**No. 17-15288**
**In the United States Court of Appeals**
**for the Ninth Circuit**

---

**JOSE ABEL FIERRO**,

Plaintiff-Appellee,

*v.*

**KEITH SMITH**, *et al.*,

Defendants-Appellants.

---

On Appeal from the United States District Court for the District of Arizona
Paul G. Rosenblatt, District Judge
Case No. 2:13-cv-02173-JJT-BSB

---

# PLAINTIFF-APPELLEE JOSE ABEL FIERRO'S ANSWERING BRIEF

---

Mary-Christine Sungaila
Marco A. Pulido
Haynes and Boone, LLP
600 Anton Blvd.
Suite 700
Costa Mesa, CA 92626
Telephone: 949-202-3000
mc.sungaila@haynesboone.com
marco.pulido@haynesboone.com

Paula M. Mitchell
Loyola Law School
919 Albany St.
Los Angeles, CA 90015
Telephone: 213-736-1000
*Certified Law Students*:
Weston Rowland
Daniel Seabolt
Suzie Vardanyan

*Pro Bono Appointed Counsel for Plaintiff-Appellee Jose Abel Fierro*

# TABLE OF CONTENTS

**Page(s)**

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**

## STATEMENT OF JURISDICTION

This Court has jurisdiction over this interlocutory appeal of an order denying summary judgment on qualified immunity grounds to review only a limited set of questions: whether, drawing all inferences in favor of Fierro, his Eighth Amendment claim raised material issues concerning the existence of a clearly established constitutional violation. *See Cunningham* v. *City of Wenatchee*, 345 F.3d 802, 807 (9th Cir. 2003); *see also Pauluk* v. *Savage*, 836 F.3d 1117, 1121 (9th Cir. 2016). However, this Court lacks "jurisdiction over an interlocutory appeal that focuses on whether there is a genuine dispute about the underlying facts." *Knox* v. *Sw. Airlines*, 124 F.3d 1103, 1107 (9th Cir. 1997). Thus, this Court "cannot review" whether "there was insufficient evidence to show that" Fierro faced an objectively serious risk of harm, that "the [Defendants] acted with deliberate indifference, or that there was a causal relationship" between Defendants' unlawful conduct and Fierro's injuries. *See Pauluk*, 836 F.3d at 1121.

## STATEMENT OF THE ISSUES

1. An inmate repeatedly seeks to be placed in protective custody[1] after reporting to prison officials that he is being targeted, threatened, and assaulted by prison gang members. The officials are aware of these reports and post-assault medical records. Do the prison officials act unreasonably and violate the Eighth Amendment by refusing to put the inmate in the only place where he will be removed from the gang: protective custody?

2. In light of an inmate's clearly established right to be free from violence at the hands of other inmates and the consensus of authority holding that prison officials cannot unreasonably deny protective custody to an inmate who is targeted by a pervasive gang with a substantial presence in the prison, would a reasonable official in Defendants' position have known that he was acting unlawfully?

---

[1] Protective custody offers the "greatest degree of protection" to an inmate within the Arizona Department of Corrections who "is in need of protection from other inmates," and requires that an inmate in protective custody be housed only with other inmates who have received protective custody as well. ER 295-1–2 ¶¶ 1–2.

## STATEMENT OF THE CASE[2]

### A. As an *Arizona Republic* investigation found, inmate-on-inmate assaults and homicides were increasingly common in Arizona prisons between 2009 and 2011.

According to the *Arizona Republic*, between fiscal year 2009 and 2011, prisons within the Arizona Department of Corrections were among the deadliest in the Nation, with a homicide rate more than double the national average. ER 325-44. In fact, inmate-on-inmate assaults increased by 90 percent in that timeframe. *Id.* Inmate homicides were either perpetrated by violent cellmates or prison gangs. *Id.* For example, one Arizona prison inmate was beaten to death after prison officials reportedly transferred him—as well as the individuals who targeted the inmate—to the same facility. *Id.*

### B. Arizona prisons' protective custody policy.

The Arizona Department of Corrections has a procedure for evaluating protective-custody requests, which inmates may make in verbal or written form. ER 295-151. This process requires, at a

---

[2] At this stage, "all factual disputes are resolved, and all reasonable inferences are drawn, in plaintiff's favor." *Karl* v. *City of Mountlake Terrace*, 678 F.3d 1062, 1068 (9th Cir. 2012). The statement of the case is set forth consistent with that standard.

minimum, four prison officials to investigate and determine whether a threat exists to the requesting inmate; at each step, the entire protective custody file is reviewed so that each officer knows all of the information contained therein. *See* ER 295-150–172; 295-155 ¶ 1.6; 295-157 ¶ 1.2.3; 295-159 ¶ 1.2.2.

After an initial investigation by a shift commander and a Corrections Officer IV ("COIV"), the protective custody request and file are received by a Deputy Warden ("DW"), who assess whether additional investigation is required. *See* ER 295-154–57 If the Deputy Warden determines that additional investigation is required, the file is sent back to the officer who handled the initial investigation. *Id.* If the Deputy Warden makes a recommendation to deny or approve protective custody, the file and recommendation are forwarded to the Protective Custody Administrator ("PCA"). *Id.*

The PCA reviews the entire protective custody file (including prior protective custody requests), makes the final decision as to whether protective custody is warranted, and provides a written explanation if the PCA's decision differs from the Deputy Warden's. ER 295-157–58; 295-157 ¶1.1.1; 295-146 (listing summary of Fierro's prior protective

custody requests). The inmate may appeal the PCA's decision to the Security Operations Administrator ("SOA"), who reviews the protective custody file and makes the final decision. ER 295-159.

### C. Between 2011 and 2014, Fierro repeatedly sought protective custody after multiple threats and assaults by gang members, and was denied six times.

Between January 2011 and December 2013, Protective Custody Administrator Coffey, Security Operations Administrator Smith, Deputy Warden Ochoa, Deputy Warden Sanders, Deputy Warden Pruett, and Deputy Warden Forester (collectively, the "Defendants") refused Plaintiff-Appellee Jose Abel Fierro's ("Fierro") requests to be placed in protective custody—protection Fierro sought in order to escape the "Border Brothers," a prison gang pervasive enough to warrant recognition as a security threat group within the Arizona Department of Corrections. *See* ER 295-5, 8–10; 295-134, 146.

#### 1. Defendants deny Fierro's first request for protective custody after he was assaulted by his cellmate Nieto, a Border Brother.

In late January 2011, Fierro was housed at the Lewis-Rast Unit and a Mexican Mafia member, "Rock," told Fierro that prison official

Perry told him and "several" others to "keep an eye on" Fierro. ER 325-8 ¶¶ 9–11. These inmates inferred from Perry's statement that Perry was "accus[ing]" Fierro of "'snitch[ing]' on them." ER 325-8 ¶ 11.

The next day, Fierro's cellmate and Border Brother member, Nieto, confronted Fierro with Perry's accusations, called Fierro a "rat" and a "snitch," and "started pushing and shoving" Fierro. ER 325-9 ¶ 12. Fierro and Nieto fought, and Fierro broke his hand by inadvertently hitting a wall during the course of the altercation. *Id.* Fierro requested protective custody, and two of the Defendants—Security Operations Administrator Smith and Protective Custody Administrator Coffey, via her designee (Jerry Eitniear)—refused to recommend or grant protective custody. ER 325-11–12 ¶¶ 19(19)–(20); 295-20; 295-158 ¶1.5. Fierro was instead provided with "alternate placement" and transferred to the Tucson-Cimarron Unit in March 2011. ER 325-13 ¶ 24.

### 2. Defendants deny Fierro's second request for protective custody after he was twice assaulted by Border Brothers on the same day.

At the Tucson-Cimarron Unit, prison staff housed Fierro, a 54-year-old suffering from various physical ailments, with "the head"—a slang term for the leader—of the Border Brothers: Jose Molina-

Gastelum ("Molina-Gastelum"). ER 325-13 ¶ 24; 295-49. In early March 2011, Molina-Gastelum searched Fierro's personal effects and read his court documents, which showed that Fierro told police officers that other individuals were involved in a crime. ER 325-13–14 ¶ 25. A few days later, on March 11, Molina-Gastelum jettisoned scalding water directed at Fierro's face, and an altercation between the two ensued. ER 325-14 ¶ 26.

Immediately after this assault, Molina-Gastelum was taken to the medical center—but not before instructing two Border Brothers (Lopez and Nunez) to "take care" of Fierro. ER 325-14–15 ¶ 26. These two Border Brothers, along with a third—Valenzuela—assaulted Fierro, causing severe injuries. ER 325-14–15 ¶¶ 26–27; *see also* ER 325-69–70 (Alan Werner's declaration corroborating Fierro's account).

After the twin beatings of March 11, prison staff documented a 3.5" laceration on Fierro's forehead and medical staff saw Fierro for an "assault" at the request of "Sgt. K." ER 295-58; 325-71. Afterward, Fierro requested protective custody, but three of the Defendants—Deputy Warden Ochoa, Protective Custody Administrator Coffey, and Security Operations Administrator Smith—refused to recommend or

grant protective custody. ER 325-19 ¶¶ 37–38; 295-48; 295-55. Instead, Fierro was transferred to the Lewis-Morey Unit in April 2012. ER 325-21 ¶ 42.

### 3. Defendants deny Fierro's third request for protective custody after another inmate told him that he was not safe in general population.

Upon his arrival at the Lewis-Morey Unit, inmate "Flaco" gave Fierro a note telling Fierro to "leave the yard or get stuck." ER 325-21 ¶ 42. Fierro learned from another inmate that Fierro's problem with the Border Brothers could not be resolved and that Fierro "had to leave the yard." *Id.* (Fierro would later learn precisely why: one of the Border Brothers' leaders, Raul "R" Mondragon, had ordered a hit on Fierro and given inmates the "green light" to stab Fierro. *Id.*) Fearing for his life, Fierro requested protective custody. *Id.*

This time, Fierro's plea did not fall on deaf ears: Deputy Warden Schuster, relying on the investigative summary of an unidentified correctional officer, recommended protective custody for Fierro. ER 295-22, 65, 70. Schuster so recommended because: (1) Fierro reported that he received a note saying "leave the yard or get stuck"; (2) Fierro reported that he was given this note "because of" his fight with the

"head of the Border Brothers at Cimarron"; (3) Fierro reported that he was assaulted by inmates who pushed their way into his cell; and (4) Fierro "ha[d] extensive bodily injury from that assault." ER 295-70.

Deputy Warden Schuster explained the rationale for his recommendation: (1) it was Fierro's "third request for protective custody"; (2) Fierro reported that he could not "defend himself" in general population "due to his medical issues"; (3) Fierro reported that his "issues" were "related" to an "STG"—a security threat group—due to a fight with a named "Border Brothers suspect" who could not be housed with Fierro according to the prison's records. *Id.*

Notwithstanding Schuster's recommendation, Appellant Coffey (the Protective Custody Administrator) denied protective custody. ER 295-69. Appellant Smith claims that he did not receive Fierro's appeal, so Fierro's appeal of the protective custody decision was effectively denied. ER 295-63, 295-22 ¶ 27. Fierro was instead transferred to the Yuma-Dakota Unit in May 2012. ER 295-22.

#### 4. Defendants deny Fierro's fourth request for protective custody after he received a threat from two inmates who told him that he was on the "list."

Upon arrival at the Yuma-Dakota Unit, Fierro was approached by two inmates, Castillo and Hernandez, who told him "you have to go or else." ER 325-25 ¶ 51. Later that day, Fierro saw Hernandez pass Castillo what looked to be a piece of wire about four to seven inches long, and overheard Castillo say "wait for later to beat [Fierro] up." *Id.* at ¶¶ 51–52; ER 325-26 ¶ 55. Fierro requested protective custody, but three Defendants (Deputy Warden Sanders, Protective Custody Administrator Coffey, and Security Operations Administrator Smith) refused to recommend or grant protective custody. ER 325-27 ¶¶ 58–60. Fierro was instead transferred to the Winslow-Kaibab Unit in June 2012. ER 325-28 ¶ 61.

#### 5. Defendants deny Fierro's fifth request for protective custody after he received a note from The Raza offering protection from the Border Brothers.

Once at the Winslow-Kaibab Unit, Fierro received a note stating, "Hey Homie I know about your [problem], now if you wanna [sic] fix your problem you're going to have to run with the Raza & put in some

work by stabbing and killing whoever we tell you to." ER 325-28 ¶ 61; 295-9. Fierro requested protective custody, but three Defendants—Deputy Warden Pruett, Protective Custody Administrator Coffey, and Security Operations Administrator Smith—refused to recommend or grant protective custody. ER 325-28–29 ¶¶ 62–65; 295-24 ¶ 39, 295-97. Fierro was transferred to "maximum custody" in the Florence-Central Unit after having no "more placement options available." ER 325-30 ¶ 66.

**6. Defendants deny Fierro's sixth request for protective custody after he was threatened by another inmate.**

While at the Florence-Central Unit, Fierro learned that Raul "R" Mondragon had given the "green light" to kill him. ER 325-30 ¶ 67. In June 2013, inmate Jesus Rivera-Castro wrote a letter to prison staff stating as much. ER 325-117. In September 2013, prison officials transferred Fierro back to the Tucson-Cimarron Unit—the same unit where he had previously been beaten by Molina-Gastelum, Lopez, Nunez, and Valenzuela. ER 325-30 at ¶ 69.

Upon Fierro's arrival to the Tucson-Cimarron Unit, an inmate told Fierro that the inmates "knew about [Fierro's] issues and previous

[protective custody] requests," and that Fierro had to "leave the yard." ER 325-31 ¶ 71. Fierro requested protective custody, but three Defendants—Deputy Warden Forester, Protective Custody Administrator Coffey, and Security Operations Administrator Smith—refused to recommend or grant protective custody. ER 295-115; 295-26 ¶ 47; 325-31 ¶70. Fierro was transferred back to the Lewis-Morey Unit in December 2013—the same unit from which Fierro was removed after making his third protective custody request. ER 325-33 ¶ 75.

**7. Two Border Brothers attack Fierro within fifteen minutes of Fierro's arrival to the Lewis-Morey Unit and he again requests protective custody. This time, he receives protective custody.**

Upon Fierro's arrival at the Lewis-Morey Unit, two Border Brothers assaulted Fierro in a general population prison yard, the purview within which the Border Brothers' assaults and threats against Fierro were, by now, a familiar occurrence. ER 325-33 ¶ 75. Fierro requested protective custody for the seventh time. *Id.* For the second time, Deputy Warden Schuster recommended protective custody, finding that: (1) Fierro was only at the Morey Unit for fifteen minutes before being assaulted; (2) "this could be STG related"; (3) this was

Fierro's seventh protective custody request; and (4) "[a]ll of his requests have been related to the STG Border Brothers." ER 295-134–35.

Appellant Coffey, apparently unsatisfied with Schuster's recommendation, requested further proof that Fierro's issue was related to the Border Brothers. *See* ER 295-147 ("Looks to me like you are recommending P.C. because his issue **could** be STG related and he has **requested 7 times** and he was **assaulted by two inmates** within 15 min[utes] of hitting the yard. Please have SSU re-investigate this and provide documentation which supports their findings.") (emphasis in original). Further, Appellant Coffey also noted in an e-mail that there is no documentation "which indicates Fierro's statements have been checked out and either confirmed or not confirmed. There is no indication his claim of having a hit on him was investigated." ER 295-147. No further documentation was available, but Appellant Coffey nonetheless finally approved protective custody. ER 295-147; ER 295-135.

### D. Fierro files this action *pro se* against the officers who refused his requests for protective custody.

Fierro alleged four counts against multiple prison officials, including the six appellants here. ER 46-4. In Count One, Fierro alleged

violations of the Eighth Amendment due to the prison officials' failure to grant protective custody. *Id.* at 1–12. In Counts Two through Four, Fierro alleged that he was denied adequate medical care. *Id.* at 13–30. The latter three claims are not at issue in this appeal, as to which the court granted summary judgment after concluding that prison medical staff (none of the appellants here) did not act with deliberate indifference because the medical treatment Fierro complained about was not shown to be "unacceptable," and that there was insufficient evidence to ground liability against one of the prison medical officials. ER 421-29–48, 436-1.

### E. Defendants move for summary judgment, arguing that they responded reasonably to the risk of harm and that they did not violate clearly established law because they followed policy.

Defendants, along with codefendant prison officials Deputy Warden McCarville and Deputy Warden Schuster,[3] moved for summary judgment and submitted a declaration by Appellant Smith, Fierro's protective custody file, and Department Order 805—the protective custody policy. SER 23–40; ER 295-1–172.

[3] The district court granted summary judgment as to codefendants Schuster and McCarville. *See* ER 421-48.

On summary judgment, the prison officials contended that they were not deliberately indifferent because they responded reasonably to any risk of harm by granting Fierro alternative placement in general population. SER 34–37. Defendants further argued that they did not violate clearly established law because they followed the protective custody policy and cited an Eighth Circuit case, *Yellow Horse* v. *Pennington Cty.*, 225 F.3d 923, 927 (8th Cir. 2000), in support of their theory. SER 37–40. Defendants also claimed that "no court" had held that prison officials violate the Eighth Amendment when they investigate an inmate's protective custody request and follow prison policy in making the reasonable decision to deny protective custody to the inmate. *See* SER 39.

### F. Fierro opposes summary judgment.

Fierro opposed the motion *pro se*, contending that failure to protect prisoners from gangs amounts to deliberate indifference, that his right to be free from violence at the hands of other inmates was clearly established, and that the prison officials were not entitled to qualified immunity because they refused to grant protective custody. SER 19–22 (citing *Walsh* v. *Mellas*, 837 F.2d 789, 797–98 (7th Cir. 1988)

(holding that district court had sufficient evidence to find that officials violated Eighth Amendment right of inmate targeted by gangs)). Fierro also argued that no prison policy could prevent Defendants' liability here because they did not in fact follow the protective custody policy. SER 22.

In support of his opposition, Fierro marshaled a handwritten statement of facts and his own declaration, a declaration of a witness to the March 11, 2012 beating, medical records produced while he was being treated for his post-altercation injuries, and *Arizona Republic* news articles concerning inmate assaults and homicides in the Arizona prison system. ER 325 3–36, 39–45, 69–71, 117, 121. Fierro also proffered letters he wrote to Appellant Smith in April 2012, 325-96–97, and inmate Jesus Rivera-Castro's letter to prison staff confirming that Fierro had a 'hit' placed on him by Mondragon. ER 325-117.

In his submissions, Fierro disputed the prison officials' account of the events, stating, among other things, that: (1) Defendants did not follow the protective custody policy, SER 22; (2) the claims of being assaulted at Tucson-Cimarron were substantiated, as made apparent by the declaration of Alan Werner, ER 330-6 ¶ 17; (3) the note from the

Lewis-Morey Unit telling him to "leave the yard" was not found because it had been taken by prison staff, ER 330-8 ¶ 25; (4) prison staff did not review his court case to corroborate his claim that Molina-Gastelum thought he was a "snitch," 330-9, ¶ 30; (6) the Do Not House With ("DNHW") list was an unreasonable means of protecting him, as demonstrated by the fact that he was continuously threatened and assaulted by the Border Brothers, ER 330-10–11 ¶¶ 33, 35; (7) there were no alternative general population placements in which he could be housed, *id.*; and (8) he was in imminent danger of getting physically assaulted. *Id.*

### G. Defendants reply to Fierro's opposition.

Defendants filed a reply brief in which they contended that: (1) Fierro did not dispute that Department Order 805 governed the protective custody process or that protective custody and alternative placement were options for inmates with legitimate protection needs, SER 3–4; (2) Fierro did not dispute that Defendants followed Department Order 805, *id.*; (3) Defendants responded reasonably by investigating and choosing alternative means to protect Fierro, *id.* at 5; (4) Fierro had offered no evidence to show that Defendants failed to

investigate, *id.* at 6; and (5) the evidence in this case involved only a dispute over the existence of arguably superior alternatives. *Id.*

Defendants also argued that no court has held prison officials to be deliberately indifferent when they follow policy, evaluate the need for protective custody, and take reasonable action to ensure an inmate's safety. SER 4–6. They also argued that no court has held prison officials liable for making a reasonable alternative housing decision upon an inmate's request for protective custody. SER 6–7.

### H. The district court denies summary judgment, finding triable issues of material fact and a violation of clearly established Eighth Amendment law under Fierro's version of the events.

The district court found triable issues as to each element of Fierro's Eighth Amendment claims. ER 421-19–25. The district court first found a triable issue as to whether Fierro faced a substantial risk of harm after noting that Fierro had been labeled a snitch and had been assaulted by the Border Brothers. ER 421-19–20. Next, the district court found a triable issue as to the prison officials' awareness of the serious harm Fierro faced after detailing the multiple reports Fierro made to the prison officials about the Border Brothers. ER 421-21–23.

Third, the district court found a triable issue as to the reasonableness of Defendants' responses to Fierro's protective custody requests, given the multiple times Fierro requested protective custody, Deputy Warden Schuster's recommendation to grant protective custody, and Defendants' unexplained reason for returning Fierro to the Tucson-Cimarron and Lewis-Morey Units even after Fierro had already been removed from those very same units as a result of his prior protective custody requests. ER 421-25.

The district court then turned its attention to the "clearly established" prong of the qualified immunity analysis. ER 421-25. The district court began its analysis by construing the facts in Fierro's favor and reiterating that triable issues of fact existed as to Fierro's Eighth Amendment claim and whether the prison officials' conduct violated the Constitution. ER 421-26. The district court "therefore" reasoned that "[q]ualified immunity" "turn[ed]" on the clearly established prong of the qualified immunity analysis. *See id.*

Under the "second step" of the qualified immunity inquiry, the district court held that "the law on failure-to-protect under the Eighth Amendment was clearly established at the time [Fierro's] claim arose in

2011" and that "prison officials have a duty to protect a prisoner from violence at the hands of other prisoners." *Id.* The district court also rejected as inapposite the Eighth Circuit case proffered by the prison officials (*Yellow Horse*, 225 F.3d at 927) and then denied summary judgment on qualified immunity grounds. ER 421-27–28.

### I. The district court denies Defendants leave to file a second motion for summary judgment

Defendants sought leave from the court to file a second motion for summary judgment. ER 436-1. The district court denied that request, concluding that no previously unavailable evidence was introduced so as to warrant an expanded factual record. *Id.* at 5, 7.

In denying the motion, the district court also reiterated its bases in the original order for finding a triable issue as to the reasonableness of the prison officials' responses to the risk of harm Fierro faced (ER 436-3), explaining that the risk of harm Fierro complained about throughout the protective custody process was about remaining in the general population, that Defendants "did make the decisions to deny" Fierro's protective custody requests, and that, even if Defendants were not in control of deciding where Fierro would be sent, the question remained "whether it was reasonable for [the prison officials] to deny

[Fierro's protective custody] requests, which meant he remained in the general population." *Id.* at 6.

### J. This interlocutory appeal follows.

Six defendants—Ochoa, Pruett, Forester, Sanders, Smith, and Coffey—appealed the district court order denying the qualified immunity defense to Fierro's Eighth Amendment claims. ER 440-1–2.

## SUMMARY OF ARGUMENT

A prison official is not entitled to qualified immunity when (1) the official's conduct violated a constitutional right, and (2) that right was clearly established at the time of the violation. *See Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009). Such an official violates an inmate's Eighth Amendment right to be free from violence at the hands of other inmates when the official knows an inmate faces a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. *Castro* v. *Cty. of L.A.*, 833 F.3d 1060, 1067 (9th Cir. 2016).

The district court here, after meticulously detailing the evidence in the record, declined to deprive Fierro of his day in court, finding triable disputes of fact that a reasonable jury could consider in concluding that Defendants unreasonably responded to—and thus

disregarded—the serious risk of harm Fierro faced. ER 421-20, 23, 25. The resulting order denying summary judgment should be affirmed.

First, Defendants do not dispute that Fierro, an inmate in his 50s suffering from various medical ailments, faced an objectively serious risk of harm. Nor could they: the evidence showed that members of a pervasive prison gang, believing Fierro was a snitch, targeted and threatened Fierro and required him to seek the aid of prison medical staff after the gang members viciously assaulted Fierro four different times, one of which involved a three-on-one stomping. ER 325 ¶¶ 12, 26, 29, 75; 295-34; 295-58; 295-70; 325-71; 325-121.

Second, although Defendants now claim that they did not draw the inference that Fierro's safety was at risk, a reasonable jury could find otherwise. Fierro repeatedly reported the prison gangs' assaults and threats in seeking protective custody. And, as Defendants concede, "each" of them (including the four Defendants who were deputy wardens at distinct prison facilities) "independently reviewed *all* of the available information"—including Fierro's protective custody "history"—before refusing to recommend or grant protective custody. *See* Defendants' Opening Br. 36–37; SER 3; ER 295-65, 295-87, 295-146.

Third, anything short of placing Fierro in protective custody was unreasonable under the circumstances here. A reasonable juror could find on this record that Defendants' responses to the gang-related threats and assaults against Fierro (moving Fierro to the general population of another prison facility, a response that twice backfired when Fierro was actually returned to prisons from which he had already been removed) was wholly inadequate—and therefore unreasonable—because that course of action failed to remove Fierro from the general prison population (the domain where the Border Brothers' assaults and threats against Fierro thrived). Moreover, Defendants have come forward with no evidence as to why it was not penologically feasible to place Fierro in protective custody, the only place where he would be out of the Border Brothers' deadly reach.

Thus, viewing the evidence in the light most favorable to Fierro, as the district court and this Court must, the district court correctly concluded that Defendants' alleged conduct violated Fierro's clearly established right to be free from violence at the hands of other inmates and that Defendants were therefore not entitled to qualified immunity. *See Estate of Ford* v. *Ramirez-Palmer*, 301 F.3d 1043, 1048 (9th Cir.

2002). Indeed, an inmate's right to be free from violence at the hands of other inmates has long been clearly established. *See Castro*, 833 F.3d at 1067. Further, at the time each Appellant refused to grant Fierro protective custody, clearly established law fairly warned Defendants that prison officials violate the Eighth Amendment when they know of an ongoing risk to an inmate from a prison gang with a substantial presence in the facility and respond unreasonably to that risk by making a recommendation or decision that ultimately leaves the inmate in harm's way. *See, e.g.*, *Howard* v. *Waide*, 534 F.3d 1227, 1242 (10th Cir. 2008); *Rodriguez* v. *Sec'y for Dep't of Corr.*, 508 F.3d 611, 623 (11th Cir. 2007); *Hamilton* v. *Leavy*, 117 F.3d 742, 748 (3d Cir. 1997). Accordingly, this Court should affirm the district court order denying summary judgment on qualified immunity grounds.

## STANDARD OF REVIEW

A decision "denying summary judgment on the ground of qualified immunity" is reviewed de novo. *Bingham* v. *City of Manhattan Beach*, 341 F.3d 939, 945 (9th Cir. 2003); *see also See Elder* v. *Holloway*, 510 U.S. 510, 516 (1994). Whether federal rights asserted by a plaintiff were clearly established at the time of the alleged violation is a question

of law that this Court also reviews de novo. *Martinez* v. *Stanford*, 323 F.3d 1178, 1183 (9th Cir. 2003). A "challenge to [this Court's] appellate jurisdiction over an interlocutory appeal" is similarly reviewed de novo. *Pauluk*, 836 F.3d at 1120.

On summary judgment, courts must resolve any factual disputes—and must draw all reasonable inferences—"in favor of the plaintiff and decide the legal question as to whether the official's alleged conduct violated clearly established law." *See Cunningham* v. *City of Wenatchee*, 345 F.3d 802, 807 (9th Cir. 2003); *Karl*, 678 F.3d at 1068.

## ARGUMENT

### I. This Court Should Affirm the Denial of Summary Judgment on Qualified Immunity and Allow Fierro's Eighth Amendment Claim to Proceed.

#### A. Overview: qualified immunity standard.

This Court applies "a two-part analysis in qualified immunity cases." *Pauluk*, 836 F.3d at 1121. "First, a court must determine whether—resolving all disputes of fact and credibility in favor of the party asserting the injury—the facts adduced at summary judgment show that the officer's conduct violated a constitutional right." *Id.*

Second, "if the court determines that the conduct did violate a constitutional right, [the] second prong requires the court to determine whether, at the time of the violation, the constitutional right was 'clearly established.'" *Id.*

To state a section 1983 claim against prison officials for failure to protect, an inmate must establish: (1) that he was "incarcerated under conditions posing a substantial risk of serious harm" and (2) that the prison officials acted with "deliberate indifference" to his health or safety. *See Farmer* v. *Brennan*, 511 U.S. 825, 834 (1994). To show deliberate indifference, the prison official must know of and disregard an excessive risk to inmate health or safety. *See Castro*, 833 F.3d at 1068; *see also Lemire* v. *Cal. Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1078 (9th Cir. 2013) (deliberate-indifference inquiry is "fact-intensive and typically should not be resolved at the summary judgment stage"). A prison official disregards a substantial risk of harm "by failing to take reasonable measures to abate it." *Castro*, 833 F.3d at 1067.

To evaluate whether the right was clearly established, courts conduct "a two-part inquiry": "(1) Was the law governing the state official's conduct clearly established? (2) Under that law could a

reasonable state official have believed his conduct was lawful?" *Jeffers* v. *Gomez*, 267 F.3d 895, 910 (9th Cir. 2001).

### B. The limits of interlocutory review.

As a general matter, this Court has jurisdiction to hear appeals only from "final decisions." 28 U.S.C. § 1291; *Johnson* v. *Jones*, 515 U.S. 304, 309 (1995). The "Supreme Court has created an exception to the final judgment rule for certain interlocutory appeals when the district court has denied a motion for summary judgment based on qualified immunity." *Pauluk*, 836 F.3d at 1120–21. Such orders are "immediately appealable" under the collateral-order doctrine so long as the defendant presents this Court with a purely legal issue that does not require this Court to consider the correctness of the plaintiff's version of the facts. *See Cunningham*, 345 F.3d at 808 (orders denying qualified immunity are "collateral" because they "are said to fall within 'that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated'").

Accordingly, this Court has "jurisdiction over an interlocutory appeal from the denial of qualified immunity where the appeal focuses on whether the defendants violated a clearly established law given the undisputed facts," but this Court does "not have jurisdiction over an interlocutory appeal that focuses on whether there is a genuine dispute about the underlying facts." *Knox*, 124 F.3d at 1107. Where an appellant raises both of these issues and argues them in the "alternative," this Court may only "decide whether there is a material dispute about the correctional officers' conduct, and if so, assume those facts in the [plaintiff's] favor in order to determine whether the denial of qualified immunity was appropriate." *See Estate of Ford*, 301 F.3d at 1048; *see also Pauluk*, 836 F.3d at 1121.

Thus, to the extent the prison officials seek to interject doubt into the factual bases for Fierro's claims, this Court lacks jurisdiction to assess those arguments. For example, Defendants contend that the district court "improperly assumed facts not in the record" as to whether Defendants were "responsible for"—i.e., caused—Fierro's transfer "to the prison where he was harmed." *See* Defendants' Opening Br. 33–34. Defendants also contend that the district court erred in

finding a triable issue of fact as to whether they were aware of the harm Fierro faced, arguing that there "simply is no evidence that any of them drew the inference that Fierro faced a substantial risk of serious harm in general population." *See* Defendants' Opening Br. 35–36.

This Court lacks jurisdiction on interlocutory review to rule on such questions. In other words, as the Tenth Circuit has explained, "whether the district court erred in denying summary judgment on the grounds that [plaintiff] 'did not allege, or submit any evidence, that [the defendant] was responsible for the delay in his transfer' and that [plaintiff] 'failed to submit any evidence that the delay in surgery caused any harm'" present "the kind of 'evidence sufficiency' issues" that the court cannot "address" on an interlocutory appeal. *Garrett v. Stratman*, 254 F.3d 946, 954 (10th Cir. 2001).

Defendants also seek to inject evidence sufficiency concerns into the "clearly established" prong of the two-part qualified immunity inquiry. For example, they claim that they reasonably delayed placing Fierro in protective custody, but did so "once" there was a "credible" threat to his safety. *See* Defendants' Opening Br. 35, 44. But "all disputes of fact and credibility" must be drawn in Fierro's favor at this

stage, *see Pauluk*, 836 F.3d at 1121, and this Court has jurisdiction to answer the "clearly established" inquiry only if it assumes material disputes of fact in Fierro's favor. *See Estate of Ford,* 301 F.3d at 1048; *see also Weyant* v. *Okst*, 101 F.3d 845, 857 (2d Cir. 1996) ("While [defendant] proffered his own view that [the plaintiff's] condition was not sufficiently serious . . . a jury need not credit [defendant's] testimony as to his observations or his attitude").

We now explain why—gauged under the proper review standards and within the proper limits of interlocutory review—Defendants knew that Fierro faced a serious risk of harm from the Border Brothers, and acted unreasonably by refusing to grant protective custody. We also show that clearly established law at the time fairly warned Defendants that they were acting unlawfully.

### C. Defendants' failure to grant protective custody was unreasonable in light of the serious risk of harm Fierro faced from not being removed from the Border Brothers gang, and violated the Eighth Amendment.

#### 1. Defendants do not dispute that Fierro faced an objectively serious risk of harm from being targeted by the Border Brothers Gang.

Courts have held that the "risk of assault is a serious problem of substantial dimensions" for "prisoners targeted by gangs" and for prisoners labeled "snitches." [4] *See Lewis* v. *Richards*, 107 F.3d 549, 553 (7th Cir. 1997); *Reece* v. *Groose*, 60 F.3d 487, 488 (8th Cir. 1995) (reputation as a snitch places inmate "at substantial risk of injury at [other inmates'] hands"); *Valandingham* v. *Bojorquez*, 866 F.2d 1135, 1138–39 (9th Cir. 1989) (whether prison officials called inmate a "snitch" was material to plaintiff's Eight Amendment "right to be protected from violence while in custody"); *Walsh*, 837 F.2d at 798

---

[4] Because Defendants do not challenge Fierro's ability to establish the objective component of his Eighth Amendment claim, this Court may proceed to analyze Defendants' awareness of the serious risk of harm and the reasonableness of their responses to that risk. *See* Defendants' Opening Br. 26–27, 33–38; *Brown* v. *N. Carolina Dep't of Corr.*, 612 F.3d 720, 723 (4th Cir. 2010) (proceeding to analyze the subjective component of plaintiff's Eighth Amendment claims where, as here, the inmate suffered significant physical injuries after being assaulted and the objective component was uncontested).

(prisoner targeted by gangs); *David* v. *Hill*, 401 F. Supp. 2d 749, 756–57 (S.D. Tex. 2005) (collecting cases).

Here, from January 2011 to December 2013, the Border Brothers, a recognized security threat group or "gang" that operates within the Arizona Department of Corrections, assaulted Fierro four times—inflicting physical injuries that required Fierro to seek medical attention. ER 325 ¶¶ 12, 26, 29, 75; 295-34; 295-58; 295-70; 325-71; 325-121.[5]

Fierro's problems with the Border Brothers began in January 2011, when gang members perceived a prison official to have identified Fierro as a snitch. *See* ER 325-8 ¶ 11; *Valandingham*, 866 F.2d at 1138–39. Officer Perry told an inmate named "Rock" (who was a Mexican Mafia member) as well as "several" other inmates to "keep an eye on" Fierro. ER 325-8–9 ¶¶ 11–12. Rock and other inmates inferred from this statement that Fierro "snitch[ed]" on the Mexican Mafia. *Id.* The next day, Fierro and Nieto (who was a Border Brothers gang

---

[5] Notably, one of the *Arizona Republic* news articles in the record, which reported on the deadliness of Arizona state prisons between 2009 and 2011, largely foreshadowed the prison gang assaults and threats that Fierro would come to endure between 2011 and 2013. *See* ER 325-44.

member) fought after Nieto called Fierro a "rat" and "snitch" and "started pushing . . . and shoving" Fierro.[6] *Id.* Fierro broke his hand during the fight, and prison staff documented the medical treatment Fierro received. ER 295-34.

Fierro's reputation as a snitch heightened in early March 2012, when Molina-Gastelum, the Border Brothers' leader and Fierro's cellmate, searched Fierro's belongings and found Fierro's court documents, which indicated that Fierro "claimed others were present and fired . . . shots at" two individuals. ER 325-13 ¶ 25; 325-67. Based on this, a jury could reasonably infer that Molina-Gastelum believed Fierro had implicated others in crimes and was therefore a "snitch."

A few days later, on March 11, Fierro was twice assaulted by the Border Brothers. First, Molina-Gastelum attempted to pour hot water on Fierro's face, prompting a fight between the two. ER 325-14 ¶ 26. Second, shortly after the Fierro-Molina-Gastelum fight, Molina-Gastelum instructed fellow Border Brothers Lopez and Nunez to "take care" of Fierro "because [he had requested protective custody] and [was]

---

[6] The relationship between the Mexican Mafia and the Borders Brothers is unclear from the record evidence presented on summary judgment.

a 'snitch.'" ER 325-14–15 ¶ 26. Border Brothers Valenzuela, Lopez, and Nunez carried out that order—assaulting Fierro after Officer Molera opened Fierro's cell door at the gang members' request.[7] After the three-on-one beating, prison staff documented a 3.5" laceration on Fierro's forehead and medical staff saw Fierro for an "assault" at the request of "Sgt. K." ER 295-58; 325-71. Finally, within 15 minutes of Fierro's arrival at the Lewis-Morey Unit—the prison institution from which Fierro had been removed after making his third request for protective custody, and to which he was nonetheless transferred after making his sixth request for protective custody—two members of the Border Brothers assaulted Fierro a fourth time in December 2013. ER 325-33 ¶ 75; 295 ¶¶ 22, 29, 51. Afterward, medical staff noted numerous physical injuries to Fierro's head, torso, arms, and legs. ER 325-121.

Additional record evidence also shows that the Border Brothers targeted Fierro after January 2011: (1) in April 2012, a Border Brothers inmate sent Fierro a note saying "leave the yard or get stuck," ER 325-21 ¶ 42; (2) a fellow inmate told Fierro—as well as prison staff—that

[7] Alan Werner's declaration corroborates Fierro's account of the events on March 11, 2012. ER 325-69–70.

one of the Border Brothers' leaders instructed fellow inmates that they had the "green light" to stab Fierro, ER 325 ¶¶ 42, 67; ER 325-117; and (3) in May 2012, two inmates told Fierro that he had to "leave the yard" and that Fierro was on the "list." ER 325-25 ¶ 51.

In light of the evidence showing that a prison official labeled Fierro a snitch, that Fierro had such a reputation among fellow inmates, and that the Border Brothers targeted and assaulted Fierro because they believed he was a snitch, a reasonable jury could find that Fierro met the objective component of his Eighth Amendment claims. *See Brown*, 612 F.3d at 723; *Lewis*, 107 F.3d at 553; *Reece*, 60 F.3d at 488; *Valandingham*, 866 F.2d at 1138–39.

**2. Defendants knew Fierro faced a substantial risk of harm and failed to take reasonable measures to remove Fierro from the Border Brothers Gang.**

**a. Each Appellant actually knew about the substantial risk of harm Fierro faced.**

Defendants acknowledge that "each" of them "independently reviewed *all* of the available information"—including Fierro's protective custody history. Defendants' Opening Br. 36–37; *see also* SER 3 (admission also made in motion for summary judgment). Record evidence shows as much, as well. *See, e.g.*, ER 295-146 (seventh

protective custody request includes "[d]ate and summary of prior requests"); 295-65 (third protective custody request: "This is the third request for protection"); 295-87 (fourth request for protective custody: "Inmates [sic] 3rd request previous request [sic] were for the same reason"; "he claims it started when he fought a Border Brother at Cimarron"); 295-103 (fifth protective custody request: recounting claims Fierro made "[i]n a prior 805 [protective custody request]" and saying that Fierro "is manipulating the 805 process . . . ."); 295-123 (sixth protective custody request: "This is the inmate's SIXTH protection review. The inmate's protection history is as follows . . . .").

Where, as here, a "plaintiff presents evidence showing that a substantial risk of inmate attacks was 'longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it, then . . . a trier of fact [may] find that the defendant-official

had actual knowledge of the risk," and summary judgment is improper.[8] *Farmer*, 511 U.S. at 842–43.

*Rodriguez* aptly shows why a reasonable juror here could find that Defendants actually knew about the substantial risk of harm Fierro faced. 508 F.3d at 621. In that case, the Eleventh Circuit held that a reasonable jury could find that the defendant had actual knowledge of the risk of harm where the plaintiff told the defendant "(1) that he was a former Latin King [gang member] who decided to renounce his membership; (2) that members of the Latin Kings had threatened to kill him when he returned to the compound in retaliation for his renunciation; (3) that the compound at [the prison facility] was heavily populated with Latin Kings; and (4) that, in order to prevent an attempt on his life, he needed either to be transferred to another institution or to be placed in protective custody." *Id.*; *see also Case* v. *Ahitow*, 301 F.3d 605, 606–07 (7th Cir. 2002) (holding that summary judgment for defendant was precluded where plaintiff notified prison staff about

---

[8] A "prison official's knowledge is a question of fact, 'subject to demonstration in the usual ways, including inference from circumstantial evidence.'" *Wallis* v. *Baldwin*, 70 F.3d 1074, 1077 (9th Cir. 1995). On summary judgment, these inferences are to be drawn in the light most favorable to the nonmoving party. *Karl*, 678 F.3d at 1068.

threats from another prisoner). Below, we analyze the evidence in the record defendant by defendant.

*Ochoa*

Deputy Warden Ochoa reviewed Fierro's second request for protective custody, which was made after Fierro suffered the two assaults on March 11, 2012. ER 295-5 ¶¶ 16, 18; 325-19 ¶ 38. Fierro asserts in his declaration that "Ochoa recommend[ed]" alternative placement in general population "knowing very well that [his] issue" related to the Border Brothers, a security threat group. ER 325-19 ¶ 38. Indeed, Fierro's protective custody file included evidence of the injuries that he suffered after the January 2011 altercation with Nieto. ER 295-34, 295-40.

Ochoa also noted on March 13 that Fierro's cellmate, Molina-Gastelum, "told others that [Fierro] had snitched on the Mexican Mafia," and that other inmates "assaulted [Fierro] and took his paperwork," a slang term for court documents. ER 325-18–19 ¶¶ 36; 295-55. Further, Ochoa "added" Molina-Gastelum, "an influential member of the" Border Brothers "prison gang," to the list of inmates with whom Fierro could not be housed. ER 325-18 ¶ 35; 295-56; 295-57.

A reasonable jury could infer that Ochoa actually knew about the risk to Fierro because she recommended alternative general population placement—thereby showing she believed some protection to be necessary—rather than denying his request for relief altogether.[9] ER 295-55; 295-155 ¶ 1.5.1 (portion of prison policy permitting deputy warden to make recommendation or deny request altogether). In light of the foregoing, a reasonable jury could find that Ochoa knew that Fierro faced a substantial risk of harm.

*Sanders, Pruett, Forester, Coffey, & Smith*

Each of the remaining Defendants reviewed Fierro's protective custody file after Ochoa; a reasonable jury could thus find that they knew about the harm Fierro faced, as well. Further, each of the remaining Defendants reviewed one of Fierro's requests for protective

---

[9] Likewise, a jury could also reasonably infer that Defendants Sanders, Pruett, Forester, and Coffey were aware of the substantial risk of harm Fierro faced because they also thought Fierro was at the very least entitled to alternative placement. ER 295-8 ¶ 30; 295-9 ¶ 37; 295-10 ¶ 45; 295 ¶¶ 18, 25, 33, 40, 48, 54. A reasonable jury could infer that if Defendants truly disbelieved Fierro, they would have denied Fierro's request altogether. *See* ER 295-70; 295-155.

custody after Deputy Warden Schuster recommended that Fierro be placed in protective custody.[10] ER 295-67.

Deputy Warden Schuster, relying on the investigative summary of an unidentified correctional officer, recommended that Fierro be placed in protective custody after Fierro made his third request for protective custody. *See* ER 295-22–25; 295-65; 295-70; 421-10. Deputy Warden Schuster so recommended because (1) Fierro reported that he received a note saying "leave the yard or get stuck"; (2) Fierro reported that he was given this note "because of" his fight with the "head of the Border Brothers at Cimarron"; (3) Fierro reported that he was assaulted by

---

[10] Deputy Warden Sanders reviewed Fierro's fourth request for protective custody, which Fierro made on May 8, 2012, ER 295-8 ¶ 30; 325-26 ¶ 54; Deputy Warden Pruett reviewed Fierro's fifth request for protective custody, which Fierro made on June 18, 2012, ER 295-9 ¶ 37; Deputy Warden Forester reviewed Fierro's sixth request for protective custody, which Fierro made on September 17, 2013. ER 295-10 ¶ 45; Protective Custody Administrator Coffey reviewed Fierro's third and subsequent requests for protective custody, ER 295 ¶¶ 18, 25, 33, 40, 48, 54; and Security Operations Administrator Smith reviewed Fierro's protective custody appeals after his first, second, fourth, fifth, and sixth requests for protective custody were denied. *See* ER 325 ¶ 19; 295 ¶¶ 20, 35, 42, 50; 421-10–11.

inmates who pushed their way into his cell; and (4) Fierro "ha[d] extensive bodily injury from this assault." [11] ER 295-70; 295-66.

Deputy Warden Schuster explained his rationale for recommending protective custody: (1) it was Fierro's "third request for protection"; (2) Fierro reported that he could not "defend himself" in general population "due to his medical issues"; (3) Fierro reported that his "issues [were] STG related due to" a fight with a Border Brothers suspect who could not be housed with Fierro and who appeared as a "Border Brother suspect" in the prison's records. *See* ER 295-70. Deputy Warden Schuster's recommendation, which adopted the investigative summary of another correctional officer, constitutes highly probative "evidence showing that a substantial risk of inmate attacks was 'longstanding, pervasive, well-documented, [and] expressly noted by prison officials in the past." *See Farmer,* 511 U.S. at 842–43.

---

[11] Although the names of the inmates identified in Schuster's recommendation have been redacted in the excerpts of record, a reasonable jury could infer that Schuster was referring to the incidents relating to March 11, 2012—the date when Border Brothers' leader Molina-Gastelum assaulted Fierro and then instructed other Border Brothers to do the same. *See supra* Pt. I.C.1.

Additionally, Defendants expressly represent that they "independently reviewed *all* of the available information." Defendants' Opening Br. 36–37; *see also* SER 3 (admission also made in motion for summary judgment); ER 295-65, 87, 146, 103, 123. Based on this admission, as well as the record evidence corroborating that admission, a reasonable jury could find that Defendants Sanders, Pruett, Forester, Coffey, and Smith "must have known" about Schuster's recommendation and the risk of harm that Fierro faced. *See Hamilton*, 117 F.3d at 747–48 (finding "sufficient circumstantial evidence upon which a factfinder could conclude that [the defendant] 'must have known' of the risk to [the inmate's] safety" where she was "made aware of" this risk "when she reviewed" a "recommendation to place [the inmate] in protective custody").

Other record evidence would further aid a reasonable juror in finding that Sanders, Pruett, Forester, Coffey, and Smith were aware of the risk of harm to Fierro, as well. Security Operations Administrator Smith reviewed at least five appeals of the protective-custody denials, in which Fierro meticulously detailed his troubles with the Border Brothers. ER 325-12 ¶ 19 (19)–(20); 295-48, 49, 63, 80, 81 98, 100, 115,

116. Protective Custody Administrator Coffey also reviewed at least five of Fierro's protective custody requests. ER 325 ¶¶ 37, 38; 295-23, 24, 26, 27, 56,134. Fierro also alerted Deputy Warden Forester to the threats from the Border Brothers by detailing the assaults by Molina-Gastelum, Valenzuela, Lopez, and Nunez. ER 325-31 ¶¶ 70–73; 295-10 ¶ 45. Deputy Warden Pruett also was aware of Fierro's protective custody requests, but disbelieved Fierro and accused him of manipulating the protective-custody process. ER 295-9 ¶ 37; 325-28–29 ¶¶ 62–63. Deputy Warden Sanders expressed a similar sentiment in reviewing and denying Fierro's fourth request for protective custody. ER 295-8 ¶ 30; 325-26 ¶ 53 (11)–(12).

Accordingly, because Fierro has proffered circumstantial evidence that would allow a reasonable jury to infer that each Defendant drew the inference that Fierro faced a serious risk of harm, "it is not enough for the prison officials to claim they did not know about" that risk. *Wallis*, 70 F.3d at 1077; *see also Weyant*, 101 F.3d at 857 ("jury need not credit [defendant's] testimony as to his observations or his attitude"). Thus, a reasonable jury could find that Defendants were aware of the substantial risk of harm Fierro faced.

**b. The district court properly found a triable issue of fact concerning whether anything short of recommending or granting protective custody was unreasonable.**

The district court correctly found a triable issue of fact as to the reasonableness of the prison officials' responses to the risk of harm Fierro faced. ER 421-25. A prisoner's right to be free from violence requires that prison officials "take reasonable measures to mitigate the substantial risk" of harm to the inmate. *See Castro*, 833 F.3d at 1067. Courts have held that a prison "official responds to a known risk in an objectively unreasonable manner if he knew of ways to reduce the harm but knowingly [or] recklessly declined to act." *See Rodriguez*, 508 F.3d at 620 (quotation omitted); *see also Tafoya* v. *Salazar*, 516 F.3d 912, 918 (10th Cir. 2008) ("A prison official may be liable for a substantial risk of serious harm to inmates . . . if he intentionally refuses other reasonable alternatives and the dangerous conditions persist."); *Lewis* v. *Richards*, 107 F.3d 549, 553 (7th Cir. 1997) (requiring plaintiff to "demonstrate that the defendants either took no precautions to avoid a known hazard which the gang presented, or that the precautions they took ignored the risk which targeted inmates faced").

In assessing the reasonableness of a prison official's response, "the trier [of fact] must consider whether, in allegedly exposing the prisoner to danger, the defendant prison official(s) were guided by considerations of safety to other inmates, whether the official(s) took 'prophylactic or preventive measures' to protect the prisoner, . . . and whether less dangerous alternatives were in fact available." *Berg* v. *Kincheloe*, 794 F.2d 457, 462 (9th Cir. 1986). "If the evidence only involves a 'dispute over the . . . existence of arguably superior alternatives,' . . . then the Supreme Court has indicated that the plaintiff has not met his burden and the case should not be presented to a jury." *Id.*

Here, a reasonable juror could find that Defendants responded unreasonably to a substantial risk of harm by failing to recommend or grant protective custody, and that the circumstances here did not permit a choice between "arguably superior alternatives." *See id.; cf. Slone* v. *Dep't of Ariz. Corr.*, 308 F. App'x 110, 111 (9th Cir. 2009) ("Slone failed to raise a genuine issue of material fact as to whether defendants acted with deliberate indifference when they investigated his requests and transferred him to a different prison unit as an alternative to placing him in protective segregation"); *see also Comstock*

v. *McCrary*, 273 F.3d 693, 708 n.5 (6th Cir. 2001) (rejecting prison officials' contentions—like the ones Defendants press here—that it is not a court's "job to second guess" the officials' responses to an inmate's needs, *see* Defendants' Opening Br. 46, and rejecting their "position" that "if a prison [official] offers some [response], no matter how insignificant, he cannot be found deliberately indifferent").

Fierro was targeted by the Border Brothers—a prison gang that is present in the prison's general population, that is classified as a security threat group, and that has targeted Fierro out of a belief that he is a snitch. This is enough to raise a triable issue as to whether Defendants acted reasonably by merely circulating Fierro through multiple general population areas within various facilities of the Arizona Department of Corrections. *See Howard*, 534 F.3d at 1242 (inmate's Eighth Amendment claim survived summary judgment "because he . . . presented evidence, both direct and circumstantial, that prison officials *knew* he faced an ongoing risk from a prison gang with a substantial presence in the facility, and that they had reasonable responses available to them"); *Rodriguez*, 508 F.3d at 623 (reasonable jury could infer that defendant "knew that the actions he undertook

would be insufficient to provide [the inmate] with reasonable protection from violence" because defendant's recommended action would leave inmate with "no protection at all from the Latin Kings who had threatened his life"); *Hamilton*, 117 F.3d at 749 (triable issue of fact even when prison officials recommended protective custody because the failure "to take additional steps beyond the recommendation of protective custody could be viewed by a factfinder as the sort of deliberate indifference to inmate safety that the Constitution forbids").

In assessing the reasonableness of Defendants' responses, a reasonable jury could consider the lack of evidence showing that Defendants were "guided by considerations of safety to other inmates," as well as the lack of any other evidence as to why protective custody was not feasible, to conclude that the prison officials in this case unreasonably denied protective custody. *See Berg*, 794 F.2d at 462; *Howard*, 534 F.3d at 1241 ("Because prison officials chose to present absolutely no pertinent evidence to the district court, we must accept Howard's allegations that these alternative solutions might have been reasonable means of protecting his safety").

Indeed, there is evidence in the record that would aid a juror in arriving at the opposite conclusion—that Defendants' failure to grant protective custody was not based on safety to other inmates or other penological interests. That is because Defendants appeared more interested in first seeing physical evidence of an assault or threat before being willing to place Fierro in protective custody. *See*, *e.g.*, ER 295-87 (refusing to grant protect custody because "[i]nmate was not assaulted at Dakota" Unit); ER 295-115 (denying protective custody and claiming that inmate was "not threatened" or "assaulted"); ER 295-22 ¶ 27 (citing Fierro's failure to proffer a threating note as basis for denying protective custody); 295-103 (official noted Fierro's "prior 805 [protective custody request]" and claimed that Fierro was "manipulating the 805 process . . . ."). As the *Howard* court explained, a reasonable jury may rely on prison officials' statements, like the ones made here by Defendants, in assessing whether their "failure to attempt the remedies identified" by the inmate, like protective custody, were not based "on an inability to" grant the requested relief. *See Howard*, 534 F.3d at 1241.

In addition, a reasonable jury could also find that granting or recommending alternative placement in general population was an

unreasonable "prophylactic measure," *Berg*, 794 F.2d at 462, because protective custody—a "less dangerous alternative," *see id.*—was available and was the only solution that would have easily and effectively removed Fierro from the "dangerous conditions" posed by the Border Brothers. *See Tafoya*, 516 F.3d at 918. Indeed, a reasonable jury could infer from the number of times that alternative placement did not abate the risk of harm to Fierro's safety—five—that granting alternative placement was a wholly inadequate remedy, particularly because Fierro "exhaust[ed] all placement options" as of September 2012 and therefore had to be placed in "maximum custody" at the Florence-Central Unit. *See* ER 325-107; *Comstock*, 273 F.3d at 707–08 n.5 (wholly inadequate response "to an inmate's serious need may constitute deliberate indifference just as readily as the intentional denial or delay of treatment").

Further, that Fierro was in his 50s and had various medical ailments—which lessened his ability to defend himself—would aid the jury in finding that Fierro faced a heightened risk of harm from being assaulted by the Border Brothers. *See* ER 325-99; *Howard*, 534 F.3d at 1238 (in assessing reasonableness of the defendants' responses to

inmate targeted by a gang with a substantial presence in the facility, court considered plaintiff's physical "characteristics" because "a jury could conclude" therefrom "that [the defendants] knew [the inmate] was particularly vulnerable to assault").

Other record evidence would also permit a reasonable jury to find that Defendants acted unreasonably. First, a reasonable jury could infer that protective custody was the only reasonable alternative after considering that Fierro spent about a year in "maximum custody" without being harmed at the Florence-Central Unit. While in a "maximum custody" facility, "inmates have limited work opportunities within the secure perimeter," "require frequent monitoring," and "require escorted movement in full restraints within the institution." Ariz. Dep't of Corr. Order 801: Inmate Classification at 3 § 1.3.1 (Feb. 25, 2010); *see also* Ariz. Dep't of Corr. Order 801: Inmate Classification at 3 § 1.3.1 (July 21, 2017) (containing a similar description of the conditions of confinement in "maximum custody").[12]

---

[12] As indicated in Fierro's request for judicial notice, Fierro respectfully asks this Court to take judicial notice of Arizona Department of Corrections Order 801 (Inmate Classification) for the limited purpose of

Second, there is evidence that Fierro's reports were not "investigated." ER 295-147. This would be a violation of prison policy, ER 295-154 ¶ 1.3.1, and a reasonable jury could rely on Defendants' failure to request that Fierro's claims be thoroughly investigated—also a violation of prison policy—when concluding that their broader, substantive decisions to deny protective custody were unreasonable.[13] *See* ER 295-155 ¶ 1.6, 295-157 ¶ 1.2.3; 295-159 ¶ 1.2.2; *Hope* v. *Pelzer*, 536 U.S. 730, 744 (2002) (relying *in part* on an Alabama Department of Corrections regulation to conclude that use of "hitching post" violated an inmate's clearly established Eighth Amendment rights); *Rodriguez*,

---

establishing the general conditions of confinement for an inmate in "maximum custody."

[13] Fierro does not claim that the violation of prison policies is the sole linchpin on which his Eighth Amendment claims rest. *Cf. Estate of* Ford, 301 F.3d at 1052 (officials "[f]ailure to follow prison procedures" amounted to inactionable "negligence"). Rather, the violations of the procedure in the policy would aid the trier of fact in determining that Defendants' broader, substantive decision to refuse protective custody was unreasonable. *See generally United States v. Bogle*, 689 F. Supp. 1121, 1144 (S.D. Fla. 1988) (procedure "surely affect[s]" substance). After all, a juror could reasonably find that any reasonable official would have asked for further investigation before making the decision not to recommend or grant protective custody after seeing Fierro's protective custody file—which documented Fierro's post-assault medical records and other indicia of Fierro's troubles with members of the Border Brothers Gang.

508 F.3d at 623 (prison official could be found liable for constitutional violation where, as here, he had "the means substantially to improve [inmate's] safety" and could "set in motion procedures" to do so). In light of the foregoing evidence, a reasonable jury could find that Defendants unreasonably responded—and thus were deliberately indifferent—to the serious risk of harm to Fierro's safety.[14]

### D. Given the limits of interlocutory review, this Court has no jurisdiction to assess the sufficiency of Fierro's evidence as to causation. Even if this Court did have jurisdiction, however, it should affirm the district court's assessment that material triable

---

[14] Notably, this evidentiary showing—which shows a triable issue of fact as to whether Defendants were deliberately indifferent to a serious risk of harm—would be sufficient to deny qualified immunity to Defendants under the law of other circuit courts. *See Scinto* v. *Stansberry*, 841 F.3d 219, 236 n.9 (4th Cir. 2016), *cert. denied sub nom. Phillip* v. *Scinto*, No. 16-1545, 2017 WL 2734638 (U.S. Nov. 13, 2017) (noting the "special problem of applying an objective qualified immunity standard in the context of an Eighth Amendment claim that is satisfied only by a showing of deliberate indifference," noting that "[s]ome Circuits have resolved this problem by concluding that qualified immunity is unavailable when the plaintiff presents a genuine dispute of material fact regarding the defendant's deliberate indifference," and collecting circuit court cases showing a circuit-split between Ninth Circuit law and the law of other circuit courts) (internal quotations omitted); *see also Estate of Ford*, 301 F.3d at 1050 (interpreting Supreme Court case law and holding that the approach noted above improperly "collapses the deliberate indifference part of the constitutional inquiry into the qualified immunity inquiry").

**issues precluded summary judgment on this element as well.**

Defendants contend that they "cannot be held liable under the Eighth Amendment or § 1983" because they "had no personal involvement in any of the decisions regarding" the particular facility "where Fierro was transferred after their alternative-placement recommendations and approvals." *See* Defendants' Opening Br. 33–34. But as explained above, this Court lacks jurisdiction to assess the sufficiency of the evidence Fierro has proffered to show "a causal relationship between" Defendants' conduct and the harm he sustained. *See Pauluk*, 836 F.3d at 1120; *Garrett*, 254 F.3d at 954.

Even if this Court were to reach Defendants' argument, however, the Court should reject it. "[P]ersonal participation is not the only predicate for section 1983 liability." *Johnson* v. *Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). Indeed, anyone who "causes" the constitutional deprivation is liable, and the "requisite causal connection can be established . . . by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Id.* at 743–44. Likewise, this Court has also held that "direct causation by affirmative action is not necessary" to show a

defendant's deliberate indifference to a risk of harm. *See Castro*, 833 F.3d at 1067.

Here, because four of the Defendants (Ochoa, Sanders, Pruett, and Forester) failed to recommend protective custody, a reasonable jury could find them liable for the foreseeable consequences of their unreasonable recommendations. *See Rodriguez*, 508 F.3d at 622 (court erroneously concluded that a defendant could not have caused inmate's injury "because he did not have final authority . . . to order [inmate]'s release from close management" into general population); *Kerman* v. *City of New York*, 374 F.3d 93, 127 (2d Cir. 2004) ("The fact that the intervening third party may exercise independent judgment in determining whether to follow a course of action recommended by the defendant does not make acceptance of the recommendation unforeseeable or relieve the defendant of responsibility.").

Moreover, none of the Defendants can escape liability on the ground that they had "no part in transferring [Fierro] to the prison where he was harmed." Defendants' Opening Br. 34; *see also Johnson*, 588 F.2d at 743; *Anthony* v. *Schackmann,* 402 F. App'x 207, 208 (9th Cir. 2010) (holding that the "district court erred . . . in granting

summary judgment as to [inmate]'s retaliation claim on the ground that defendants did not personally decide to transfer Anthony to segregation after he complained about their conduct").

Finally, "foreseeability is normally an issue of fact," *Kerman*, 374 F.3d at 127, and a reasonable jury could find that the harm Fierro sustained was a foreseeable consequence of failing to recommend or grant protective custody because their actions were insufficient to remove Fierro from the Border Brothers who were present in the general prison population of the Arizona Department of Corrections. *See Rodriguez*, 508 F.3d at 623 (reasonable jury could infer that defendant "knew that the actions he undertook would be insufficient to provide [the inmate] with reasonable protection from violence" because recommended action would leave inmate with "no protection at all from the Latin Kings who had threatened his life"). Thus, this Court should reject Defendants' invitation to have this Court exceed its jurisdiction and impose a heightened evidentiary burden on Fierro's ability to show that Defendants' unlawful conduct foreseeably caused his injuries.

### E. Clearly established law fairly warned Defendants that they were violating the Eighth Amendment.

Qualified immunity "shields government actors from civil liability under 42 U.S.C. § 1983 if 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Castro*, 833 F.3d at 1066 (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). The foregoing "is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Hope*, 536 U.S. at 739 (internal citations omitted); *see also White* v. *Pauly*, 137 S. Ct. 548, 551 (2017) (Supreme Court has repeatedly held that its case law does "not require a case directly on point" for a right to be clearly established, but existing precedent must have placed the constitutional question beyond debate) (citing *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015)).

The failure of a prison official to respond reasonably to a known, credible threat to an inmate's safety has long constituted a clear violation of the inmate's Eighth Amendment rights. *See Farmer*, 511 U.S. at 837; *Robinson* v. *Prunty*, 249 F.3d 862, 866 (9th Cir. 2001); *Berg*,

794 F.2d at 460–61. At root, Fierro's version of the events, when assumed true, shows a violation of clearly established law because Defendants' failure to place him in protective custody left Fierro in a location within the general prison population where he was not removed from the serious risk of harm posed by the prison gang that targeted him. *See Case*, 301 F.3d at 607 (citing five circuit court cases, including one from the Ninth Circuit, and holding that defendants were not entitled to qualified immunity where there was "evidence that the defendants knew that [an inmate] posed a serious danger to [the plaintiff], and they could have averted the danger easily either by leaving [the plaintiff] in segregation . . . or by placing the predatory [inmate] in segregation or at least by assigning him to work in a part of the prison not traversed three times a day by" the plaintiff) (citing *Robinson*, 249 F.3d at 867); *accord Howard*, 534 F.3d at 1242 (inmate targeted by prison gang); *Rodriguez*, 508 F.3d at 623 (inmate targeted by prison gang); *Hamilton*, 117 F.3d at 749; *Leach* v. *Carey*, No. 100CV06139LJOGSAP, 2008 WL 618955, at *1 (E.D. Cal. Mar. 6, 2008), *aff'd sub nom*. *Leach* v. *Drew*, 385 F. App'x 699, 700–01 (9th Cir. 2010) (affirming district court's application of clearly established law in

denying qualified immunity to official who failed to protect inmate from gang) (citing *Robinson*, 249 F.3d at 866); *Barnard* v. *Cty. of Los Angeles*, No. CV0505611GAFFMOX, 2011 WL 13213574, at *10 (C.D. Cal. June 23, 2011) (denying summary judgment to defendant who placed inmate targeted by gang in general population, as facts were "materially [in]distinguishable from those in" *Leach*, which relied on *Robinson*).

Nonetheless, Defendants contend that a reasonable official in their shoes would not have known that he or she was acting unlawfully. But many years before the claims in this case arose, this Court held that "the law regarding prison officials' duty to take reasonable measures to protect inmates from violence at the hands of other prisoners was 'clearly established.'" *Robinson*, 249 F.3d at 866 (citing *Farmer*, 511 U.S. at 833). Defendants contend that this "define[s] the constitutional right at issue too broadly." Defendants' Opening Br. 28. But this Court, sitting en banc, has rejected that precise argument. *See Castro,* 833 F.3d at 1067. Consistent with Supreme Court precedent, this Court explained that "a right is clearly established when the 'contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.*;

*Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987) (contours of right must be "sufficiently clear that a reasonable official would understand that what he is doing violates that right.").

Here, the contours of Fierro's right, like those of the right of the inmate in *Castro*, "were his right to be free from violence at the hands of other inmates." *See id.* Further, as this Court recognized in *Castro*, the "Supreme Court need not catalogue every way in which one inmate can harm another for [this Court] to conclude that a reasonable official would understand that his actions violated [the inmate's] right." *Id.* (holding that "duty to protect [inmate] from violence was clearly established at the time of the incident," and rejecting defendants' contention "that such a broad description of that duty is too general to guide [this Court's] analysis").

Defendants also contend that, "[e]ven today, no precedent exists that clearly establishes that prison officials act unconstitutionally when they act as [Defendants] acted here in response to prisoners' protective custody requests." Defendants' Opening Br. 45. Not so. At the time Fierro made each of his requests for protective custody, courts had established that recommenders and decision makers can be held liable

for failing to recommend or grant protective custody where, as here, prison "officials *knew* [the inmate] faced an ongoing risk from a prison gang with a substantial presence in the facility, and that they had reasonable responses available to them" yet failed to choose a reasonable response. *See Howard*, 534 F.3d at 1242; *Rodriguez*, 508 F.3d at 623 (reasonable jury could find unreasonable defendants' response to "Rodriguez's requests for protection" because the defendant "only" recommended "that Rodriguez be returned to the compound" where "he would have no protection at all from the" gang "who had threatened his life"); *Hamilton*, 117 F.3d at 749 (recommenders and decision makers could be liable for failing to provide protective custody).

Defendants also suggest that they did not violate clearly established law because they "followed policy." Defendants' Opening Br. 37, 44. But Defendants' theory presupposes that a reasonable jury here could only find that they actually followed their policy. Not so. As shown above, a reasonable jury could find that Defendants violated their own policy because Fierro's reports were not investigated and because Defendants did not request further investigation by others despite the

well-documented gang threats and assaults in Fierro's protective custody file. *See supra* Pt. I.D.2.b.

Accordingly, because courts have held that prison officials are not entitled to qualified immunity when they disregard their own policy in the course of violating the Eighth Amendment, and because a reasonable jury could find that Defendants violated their own policy under the circumstances here, qualified immunity is unwarranted here. *See Walton* v. *Dawson*, 752 F.3d 1109, 1122 (8th Cir. 2014) ("violating an internal policy does not *ipso facto* violate the Constitution, but when that policy equates to the constitutional minimum under the totality of the circumstances," the court "appropriately focus on the objectively unconstitutional conduct which breaches the policy"); *cf. Yellow Horse*, 225 F.3d at 928 (official who actually followed the policy was entitled to qualified immunity).

Further, even assuming *arguendo* that Defendants did follow their policy, courts had made clear in 2011 that prison policies cannot override constitutional duties. *See, e.g.*, *Howard*, 534 F.3d at 1241 ("Because prison officials are required to take reasonable protective action once a risk comes to their attention, [reliance on a policy] does

not satisfy the defendants' Eighth Amendment duties because the limitations of prison grievance procedures cannot override constitutional duties."); *see also Gardner* v. *Howard*, 109 F.3d 427, 430–31 (8th Cir. 1997) (defendant's liability attaches for the violation of a "constitutional right," regardless of any violation of "prison policy").

Finally, Defendants suggest that the district court believed the "second prong" of the qualified immunity inquiry was to be answered by the jury. *See* Defendants' Opening Br. 41–42. Not so. As shown above, the district court correctly began its analysis on qualified immunity by crediting Fierro's version of the events as true, and then addressed the clearly established inquiry. *See Pauluk*, 836 F.3d at 1121. That is the correct methodology when reviewing qualified immunity claims, and so the district court did not err by collapsing these twin inquiries into one, as Defendants claim. *See id*. Moreover, even if this Court could not discern the basis for the district court's denial of qualified immunity, the proper remedy would be to remand the case—not dismiss the claims against Defendants. *See Maropulos* v. *Cty. of L.A.*, 560 F.3d 974, 975 (9th Cir. 2009).

After properly conducting the two-part qualified immunity inquiry and reviewing clearly established law at the time, the district court correctly concluded that pre-existing law fairly warned Defendants about the unlawfulness of their conduct. *See Hope*, 536 U.S. at 739. Therefore, this Court should affirm the denial of summary judgment.

## CONCLUSION

For the foregoing reasons, this Court should affirm the denial of summary judgment and remand the case for a trial on the merits.

Respectfully submitted,

Dated: December 8, 2017

HAYNES AND BOONE, LLP

By: /s/ Mary-Christine Sungaila
Mary-Christine Sungaila
Pro Bono Appointed Counsel for
*Plaintiff-Appellee Jose Abel Fierro*

**Certificate of Compliance, Fed. R. App. P. 32(a)**

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B)(i) because:

■ this brief contains 12,360 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

■ this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Century Schoolbook
font.

Dated: December 8, 2017

HAYNES AND BOONE, LLP

By: /s/ Mary-Christine Sungaila
Mary-Christine Sungaila
Pro Bono Appointed Counsel for
*Plaintiff-Appellee Jose Abel Fierro*

## Statement of Related Cases

Appellee is not aware of any related cases currently pending in the Ninth Circuit.

Dated: December 8, 2017

HAYNES AND BOONE, LLP

By: /s/ Mary-Christine Sungaila
Mary-Christine Sungaila
Pro Bono Appointed Counsel for
*Plaintiff-Appellee Jose Abel Fierro*

## Certificate of Service

I hereby certify that, on this 8th day of December, 2017, I electronically filed the foregoing Answering Brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: December 8, 2017

HAYNES AND BOONE, LLP

By: /s/ Mary-Christine Sungaila
Mary-Christine Sungaila
Pro Bono Appointed Counsel for
*Plaintiff-Appellee Jose Abel Fierro*

4820-9900-6040