

No. 25-1623

**In the United States Court of Appeals
For the Ninth Circuit**

BENJAMIN ESPINOSA,

Plaintiff-Appellee,

v.

WILLIAM GITTERE, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Nevada
Case No. 3:21-cv-00205
(Hon. Anne R. Traum)

PLAINTIFF-APPELLEE'S ANSWERING BRIEF

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INTRODUCTION

This case arises from the failure of Nevada Department of Corrections staff to protect Plaintiff-Appellee Benjamin Espinosa from repeatedly receiving food contaminated by feces and other toxic substances and subsequent retaliation against Mr. Espinosa for complaining about the persistent poisoning of his food. The district court found that genuine disputes of material fact precluded a defense of qualified immunity on Mr. Espinosa's First and Eighth Amendment claims. Defendants filed an interlocutory appeal of the district court's order, but rather than raise any purely legal questions—the only type of question this Court has jurisdiction to review—they ask this Court to revisit the district court's determinations relating to the sufficiency and admissibility of evidence and to resolve factual disputes in their favor. Because this Court cannot reach any of the questions posed by Defendants in this appeal, it should be dismissed for lack of jurisdiction.

If this Court concludes that it has jurisdiction over any aspect of Defendants' arguments, it should affirm. As the district court concluded, a reasonable jury could find that Mr. Espinosa's Eighth Amendment rights were violated when he and other incarcerated people reported the

poisoning of their food and Defendants failed to take adequate measures to stop it, and that Mr. Espinosa's First Amendment rights were violated when he was taken from his cell and moved to the infirmary for thirteen days, where he faced increased restrictions on his movement, on the same day the Warden received his grievance complaining about food tampering . And because the Eighth Amendment right to adequate food and the First Amendment right to file grievances free from retaliation were both clearly established, the district court properly denied qualified immunity to Defendants.

STATEMENT OF JURISDICTION

The district court had jurisdiction over Mr. Espinosa's claims under 28 U.S.C. § 1331 because they arise under the First and Eighth Amendments to the U.S. Constitution. *See* 1-ER-002; 4-ER-424-25. This Court, however, lacks jurisdiction to decide this appeal. As explained in detail below, though this Court generally has jurisdiction over the district court's denial of qualified immunity as an immediately appealable collateral order, *see Hernandez v. City of San Jose*, 897 F.3d 1125, 1132 (9th Cir. 2018), this Court lacks jurisdiction over the "question of 'evidence sufficiency,' i.e., which facts a party may, or may not, be able to

prove at trial,” *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995). Defendants’ entire appeal is made up of such evidentiary questions that this Court should not reach. As a result, it should be dismissed for lack of jurisdiction. *See* Argument § I, *infra*.

STATEMENT OF THE ISSUES

1. Does this Court have jurisdiction to reach the factual questions posed by Defendants in this appeal?

2. Did the district court correctly hold that Defendants are not entitled to qualified immunity on Mr. Espinosa’s Eighth Amendment claim?

3. Did the district court correctly hold that Defendants are not entitled to qualified immunity on Mr. Espinosa’s First Amendment claim?

STATEMENT OF THE CASE

I. Factual Background

Mr. Espinosa was incarcerated at Ely State Prison between 2019 and 2021. 4-ER-414-43.¹ During that time, Defendant William Gittere

¹ Because Mr. Espinosa proceeded pro se below, the district court properly considered his verified complaint as evidence in support of his motion for summary judgment. *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004).

was the Warden at the Prison, Defendants William Ruebart and David Drummond were Associate Wardens, Defendant Jon Verde was the Food Manager, Defendant Dennis Homan was the Kitchen Staff Sergeant, and Defendant Harold Wickham was the Deputy Director of Prisons at the Nevada Department of Corrections. 4-ER-416-17; 4-ER-500. During his time at Ely State, Mr. Espinosa was housed in protective custody, separate and apart from individuals housed in general population or classified as part of a “security threat group.” 1-ER-003; 4-ER-417-18 ¶¶ 17, 19.

In September 2019, while eating dinner, Mr. Espinosa and other protective-custody individuals notified Defendants Gittere, Ruebart, and Drummond that they believed feces had been mixed into their food. 4-ER-417 ¶ 17. They reported that the dinner “contained a pungent, foul smell, that was intensified when microwaved.” 2-ER-148 ¶ 4 (Decl. of E. Alvarado); 2-ER-151 ¶¶ 4-5 (Decl. of M. Herrod). Thirty or forty people “got extremely sick that night with vomiting.” 2-ER-148 ¶ 6; 2-ER-151 ¶ 6; 2-ER-107. Their food had been prepared by individuals housed in general population, who were working in the kitchen supervised by Defendants Verde and Homan. 4-ER-417 ¶ 17. Usually, while food was

being prepared, Verde “mostly remained in the office” on his computer and tHoman “was almost never in the culinary [unit] overseeing workers.” 2-ER-153 ¶4-5.

Gittere, Ruebart, and Drummond visited the protective-custody unit to investigate the food tampering incident. 4-ER-418 ¶¶ 20–21. They also reviewed security footage and discovered two general population individuals tampering with food. 4-ER-418 ¶ 22. The pair was arrested, “placed in the hole,” and interviewed by law enforcement. 4-ER-418 ¶ 22. Defendants have refused to disclose whether they faced disciplinary action or criminal charges. 2-ER-204.²

² Mr. Espinosa sent Defendants a request for production of documents, asking for “Redacted version[s] of Notice of Charges of any and all inmates charged for the ‘feces incident’ occurring between September 1, 2019 to October 31, 2019 spoken of in Plaintiffs First Amended Complaint[.]” 2-ER-213. Defendants did not produce any documents, but not on the basis that there existed no responsive documents; they objected for the stated reason that the information sought was “confidential” and “sensitive,” and would “breach confidentiality laws, rules and regulations for other inmates.” 2-ER-214. Mr. Espinosa requested similar information in interrogatories, asking whether any “inmate(s) [were] charged criminally and/or disciplinarily for incident occurring on September 18, 2019 as spoken of in the F.A.C.,” or whether any “inmates ever fired from the culinary for suspicion of food tampering.” 2-ER-204. Defendants did not provide an answer, writing that it is “against NDOC policies to reveal one inmate’s disciplinary action(s) to another inmate.” 2-ER-204.

Following the incident, general-population individuals working in the kitchen started poisoning food using “white flash,” an odorless and tasteless detergent. 4-ER-418 ¶ 23; 4-ER-463 ¶¶ 22-23. The detergent states on its packaging that it is “caustic” and that, if it is ingested, poison control should be called. 4-ER-418 ¶ 23. Mr. Espinosa and his cellmate also found dirt, hair, and dust bunnies in their eggs, and saw eggsbrown and dirty as if mixed with mop water. 2-ER-145; 2-ER-121; 2-ER-116. Other people in protective custody found “toenail clippings, metal shavings, and pencil lead in their food.” 2-ER-159 ¶ 8. According to someone working in the kitchen at the time, when people complained about the food being contaminated or sent it back to the kitchen, Defendants Verde and Homan would direct them to put the food in a new tray and serve it again. 2-ER-154 ¶¶ 11-13.

Mr. Espinosa and others notified Gittere, Ruebart, Wickham, Drummond, Verde, and Homan about the ongoing contamination of their food, including by filing grievances. 2-ER-108; 4-ER-418 ¶ 24;; 2-ER-159 ¶ 13 (Decl. of J. P. Koppenhaver); 2-ER-163 ¶ 8 (Decl. of G. M. Tiaffay); 2-ER-156 ¶ 3 (Decl. of J. Holman). In response, Defendants purportedly began “randomly switch[ing] food cart containers,” so that the people

preparing the food would not know where the food they prepared was being delivered. 4-ER-419 ¶ 26. But Mr. Espinosa and others who had worked in the kitchen observed that this failed to prevent the poisoning because the cellophane covering the food containers still had the “original unit’s number written on it in marker.” 4-ER-419 ¶ 27 & n.3; 2-ER-145 ¶¶ 20-22. Additionally, someone working in the kitchen observed that the carts were not switched by prison staff but by the incarcerated people who Mr. Espinosa and others suspected of poisoning the food, so they were aware which ones were switched. 2-ER-153 ¶¶ 8-9. Mr. Espinosa and others notified Defendants that the cart-switching, tray-swapping, and other protective measures they had supposedly implemented were not effective, but Defendants took no action, asserting that the measures were working. 2-ER-117, 119-22; 2-ER-139 ¶8 (Decl. of B. Espinosa); 2-; 2-ER-159-60 ¶¶ 13-15 (Decl. of J. P. Koppenhaver); 2-ER-172-73.

Mr. Espinosa and others continued to suffer health consequences as a result of the contamination of their food. Mr. Espinosa experienced “numbness of tongue[,] bubbling of guts, acid reflux, [and] severe heartburn.” 4-ER-419 ¶ 29. As Mr. Espinosa described in grievances, he “had to stop eating state food altogether.” 3-ER-353; 2-ER-116. When he

tried to eat, his mouth would get “extremely dry from the chemical taste.” 3-ER-353; *see also* 2-ER-163 ¶ 8 (describing meal as “tast[ing] like soap”). Others suffered the same symptoms, with the most common being “bubbling of guts, cramping, and numbness of tongue.” 4-ER-419 ¶ 29 n.4; 2-ER-152 ¶ 12; 2-ER-149 ¶ 11.

As a precaution, Mr. Espinosa and his cellmate began washing their meals before eating them. 4-ER-420 ¶ 37; 2-ER-143 ¶ 6. On or about June 6, 2020, while the pair were washing their shredded chicken, they discovered a “wire[,] like from a scotch bright” brush in the chicken. 2-ER-110; 4-ER-420-21 ¶¶ 38-39; 2-ER-143 ¶ 7. Mr. Espinosa reported finding the metal wire to his unit correctional officer, who advised him to send a kite to Gittere. 4-ER-421 ¶ 39; 3-ER-346; 2-ER-144 ¶ 8. Mr. Espinosa sent the kite and taped the metal wire onto the kite. 2-ER-110; 4-ER-421 ¶ 40; 2-ER-144 ¶ 9. Defendant Gittere’s office received the kite two days later. 2-ER-110. The same day, a cell extraction response team arrived to Mr. Espinosa’s cell and forcibly moved him to the infirmary. 4-ER-421 ¶ 41; 2-ER-144 ¶¶ 10-11. The officers who extracted him from his cell said that they had been ordered to do so by Gittere. 2-ER-140 ¶ 12; 2-ER-144 ¶ 10. Mr. Espinosa informed them he did not want to go to the

infirmery, but they told him it had been ordered by Gittere so it was “non-negotiable,” 2-ER-144 ¶ 11, and, if he “refused, they would have to mace [him] and his cellmate,” 2-ER-140 ¶ 12. Individuals held in the infirmary are not allowed to leave their cell without handcuffs, and they are denied access to “recreation, tier time, food items from [the] canteen,” and other prison “programming.” 4-ER-421 ¶ 42; 2-ER-192-93. It was “widely known that Def[endant] Gittere places inmates who challenge him in the infirmary under custody for a period out of retaliation as he knows inmates do not like remain there.” 4-ER-421 ¶ 43. After Mr. Espinosa was taken to the infirmary, an investigator called his cellmate into the office because Gittere had directed that he investigate whether Mr. Espinosa put the wire in his food. 2-ER-144 ¶ 12-13. The investigator told Mr. Espinosa’s cellmate that “Gittere was ‘pissed’ that Mr. Espinosa keeps pushing and ruffling feathers,” and that, by moving him to the infirmary, Gittere “is just showing that he can complicate Mr. Espinosa’s time.” 2-ER-144-45 ¶ 14-16; *see also* 4-ER-421-22 ¶¶ 47-48.

Mr. Espinosa sent a kite to Gittere asking why he had been moved, given that at that time, he felt “completely healthy” and did not have “any type of symptoms that would warrant medical attention,” and he asked

to be returned to his cell. 3-ER-357; 3-ER-359; 2-ER-171; 2-ER-114. Mr. Espinosa received a response stating, “You are custody status.”³ 3-ER-357. He sent a second kite two days later, stating that “the warden said that I am in the infirmary to be evaluated by medical but he is mistaken as I do not have any health conditions nor do I want to be evaluated.” 3-ER-358.

When Mr. Espinosa asked staff why he was being held in the infirmary, one correctional officer told him, “Oh yeah, you’re the stupid one who kited the warden. That’s why you are here.” 4-ER-421 ¶ 46. Mr. Espinosa was held in the infirmary for thirteen days before he was moved back to his cell. 4-ER-421 ¶ 44; 3-ER-359. Upon his return, he filed a grievance against Defendant Gittere “for retaliating” against him “by placing [him] in the infirmary.” 2-ER-168-69; *see also* 2-ER-111-12.

Mr. Espinosa continued to file grievances reporting food poisoning symptoms. 4-ER-422 ¶ 48; 2-ER-175; 2-ER-177 (stating the food contamination is “not an isolated incident” and has “been documented by

³ Individuals admitted to the infirmary are placed in either “medical” or “custody” status. ER-189-90. In Defendants’ words, individuals are placed in “custody” status “when non-medical supervisory personnel assess that a medical or mental health problem is present and should be evaluated by medical personnel.” ER-190-91.

at least 25 inmates (or near)"). At one point, Mr. Espinosa and his cellmate were moved to a "mixed lockdown unit," which held a mix of protective custody and general population individuals, and Mr. Espinosa's symptoms "stopped completely." 4-ER-422 ¶ 51. While in the mixed unit, Mr. Espinosa spoke with people in general-population custody who "admitted that they were poisoning" protective-custody food "using the white, caustic[] cleaning agent." 4-ER-422 ¶ 53. One of the individuals told Mr. Espinosa that a member of the staff "would give them a heads up when the carts are switched." 4-ER-422 ¶ 54. The moment that he returned to an all-protective custody unit, "his symptoms all came back." 4-ER-422 ¶ 52.

After eight months, Mr. Espinosa was finally tested for *H. pylori* bacteria. 4-ER-420 ¶¶ 32–33; 4-ER-372.⁴ The test returned positive, and he was placed on an "aggressive form of antibiotics which cured his acid reflux, heartburn, and ulcers." 4-ER-420 ¶ 35. He has since been

⁴ *H. Pylori* is a bacterium that infects the stomach lining and is a common cause of stomach and intestinal ulcers. Mayo Clinic, *Helicobacter pylori* (*H. pylori*) infection (June 14, 2025), <https://www.mayoclinic.org/diseases-conditions/h-pylori/symptoms-causes/syc-20356171>.

transferred to a different facility within the Nevada Department of Corrections.

II. Procedural History

In May 2021, Mr. Espinosa operating pro se filed a complaint in the U.S. District Court for the District of Nevada. He then filed an amended complaint. 4-ER-414-28. As relevant to this Motion, his amended complaint alleges (1) a violation of the First Amendment against Defendant Gittere, on the basis that Gittere's order to move Mr. Espinosa to the infirmary constituted retaliation against him for filing complaints regarding the food contamination, 4-ER-424; and (2) an Eighth Amendment deliberate indifference claim against Defendants Gittere, Ruebart, Wickham, Drummond, Verde, and Homan, for failing to protect Mr. Espinosa from the contaminated food, 4-ER-424-25.

Defendants moved for summary judgment, arguing, in short, that they were entitled to qualified immunity, 3-ER-273, that no constitutional violations had occurred, 3-ER-275-83, and that—despite the numerous grievances, kites, and complaints Mr. Espinosa filed—there was “nothing” that would have put “any of the Defendants” on notice that they were acting in a retaliatory manner by moving Mr.

Espinosa into the infirmary or that Mr. Espinosa presented any “serious medical need.” 3-ER-283. Mr. Espinosa opposed the motion, attaching supporting declarations, medical kites, grievances, and arguing that material factual disputes precluded judgment. 2-ER-227-55.

The magistrate judge recommended granting the motion. 1-ER-028. Mr. Espinosa then filed objections to the report and recommendation, 2-ER-071-80, which the district court overruled, 2-ER-027. Mr. Espinosa filed a motion for reconsideration, arguing that the court had erred in finding no genuine dispute of material fact as to the elements of his deliberate indifference and retaliation claims, 2-ER-050-57. On reconsideration, the court agreed, vacating its prior orders and denying Defendants’ motion for summary judgment and denying qualified immunity. 1-ER-013. The court then entered an amended order, correcting the standard for a motion for reconsideration, adding a finding of clear error, and instructing the clerk of court to reopen the case. 1-ER-002. “No other part of the Court’s order” denying Defendants’ motion for summary judgment “ha[d] been amended” by the order. 1-ER-002.

The district court’s denial of Defendants’ summary-judgment motion was premised on factual disputes that precluded resolution of the

claims at summary judgment. On the Eighth Amendment claim, the district court held that (1) Mr. Espinosa sufficiently alleged “he was exposed to feces and cleaning detergent in his food, which is a substantial risk of serious harm” within the meaning of the Eighth Amendment, 1-ER-040; 1-ER-027; 1-ER-017; (2) Defendants permitted general population individuals to cook for individuals held in protective custody, 1-ER-018; and (3) “[m]any” protective-custody individuals grieved or told Defendants that the general-population kitchen staff “were tampering with protective custody inmates’ food months before and months after” Mr. Espinosa was transferred to Ely State Prison, 1-ER-018. The court further held that genuine disputes of material fact remained with respect to Defendants’ knowledge that the random tray-swapping was ineffective in preventing poisonings or whether they knew that their other protective measures were ineffective, 1-ER-019. Resolving these disputes, the court explained, “requires credibility determinations” that cannot be made on summary judgment.⁵ *Id.*

⁵ The district court also held that Defendant Homan’s role in these events is “a question of fact that precludes summary judgment.” *Id.*

On the First Amendment claim, the district court held that (1) the close temporal proximity between the retaliatory act (Mr. Espinosa being forcibly sent to the infirmary on June 8) and the motive for retaliation (Mr. Espinosa sending the kite on June 6) “is sufficient to show a causal connection,” 1-ER-036; 1-ER-027; 1-ER-020; (2) the cell-extraction team threatened to mace Mr. Espinosa if he did not comply with extraction to the infirmary, 1-ER-020-21; (3) Mr. Espinosa lost “recreation time and other privileges” while in the infirmary, 1-ER-021; and (4) Mr. Espinosa “put forth facts that show a retaliatory motive,” namely, that Mr. Espinosa had “grieved and otherwise complained about his and other protective-custody inmates’ food being contaminated and the inadequacy of Defendants’ corrective measures.” 1-ER-022.

Defendants appealed both the district court’s order denying summary judgment and the later amended order, “to the extent that [they] den[y] Defendants’ motion for summary judgment asserting immunity from suit, including but not limited to qualified immunity[.]” ER-490. Mr. Espinosa then moved to dismiss the appeal, arguing that this Court lacks jurisdiction to consider the fact-bound questions raised by Defendants in an interlocutory posture. Dkt. No. 25. The motions

panel denied the motion without prejudice to raising the jurisdictional argument in this brief. Dkt. 33.

STANDARD OF REVIEW

This Court “review[s] the district court’s denial of qualified immunity de novo.” *Rosenbaum v. City of San Jose*, 107 F.4th 919, 924 (9th Cir. 2024). That review, however, is “circumscribed”: the Court cannot review “[a]ny decision by the district court that the parties’ evidence presents genuine issues of material fact.” *Id.* “Instead, [the Court] must consider only ‘whether the defendant would be entitled to qualified immunity as a matter of law, assuming all factual disputes are resolved, and all reasonable inferences are drawn, in plaintiff’s favor.’” *Id.* The Court “must affirm the district court’s denial of qualified immunity if, resolving all factual disputes and drawing all inferences in [the plaintiff]’s favor, Defendants’ conduct (1) violated a constitutional right (2) that “was clearly established at the time of the officer[s]’ alleged misconduct.” *Id.*

Because Mr. Espinosa was pro se in the district court, the Court “must consider as evidence in his opposition to summary judgment all of [Mr. Espinosa]’s contentions offered in motions and pleadings, where

such contentions are based on personal knowledge and set forth facts that would be admissible in evidence, and where [Mr. Espinosa] attested under penalty of perjury that the contents of the motions or pleadings are true and correct.” *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004).

SUMMARY OF ARGUMENT

This Court lacks jurisdiction over this appeal. On an interlocutory appeal from a denial of qualified immunity, this Court can review only purely legal questions, not factual disputes about sufficiency of the evidence. And where the district court has found that disputed material facts preclude a finding of qualified immunity, this Court cannot review that determination or reweigh the facts. Defendants ask this Court to do precisely that. Although Defendants attempt to frame some of the issues as questions of law, their arguments boil down to the claim that Mr. Espinosa’s evidence was insufficient to create a triable issue of fact for a jury. And while whether a right is clearly established for the purposes of qualified immunity can often be a legal question, here Defendants’ arguments on that question all depend on resolving disputed facts in their favor, rather than taking the evidence in the light most favorable to Mr. Espinosa.

To the extent this Court concludes it does have jurisdiction, it should affirm the denial of qualified immunity. First, as to the Eighth Amendment claim, a reasonable jury could conclude that there was an objective risk of harm that Mr. Espinosa would be served food contaminated with feces, detergent, and other items, and that each Defendant was aware of that risk and failed to take basic steps to prevent Mr. Espinosa from being served contaminated food. And because the right to adequate food is clearly established by Supreme Court and Ninth Circuit precedent, Defendants are not entitled to qualified immunity.

Second, as to the First Amendment claim, a reasonable jury could conclude that Defendant Gittere moved Mr. Espinosa to the infirmary because of his protected activity of filing complaints about food contamination. And the move to the infirmary for thirteen days without medical justification would chill a person of ordinary firmness from exercising their First Amendment rights because the infirmary comes with significant restrictions, including being kept in a cell 24 hours a day without recreation time or time to socialize with other people. And because Mr. Espinosa has shown that his protected activity motivated the transfer, he has created a genuine dispute of material fact as to

whether Defendants’ stated justification for moving him—concern for his health—was in fact pretext for retaliation. Because the right to be free from retaliation for filing grievances is well-established in this Circuit, Defendants are not entitled to qualified immunity.

ARGUMENT

I. This Court Lacks Jurisdiction over this Appeal.

As Mr. Espinosa explained his Motion to Dismiss, Dkt. 25, this Court lacks jurisdiction. Defendants acknowledge (at 3-5) that both the Supreme Court and this Court have repeatedly made clear that courts of appeal have sharply circumscribed appellate jurisdiction to hear interlocutory appeals of otherwise non-final denials of qualified immunity. *See Plumhoff v. Rickard*, 572 U.S. 765, 771-72 (2014); *Foster v. City of Indio*, 908 F.3d 1204, 1209-10 (9th Cir. 2018). This Court has jurisdiction to hear such appeals only when they raise “purely legal . . . contention[s]” that undisputed conduct “did not violate the [Constitution] and, in any event, did not violate clearly established law.” *Foster*, 908 F.3d at 1210 (quoting *Plumhoff*, 572 U.S. at 773). Defendants cannot appeal “a *fact*-related dispute about the pretrial record, namely, whether or not the evidence in the pretrial record was sufficient to show

a genuine issue of fact for trial.” *Johnson v. Jones*, 515 U.S. 304, 307 (1995). And this Court “may not reweigh the evidence to evaluate whether the district court properly determined there was a genuine issue of material fact.” *Id.* at 1213. In other words, this Court has jurisdiction “only if the appellant concedes the facts and seeks judgment on the law.” *Adams v. Speers*, 473 F.3d 989, 991 (9th Cir. 2007).

Party presentation controls the inquiry: Even if the underlying order contained appealable “abstract issue[s] of law,” *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996) (citation modified), this Court evaluates its jurisdiction from the “nature of the defendant’s argument on appeal.” *Est. of Anderson v. Marsh*, 985 F.3d 726, 730 (9th Cir. 2021).

Defendants’ arguments on appeal far exceed the scope of this Court’s jurisdiction. Their arguments largely fall into one of two categories: (1) Mr. Espinosa’s evidence fails to support a finding that he has met the elements of his claims, and (2) the district court erred in relying on evidence that—in Defendants’ view—was inadmissible. In the present interlocutory posture, the Court cannot reach questions in either category. And to the extent Defendants argue that the district court erroneously found the law was clearly established, that is still not a legal

question over which this Court has jurisdiction because their argument depends on the Court resolving disputed facts in their favor. Accordingly, this appeal should be dismissed.

A. This Court Does Not Have Jurisdiction Over Defendants’ Arguments Concerning Evidentiary Sufficiency.

In arguing primarily that Mr. Espinosa “failed to establish” the elements of his claims or “failed to meet his burden,” Opening Br. at 22-29, 38-46, Defendants ask this Court to review questions of “evidence sufficiency” over which it lacks jurisdiction. *Johnson*, 515 U.S. at 313; *see also Ames v. King Cnty.*, 846 F.3d 340, 347 (9th Cir. 2017) (“When the district court has determined the parties’ evidence presents genuine issues of material fact, such determinations are not reviewable on interlocutory appeal.”). Defendants spend the bulk of their Opening Brief arguing that the district court improperly weighed the evidence presented. On Mr. Espinosa’s Eighth Amendment claim, Defendants argue that the district court’s ruling should be reversed because Mr. Espinosa failed to provide sufficient evidence demonstrating that (1) his food was being contaminated with either feces or detergent, Opening Br. at 23-25; (2) Defendants knew that his food was contaminated, *id.* at 27-

29; (3) Defendants failed to sufficiently respond to the risk of contamination, *id.* at 30-32; and (4) the contamination caused Mr. Espinosa's health problems, *id.* at 34-36. Defendants also argue that the district court gave insufficient deference to the Nevada Department of Corrections' own conclusions regarding the food tampering. *Id.* at 48-53. On the First Amendment claim, Defendants similarly argue that Mr. Espinosa failed to provide sufficient evidence demonstrating that (1) Defendant Gittere ordered him transferred to the infirmary, *id.* at 38-39; (2) the transfer was an adverse action because it had a chilling effect on his speech, *id.* at 41-42; and (3) there was a causal connection between the transfer and his protected activity, *id.* at 44-46.

These arguments about the sufficiency of the evidence are plainly not reviewable. *See Johnson*, 515 U.S. at 307. This Court has consistently declined to reach appeals concerning whether a fact is material, genuine, or supports a particular inference, which is what Defendants ask this Court to do here. In *Singh v. City of Phoenix*, 124 F.4th 746, 755 (9th Cir. 2024), for example, the defendant cross-appealed from a district court order concluding that there were disputes of material fact that prevented finding as a matter of law that the defendant's use of force was

reasonable. This Court dismissed the cross-appeal, explaining that it “lack[s] jurisdiction to review a district court’s conclusion that genuine factual disputes exist.” *Id.* (quoting *Sialoi v. City of San Diego*, 823 F.3d 1223, 1230 (9th Cir. 2016)). Here, too, the district court determined that there were genuine disputes of material fact that precluded finding as a matter of law that Defendants did not violate Mr. Espinosa’s Eighth and First Amendment rights, and this Court lacks jurisdiction to review that conclusion as Defendants request. *See also, e.g., Peck v. Montoya*, 51 F.4th 877, 886 (9th Cir. 2022) (refusing to exercise jurisdiction where defendants challenged the district court’s determination that there was a genuine issue of fact as to whether the plaintiff “was moving toward the gun when the [defendants] fired at him”); *Conatser v. N. Las Vegas Police Dep’t*, 445 F. App’x 932, 933 (9th Cir. 2011) (concluding Court did not have jurisdiction over defendants’ arguments that “the district court erred because the evidence cannot support” the inferences made by the court); *Brizuela v. City of Sparks*, No. 22-16357, 2023 WL 5348815, at *1 (9th Cir. Aug. 21, 2023) (declining jurisdiction over defendants’ assertion that “there [was] no evidence to dispute the Officers’ testimony and corroborative evidence”).

Principally relying on *Behrens*, *Plumhoff*, and *Carley v. Aranas*, 103 F.4th 653 (9th Cir. 2024), Defendants argued in response to Mr. Espinosa’s motion to dismiss that this Court does not lack jurisdiction simply because the district court found a genuine dispute of material fact. Dkt. No. 30 pp. 2-3. But Mr. Espinosa does not argue that this Court lacks jurisdiction simply because the district court found that disputes of fact exist, but rather because Defendants’ purportedly legal questions require this Court to review that conclusion and resolve factual disputes in Defendants’ favor. And, as this Court has held, “[a]ny decision by the district court that the parties’ evidence presents genuine issues of material fact is categorically unreviewable on interlocutory appeal.” *Rosenbaum v. City of San Jose*, 107 F.4th 919, 924 (9th Cir. 2024).

That’s consistent with *Behrens*, *Plumhoff*, and *Carley*. In *Behrens*, the Supreme Court confirmed “that summary judgment determinations are appealable when they resolve a dispute concerning an ‘abstract issu[e] of law’ relating to qualified immunity.” 516 U.S. at 313 (quoting *Johnson v. Jones*, 515 U.S. 304, 313 (1995)). It then reversed this Court’s judgment and remanded with instructions to determine whether, viewed “in the light most favorable to the nonmoving party,” the defendants’

conduct constituted a violation of clearly established law. *Id.* at 313-14. Likewise, in both *Plumhoff* and *Carley*, courts resolved the clearly established question as a matter of law after “view[ing] the facts in the light most favorable to the nonmoving party,” *Plumhoff*, 572 U.S. at 768, or “assuming all factual disputes are resolved, and all reasonable inferences are drawn, in plaintiff’s favor,” *Carley*, 103 F.4th at 659.

Perhaps recognizing that this Court cannot review their evidence sufficiency argument, Defendants tried to reframe it as a legal one, arguing that Mr. Espinosa’s claims “are premised on bare allegations” and thus, they say, “no evidence” at all. Dkt. No. 30 p. 10 (quoting *Howard*, 2025 WL 275118, at *1; *Est. of Anderson v. Marsh*, 985 F.3d 726, 731 (9th Cir. 2021)). This Court has recognized a “narrow exception[]” to the “rule barring evidence-sufficiency challenges on interlocutory appeal” where the plaintiffs’ claims are premised *solely* on “bare allegations.” *E.g.*, *Howard*, 2025 WL 275118, at *1 (citation modified). But that narrow exception does not apply here, where Mr. Espinosa presented, and the district court analyzed, ample evidence supporting his claims. *See* 1-ER-006-012.

As to the Eighth Amendment claim, even if Defendants called Mr. Espinosa's allegations "bare" in their opposition to the Motion to Dismiss, that is not the argument they made in their Opening Brief. Instead, they challenged the district court's decision to rely on Mr. Espinosa's sworn testimony and that of his supporting witnesses that their food was contaminated with feces and cleaning detergent. Opening Br. p. 23-24. Defendants may not agree with that admissibility determination, but that does not convert Mr. Espinosa's sworn testimony, supported by contemporaneous documents and corroborating testimony, into "bare allegations." *See Howard*, 2025 WL 275118, at *1 (concluding that verified complaint and supporting documents were more than a mere "bare allegation").

As to Mr. Espinosa's First Amendment retaliation claim, Defendants did argue in their Opening Brief that Mr. Espinosa relies solely on "speculative or conclusory" allegations about Defendant Gittere's involvement in his cell extraction. Opening Br. p. 37. But even assuming sworn testimony based on personal knowledge could ever constitute "bare allegations" under this Court's precedent, Defendants acknowledge that the district court and the magistrate judge expressly

did not rely on Mr. Espinosa’s testimony. *Id.* p. 38-39 (citing 1-ER-027, 036); Dkt. No. 30 p. 9 n.1 (same). Instead, the district court and magistrate judge relied on other corroborating evidence to conclude there was a genuine dispute of material fact as to the warden’s involvement in Mr. Espinosa’s transfer—namely, that responses to Mr. Espinosa’s kites refusing to remove him from the infirmary appear to be from the Warden. 1-ER-005.

In short, in “an interlocutory appeal, [this Court is] not free to revisit the district court’s conclusions as to ‘which facts a party may, or may not, be able to prove at trial.’” *Nicholson v. City of Los Angeles*, 935 F.3d 685, 693 (9th Cir. 2019) (quoting *George v. Morris*, 736 F.3d 829, 834 (9th Cir. 2013)). Defendants’ desire “to appeal [the] district court’s determination that the evidence is sufficient to permit a particular finding of fact after trial,” *Johnson*, 515 U.S. at 314, does not remedy this Court’s lack of jurisdiction to review those determinations.

B. The Admissibility of Mr. Espinosa’s Evidence Is Not Within the Scope of Interlocutory Review.

In addition to arguing that Mr. Espinosa’s evidence was not sufficient, Defendants argue that the district court improperly relied on inadmissible evidence in concluding that there were genuine disputes of

material fact that precluded summary judgment. Opening Br. at 22-26; 33-34, 38-39. In particular, they accuse the district court of “wrongly” relying on Espinosa’s “allegations” about being exposed to contaminated food because those allegations are “inadmissible” for lack of “personal knowledge.” *Id.* at 22-26. But this Court has routinely held that it “lack[s] jurisdiction” over interlocutory appeals raising questions concerning the admissibility of evidence because an argument that the plaintiff “failed to present sufficient *admissible* evidence to prove certain elements” is itself an inherently “factual argument[.]” *See Gomez v. Cnty. of Los Angeles*, 314 F. App’x 928, 930 (9th Cir. 2009) (emphasis added); *see also*, *e.g.*, *Howard*, 2025 WL 275118, at *1 n.1 (confirming that court could “[n]ot assess whether the district court erred in disregarding [the defendant’s] requests for admission as part of the record”); *Sneed v. Chase*, 266 F. App’x 545, 545–46 (9th Cir. 2008) (stating that an appeal “argu[ing] that [the plaintiff] failed to introduce sufficient admissible evidence to create . . . triable issues” did not raise any justiciable “question[s] of law”); *Munoz v. Curtis*, 47 F. App’x 501, 502 (9th Cir. 2002) (declining to reach appellant’s argument that the appellee “failed to produce authenticated, admissible evidence to support his assertions”

because jurisdiction is “limited to questions of law and does not extend to . . . questions about evidentiary sufficiency at summary judgment”).

Defendants claim this Court can exercise jurisdiction over that evidence-related question because the Supreme Court in *Plumhoff* “rejected the argument that an appellate court lacks jurisdiction to exclude immaterial or improperly admitted evidence when reviewing issues.” *Id.* at 3 (citing *Plumhoff*, 572 U.S. 765, 772-73 (2014)). It did no such thing. *Plumhoff* did not even mention the admissibility of evidence, let alone overrule this Court’s precedent holding that courts of appeals do not have jurisdiction over an interlocutory appeal concerning the admissibility of evidence. 572 U.S. at 772-73. To the contrary, it examined the purely legal question whether, *based on the undisputed facts*, the defendants violated the Fourth Amendment. *Id.* at 774-78. Nor is that how this Court has interpreted *Plumhoff*. In *Voskanyan v. Upchurch*, No. 21-55333, 2022 WL 4181664 (9th Cir. Sept. 13, 2022), for example, this Court held, after *Plumhoff*, that it did not have jurisdiction over an appeal from a denial of qualified immunity where the defendant’s argument depended on “the district court’s exclusion of prison medical records and an expert report.” *Id.* at *2.

This Court’s holding in *Voskanyan* is in accord with the approach of other circuits, which have similarly held, after *Plumhoff*, that “evidentiary objections are beyond the scope of [] interlocutory jurisdiction.” *Ellis v. Salt Lake City Corp.*, 147 F.4th 1206, 1223 (10th Cir. 2025); see *Locke v. Haessig*, 788 F.3d 662, 672 n.4 (7th Cir. 2015) (holding that “[t]he admissibility” of a “statement” on which the district court relied in denying qualified immunity was “not within the limited scope of our appellate jurisdiction on this interlocutory appeal”); see also *Bridges v. Morgan*, No. 21-12425, 2022 WL 342905, at *3 (11th Cir. Feb. 4, 2022) (per curiam) (holding that admissibility argument “is not one we have interlocutory jurisdiction to review since it merely concerns ‘the facts a party may, or may not, be able to prove at trial’”).

“[B]oiled down,” Defendants’ arguments concerning admissibility ask this Court to conclude “that the evidence is insufficient to raise an issue of material fact.” *Voskanyan*, 2022 WL 4181664, at *5 (Christen, J., concurring). And when defendants argue *that*, this Court “lack[s] jurisdiction.” *Id.*

C. Defendants’ Presentation of the Clearly Established Question Deprives This Court of Jurisdiction Over It.

This Court also lacks jurisdiction over the question whether Mr. Espinosa’s rights were clearly established. Again relying on *Plumhoff*, Defendants attempt to frame their argument that Mr. Espinosa did not establish a violation of a clearly established right as a legal question over which this Court can exercise jurisdiction. Opening Br. p. 3-4. But, as Defendants acknowledge, jurisdiction over the “clearly established” question is appropriate only if it can be resolved “assuming all factual disputes are resolved, and all reasonable inferences are drawn, in plaintiff’s favor.” *Id.* at 4 (quoting *Carley v. Aranas*, 103 F.4th 653, 658-59 (9th Cir. 2024)). Defendants resist that requirement: Their presentation of the question requires this Court to rule on the admissibility of Plaintiff’s evidence and resolve factual disputes in *Defendants’* favor. *See id.* at 47. Because they “have not advanced an argument as to why the law is not clearly established that takes the facts in the light most favorable to [the plaintiff],” this Court lacks jurisdiction. *George*, 736 F.3d at 836; *see also Singh*, 124 F.4th at 756 (dismissing appeal where defendant did “not argue that there was no Fourth

Amendment violation even if all disputed facts are construed in Plaintiff's favor"); *Knox v. Sw. Airlines*, 124 F.3d 1103, 1107 (9th Cir. 1997) (stating the 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.*" (emphasis added)).

On Mr. Espinosa's Eighth Amendment claim, for example, Defendants ask this Court to answer whether it was clearly established that "a defendant violates the Eighth Amendment based on a failure to protect from food contamination" *qualified* by its construction of the facts that Espinosa has not offered "objective, admissible evidence of contamination," "no defendant could possibly know that the prison food was contaminated," and the "prison nevertheless instituted precautionary measures to prevent food contamination." Opening Br. at 47. The premises embedded in Defendants' presentation of the question directly contradict findings made by the district court. *See, e.g.*, 1-ER-040 (finding Mr. Espinosa was exposed to contaminated food); 1-ER-017; 1-ER-019 (finding dispute of material fact concerning whether Defendants knew they had been ineffective in preventing poisonings); 1-ER-018

(finding that “[m]any” protective-custody individuals grieved or told Defendants that the general-population kitchen staff “were tampering with protective custody inmates’ food”). The only way for this Court to answer the question presented by Defendants is to first resolve disputed material facts in Defendants’ favor and exclude evidence on which the district court relied. And that exercise is squarely outside of this Court’s jurisdiction. *See* section I & II, *supra*.

The same is true of Defendants’ argument that the district court erred in concluding Mr. Espinosa’s First Amendment right at issue was clearly established. Defendants ask this Court to address whether it was clearly established that “a defendant violates the First Amendment by transferring an offender to infirmary after reporting he was extremely sick,” again qualified by its construction of the facts, namely that “the admissible evidence establishes that the defendant had no involvement in the transfer decision.” Opening Br. at 47. As with Mr. Espinosa’s Eighth Amendment claim, this Court cannot answer Defendants’ question without explicitly resolving disputed facts or rejecting factual inferences made by the district court. The court found that Defendant Gittere’s office received the kite sent by Mr. Espinosa, 1-ER-005; the close

temporal proximity between the protected activity (Defendant Warden's receipt of the kite with the piece of metal) and the retaliatory act (Mr. Espinosa being forcibly sent to the infirmary that same day) was "sufficient to show a causal connection," 1-ER-036; 1-ER-020; and Mr. Espinosa "put forth facts that show a retaliatory motive," 1-ER-022, 1-ER-011, among other things.

In their opposition to Mr. Espinosa's motion to dismiss, Defendants acknowledged that their brief may not have taken the facts in the light most favorable to Mr. Espinosa. Dkt. 30 at p. 6. But they assert that the Court can ignore their "defense-friendly presentation" and instead look to the record to resolve their appeal. *Id.* (citing *Estate of Silva ex rel. Allen v. Murrow*, Case No. 23-55559, 2025 WL 1218454, at *1 (9th Cir. Apr. 28, 2025); *Howard v. Fye*, Case No. 24-146, 2025 WL 275118, at *1 (9th Cir. Jan. 23, 2025)). However, even assuming the Court can ignore Defendants' presentation of the facts, Defendants' "legal" arguments depend entirely on the Court first resolving facts in *their* favor that the district court found to be disputed. They do not even engage with any of the cases cited by the district court to find that the rights at issue were

clearly established. Instead, they focus only on whether there is a case holding that their characterization of the facts was unconstitutional.

Where the “the defendants fail to pose [] the qualified immunity question in a manner that would permit [the Court] to conclude that the answer to it does not depend upon whose account of the facts is correct,” this Court “lack[s] the authority to provide an answer.” *Cady v. Walsh*, 753 F.3d 348, 361 (1st Cir. 2014) (internal quotation marks omitted). That is exactly what Defendants have done here. Thus, this Court should decline to “do an appellant’s work for it” by “manufacturing legal arguments” where Defendants made none and dismiss the appeal. *George*, 736 F.3d at 837 (internal quotation marks omitted).

II. The District Court Correctly Concluded Defendants are Not Entitled to Qualified Immunity.

If this Court does reach the merits, it should conclude that the district court correctly denied qualified immunity to Defendants. In determining whether an official is entitled to qualified immunity, this Court asks (1) “whether the evidence viewed in the light most favorable to the plaintiff is sufficient to show a violation of a constitutional right,” and (2) “whether that right was ‘clearly established at the time of the violation.’” *Sandoval v. Cty. of San Diego*, 985 F.3d 657, 671 (9th Cir.

2021) (quoting *Horton by Horton v. City of Santa Maria*, 915 F.3d 592, 599 (9th Cir. 2019)).

The district court correctly concluded that (1) the evidence, viewed in the light most favorable to Mr. Espinosa, is sufficient to show a violation of his Eighth and First Amendment rights, and (2) those rights were clearly established at the time they were violated. The district court reached the right conclusion, and this Court should affirm.

A. Defendants are not entitled to Qualified Immunity on Mr. Espinosa’s Eighth Amendment Claim.

The district court correctly held that, when drawing all inferences and resolving all disputed facts in Mr. Espinosa’s favor, a reasonable juror could conclude that Defendants violated Mr. Espinosa’s clearly established Eighth Amendment right to adequate food. 1-ER-007-09; *see Foster v. Runnels*, 554 F.3d 807, 815 n.5 (9th Cir. 2009).

Mr. Espinosa has satisfied both prongs of a deliberate-indifference claim under the Eighth Amendment. He has made (1) an objective showing that there existed an excessive risk of harm to Mr. Espinosa’s safety, *Lemire v. Cal. Dep’t of Corr. & Rehab.*, 726 F.3d 1062, 1076 (9th Cir. 2013), and (2) a subjective showing that Defendants knew of the risk and disregarded it. *Foster*, 554 F.3d at 814. Further, he has established

that Defendants’ actions were the cause of the risk. Because this was a violation of clearly established law, this Court should affirm the denial of summary judgment.

i. A reasonable jury could conclude there existed a serious risk of harm to Mr. Espinosa.

The district court properly concluded that Mr. Espinosa sufficiently established, through his sworn declaration and the sworn declarations of other incarcerated people, that he was exposed to feces and cleaning detergent in his food, which “is a substantial risk of serious harm.” 1-ER-007 (citing (ECF No. 83 at 13-14, ECF No. 87); *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000) (stating that “deprivations denying the minimal civilized measure of life’s necessities,” including “adequate [] food,” are “sufficiently grave to form the basis of an Eighth Amendment violation”) (citation modified). Mr. Espinosa offered evidence that thirty or forty people fell ill after they ate a dinner in September 2019 that had a “pungent, foul smell” and so they suspected had been contaminated with feces. 2-ER-148 ¶¶ 4, 6; 2-ER-151 ¶¶ 4-6; 2-ER-107. that their dinner that evening, *see, e.g.*, 2-ER-151 ¶¶ 4-5; 2-ER-148 ¶ 4; Mr. Espinosa and others who were impacted raised complaints, which led to an investigation. 4-ER-418 ¶¶ 20–21. Nevertheless, the food poisoning continued, this time

with detergent, as well as other contaminants like dirt, hair, toenail clippings, and metal. 2-ER-145; 2-ER-121; 2-ER-116; 2-ER-159 ¶ 8; 4-ER-418 ¶ 23; 2-ER-145. Mr. Espinosa and others brought the continued food poisoning to Defendants’ attention, including complaining that meals had a “chemical taste” or “tasted like soap,” 4-ER-419 ¶ 29 & n.4; 3-ER-353; 2-ER-163 ¶ 8.; 2-ER-108; 4-ER-418 ¶ 24; 2-ER-159 ¶ 13; 2-ER-163 ¶ 8; 2-ER-156 ¶ 3. As a result, and as documented by various sources of documentary evidence, Mr. Espinosa suffered severe gastrointestinal issues, 4-ER-419 ¶ 29; 3-ER-353; 4-ER-419 ¶ 29; 3-ER-353; 2-ER-116; 4-ER-420 ¶ 30, 31, 33; 3-ER-384, and after months of experiencing symptoms, was finally tested and treated for stomach bacteria. 4-ER-420 ¶¶ 32–33, 35; 3-ER-372.

Defendants characterize all this evidence as mere “allegations.” Opening Br. at 22. They ignore grievances and medical records and argue that the declarations submitted by Mr. Espinosa are inadmissible because Mr. Espinosa and the declarants (1) lack personal knowledge that feces and cleaning detergent were present in the food, and (2) are not qualified to provide an opinion that the food was contaminated. Opening Br. at 22-23. As described above, this Court cannot second-guess

the district court’s admissibility determination in this interlocutory posture. *See* Section I, *supra*. But, in any event, the Court should reject the inadmissibility argument.

Mr. Espinosa and his declarants have the requisite personal knowledge because they themselves consumed the meals in question, and the foundation for that personal knowledge is self-evident: as does any lay witness, they have experience interacting with the substances implicated here—feces and detergent—and they have consumed hundreds of non-contaminated meals throughout their lifetimes. Federal courts consistently hold that testimony based on a witness’s “personal observation and recollection of concrete facts” is admissible. *See United States v. Beck*, 418 F.3d 1008, 1015 (9th Cir. 2005). Further, no scientific or formal training is needed to provide an opinion that food that has a “chemical taste” or “taste[s] like soap” may be contaminated with detergent, or that food that smells “pungent” and results in rampant bacterial infections has been contaminated with feces. 3-ER-353; 4-ER-419 ¶ 29; 2-ER-116; 2-ER-163 ¶ 8; 2-ER-148 ¶ 4; 2-ER-151 ¶¶ 4-5.⁶

⁶ To the extent Defendants seek to argue that expert testimony is instead required to establish whether Mr. Espinosa’s food was contaminated with

None of the cases cited by Defendants give any reason to doubt this conclusion. In several of the cases Defendants cite for the proposition that Mr. Espinosa lacks personal knowledge to opine on the contents of his own meals, Opening Br. at 22-23, it was not obvious—as it is here—that the witnesses were personally aware of the facts to which they testified. *See Intermountain Fair Housing Council v. Boise Rescue Mission Ministries*, 657 F.3d 988, 997–98 (9th Cir. 2011) (holding that conclusory allegation of differential treatment in affidavit was insufficient without personal knowledge of discrimination); *Lowry v. City of San Diego*, 858 F.3d 1248 (9th Cir. 2017) (holding it was not abuse of discretion for district court to conclude that witness “lacked personal knowledge of events that she did not in fact witness or was not in a position to perceive on the night in question”); *Haggerty v. Fed. Ins. Co.*, 32 Fed. App’x 845, 848 n.4 (9th Cir. 2002) (stating district court “properly excluded” a declaration that “lack[ed] foundation in that there was no evidence [the declarant] had personal knowledge” regarding statements made by

feces and/or detergent, they have waived that argument by failing to raise it below. *Visendi v. Bank of Am., N.A.*, 733 F.3d 863, 870 (9th Cir. 2013) (declining to consider argument for the first time on appeal where party “failed to raise it to the district court”).

another individual). Moreover, both *Intermountain Fair Housing Council* and *Lowry* involved the question whether the evidence was sufficient to overcome a motion for summary judgment, not whether it should be excluded altogether. And, again, those questions of evidentiary sufficiency are beyond the jurisdiction of this Court.

The other cases cited by Defendants, Opening Br. at 23-26, are also inapposite because they involve lay witnesses who sought to provide testimony concerning matters obviously requiring scientific knowledge or skill. *Panchev v. Pac. Gas. & Elec. Co.*, 825 Fed. App'x 462, 463 (9th Cir. 2020) (district court did not abuse its discretion in excluding testimony by lay witness regarding injuries caused by exposure to “elevated levels of arsenic or uranium”); *Felkins v. City of Lakewood*, 774 F.3d 647, 651–53 (10th Cir. 2014) (stating that a lay witness could neither self-diagnose avascular necrosis nor determine whether that condition caused a femur fracture and other complications). Here, on the other hand, Mr. Espinosa sought to rely on firsthand testimony of the contents of each declarant’s own meal and the symptoms they experienced after eating the meal.⁷

⁷ Contrary to Defendants’ contention, Mr. Espinosa does not concede that “he had absolutely no ability to detect detergent in his food,” Opening Br.

Defendants also rely on *Rolen v. Hansen Beverage Co.*, 193 Fed. Appx. 468 (6th Cir. 2006), an out-of-circuit unpublished case, to suggest that establishing food contamination requires “either expert testimony or . . . a combination of both expert and lay testimony.” Opening Br. at 26. But *Rolen* does not hold that. Rather, it held that the expert opinion offered in that case did not meet the *Daubert* requirements and that the plaintiff was unable to show proximate cause. 193 Fed. App’x at 474.

Defendants also argue that the district court was required to find that Mr. Espinosa’s food was not tampered with because a response to Mr. Espinosa’s grievance stated that “[t]here is not any tampering of the food occurring,” and the district court must accept that finding as true because it was made by an employee of a state administrative agency. Opening Br. at 51. That is absurd. There is no rule that courts must accept the factual statements of prison officials on grievance forms as true, which is why Defendants do not cite a single case adopting that rule. Nor would such a rule comport with basic notions of due process.

at 25, and in fact explained that the food had a chemical taste. 4-ER-419 ¶ 29.

That Mr. Espinosa was required to administratively exhaust his claims under the Prison Litigation Reform Act (PLRA) does not create such a requirement. Courts routinely review cases subject to the PLRA without giving deference to the factual statements of state officials. The agency deference cases that Defendants cite do not help them, either. Their primary support is a Supreme Court case from 1946—predating modern administrative law—which held that an adjudication by the Alaska Unemployment Compensation Commission after a full hearing was supported by substantial evidence in the administrative record. *See* Opening Br. at 50 (citing *Unemployment Comp. Comm’n of Alaska v. Aragon*, 329 U.S. 143, 153 (1946)). Here, of course, there was no hearing, no opportunity to present evidence, and no “record” for the court to review. The Ninth Circuit case Defendants cite for the standard is likewise inapplicable because its holding was specific to a statutory grant of authority to federal courts to review “interconnection agreements” adopted by state agencies pursuant to the Telecommunications Act, and, like *Aragon*, it involved a review of decisions issued after full arbitration hearings, not a stray statement on a form. *US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1117 (9th Cir. 1999). Neither of these

cases stands for the proposition that any statement by a state agency employee is subject to a substantial evidence standard, let alone that it must be accepted as true as Defendants contend.

Even if the statement that there was no tampering were subject to substantial evidence review, Defendants have pointed to *no* evidence from the investigation into the food tampering to support that finding. Opening Br. at 52 (citing 2-ER-107, ECF No. 75 at 8; 3- ER-362, ECF No. 62-4 at 3). Though they say that the investigation included interviewing employees and incarcerated people and reviewing video, they do not cite any videos or interviews. *Id.* Instead, they cite a conclusory statement that the investigation found no tampering. 2-ER-107. That is circular; it cannot provide evidentiary support for the finding that there was no tampering, especially when Mr. Espinosa presented evidence that food with contaminants continued being served. *See e.g.*, 2-ER-108; 4-ER-418 ¶ 24; 2-ER-159 ¶ 13.

At most, the evidence presented by Defendants in their brief highlights only that there is a genuine dispute of material fact that Mr. Espinosa's food was repeatedly poisoned with feces and detergent, creating an excessive risk of harm to his safety.

ii. A reasonable jury could conclude that Defendants knew of the harm and disregarded it.

The district court correctly concluded that there are genuine disputes of material fact relating to the subjective prong of the deliberate indifference inquiry, 1-ER-007-08; *see Foster*, 554 F.3d 807, 814 (9th Cir. 2009), which requires demonstrating two things. First, Mr. Espinosa must show “that the risk was obvious or provide other circumstantial or direct evidence that the prison officials were aware of the substantial risk.” *Lemire*, 726 F.3d at 1078. Contrary to Defendants argument, plaintiffs need not provide definitive proof of a defendant’s mental state.. Opening Br. at 26. “[V]ery obvious and blatant circumstances indicating that the prison official knew the risk existed” allow for an inference that “the official must have known” of the risk.. This “inference of knowledge from an obvious risk has been described by the Supreme Court as a rebuttable presumption,” and accordingly, “prison officials bear the burden of proving ignorance of an obvious risk.” *Coleman v. Wilson*, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995) (*Farmer v. Brennan*, 511 U.S. 825, 844 (1994)).

In addition to establishing knowledge of the risk, Mr. Espinosa must show “that there was no reasonable justification for exposing [him]

to the risk.” *Lemire*, 726 F.3d at 1078. Both of these inquiries “are fact-intensive and typically should not be resolved at the summary judgment stage.” *Id.*

Here, Mr. Espinosa has established that each Defendant knew about the repeated food poisonings because Mr. Espinosa and other individuals told them, repeatedly. *See e.g.* 2-ER-117, 119-20, 122; 2-ER-138-141; 2-ER-145 ¶¶ 17-23; 2-ER-153-54 ¶¶ 4-13; 2-ER-159-60 ¶¶ 13-15; 2-ER-172-73. As the district court found, Defendants permitted general-population staff to cook for the protective-custody group, and “[m]any” people “grieved or otherwise told” Defendants Verde, Homan, Wickham, Ruebart, and Drummond that general-population individuals were tampering with the food, both in the months before and after Mr. Espinosa arrived at Ely State Prison. 1-ER-008. Defendants Gittere, Ruebart, and Drummond visited the protective-custody unit to investigate. 4-ER-418 ¶¶ 20–21. As contamination continued, Mr. Espinosa and others filed more grievances, 2-ER-108; 4-ER-418 ¶ 24; 2-ER-159 ¶ 13; 2-ER-163 ¶ 8; 2-ER-156 ¶ 3, resulting in Defendants Gittere, Ruebart, Drummond, and Verde making limited and

unsuccessful efforts to randomly switch food carts. *See* 4-ER-419 ¶ 26-27& n.3; 2-ER-144 ¶¶ 20-22.

Defendants also argue that that they “could not actually ‘know’ that Espinosa faced any risk of harm from contaminated food when investigations revealed that no tampering was occurring.” Opening Br. at 37. Accepting the conclusion that no tampering was occurring requires this Court to consider competing evidence and draw inferences in favor of Defendants, which the Court lacks jurisdiction to do and, in any event, is improper at summary judgment. *See* Section I, *supra*. Here, where Mr. Espinosa has presented significant evidence demonstrating Defendants’ knowledge, and the district court correctly concluded that “a reasonable juror could find that Defendants knew that STG inmates may have been poisoning protective custody inmates,” notwithstanding the results of their purported investigation. 1-ER-008.

Defendants also argue that they did not disregard any serious risk of harm because an internal investigation revealed no food tampering. Opening Br. at 27. Defendants principally rely on *Peralta v. Dillard*, to argue that an official who “relied on the . . . opinions of [others] who had investigated [the inmate’s] complaints,” cannot be held liable. 744 F.3d

1076, 1086 (9th Cir. 2014). But the holding in *Peralta* was much narrower. There, the court found that two individuals could not be liable for a failure to treat a serious dental condition where they had “largely administrative roles” in the dental care system and reasonably relied on “the medical opinions of the staff dentists” who had investigated the plaintiff’s dental complaints. 744 F.3d at 1087. This case is different. Here, Defendants are not relying on the expertise of others more qualified to make a medical assessment, and Defendants’ efforts to ascertain whether food was being tampered with hardly qualifies as an “investigation.” 2-ER-105-07 (documenting review of video footage and observation of food service on two days)

In any event, Mr. Espinosa and others continued to report contamination well after the alleged investigation concluded, *see e.g.*, 2-ER-117, 119-20, 122; 2-ER-138-141; 2-ER-145 ¶¶ 17-23—complaints that suffice to establish Defendants were aware that the investigation’s conclusion that there was no contamination was wrong.⁸

⁸ Defendants mischaracterize *Peralta* as holding “that inmate complaints could not provide the awareness required to establish deliberate indifference.” Opening Br. at 28. *Peralta* holds that “the mere filing of a lawsuit” (i.e. a legal complaint) does not alone establish knowledge, not

In sum, the district court correctly held that there was at least a dispute of material fact as to whether each Defendant knew of the risk of harm and whether their response to that risk of harm was reasonable.⁹ Given these disputes about the reasonableness of Defendants conduct, “the case cannot be resolved at summary judgment on qualified immunity grounds.” *Rosenbaum v. City of San Jose*, 107 F.4th 919, 924 (9th Cir. 2024) (citation omitted)), and the district court’s denial of summary judgment was warranted.

iii. A reasonable jury could find that Defendants’ actions or inactions were the actual and proximate cause of Mr. Espinosa’s exposure to contaminated food.

Mr. Espinosa has demonstrated that “but for” Defendants’ actions or inactions, he would not have repeatedly received food containing human feces and other toxic substances. *See Maney v. Oregon*, 729 F. Supp. 3d 1087, 1147 (D. Or. 2024), *aff’d*, No. 24-2715, 2025 WL 1794110

that communications of complaints (such as oral statements and grievances) cannot establish knowledge. 744 F.3d at 1087.

⁹ Contrary to Defendants’ argument, the district court did not impute “collective actions” to each individual defendant. Opening Br. at 33-34, It simply considered whether there was evidence of “knowledge” and “disregard,” and correctly concluded that there were genuine disputes of material fact on each issue as to all Defendants.

(9th Cir. June 30, 2025). As this Court has recognized, “[a]s a practical matter, plaintiffs who have already demonstrated a triable issue of fact as to whether prison officials exposed them to a substantial risk of harm, and who actually suffered precisely the type of harm that was foreseen, will also typically be able to demonstrate a triable issue of fact as to causation.” *Lemire*, 726 F.3d 1at 1081. Such is the case here, where Mr. Espinosa has demonstrated both that Defendants exposed him to substantial risk of being served inadequate and contaminated food, *supra* Section II.A.i., and that he actually suffered that foreseeable harm when he was in fact served contaminated food. 4-ER-419 ¶ 29; 3-ER-353; 3-ER-353; ER-419 ¶ 29; 2-ER-116. As a result, a reasonable jury could find that Defendants’ actions caused Mr. Espinosa to be subject to the risk of receiving contaminated food in violation of the Eighth Amendment.

Defendants also argue that Mr. Espinosa “failed to offer any admissible evidence that his stomach troubles were caused by food contamination,” and they fault the lack of expert testimony regarding the link between the food and his medical symptoms. Opening Br. at 34. That is beside the point. The causation inquiry does not concern whether the risk of harm from receiving adequate food actually resulted in that harm

(severe food poisoning) occurring. Rather, it concerns whether Defendants’ actions or inactions—here, the failure to respond reasonably to repeated reports of contaminated food—resulted in Mr. Espinosa receiving inadequate food that put him at risk of food poisoning. *See Maney*, 729 F. Supp. 3d at 1147. And as discussed above, Mr. Espinosa has established that causation.

Because, at a minimum, “reasonable persons could differ’ on the question of causation,” “summary judgment is inappropriate and the question should be left to a jury.” *Lemire*, 726 F.3d at 1062.

iv. Mr. Espinosa’s right to adequate food is clearly established.

The district court correctly held that Mr. Espinosa’s “right to adequate food” under the Eighth Amendment, *Foster*, 554 F.3d at 815 n.5, was clearly established at the time of the violations. This conclusion is supported by both Supreme Court and Ninth Circuit precedent recognizing that “[t]here is no question that an inmate’s Eighth Amendment right to adequate food is clearly established.” *Id.* at 815; *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996) (“Adequate food is a basic human need protected by the Eighth Amendment.”); *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (“The [Eighth] Amendment [] imposes

duties on these officials, who must . . . ensure that inmates receive adequate food”) (internal quotation marks omitted);¹⁰ *see also Johnson v. Lewis*, 217 F.3d 726, 732 (9th Cir. 2000) (receiving “inedible food and inadequate drinking water for four days” “would establish [a] deprivation[] sufficiently serious to satisfy the objective component of an Eighth Amendment claim).

Relying on this well-settled caselaw, this Court has specifically approved of claims under the Eighth Amendment where the plaintiff alleged that their food was contaminated with “human feces” or otherwise not fit for consumption. *Robles v. Michienzi*, 902 F.2d 40 (9th Cir. 1990) (table) (holding that a claim concerning food contaminated with feces was not frivolous); *Carr v. Higgins*, 700 Fed. App’x 598, 601

¹⁰ Defendants argue that *Farmer* presents a similar fact pattern as the one here, and that the Court considered those facts and concluded that there was no Eighth Amendment violation. Opening Br. at 47. In reality, the facts could not be more different: *Farmer* involved a failure by officials to protect an incarcerated person from being beaten and raped by another person in her cell. 511 U.S. at 830. And *Farmer* did not address whether any Defendant was entitled to qualified immunity because it was a *Bivens* action against federal officials; it considered only whether the defendants had been deliberately indifferent. 511 U.S. at 829. Accordingly, the conclusion in that case that the particular facts did not establish a violation of the Eighth Amendment does not mean the right to adequate food was not clearly established.

(9th Cir. 2017) (concluding “a genuine dispute of material fact exists as to whether [a defendant] fed or conspired to feed [the plaintiff] feces” in violation of the Eighth Amendment); *see also LeMaire v. Maass*, 12 F.3d 1444, 1456 (9th Cir. 1993) (stating that although prison food is not required to be “tasty or aesthetically pleasing,” it must be “adequate to maintain health”); *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996), *opinion amended on denial of reh’g*, 135 F.3d 1318 (9th Cir. 1998) (holding food that was “spoiled, tampered with, cold, raw, [and failed] to meet a balanced nutritional level,” and water that was “Blue/Green in Color and Foul Tasting” was “inadequate to maintain health” under the Eighth Amendment); *cf. Anderson v. Cnty. of Kern*, 45 F.3d 1310, 1314 (9th Cir. 1995) (“Unquestionably, subjection of a prisoner to lack of sanitation that is severe or prolonged can constitute an infliction of pain within the meaning of the Eighth Amendment.”).

Defendants largely ignore these cases, arguing that the right at issue is not clearly established because no court has found a constitutional violation on the precise facts at issue here. Opening Br. p. 47. That is not required. As this Court has explained, a plaintiff “does not have to identify a controlling case finding a constitutional violation on

the exact facts of her case for her asserted right to be clearly established.” *Whalen v. McMullen*, 907 F.3d 1139, 1153 (9th Cir. 2018); *see also* *Rosenbaum v. City of San Jose*, 107 F. 4th 919, 924 (9th Cir. 2024) (stating that “there need not be a Supreme Court or circuit case directly on point”). Thus, because Mr. Espinosa has shown that circuit case law clearly establishes his right to receive adequate food free of feces or contaminants, Defendants are not entitled to qualified immunity.

In sum, the district court correctly concluded that Mr. Espinosa had created at least a genuine dispute of material fact as to both prongs of his Eighth Amendment claim, and the district court correctly denied summary judgment.

B. Defendants are Not Entitled to Qualified Immunity on Mr. Espinosa’s First Amendment Claim.

i. A reasonable jury could conclude that Defendants violated Mr. Espinosa’s First Amendment rights.

The district court also correctly held that, drawing all inferences and disputed facts in Mr. Espinosa’s favor, a reasonable juror could conclude that Mr. Espinosa had established all “five basic elements” of a First Amendment retaliation claim: “(1) An assertion that a state actor took some adverse action against [him] (2) because of (3) [his] protected conduct, and that such action (4) chilled [his] exercise of his First

Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal.” *Chavez v. Robinson*, 12 F.4th 978, 1001 (9th Cir. 2021); *see* ER-10-11.

First, it is undisputed that Mr. Espinosa engaged in protected activity (element 4) by complaining to Gittere about the poisoning and tampering of his food, including reporting that he found a metal wire in his food. Opening Br. at 41-42; *see Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012) (filing grievances is protected First Amendment Activity).

Second, a reasonable jury could find that Defendant Gittere took an adverse action (element 1) against Mr. Espinosa by forcibly removing him from his cell and transferring him to the infirmary. Defendants argue that Mr. Espinosa “has no admissible evidence that Warden Gittere had any involvement in transferring [him] to the infirmary.” Opening Br. at 38. They contend that his “only evidence” was his testimony that officers told him that Gittere had ordered the transfer, which the district court found to be inadmissible. To begin with, that is not the only evidence of Gittere’s involvement. The district court also relied on the fact that the responses to Mr. Espinosa’s kites challenging his move to the infirmary had a stamp from Gittere’s office, so a jury could infer they were from

Gittere. 1-ER-005 (citing ECF No. 74 at 11, 14). In this correspondence, Gittere repeatedly refused Mr. Espinosa's requests to be returned to his cell and did not dispute Mr. Espinosa's assertions that Gittere was responsible for the move to the infirmary. 2-ER-110-13. To the contrary, he defended the decision to send him to the infirmary, stating that he was concerned about Mr. Espinosa's health. 2-ER-113. That evidence is sufficient to create a dispute of material fact as to whether, contrary to his testimony, Gittere was responsible for transferring Mr. Espinosa to the infirmary. And even if he was not responsible for the transfer itself, it establishes that he was responsible for Mr. Espinosa's continued stay there after he repeatedly requested to leave, which would itself be an adverse action.

And even if that evidence is not sufficient, the district court was wrong to disregard the statements of the corrections officers and the investigator as inadmissible hearsay. *See* ER-026 n.5. The statements were made by employees of the Nevada Department of Corrections, and they are therefore party admissions and not hearsay. *See* Fed. R. Evid. 801(d)(2)(A). But, importantly, even if they are, the "contents" of the statements "could be presented in an admissible form at trial"—i.e.,

through direct testimony—and so this Court can “consider the [] contents” in revisiting the district court’s summary judgment rulings. *Fraser v. Goodale*, 342 F.3d 1032, 1037 (9th Cir. 2003).

Defendants also argue that, even if Gittere was responsible for the transfer to the infirmary, it was not an adverse action. That is wrong. *See Karban v. Baltierra*, 2022 WL 1636751, at *1 (9th Cir. May 24, 2022) (reversing grant of summary judgment on retaliation claim where plaintiff was transferred two weeks after filing a grievance). While not every transfer is an adverse action, a transfer is certainly an adverse action where, as here, it is accompanied by isolation, increased restrictions, and a loss of privileges. ER-421 ¶ 42; ER-192-93; *see Johnson v. Ryan*, 55 F.4th 1167, 1201 (9th Cir. 2022) (transfer to “maximum custody” was adverse action); *Shepard v. Quillen*, 840 F.3d 686, 688 (9th Cir. 2016) (explaining that “being placed in administrative segregation constitutes an adverse action”); *Watison v. Carter*, 668 F.3d 1108, 1115 (9th Cir. 2012) (same). Indeed, even a threat of a transfer can support a retaliation claim. *See Harbridge v. Reed*, No. 22-55861, 2024 WL 4719083, at *3 (9th Cir. Nov. 8, 2024) (“[O]ur precedent establishes that a threat of transfer satisfies the adverse-action requirement for a First

Amendment retaliation claim.” (citing *Gomez v. Vernon*, 255 F.3d 1118, 1127 (9th Cir. 2001)). Given this precedent, a reasonable jury could easily find that forcibly removing Mr. Espinosa from his cell and placing him in the infirmary where he was isolated from other people and did not have access to privileges like recreation time was an adverse action.

Third, the district court correctly held that a reasonable jury could find that Defendant Gittere ordered Mr. Espinosa to the infirmary “because of” (element 2) the grievance he sent to report the metal wire he found in his food. 1-ER-036. To begin with, Defendants did not object to the Magistrate Judge’s finding that the move to the infirmary was motivated by Mr. Espinosa’s complaints about food tampering, so they cannot challenge that finding on appeal. *See Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998). In any event, Defendants are wrong that Mr. Espinosa’s arguments as to causation are mere speculation. Mr. Espinosa’s grievance was filed just two days before Mr. Espinosa was moved to the infirmary, and it was received by Gittere’s office *the same day* he was moved, which is strong evidence of retaliatory motive. ER-036; *see, e.g., Johnson v. Shooting*, 2022 WL 17543245, at *3 (D. Nev. Aug. 30, 2022) (fact that plaintiff was moved to solitary confinement the

same day he filed a grievance was sufficient to show retaliatory motive). Indeed, this Court has found much longer periods sufficient to establish causation. *See, e.g., Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1062 (9th Cir. 2013) (“four-to-five month period” between protected speech and retaliation was sufficient to find causation); *Coszalter v. City of Salem*, 320 F.3d 968, 977 (9th Cir. 2003) (finding that “three to eight months is easily within a time range that can support an inference of retaliation”).

Defendants rely on *Pratt v. Rowland*, 65 F.3d 802, 808 (9th Cir. 1995) to assert that temporal proximity on its own is insufficient to establish causation. *See* Opening Br. at 43. But in *Pratt*, the Court held that temporal proximity was not enough “in this particular case” because there was no evidence that the officials responsible for the adverse action were aware of the protected activity. 65 F.3d at 808. It did not hold that temporal proximity could *never* be sufficient on its own. *Id.* And here, unlike in *Pratt*, it is undisputed that Gittere was aware of Mr. Espinosa’s grievances about food tampering, as they were marked received by the

Warden's office on the very same day the retaliation occurred. Opening Br. at 9 (admitting that grievance was received by Warden's office).¹¹

Moreover, Defendants themselves admit that the move to the infirmary was linked to Mr. Espinosa's grievance; they contend the reason they took him to the infirmary was concern for his health because he had stated *in the grievance* that he had been "extremely sick." Opening Br. at 39 (quoting 2-ER-171-73). On top of that, when Mr. Espinosa was in the infirmary, a staff member told him he was there because he "kited the warden." ER-421 ¶ 46. And an investigator told Mr. Espinosa's cellmate "Gittere was 'pissed'" and was trying to "complicate his time" by sending him to the infirmary. 2-ER-144-45 ¶ 14-16. Indeed, the investigator was talking to the cellmate because he was looking into charges against Mr. Espinosa at Gittere's request. 2-ER-144 ¶ 13. Combined with the temporal proximity, that is more than enough

¹¹ For the same reason, Defendants' two unpublished memorandum decisions that cite *Pratt* without further elaboration also do not establish that temporal proximity is insufficient here. Opening Br. at 43 (citing *Phillippi v. Patterson*, 599 Fed. Appx. 288, 289, 2015 WL 1262437 (9th Cir. 2015); *Gray v. Shedd*, 559 Fed. Appx. 621, 621-22, 2014 WL 791822 (9th Cir. 2014)).

evidence for a reasonable jury to find that he was moved to the infirmary “because of” the grievance.

Fourth, a jury could also find that being forcibly removed from his cell and placed in the infirmary for 13 days would have a chilling effect on Mr. Espinosa’s First Amendment rights (element 4). Importantly, Mr. Espinosa does not have to show that *his* speech was chilled, just that Defendants’ actions would “chill or silence a person of ordinary firmness from future First Amendment activities.” *Watison*, 668 F.3d 1108, 1114 (9th Cir. 2012). He has done so here by establishing that, for thirteen days, he was denied privileges like recreation time, “tier time,” food from the canteen, and access to prison programs. ER-421 ¶ 42; ER-192-93. Indeed, he was not permitted to leave his cell at all. *Id.* In *Hines v. Gomez*, this Court held that a “ten-day confinement” and loss of television privileges would chill the exercise of First Amendment rights. 108 F.3d 265, 269 (9th Cir. 1997). And in *Pratt*, the Court held that even transferring someone to a double cell from a single cell could give rise to a retaliation claim. 65 F.3d at 807. Moreover, as described above, this Court has repeatedly concluded that a transfer or threat of transfer to a unit or facility with worse conditions would chill a person of ordinary

firmness from engaging in protected activity. *See Gomez*, 255 F.3d at 1127 (threat of transfer would have chilling effect); *Watson*, 668 F.3d at 1115 (placement in administrative segregation would have chilling effect). Indeed, this Court has held that even denial of an incarcerated person's request to live with a sibling would chill a person of ordinary firmness. *See Garcia v. Smith*, 666 F. App'x 581, 585 (9th Cir. 2016).

Defendants argue that the transfer to the infirmary could not have a chilling effect because Mr. Espinosa was sick, and being in the infirmary would help him. Opening Br. at 44-45. But Mr. Espinosa repeatedly stated that he did not want to be in the infirmary and that he was no longer sick, yet he was kept there anyway by Gittere against his will. *See* 3-ER-357-59; 2-ER-171; 2-ER-114. For that reason, *Holleman v. Zatecky*, 951 F.3d 873, 881 (7th Cir. 2020), cited by Defendants (at 44), is inapposite. There, the Seventh Circuit explained that not every transfer is retaliation, and, looking to whether the transfer in that situation was sufficiently "adverse," it found that a transfer to a similar facility with only "minor differences" was not sufficient to chill a person of ordinary firmness from engaging in protected speech. *Id.* But the court acknowledged that a transfer that came with an "increase in restrictions"

would have a chilling effect. *Id.* That is the situation here: Mr. Espinosa faced more restrictions during the time he was in the infirmary, including not being able to leave his cell. Thus, even if the Seventh Circuit’s analysis applied here, a jury could find that those restrictions were sufficient to chill a person of ordinary firmness from engaging in protected activity.

Fifth, Mr. Espinosa put forward sufficient facts establishing that any legitimate penological goal advanced by Defendants was pretext for retaliation (element 5). As the district court explained, this Court has held that facts showing a retaliatory motive can be sufficient to create an inference that a legitimate penological goal is pretext. *See Johnson*, 55 F.4th at 1202. In *Johnson*, this Court acknowledged that stopping prison gang activity was a legitimate penological goal, and it found that the defendants’ decision to move the plaintiff back to a maximum-security unit was consistent with the prison’s procedures regarding gang activity. *Id.* But it nonetheless concluded that, “even if Johnson ‘arguably ended up where he belonged,’ the presence of a genuine dispute of material fact with respect to a retaliatory motive means that Defendants’ general justification for the action is not sufficient to defeat summary judgment.”

Id.; see also *Bruce v. Ylst*, 351 F.3d 1283, 1289 (9th Cir. 2003) (reaching similar conclusion).

Likewise, here, Defendants argue that “[p]reventing disease and protecting the health of [incarcerated people] are legitimate penological goals.” Opening Br. p. 45 (citing *McClure v. Tucker*, 276 F. App’x 574, 575 (9th Cir. 2008)). But that “general justification” cannot support Gittere’s decision to move Mr. Espinosa to the infirmary because Mr. Espinosa has already established that there is “a genuine dispute of material fact with respect to a retaliatory motive.” *Johnson*, 55 F.4th at 1202. In short, even if Mr. Espinosa could have properly been moved to the infirmary for his health, he has created a material dispute of fact as to whether that was the actual reason he was moved.

Despite it being the basis for the district court’s holding on this prong, Defendants do not even cite *Johnson* or engage with its reasoning. See Opening Br. p. 44-45. In any event, Defendants cannot show as a factual matter that moving Mr. Espinosa to the infirmary—and keeping him there—was done to maintain his health when he informed Gittere that he did not need medical attention and did not feel sick, where he did not receive medical attention during that time, and he repeatedly asked

to be returned to his cell. 3-ER-357-59; 2-ER-171; 2-ER-114. ER-111-14. Moreover, Gittere repeatedly stated that he does “not recall the reason for Mr. Espinosa’s assignment to the infirmary,” ER188, which further undermines Defendants’ assertion now that it was motivated by concern for his health. Because Mr. Espinosa did not need medical treatment when he was moved, let alone for thirteen days, a reasonable jury could find that his placement in the infirmary for that time was not done for his health but instead to punish him for filing grievances.

In sum, the district court correctly concluded that Mr. Espinosa had created at least a genuine dispute of material fact as to all five elements of his retaliation claim and denied summary judgment.

ii. Mr. Espinosa’s right to be free from retaliation after filing complaints is clearly established.

The right to “file prison grievances and pursue civil rights litigation in the courts” without retaliation is clearly established. *Entler v. Gregoire*, 872 F.3d 1031, 1039 (9th Cir. 2017).

This Court has “long recognized that a corrections officer may not retaliate against a prisoner for exercising his First Amendment right to report staff misconduct.” *Shepard v. Quillen*, 840 F.3d 686, 688 (9th Cir. 2016). Indeed, it noted more than 30 years ago that “[t]he prohibition

against retaliatory punishment is ‘clearly established law’ in the Ninth Circuit, for qualified immunity purposes.” *Pratt*, 65 F.3d at 806 & n. 4.

More specifically, it is clearly established that filing grievances is a protected activity, *see, e.g., Watison*, 668 F.3d at 1114, and that a transfer or threat of transfer to more restrictive conditions is an adverse action that would chill a person of reasonable firmness from engaging in protected First Amendment activity, *see, e.g., Shepard*, 840 F.3d at 688; *Gomez*, 255 F.3d at 1127; *Watison*, 668 F.3d at 1115; *Hines*, 108 F.3d at 269; *Pratt*, 65 F.3d at 807; *Harbridge*, 2024 WL 4719083, at *3.

Defendants do not dispute that the right to be free from retaliation for filing grievances about prison conditions is clearly established, but again argue that the right at issue is not clearly established because no court has found a constitutional violation on the specific facts at issue here. Opening Br. p. 47. As described above, that level of specificity is not required. *See Whalen*, 907 F.3d at 1153; *Rosenbaum*, 107 F. 4th at 924. Thus, because Mr. Espinosa has shown that circuit case law clearly establishes that retaliation of the type that occurred here—transferring someone to a more restrictive cell because they filed a grievance—violates the First Amendment, Defendants are not entitled to qualified immunity.

CONCLUSION

This Court should dismiss the appeal in its entirety for lack of jurisdiction or affirm the district court.

Dated: January 27, 2026 Respectfully submitted,

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* Public Justice thanks Hannah Terrapin, a law student at Yale Law School, for her substantial contributions to this brief.

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(i) and Circuit Rule 32-1 because, excluding the parts exempted by Fed. R. App. P. 32(f), this brief contains 13,521 words. This document complies with the typeface and type-style requirements of Fed. Rs. App. P. 32(a)(5) and 32(a)(6) because it has been prepared using a 14-point proportionally spaced font that uses serifs, and it is set in a plain, roman style, excepting italics occasionally used for emphasis.

Dated: January 27, 2026

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