determination is dispositive here. When an inmate tells a guard that another inmate has threatened to assault him, the guard knows of the risk and has a duty to protect him. *Clem*, 566 F.3d at 1180, 1183; *Wilk*, 956 F.3d at 1149; *see also Brown v. Budz*, 398 F.3d 904, 914 (7th Cir. 2005) (explaining that this is a "typical" deliberate-indifference fact pattern). By greater force, when Aberha told

Delafontaine that his cellmate had in fact assaulted him, Delafontaine knew of the risk to Aberha and had a duty to protect him.

Wilk is illustrative. There, an inmate "threatened to attack and kill" the plaintiff. 956 F.3d at 1146. The plaintiff immediately reported the threat and went into protective custody. *Id.* But a few days later, officials remanded him to general population, even though the other inmate was also still in general population. *Id.* Sure enough, the other inmate attacked the plaintiff. *Id.* This Court held that reasonable jurors could find that the officials to whom the plaintiff had communicated the threat were subjectively aware of the risk the other inmate posed to him and indifferent to it. *Id.* at 1149.

In the same vein, consider *Clem*. There, the plaintiff's cellmate became drunk and threatened to kill him. 566 F.3d at 1180. The plaintiff immediately asked the guard on duty to move him to a different cell, but the guard told him to "deal with it" and returned to his other duties. *Id.* (cleaned up). The cellmate carried out his threat, breaking the plaintiff's jaw and knocking him unconscious. *Id.*

The legal issue in that case was an incorrect jury charge: The trial court had declined to instruct the jury that the guard could be liable for failing to act. *Id.* at 1182. But the next question was whether the incorrect instruction was prejudicial, and this Court held that it was. *Id.* at 1182–83. It reasoned that when an official hears an inmate's "call for help immediately prior to his beating" and takes no steps to abate the

risk, a properly instructed jury "may well" conclude that the official is liable for the harm that follows. *Id.* at 1182–83 (quotation marks omitted). In other words, once the plaintiff told the guard of his cellmate's threat, the guard subjectively knew the plaintiff was in danger and had a duty to abate it. *Id.*

Cases from other circuits confirm that when a guard knows one inmate poses a danger to another—whether because the former has already assaulted the latter, has threatened to assault the latter, or would obviously assault the latter—the guard knows enough that failing to act is deliberate indifference. In *Makdessi v. Fields*, the plaintiff reported that he had been sexually assaulted by his cellmate; officials declined to change his cell assignment; and his cellmate beat and raped him again. 789 F.3d 126, 135, 130 (4th Cir. 2015). The Fourth Circuit held that the guards who read the report could be held liable. *Id.* at 136. In *Whitson v. Stone Cty. Jail*, prison officials placed a male and a female inmate in the back of a dark van, left them alone, and blasted loud music. 602 F.3d 920, 925 (8th Cir. 2010). The male inmate raped the female inmate. *Id.* The Eighth Circuit held that the risk was so "obvious" that a jury could find that the defendants were subjectively aware of it. *Id.* at 925–26 & n.3.

Under the rule of these cases, Delafontaine cannot prevail at summary judgment. After Aberha reported that Booker had just sexually assaulted him, Delafontaine was in substantially the same

position as the guards in *Clem*, *Wilk*, and *Makdessi*. And just like the guard in *Clem*, Delafontaine "made fun of" Aberha, "totally discounted" the situation, and returned to his other duties. ER-26; *see* ER-72; *cf.* 566 F.3d at 1180. A jury could find that Delafontaine was deliberately indifferent.

Delafontaine retorts that the Eighth Amendment doesn't oblige him to take seriously Aberha's "one uncorroborated report." OB 23. He argues that charging officials with knowledge of risk after a single call for help would allow inmates to "cry wolf in order manipulate cell assignments" by "simply yelling out an allegation as a prison official walks by their cell." OB 25–26. He insists that such a rule would make prison operations "unmanageable" and raise "security concerns." OB 26. He argues that the Eighth Amendment requires more, like "reports of prior assaults" or an established propensity for violence, before it charges prison guards with subjective knowledge of a risk. OB 25, 27.

Delafontaine has forfeited this argument. *See Honcharov v. Barr*, 924 F.3d 1293, 1295 & n.1 (9th Cir. 2019). This Court is a "court[] of review, not first view." *Id.* at 1296 (quotation marks omitted). It generally declines to review arguments not presented in the first instance to the district court. *Id.* And Delafontaine failed to present his "one uncorroborated report" argument to the district court. Instead, he

presumed that his version of events—under which there was no report—would control. ER-65 ("At no time did Aberha tell Officer Delafontaine that inmate Booker had sexually assaulted him or posed a serious risk to his safety."); ER-116–17 (similar); ER-131–32 (similar). So the district court "had no reason to consider" any arguments in the alternative, and this Court in turn should decline to entertain them for the first time on appeal. *See Walsh v. Nev. Dep't of Hum. Res.*, 471 F.3d 1033, 1037 (9th Cir. 2006) (quotation marks omitted); *Honcharov*, 924 F.3d at 1295–96 & n.1.

In any event, Delafontaine's argument is unsound. The implication of his proposed rule is that unless an inmate is caught in the act, he gets at least two free attacks (and perhaps more; Delafontaine doesn't offer a number) before officials must intervene and protect his victims. This Court's cases—and other circuits'—are not so cavalier. *Clem* involved only one uncorroborated report. 566 F.3d at 1180. So did *Wilk*. 956 F.3d at 1146. So did *Makdessi*. 789 F.3d at 135. *Whitson* involved *no* prior reports. 602 F.3d at 925. All these cases held that the officials knew enough to be liable for failing to intervene. Delafontaine's argument is so plainly contrary to governing law that this Court no longer publishes opinions rejecting it. *See Meagher v. Prioleau*, 857 F. App'x 908, 909 (9th Cir. 2021) (rejecting argument

that jail officials need not heed "unproven, anecdotal allegations of violence").[9]

Delafontaine makes much of *Riccardo v. Rausch*, in which the Seventh Circuit suggested that some prisoners may "cry 'wolf'" to "manipulate [cell] assignments." 375 F.3d 521, 525, 527 (7th Cir. 2004); OB 23. But he omits some salient features of that case. For one, Riccardo expressed fear because he thought his cellmate was a member of the Latin Kings, a gang hostile to his own—but, as the guards knew, the cellmate was "himself in segregation for protection *from* the Latin Kings." 375 F.3d at 527. So the objective risk to Riccardo was no greater than the background risk of sharing a cell "with any other prisoner." *Id.* at 526–27. Knowing that, the guards had no duty to act on Riccardo's fears. *Id.* at 528 (explaining that when "the objective indicators do not substantiate" an inmate's "bare assertion," officials may treat it with skepticism). Delafontaine offers no similar reason to have doubted Aberha's report.

For another, Riccardo's fear didn't come to pass. He feared a hit from a rival gangmember, but what he suffered was a sexual assault that

[9] *Meagher* involved a pretrial detainee whose claims arose under the Fourteenth Amendment, but the Court applied the Eighth Amendment standard enunciated in cases like *Farmer*, *Serrano*, and *Wilk* because pretrial detainees are entitled to at least as much protection as convicted prisoners. 857 F. App'x at 909.

had nothing to do with gang membership. *Id.* at 526. The Seventh Circuit found this point significant.[10]

One last distinction: Riccardo reported an unfounded fear, while Aberha reported a completed assault. Believing the former might be "credulous," but disbelieving the latter is surely "[ir]responsible." *See* 375 F.3d at 525. Indeed, Delafontaine knows this, which is why he argued below that if Aberha had told him of the sexual assault, "he would have separated Aberha and Booker prior to count taking place." ER-65.

Delafontaine cites several other out-of-circuit cases for the proposition that he need not have believed Aberha, OB 24 & nn.3–6, but they are easily distinguished:

- In *Reedy v. West*, the plaintiff made only "some vague statement[s]" that his cellmate had threatened him, without offering a motive or any other specifics. 988 F.3d 907, 914 (6th Cir. 2021). That is very different from Aberha's report of a completed assault.
- In *Doe v. Ga. Dep't of Corr.*, the prior "uncorroborated . . . allegation" was against a guard, not an inmate, and the guard

[10] This Court, however, may not. *See Lemire*, 726 F.3d at 1076 ("[I]t is enough for the inmate to demonstrate that he was exposed to a substantial risk of some range of serious harms; the harm he actually suffered need not have been the most likely result among this range of outcomes.").

disputed it. 248 F. App'x 67, 69–70 (11th Cir. 2007). The Eleventh Circuit reasoned that compelling officials to believe such accusations "would empower any prisoner at any time to dictate prison staffing," an outcome it found untenable. *Id.* at 71. But inmate cell assignments don't raise the same policy concerns; and meanwhile, officials may be skeptical that *guards* will "violate . . . decorum" or "commit a punishable offense," but they cannot apply the same skepticism to *inmates*. *See Whitson*, 602 F.3d at 927. So *Doe* doesn't apply here.

- In *Lenz v. Wade*, the "uncorroborated accusations" were from years past, not earlier that day. 490 F.3d 991, 994, 996 (8th Cir. 2007). Also, as in *Doe*, the subject of the accusations was an officer, not an inmate. *Id.*
- In *Ard v. Rushing*, again, the subject of the prior allegations was a guard. 597 F. App'x 213, 214 (5th Cir. 2014). And the allegations weren't just "uncorroborated"—they had been investigated and found meritless. *Id.* at 219–20.

These cases are far afield from the facts at hand: A specific, urgent accusation from an inmate that the prisoner with whom he is confined has just assaulted him. Whether the cases above would have come out the same way under the law of this circuit, given cases like *Clem* and

Wilk, is unclear. But even on their own terms, they do not help Delafontaine escape liability here.[11]

Finally, Delafontaine states, somewhat inexplicably, that "even under the District Court's version of Aberha's allegations, Delafontaine was not made aware of the alleged sexual assaults until after they allegedly occurred." OB 27. Not so. As the district court explained, a reasonable jury could find that "Booker sexually assaulted [Aberha] three times," and that Aberha "reported the *first* incident to Defendant, but Defendant made fun of" him. ER-21 (emphasis added). Under that version of events, Delafontaine was very much "made aware" of the first sexual assault before the second and third occurred. *Cf.* OB 27. But he ignored that knowledge, allowing Booker to rape Aberha. ER-26.

2.3. Delafontaine failed to take reasonably available steps to abate the risk to Aberha.

A prison official who knows of a substantial risk of serious harm to an inmate must take "reasonable available measures to abate that risk."

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[11] Delafontaine also tries to transplant a rule about evidence at summary judgment into the substantive standard for failure-to-protect claims. OB 24–25 (citing *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054 (9th Cir. 2002)). Setting to one side that *Villiarimo* is an employment case that has nothing to do with subjective knowledge under the Eighth Amendment, the "uncorroborated" statement there was made without personal knowledge. 281 F.3d at 1059 & n.5. Aberha had personal knowledge that Booker had just sexually assaulted him.

Castro, 833 F.3d at 1071.[12] What measures are reasonable depends on the "severity of the risk" and the prevailing "penological circumstances." *Lemire*, 726 F.3d at 1079. This element of deliberate indifference, like the official's subjective knowledge, is a "fact-intensive" inquiry that "typically should not be resolved at the summary judgment stage." *Id.* at 1078 (citing *Farmer*, 511 U.S. at 842).

Delafontaine took no measures to abate the risk to Aberha. Just like the guard in *Clem*, he walked away without intervening and continued with his headcount of inmates. *Compare* 566 F.3d at 1180 ("[I]t is uncontested that Lomeli continued with his count, walking away from Clem's cell without intervening."), *with* ER-72 ("Once count was commenced both me and C/O Sunday stepped out for count."). The risk to Aberha was at least as great as to Clem, and the prevailing penological circumstances—count time—were the same. *Cf.* 566 F.3d at 1180. The only difference is that Clem's cellmate had merely threatened to assault him, while Aberha's cellmate had in fact just assaulted him—but that difference favors Aberha. *Cf. id.* So just as

[12] The plaintiff in *Castro* was a pretrial detainee, so formally his claim came under the Fourteenth Amendment. 833 F.3d at 1071. But as the Court explained at length, the Fourteenth Amendment standard for failure-to-protect claims is identical to the Eighth Amendment standard except for the mental state required. *Id.* at 1068–72. Because the availability of reasonable measures to abate the risk is an "objective component[]," the Eighth and Fourteenth Amendments share it in common. *Id.* at 1072; *see Farmer*, 511 U.S. at 847.

Clem was entitled to a "'failure to act' [jury] instruction," Aberha is entitled to present his case to a jury. *See id.* at 1182–83.

Delafontaine argues that the Eighth Amendment was satisfied once he "referred the matter [to Caseworker Travis] for further investigation." OB 29–30. He has forfeited that argument, too. His argument to the district court focused exclusively on his subjective knowledge. ER-65, 67–68; ER-113–14, 116–18; ER-130–33. He failed to argue below that even if he knew Aberha was in danger, he responded reasonably. *Ibid.* This Court should decline to consider that argument for the first time on appeal. *See Honcharov*, 924 F.3d at 1295–96.

At any rate, the argument is flawed in at least four ways. First, the record contains little evidence that Delafontaine *did* refer the matter to Travis. He says nothing of it in his declaration, which recounts only the following sequence of events: (1) He talked to Aberha around count time; (2) the officers began their headcount; (3) Aberha talked to Officer Sunday over the intercom during the headcount; and (4) Delafontaine returned to Aberha's cell after Booker assaulted him in front of Travis. ER-72. Travis, for her part, does declare that "unit staff" told her to investigate the matter—but she declines to say who. ER-75. As far as the record shows, it could just as easily have been Sunday. So Delafontaine has fallen short of his burden to show that he responded to the risk at all. Fed. R. Civ. P. 56(a). At best, the record is

ambiguous on this point, and resolving that ambiguity is the province of the jury. *See Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (per curiam).

Second, even if Delafontaine did refer the matter to Travis, *Clem* establishes that when a guard learns of a threat of *imminent* harm, he can't just walk away. 566 F.3d at 1180, 1183. Delafontaine himself understands this, which is why he insisted to the district court that if he had known he was "walking away from a potentially volatile situation," he "would have separated Aberha and Booker prior to count taking place." ER-118; ER-65. For purposes of his interlocutory appeal, he did know. And yet, he walked away.

Third, Travis appears not to have had the power or the duty to intervene in an assault. When Booker began beating Aberha in front of her, she "[waved] to correctional staff for assistance." ER-75. Her powers as a caseworker extended no further than "yell[ing] and order[ing]" Booker to stop. *Id.* In this she was like the safety-check "volunteer" in *Castro*. 833 F.3d at 1065. And as this Court explained there, "delegating" safety duties to such persons is not a reasonable way to abate a severe, known risk that one cellmate will assault another. *Id.* at 1073.

Fourth, it's undisputed that after Delafontaine left his cell, Aberha was at the mercy of Booker for fifty minutes before Travis arrived. OB 30. The record doesn't reflect a reason, but as the party moving for summary judgment, justifying the delay is Delafontaine's burden. He

offers no justification. Instead, he argues that fifty minutes is a reasonable amount of time to leave an inmate unattended in his cell with his assailant. *Id.* In *Castro*, the Court held that a supervisor who delayed "[s]ix minutes" after the volunteer's report of "inappropriate touching" "failed to respond fast enough." 833 F.3d at 1065, 1073. So fifty minutes is too long by an order of magnitude.

Delafontaine again invokes out-of-circuit cases to support his argument that asking Travis to investigate discharged his duty to Aberha. OB 28–29. The first, *Doe*, is unhelpful for the same reason as before: It involves a complaint about a guard, not an inmate. *See* 248 F. App'x at 71. Requiring officials to "divest[]" a guard of his duties after a single complaint would raise policy concerns not present in requiring officials to separate two inmates. *See id.*; *see also Whitson*, 602 F.3d at 927 (explaining that the Eighth Amendment requires different assumptions about guards' and inmates' conduct).

The other case, *Longoria v. Texas*, granted summary judgment to an administrative officer who knew nothing about the plaintiff's "communications with prison officials" or his "asserted fears of attack." 473 F.3d 586, 594 (5th Cir. 2006). She was two telephone calls removed from the officer on duty in the unit—Delafontaine's counterpart—and she told that officer to investigate the plaintiff's claim that he was in danger. *Id.* at 591. In other words, she told that officer

to do exactly what Delafontaine should have done. So *Longoria* offers Delafontaine no help either.

In the end, Delafontaine does not dispute that after he talked with Aberha, he left Aberha unattended with his attacker for fifty minutes. OB 30. He "let the state of nature take its course." *Farmer*, 511 U.S. at 833. That he was "not free" to do. *Id.*; *Clem*, 566 F.3d at 1180, 1183. So he is not entitled to summary judgment.

3. Delafontaine is not entitled to qualified immunity.

Under "the facts that the district court assumed when it denied summary judgment," *cf. Johnson*, 515 U.S. at 319, Delafontaine violated Aberha's clearly established right to protection from his cellmate. He is not entitled to qualified immunity.

3.1. Qualified immunity applies only when the law is unclear.

Qualified immunity shields government agents from liability for violating constitutional rights when they are not "clearly established." *Camreta v. Greene*, 563 U.S. 692, 705 (2011). It has two prongs: Whether the officer violated a right and whether that right was clearly established. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Courts may address the prongs in any order, but the Supreme Court has recognized that addressing the merits first is "often beneficial," and this

Court "typically" addresses the merits first. *Id.*; *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1168 (9th Cir. 2013).

Delafontaine bears the burden of proving he is entitled to qualified immunity. *Slater v. Deasey*, 789 F. App'x 17, 21 (9th Cir. 2019) (citing *Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir. 2005)). This issue may be the subject of a split within this circuit, *cf. Isayeva*, 872 F.3d at 946, but the Supreme Court has consistently held that a government agent seeking immunity bears the burden "of showing that such an exemption is justified." *Richardson v. McKnight*, 521 U.S. 399, 412 (1997) (quoting *Forrester v. White*, 484 U.S. 219, 224 (1988)) (qualified immunity); *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432 (1993) (absolute immunity); *see also Buckley v. Fitzsimmons*, 509 U.S. 259, 281 (1993) (Scalia, J., concurring) ("[T]he defendant official bears the burden of showing that the conduct for which he seeks immunity would have been privileged at common law in 1871."). The Court has also held that "qualified immunity is an affirmative defense and that the burden of pleading it rests with the defendant." *Crawford-El v. Britton*, 523 U.S. 574, 587 (1998) (quotation marks omitted).

To determine whether an officer violated clearly established law, this Court looks for factually similar cases, "mindful that there need not be a case directly on point." *A.K.H. ex rel. Landeros v. City of Tustin*, 837 F.3d 1005, 1013 (9th Cir. 2016) (quotation marks omitted). "The Supreme Court need not catalogue every way in which one inmate can

harm another" for a reasonable officer to understand that he must protect an inmate from a known threat of harm. *Wilk*, 956 F.3d at 1148 (quoting *Castro*, 833 F.3d at 1067). Even in novel factual circumstances, officials are not entitled to qualified immunity if their conduct "obvious[ly]" or "egregious[ly]" violates the Constitution. *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020) (per curiam) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741, 745 (2002)).

3.2. Aberha's right to protection from his cellmate has long been clearly established.

Booker sexually assaulted Aberha in September 2018. ER-26. Aberha's right to protection from Booker had been established long before that. Broadly, this Court has held that "[t]hat right has been clearly established since the Supreme Court's decision in *Farmer*." *Wilk*, 956 F.3d at 1150. And even at a more fine-grained level, *Clem* and *Castro* clearly established every element of the deliberate-indifference analysis years before the events at issue.

Objectively high risk. This Court had clearly established by 2009 that leaving an inmate trapped with a cellmate who has threatened to attack him exposes the inmate to a substantial risk of serious harm. *Clem*, 566 F.3d at 1180, 1182; *Wilk*, 956 F.3d at 1149–50 (confirming that *Clem* clearly established that rule). Booker here had in fact attacked Aberha already—but that only heightens the risk, so it doesn't make for a "novel factual circumstance[]." *Hope*, 536 U.S. at 741. Or,

if it does, the rule of *Clem* applies to it with "obvious clarity." *Id.* (quotation marks omitted); *Wilk*, 956 F.3d at 1150. Courts need not "catalogue every way in which one inmate can harm another" before a reasonable official is charged with understanding what the Eighth Amendment requires. *Wilk*, 956 F.3d at 1148 (quoting *Castro*, 833 F.3d at 1067).

Subjective knowledge. *Clem* clearly established that prison officials may not ignore an inmate's report that his cellmate has threatened him. 566 F.3d at 1180, 1182. From that rule, "every reasonable official would [also] understand" that he may not ignore an inmate's report that his cellmate has just attacked him. *See District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quotation marks omitted). Ignoring an assault is more egregiously unconstitutional than ignoring a threat, so *Clem* is "not only on point—it is *a fortiori* or super precedent." *See McCowan v. Morales*, 945 F.3d 1276, 1286 (10th Cir. 2019); *Hollister v. Tuttle*, 210 F.3d 1033, 1035 (9th Cir. 2000) (applying similar "a fortiori" principle); *see also, e.g.*, *Shannon v. Koehler*, 616 F.3d 855, 863 (8th Cir. 2010) (same); *Tellier v. Fields*, 280 F.3d 69, 86 (2d Cir. 2000) (same).

Nor does anything in *Clem* suggest that an inmate must further corroborate a threat to trigger a right to protection. So Delafontaine cannot use that excuse to "claim ignorance" of Aberha's right to protection from Booker here. *Cf. Wilk*, 956 F.3d at 1150.

Reasonable steps. *Clem* and *Castro* both clearly establish that Delafontaine's cavalier response to Aberha's report was unreasonable. Like Delafontaine, the guard in *Clem* continued with his headcount after learning of the threat to the inmate, and this Court held a reasonable jury could find him liable for that. 566 F.3d at 1180, 1183. After *Clem*, a reasonable official would have understood that when an inmate reports a threat from his cellmate, leaving the two unattended is not a reasonable response. And if there were any doubt, *Castro* confirmed in 2016 that delegating the task to someone who cannot prevent the harm is also unreasonable. 833 F.3d at 1073.

In sum, by September 2018, Delafontaine was on clear notice that he could not leave Aberha at the mercy of Booker and continue with his other duties. Because he did so anyway, he is not entitled to qualified immunity.

CONCLUSION

For all these reasons, the district court's order denying summary judgment should be affirmed.

Dated: September 13, 2022

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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