No. 17-55107

IN THE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Rafael Benitez,

Plaintiff-Appellant,

v.

Sandra Hutchens, in her individual capacity, and **Don Barnes**, in his official capacity as Sheriff-Coroner,

Defendants-Appellees.

On appeal from the United States District Court
for the Central District of California
Case No. 8:12-cv-550-AG-JC
Hon. Andrew J. Guilford, Hon. Jacqueline Chooljian

REPLACEMENT OPENING BRIEF OF PLAINTIFF-APPELLANT RAFAEL BENITEZ

Matthew B. Borden
Athul K. Acharya
BRAUNHAGEY & BORDEN LLP
351 California Street, 10th Floor
San Francisco, California 94104
(415) 599-0210
Counsel for Plaintiff

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

RULES

REGULATIONS

CONSTITUTIONAL PROVISIONS

STATEMENT OF JURISDICTION

The district court had jurisdiction over this federal civil-rights action under 28 U.S.C. §§ 1331 and 1343. That court granted Defendants' motion to dismiss and issued its final judgment on December 26, 2016. ER 1. Plaintiff Rafael Benitez timely appealed on January 25, 2017. ER 30; Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

Benitez was held in the Orange County Jail for five years while he awaited his civil trial for involuntary civil commitment. He alleges that the jail held him in conditions that were unconstitutionally punitive for a civil detainee. This appeal is about whether he can hold Orange County and Sheriff Hutchens liable.

1. To sue Orange County, Benitez must plausibly allege that the conditions he encountered were caused by the county's written or unwritten policy or widespread practice. Benitez alleged that (1) the jail's uniform practice was to hold all civil detainees in the same conditions, and (2) according to sheriff's deputies, the jail's policy authorized those conditions. Is his claim plausible enough to survive a motion to dismiss?

2. To sue Sheriff Hutchens personally, Benitez must show she was "in charge of" the policy that caused the jail to hold him in punitive conditions. Under state law, she had "sole and exclusive authority" over the jail and its policies. And her name and letterhead grace the only jail housing policies in the record. Can Benitez hold her individually liable?

STATUTORY ADDENDUM

All relevant statutory and regulatory authorities are in the addendum bound with this brief.

INTRODUCTION

When Rafael Benitez finished serving his prison sentence, the state didn't set him free. Instead, it sought to civilly commit him to Coalinga State Hospital for treatment. But while he waited for his civil trial, it locked him up in the Orange County Jail. He remained in the jail, awaiting civil adjudication, for over five years.[1] For the first four, even though he was a civil detainee, he was forced to live with the jail's general criminal population. For the remaining year, he lived in separate quarters but in materially similar conditions.

Jails are designed to punish criminals. But the state may not constitutionally punish persons committed under civil process. Those merely *awaiting adjudication* for civil commitment are entitled to even more lenity. As this Court put it in *Jones v. Blanas*, "purgatory cannot be worse than hell." 393 F.3d 918, 933 (9th Cir. 2004). That is why, for over fifteen years, this Court has enforced a presumption that the state may not hold civil detainees in conditions either similar to their criminal counterparts or more restrictive than they would face upon commitment. *King v. County of Los Angeles*, 885 F.3d 548, 557–58 (9th Cir. 2018). California law affords them similar protections. Cal. Pen. Code § 4002(b).

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[1] The state eventually tried Benitez in August 2014. The jury returned a hung verdict. *People v. Benitez*, Case No. M-11715 (Orange Cty. Super. Ct. Oct. 14–Nov. 13, 2014). He currently lives in Coalinga State Hospital awaiting retrial.

Nevertheless, Orange County held Benitez for *five years* in conditions far more restrictive than he would face if he were committed to a state hospital. But this is not a case about an isolated constitutional injury. Orange County treated all its civil detainees the same. This case is about an ongoing, continuous violation of constitutional rights that the Orange County Jail, under the direction of Sheriff Sandra Hutchens, inflicted on all its civil detainees as a matter of official policy or uniform practice. And this appeal is about whether Benitez can hold them responsible.

The Orange County Jail is notorious for systematically violating its inmates' rights.[2] Nevertheless, the district court found it implausible that the jail or Sheriff Hutchens were responsible for Benitez's mistreatment. It observed that Sheriff Hutchens herself had had no "direct

[2] For example, the California Court of Appeal held in 2016 that the jail "operated a well-established program" of obtaining confessions from "targeted defendants" through jailhouse informants, in violation of their Sixth Amendment rights. *People v. Dekraai*, 5 Cal. App. 5th 1110, 1141 (2016); *see also id.* at 1149 ("The magnitude of the *systemic problems* cannot be overlooked." (emphasis added)). In 2017, the ACLU issued a report on a host of programmatic rights-violations, from deputies instigating cage fights among inmates, to routine denials of non-emergency medical care, to persistent overcrowding. ACLU of Southern California, *Orange County Jails* 26, 44, 61 (2017), https://www.aclusocal.org/sites/default/files/ocjails2017-aclu-socal-report.pdf; *see also* R. Scott Moxley, *Are Orange County Deputies Trying to Kill Pre-Trial Inmate Josh Waring?*, OC Weekly (Oct. 16, 2019), https://ocweekly.com/josh-waring-orange-county-jail/.

contact" with Benitez. Nor had Benitez proffered a "specific, official" policy of treating civil detainees the same as criminal inmates. The court reasoned thus that his complaint did not exclude the possibility that jail officers gone rogue were in fact responsible for the conditions of his confinement. And so it held that his allegations of an official policy or widespread practice were "conclusory" and dismissed his complaint.

But Benitez supported his conclusions with concrete facts. He alleged, for example, that for four out of the five years he was there, the jail *had* nowhere else to house civil detainees—in other words, that housing them with criminal inmates was *inherently* a matter of policy. For the final year, he cited jail policies by chapter and verse—policies that are in the record under Sheriff Hutchens's name and letterhead. He also alleged that everyone he asked—from jail staff to sheriff's deputies to employees of a county watchdog agency—told him forthrightly that his confinement accorded with official policy.

The district court brushed all that aside. Instead, it effectively required Benitez to produce—at the pleading stage, no less—written policies spelling out all the punitive conditions he alleged. It demanded that he state not only a *plausible* claim but one that excluded all alternative theories of the case. In short, it turned the standard for dismissal upside down: Rather than construe his allegations in the light most favorable to him, it construed them in the light most favorable to Defendants.

The court also misapplied the substantive law. Benitez can hold Orange County liable for the jail's policies and practices even if they are unwritten—even if discovery never reveals a written policy that says in so many words that "civil detainees shall be treated just like criminal inmates." *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (1978). In like manner, even though Sheriff Hutchens may not have stood at the jail's intake door and ordered her deputies to throw him in with the general criminal population, Benitez can still hold her individually liable because she was "in charge of" that policy or practice. *See OSU Student All. v. Ray*, 699 F.3d 1053, 1077 (9th Cir. 2012); *Starr v. Baca*, 652 F.3d 1202, 1208 (9th Cir. 2011). So on both counts, he has stated a claim.

The pages of the Federal Reporter are full of difficult cases of municipal and supervisory liability—cases like excessive force, failure to protect, or failure to treat, in which the supervening discretion of individual officers blurs the lines of fault and causation. This is not such a case. This is an easy case. Benitez alleged that the Orange County Jail, managed by Sheriff Hutchens, uniformly—whether as a matter of policy, custom, or practice—held its civil detainees in punitive conditions. He seeks to hold liable the county and the person in charge. This Court should let him proceed.

STATEMENT OF THE CASE

1. On March 15, 2008, Rafael Benitez was booked into the Orange County Jail (OCJ) to await trial for civil commitment under California's Sexually Violent Predator Act (SVPA). ER 71 ¶ 6.[3] Just as it did with all SVPA detainees, the jail housed him with inmates accused of crimes and serving criminal sentences. ER 71 ¶ 10. Forced to live cheek-by-jowl with them, Benitez worried for his safety. ER 75–76 ¶ 13. He knew that such inmates often target and attack persons accused of sex crimes. *Id.*[4]

But when he asked—repeatedly—to be housed in separate quarters, the jail's staff and sheriff's deputies told him "no such unit existed." ER 71 ¶ 8; ER 76 ¶ 14. They told him that the jail's policy, as outlined in the Jail Operations Manual (JOM), was to house civil detainees together with criminal ones. ER 71 ¶¶ 7–8; ER 76 ¶ 14. Indeed, they told him that the jail's policy was not to differentiate between the two groups at all. ER 76 ¶ 15. Its policy was to treat them the same. *See id.*

In May 2012, Sheriff Hutchens circulated a memorandum to jail

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[3] Because this appeal is taken from a motion to dismiss, all facts presented are as stated in Benitez's Third Amended Complaint (TAC). *See Capp v. County of San Diego*, No. 18-55119, 2019 WL 4892745, at *2 (9th Cir. Oct. 4, 2019).

[4] For example, in *King v. County of Los Angeles*, a civil-detainee plaintiff was attacked by a criminal inmate who slashed his cheek, chin, neck, and thigh with a modified razor. 885 F.3d 548, 552 (9th Cir. 2018).

staff with a "completely new" policy for quartering civil detainees at the jail. ER 57.[5] The new policy specified for the first time that "Civil Detainees will be housed separately from other criminal inmates." *Id.* It also specified some ways in which their conditions would improve—for example, that they would have "more opportunities" to exercise and change their clothing. ER 58–59.

But mostly conditions remained the same. Benitez was still jailed in a cell; he was still monitored by audio and video 24 hours a day; he still could not shower or use the toilet in private; he still could not receive telephone calls or make unmonitored calls; he still had no physical access to a law library. ER 72–75 ¶ 11 (alleging 82 ways in which the conditions of his confinement were unconstitutionally punitive). He could not even turn off the light in his cell at night. ER 75 ¶ 11(lxxi).

In contrast, Benitez currently lives at Coalinga State Hospital (Coalinga), which houses persons civilly committed under the SVPA. ER 70 ¶ 2; *King*, 885 F.3d at 555. At Coalinga, Benitez is a patient, not an inmate. *See id.* He lives in a dorm, not a cell. *See id.* He is treated by a team of psychologists, psychiatrists, social workers, and other medical and clinical staff. *See id.* He can make and receive calls at a public telephone; he is encouraged to have visitors, whom he may hug and kiss; he may receive packages and possess personal items; and he has

[5] The district court took judicial notice of this policy. ER 12.

many opportunities to work, play, learn, and socialize. *Id.*[6]

In 2012, perceiving that his entreaties to jail staff would not secure him living conditions comparable to those at Coalinga, Benitez began to direct his complaints to Orange County's Office of Independent Review (OIR). ER 76 ¶ 17.[7] OIR is a watchdog agency that the county established in 2008 after dangerous conditions at the OCJ led to the death of one inmate at the hands of another. *Office of Independent Review*, http://ocoir.ocgov.com/ (last visited Oct. 8, 2019).[8] Its purpose is to monitor, oversee, and advise the sheriff's department. *Id.* But OIR staff told Benitez that although they had reached out many times to Sheriff Hutchens about civil detainees' living conditions, Hutchens refused even to acknowledge that they were unlawful. ER 76–77 ¶¶ 18–19.

2. Sandra Hutchens was the sheriff of Orange County throughout the proceedings in the district court.[9] *See* ER 70 ¶ 3. By state law, she

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[6] The *King* court took judicial notice of these facts from the Coalinga website, *Department of State Hospitals–Coalinga*, Cal. Dep't of State Hospitals, http://www.dsh.ca.gov/coalinga/ (last visited Oct. 8, 2019). 885 F.3d at 555. This Court should do the same. *See id.*

[7] Benitez may have been communicating with OIR before 2012, as well; the TAC is unclear on this point. *See* ER 71 ¶ 8.

[8] The Court may take judicial notice of undisputed and publicly available information displayed on government websites. *King*, 885 F.3d at 555.

[9] While this appeal was pending, Don Barnes succeeded Hutchens as the Sheriff-Coroner of Orange County. *See* Ben Brazil, *Don Barnes is sworn in as Orange County's new sheriff*, L.A. Times (Jan. 9, 2019), https://www.latimes.com/socal/daily-pilot/news/tn-wknd-et-barnes-

had charge of and was the "sole and exclusive authority" over the Orange County Jail. Cal. Gov. Code §§ 26605, 26610. She was "answerable for [the] safekeeping" of prisoners in her custody. Cal. Pen. Code §§ 4000, 4006. She was specifically in charge of developing "a written classification plan designed to properly assign inmates to housing units." 15 Cal. Code Regs. § 1050(a). Indeed, the May 2012 change to the jail's housing policy, moving civil detainees out of the criminal population, issued under her letterhead. ER 57.

3. In June 2012, Benitez sued Sheriff Hutchens in her individual and official capacities. ER 119. After several rounds of briefing and amendment, Benitez filed the operative TAC in October 2015, which continues to name Hutchens in her individual and official capacities. ER 70 ¶ 4. She moved to dismiss the official-capacity claim, but expressly declined to address the claim against her individually on the theory that she had been served "in her official capacity only." ER 41 & n.2.

The magistrate judge assigned to the case entered a report and recommendation on both claims. ER 7–29. On official liability, she concluded that Benitez had failed to plausibly allege any "*specific*, *official*" municipal policy or practice that governed how he was held.

20190109-story.html. Under Federal Rule of Appellate Procedure 43(c)(2), he automatically replaced Sheriff Hutchens in her official capacity in this appeal. Sandra Hutchens remains a defendant in her individual capacity.

ER 28. On individual liability, she reasoned that Benitez's allegations made "equally possible" that either Sheriff Hutchens *or* some "other individuals" were responsible for the conditions of his confinement. ER 18; ER 21; ER 23. So she recommended that the court dismiss the entire TAC, without leave to amend. ER 29. The district court adopted her report and dismissed the case. ER 2–6; ER 1.

This appeal followed.

STANDARD OF REVIEW

This Court reviews dismissal of a complaint for failure to state a claim de novo. *OSU*, 699 F.3d at 1061. It accepts as true the well-pleaded allegations of fact that underlie the elements of a cause of action and construes them in the light most favorable to the plaintiff. *Id.*; *Starr*, 652 F.3d at 1216. If the complaint, so construed, gives the opposing party fair notice of the claim and plausibly suggests an entitlement to relief, the motion to dismiss must be denied. *Starr*, 652 F.3d at 1216–17. A complaint susceptible to multiple interpretations survives a motion to dismiss so long as at least one interpretation plausibly suggests that the plaintiff is entitled to relief. *Id.* And this Court construes *pro se* pleadings, especially in civil-rights cases, liberally. *Capp*, 2019 WL 4892745, at *4; *Jackson v. Barnes*, 749 F.3d 755, 763–64 (9th Cir. 2014).

SUMMARY OF ARGUMENT

Benitez has plausibly alleged that Orange County and Sheriff Hutchens are liable under 42 U.S.C. § 1983 for the unconstitutionally punitive conditions of his civil confinement at the OCJ.

1. The OCJ held Benitez in conditions that were at all times much more restrictive than those at Coalinga. For the first four years, it simply jailed him as though he were a member of the general criminal population. For the final year, it held him separately but in conditions that

were still much more restrictive than those at Coalinga. So for all five years, it held him in conditions that were presumptively punitive. *King*, 885 F.3d at 558. Defendants did not seek to rebut the presumption below and the Court should not permit them to do so now.

2. Benitez's suit against the sheriff of Orange County in his official capacity is equivalent to a suit against Orange County. To hold the county liable for his mistreatment, Benitez must plausibly allege that its policy, custom, or practice was responsible for the conditions he encountered. *See Monell*, 436 U.S. at 690–91. Benitez's complaint meets that standard:

- Benitez alleged that every state actor with whom he spoke—jail staff, sheriff's deputies, and OIR employees—told him the jail housed civil detainees with the general criminal population as a matter of official policy.
- In fact, he further alleged that until May 2012, they told him the jail *had* no separate facilities in which to hold civil detainees—which makes it implausible that Orange County was *not* responsible.
- For the period after May 2012, when the jail began to house civil detainees separately, Benitez alleged some 82 specific ways in which the *actual* conditions to which jail subjected him were unconstitutionally punitive.

- He alleged that the conditions of his confinement were programmatic, not individual—that he was at all times held in the same conditions as all SVPA detainees.
- And he alleged that Sandra Hutchens was "the most senior supervisor" of the OCJ and "responsible for [its] management." ER 70.

The combined force of these detailed allegations is more than enough to make his claim plausible. At a bare minimum, Benitez plausibly alleged that he was held according to an unwritten custom or practice, for which the county is equally liable. *See Monell*, 436 U.S. at 690–91; *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480–81 (1986).

3. Sheriff Hutchens is liable in her personal capacity because she was "in charge of" the jail's policies. *OSU*, 699 F.3d at 1076–77; *see Starr*, 652 F.3d at 1208. This Court has explained time and again that supervisors need not themselves inflict the constitutional injury to be liable in their personal capacity. *Starr*, 652 F.3d at 1205–06 ("We have never required a plaintiff to allege that a supervisor was physically present when the injury occurred."); *Lacey v. Maricopa County*, 693 F.3d 896, 915–16 (9th Cir. 2012) (en banc).

Benitez alleges and state law confirms that Sheriff Hutchens was in charge of the jail. What is more, her name and letterhead grace the the only written policies in the record. So state law, the record, and Benitez's allegations all show that Sheriff Hutchens managed and was in

charge of the jail's policies. That is enough to allow Benitez's suit to proceed.

ARGUMENT

To state a claim under § 1983, a plaintiff must allege that someone deprived him of a federal right under color of state law. Benitez spent five years in the Orange County Jail awaiting civil adjudication in conditions identical or similar to those faced by criminal inmates. Such conditions are presumptively punitive. And he alleged plausible and concrete facts that, taken as true, show that he was held according to official county policies, and that Sheriff Hutchens was in charge of those policies. He thus plausibly alleged that Hutchens—and through her, Orange County—deprived him of his right under the Fourteenth Amendment not to be held in conditions that amount to punishment. Nothing more is required. Benitez is entitled to proceed to discovery and litigate his case.

1. Benitez was jailed in conditions that were unconstitutionally punitive for a civil detainee.

A person detained under civil process may not be held in conditions that amount to punishment. *King*, 885 F.3d at 556–57; *Jones*, 393 F.3d at 932. Benitez alleged two distinct periods of confinement. In the first period, from his booking in 2008 until May 2012, he was held in the general criminal population, subject to the same conditions

and restrictions as inmates accused of crimes or serving criminal sentences. ER 71 ¶¶ 8, 10. Such conditions are presumptively punitive and so are unconstitutional for civil detainees. *King*, 885 F.3d at 557.

In the second period, beginning May 2012, Sheriff Hutchens issued new regulations directing the jail to hold civil detainees separately from criminal ones. ER 57–62. As in *King*, civil detainees at OCJ were now allowed a few "privileges" unavailable to their criminal counterparts. *See King*, 885 F.3d at 553–54; ER 57–62. But ultimately, the "basic nature of the SVP detainees' incarceration" in OCJ was not much changed: Benitez still faced conditions far more restrictive than those at Coalinga. *Cf. King*, 885 F.3d at 557; ER 71–75 ¶¶ 9, 11. For example:

- Benitez was still confined to his cell 24 hours a day, apart from four hours a week for exercise;
- he was still subject to 24-hour audio and video monitoring;
- he still had no privacy while showering or using the toilet;
- he still could not receive telephone calls;
- he still could not place unmonitored calls;
- he still could not receive "contact visits";
- he still was not given sufficient food;
- he still had no physical access to a law library;
- and, in fact, he was sometimes still "locked with those serving criminal sentences [or] awaiting criminal trials."

Compare ER 71–75 ¶¶ 9, 11 (describing the many ways in which Benitez's confinement at OCJ was more restrictive than at Coalinga), *with King*, 885 F.3d at 555 (describing conditions at Coalinga). Many of these restrictions are just like those William King suffered at Twin Towers Correctional Facilities. *See King*, 885 F.3d at 553–54. And, as in *King*, such restrictions are presumptively punitive. *Id.* at 557.

That presumption is rebuttable with a showing that the restrictions are justified by and proportionate to legitimate, non-punitive interests, *id.*, but Sheriff Hutchens made no attempt at such a showing below. *See* ER 41–51; ER 34–38. The district court, for its part, did not analyze the issue and effectively presumed that Benitez was confined in unconstitutionally punitive conditions. ER 18. This Court should do the same. *See In re Mortg. Elec. Registration Sys., Inc.*, 754 F.3d 772, 780 (9th Cir. 2014) ("Generally, arguments not raised in the district court will not be considered for the first time on appeal.").

2. Benitez can hold Orange County liable because county policy directed the conditions in which he was held.

A suit against Don Barnes in his official capacity as the current sheriff of Orange County[10] is a suit against Orange County. To hold Orange County liable, Benitez must show that official jail policy

[10] Barnes succeeded Sheriff Hutchens while this appeal was pending. *See supra* n.9.

governed the conditions in which he was held. Showing an official policy can sometimes be difficult. In cases involving excessive force, for instance, the cause of the constitutional violation could as easily be the caprice of individual officers as official policy.

But this is not that type of case. Benitez didn't allege that his jailers subjected him alone to punitive conditions—he alleged that the jail subjected all civil detainees to the *same* punitive conditions. Indeed, he alleged that for four out of the five years he was there, the jail had no non-punitive facilities in which it *could* hold civil detainees. In this type of case, the facts speak for themselves: If there was no written policy of holding civil detainees in such conditions, there was manifestly an unwritten one. At a minimum, there was a custom or practice of so holding them, and Orange County is just as liable for that.

2.1. Benitez's claim against Sheriff Barnes in his official capacity is a claim against Orange County.

A suit against a government officer in his official capacity is equivalent to a suit against the municipal entity of which he is an agent. *Monell*, 436 U.S. at 690 n.55; *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991). Under California law, a sheriff overseeing and managing the local jail is an agent of the county. *Cortez v. County of Los Angeles*, 294 F.3d 1186, 1190 (9th Cir. 2002) (citing Cal. Const. art. XI, § 1(b); Cal. Gov. Code §§ 23013, 25303, 815.2, 26605; Cal. Pen. Code § 4000; 15 Cal. Code Regs. §§ 1050, 1053, 1006). That means

he is an agent of the county for § 1983 purposes, too. *See id.*; *Starr*, 652 F.3d at 1208.

Don Barnes is the sheriff of Orange County. *See supra* n.9. He is therefore an agent of Orange County. So Benitez's claim against Sheriff Barnes in his official capacity is a claim against Orange County itself.

2.2. When a county directs its agents to inflict constitutional injury, it is liable under *Monell*.

A plaintiff can bring a § 1983 claim against a municipality only if the municipality itself inflicted his injury. *Gibson v. County of Washoe*, 290 F.3d 1175, 1185 (9th Cir. 2002), *overruled on other grounds by Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (en banc). But a municipality can act only through its agents. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988) (opinion of O'Connor, J.). So one way a plaintiff can show that a municipality inflicted his injury is by showing that it "directed" its agents to inflict the injury. *Gibson*, 290 F.3d at 1185; *see Rodriguez v. County of Los Angeles*, 891 F.3d 776, 802–03 (9th Cir. 2018) (outlining the three theories under which a municipality is liable for an injury under § 1983).

A municipality directs its agents through its policies, customs, and practices. *Los Angeles County v. Humphries*, 562 U.S. 29, 36 (2010). A municipality's policies include the decisions of its lawmakers and the acts of its policymaking officials. *Connick v. Thompson*, 563 U.S. 51, 61 (2011). Who counts as a municipal policymaker—i.e., whose decisions

count as the municipality's—is a question of state and local law. *Praprotnik*, 485 U.S. at 124–25 (opinion of O'Connor, J.); *Hyland v. Wonder*, 117 F.3d 405, 414 (9th Cir. 1997). This type of formal policy may be "committed to writing," but it may be unwritten too. *Pembaur*, 475 U.S. at 480–81.

Along with affirmative decisions by policymakers, a municipality can direct its agents through "practices so persistent and widespread as to practically have the force of law." *Connick*, 563 U.S. at 61; *Pembaur*, 475 U.S. at 481–82 n.10 (plurality opinion). In particular, "a plaintiff can show a custom or practice of *violating a written policy*; otherwise an entity, no matter how flagrant its actual routine practices, always could avoid liability by pointing to a pristine set of policies." *Castro*, 833 F.3d at 1075 n.10 (emphasis added).

2.3. Orange County directed its agents to hold Benitez in unconstitutionally punitive conditions.

Benitez alleged that the OCJ's policies and practices directed the conditions in which jail staff held him. And he offered a plethora of specific underlying facts to support that conclusion.

1. For the first period, from 2008 to May 2012, Benitez alleged the OCJ held him as though he were part of its general criminal population. ER 71 ¶ 10; ER 76 ¶ 14. He did not allege that he was specially mistreated—he alleged that *all* detainees awaiting a commitment hearing were held in the same manner. ER 71 ¶ 10; *see* ER 76 ¶ 16. He

alleged that jail staff, sheriff's deputies, and OIR employees all told him that civil detainees were so held in accordance with the jail's policies, "as outlined within the JOM." ER 71 ¶ 8; ER 76 ¶ 14. In fact, when he asked to be housed separately, the deputies told him that "no such unit existed." ER 76 ¶ 14. Not only that, they told him the jail's policies did not distinguish between civil detainees and criminal inmates at all. ER 76 ¶ 15.

These are not labels and conclusions or formulaic recitations of the elements of a cause of action. *Cf. Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Nor are they "unadorned, the-defendant-unlawfully-harmed-me accusation[s]." *Id.* Nor yet are they "[v]ague and conclusory allegations of official participation in civil rights violations." *See Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992) (per curiam) (quotation marks omitted). Rather, they are precisely the type of underlying factual allegation that gives fair notice and enables the opposing party to defend itself effectively. *Starr*, 652 F.3d at 1216.

Benitez alleged that he was told that the jail's policy for holding civil detainees was "outlined within the JOM"—that is, he was told it was a *written* policy. ER 71 ¶ 8. When a municipality's written policies direct employees to violate federal law, drawing the lines of fault and causation to the municipality is "straightforward." *See Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 404–05 (1997). In other words, like *Monell*, this is the "clear case." 436 U.S. at 713 (Powell, J., concurring).

But even disregarding that allegation—even if the policy wasn't written down somewhere—Benitez's allegations show that the jail's *un*-written policy or custom before May 2012 was to hold criminal and civil detainees together. Sheriff's deputies told Benitez forthrightly that the jail had no separate quarters for civil detainees. ER 76 ¶¶ 14–15. And confirming that, they held *all* civil detainees in the general criminal population. *See* ER 71 ¶ 10.

Taken as true, those allegations refute the notion that Benitez was jailed with criminal inmates on the whims of individual rogue officers. They show that if there was no formal rule, then there was a mandatory "understanding" that civil detainees would be held undifferentiated from their criminal counterparts. *See Pembaur*, 475 U.S. at 480–81. Confirming those allegations, four years into Benitez's detention, the jail announced—in a policy that was by its own admission "completely new"— that civil detainees would henceforth be separated from the general criminal population. ER 57. Whether the policy before that was written or unwritten matters not: A municipality is as liable for its unwritten policies as its written ones. *Pembaur*, 475 U.S. at 480–81.

Even on the most cramped reading of his complaint, Benitez's allegations establish (1) that jail staff understood that they should warehouse civil detainees with criminal ones; and (2) that during the first period of Benitez's confinement, their uniform practice was to do just that. ER 71 ¶¶ 8, 10; ER 76 ¶ 14. Under *Monell*, that sort of

"persistent and widespread" practice, too, amounts to an official policy. *Connick*, 563 U.S. at 61; *see Monell*, 436 U.S. at 690–91. So even on this improperly narrow treatment of his allegations, Benitez can hold the county liable.

The district court faulted Benitez for not alleging "a *specific*, *official* municipal policy, custom, or usage." ER 28. But the policy Benitez alleged is specific enough: The jail did not differentiate between its civil detainees and its general criminal population. ER 76 ¶ 15. Just because the policy is simple does not mean it is vague. And Benitez's allegations that jail staff told him the policy was official and that they treated it as official are specific "allegations of underlying facts" that buttress his allegation that it *was* official. *See* ER 71 ¶¶ 8, 10; ER 76 ¶ 14; *Starr*, 652 F.3d at 1216.

To require more—to demand, for instance, that Benitez produce chapter-and-verse citations to the JOM—is to flip the standard for dismissal. *Cf. OSU*, 699 F.3d at 1077. That sort of factual development into details exclusively in the opposing party's hands is exactly what discovery is for. *See id.* Such a demand is also wrong on the substantive law. Even if the JOM said nothing about civil detainees during these first four years, the jail's manifest, uniform practice of holding them with criminal inmates makes Orange County just as liable. *Connick*, 563 U.S. at 61; *Monell*, 436 U.S. at 690–91.

2. For the final year of his confinement in the OCJ, beginning May 2012, Benitez *did* provide chapter-and-verse citations to JOM policies. ER 71 ¶ 9. The district court took judicial notice of their contents, so the policies are in the record. ER 12; ER 57–62. While they offered some token improvements to civil detainees' quality of life—most importantly, removing them from the general criminal population—things mostly stayed the same. In particular, Benitez alleged 82 specific ways in which the actual conditions of his confinement remained punitive, in that they were "*far* more restrictive than the conditions civil detainees are subjected to at Coalinga State Hospital following SVPA commitment." ER 72; *see* Part 1, *supra* (discussing the most egregious restrictions).

As with the first four years, Benitez again alleged that the jail subjected *all* SVPA detainees to the same conditions. ER 71–72 ¶ 11. He alleged that he informed Sheriff Hutchens, through OIR, of the actual conditions he faced. ER 76 ¶ 18. But, he alleged, Sheriff Hutchens simply brushed off his complaint and responded that those conditions were not, in her view, "unlawful." ER 76–77 ¶ 19. In other words, she "acquiesce[d]" in them. ER 77 ¶ 20.

These factual allegations show that the conditions he suffered were driven by official policy or practice. Not only were they uniformly applied, but Sheriff Hutchens was informed of them and did nothing. At a minimum, Benitez's allegations show that Sheriff Hutchens continued

to adhere to an approach that had failed to prevent her subordinates from violating civil detainees' constitutional rights. That is itself a policy under *Monell*. *See Brown*, 520 U.S. at 407. And if Benitez's allegation that Hutchens acquiesced in the punitive conditions needs more factual development, that is a matter for discovery; it does not doom his claim at the pleading stage. *OSU*, 699 F.3d at 1077.[11]

The district court harped on perceived inconsistencies between the May 2012 policies and Benitez's allegations. ER 23–25. But minor inconsistencies do not make allegations implausible. *Lacey*, 693 F.3d at 924 ("*Iqbal* . . . does not require us to flyspeck complaints looking for any gap in the facts."). Here, even if the jail's new written policies were "pristine," Benitez alleged "actual routine practices" that were punitive, which is enough to survive a motion to dismiss. *Castro*, 833 F.3d at 1075 n.10.[12]

Besides, the district court was simply mistaken about several supposed inconsistencies. For instance, the court noted that although Benitez alleged that he was confined to his cell for most of the day, the new policy gave civil detainees access to a "dayroom." ER 24; *see* ER 58.

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[11] Sheriff Hutchens plainly acquiesced at least as of the date in 2012 that she was served with the complaint. *See* ER 77 ¶ 20.

[12] Similarly, "routine failure" or "claimed inability" to follow a policy that passes constitutional muster is itself a custom or policy that "overrides, for *Monell* purposes," the paper policy. *Redman v. County of San Diego*, 942 F.2d 1435, 1445 (9th Cir. 1991) (en banc), *abrogated on other grounds by Farmer v. Brennan*, 511 U.S. 825, 836–37 (1994).

But in fact, the policy distinguished here between "SVPs" and "non-SVP Civil Detainees." ER 58. It required that the two groups "not" be commingled. *Id.* And it then provided that "Civil Detainees" simpliciter would have use of the dayroom. *Id.*[13] The natural inference—especially on a motion to dismiss, when all inferences must be drawn in favor of the plaintiff—is that only "non-SVP Civil Detainees" in fact got use of the dayroom. In other words, there is no inconsistency between Benitez's allegation and the jail's paper policy.

Similarly, the district court questioned Benitez's allegation that just like criminal inmates, he could not receive telephone calls or place unmonitored calls. ER 24–25; *see* ER 73 ¶ 11(xxxix–xl). But that too tracks the new policies, which provided only that civil detainees would "have telephone access," not that they would have any better access than that afforded criminal inmates. ER 58. Benitez also alleged that he had no privacy while showering or using the toilet. ER 72 ¶ 11(xvi–xvii). The new policies are silent on that. *See* ER 57–62. And he alleged he still had no physical access to a law library—which the new policies confirm. *Compare* ER 72 ¶ 11(xiv), *with* ER 62.

In fact, even on the most ungenerous reading of the record, taking the May 2012 policies at face value, they are still more restrictive than

[13] There is only a single dayroom. The policy provides that both SVPA and non-SVPA civil detainees are to be housed in "Module R-33." ER 58. The dayroom provision then allows civil detainees access to "[t]he" dayroom in the module. *Id.*

conditions at Coalinga. As this Court noted in *King*, patients at Coalinga live in "dorms," while inmates in the civil-detainee module of OCJ are jailed in "cell[s]." *See* 885 F.3d at 555; ER 57–61. While patients at Coalinga may participate in a variety of indoor and outdoor sports, civil detainees at OCJ get three and a half hours a week on a roof. *See King*, 885 F.3d at 555; ER 58. And while Coalinga permits patients to receive packages and possess personal items, the OCJ declares such items contraband and threatens detainees with disciplinary action. *See King*, 885 F.3d at 555; ER 59. It bears repeating that Sheriff Hutchens offered no legitimate, non-punitive justification for these restrictions. *See* Part 1, *supra*. So they are enough, on their own, to sustain Benitez's claim.

Ultimately, the search for a policy or custom is about responsibility. A municipality may be held responsible only for its own acts. *Brown*, 520 U.S. at 403–04. For four of the five years it held Benitez, Orange County had no separate facilities in which to hold civil detainees and could *only* hold them with criminal inmates. For those four years, Benitez has vaulted over the standard to state a claim: It is implausible that Orange County was *not* responsible.

And Benitez stated a claim for the final year, too: He alleged that Orange County held him under specific, detailed, presumptively punitive restrictions; that they were directed by official policy or, at a

minimum, were applied as a uniform custom or practice to all civil detainees; and that Sheriff Hutchens imposed the policy or at least acquiesced in the practice. And if nothing else, the record contains specific policies issued under her name and letterhead that are unconstitutionally punitive on their face.

Under California law, the sheriff is "required by statute to take charge of and keep the county jail and the prisoners in it, and is answerable for the prisoners' safekeeping." *Starr*, 652 F.3d at 1208 (cleaned up). On that basis, this Court held Sheriff Baca liable in his official capacity for the conditions of William King's confinement. *King*, 885 F.3d at 558–59. By the same token, Benitez can hold Sheriff Barnes liable in his official capacity here.

3. Benitez can hold Sheriff Hutchens liable in her individual capacity because she was in charge of the jail's policies.

A person is individually liable under § 1983 if, under color of state law, she "subjects" a person or "causes [him] to be subjected" to a deprivation of his federal rights. Section 1983's broad, remedial liability[14] extends to a supervisor who is "in charge of" or "possesses responsibility for the continued operation of" a policy that causes her employees to deprive a person of his federal rights. *OSU*, 699 F.3d at 1076 (quoting

[14] *See Monell*, 436 U.S. at 684 ("This act is remedial, and in aid of the preservation of human liberty and human rights." (quoting Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871) (Rep. Shellabarger))).

Dodds v. Richardson, 614 F.3d 1185, 1199 (10th Cir. 2010)). As shown above, the jail had a policy of housing civil detainees in conditions similar or identical to those faced by criminal inmates. And under California law, Sheriff Hutchens possessed responsibility for the continued operation of that policy. So she is liable under § 1983 in her individual capacity.

3.1. A supervisor is liable for her subordinates' acts if she is in charge of the policy that governs those acts.

This Court has long recognized that although a supervisor will "rarely be directly and personally involved in the same way as are the individual officers who are on the scene inflicting constitutional injury," she can still be held liable in her individual capacity. *Larez*, 846 F.3d at 645. Neither "direct causation by affirmative action" nor physical presence is necessary. *Castro*, 833 F.3d at 1067 (quotation marks omitted); *Starr*, 652 F.3d at 1205. But a plaintiff may not proceed on a theory of vicarious liability; he can recover only if the supervisor "breached a duty to [him] which was the proximate cause of the injury." *Starr*, 652 F.3d at 1207 (quotation marks omitted).

The requisite causal connection can be established by alleging that the supervisor created, promulgated, advanced, implemented, managed, or in some other way "possesse[d] responsibility for the continued operation of" a policy under which her subordinates violated constitutional rights. *OSU*, 699 F.3d at 1076. The supervisor need not have "devised"

the policy; all a plaintiff need allege is that she was "in charge of" it. *Id.* at 1076–77. The policy may be "unwritten." *Id.* And if it is more like a *custom* than a policy, then the supervisor is liable if she knew of the custom, knew or reasonably should have known it would cause injury, and did not put a stop to it. *Starr*, 652 F.3d at 1207–08.

3.2. Sheriff Hutchens was in charge of the policies that governed the conditions in which Benitez was held.

When Benitez was in the OCJ, Sheriff Hutchens was the official charged under state law with promulgating, managing, and implementing its policies. She was the "sole and exclusive authority to keep the county jail and the prisoners in it." Cal. Gov. Code § 26605; *accord* Cal. Pen. Code § 4000 (providing that the county sheriff operates the county jail). She was "answerable for [prisoners'] safekeeping in the courts of the United States." Cal. Pen. Code § 4006. In fact, she was specifically in charge of developing and implementing a "written classification plan designed to properly assign inmates to housing units." 15 Cal. Code Regs. § 1050(a). She was thus "in charge of" the policies that governed the conditions in which Benitez was held. *See Starr*, 652 F.3d at 1208 (citing *Redman*, 942 F.3d at 1446–48); *OSU*, 699 F.3d at 1077.

OSU Student Alliance is illustrative. There, the court held that students could hold the head of a university's facilities department liable in his individual capacity for constitutional violations committed by custodial staff executing department policies. *See OSU*, 699 F.3d at 1076–

77 ("[B]ecause it alleges that Martorello was in charge of the newsbin policy and that the confiscation without notice was conducted pursuant to that policy, the complaint pleads a due process claim against Martorello."). So too here: Benitez can hold Sheriff Hutchens liable in her individual capacity for constitutional violations committed by jail staff executing jail policies. *See id.* Both individuals are liable for the same reason: they are "in charge of" their respective policies. *See id.* All the more here, because the sheriff's authority over the jail is explicit in state law. *Starr*, 652 F.3d at 1208.

Iqbal is not to the contrary. First, the defendants there were not local sheriffs. They were officials "at the highest level of the federal law enforcement hierarchy": John Ashcroft, Attorney General of the United States, and Robert Mueller, Director of the Federal Bureau of Investigation. *Iqbal*, 556 U.S. at 667–68. And second, Javaid Iqbal sought to hold Ashcroft and Mueller responsible not for his arrest, nor for his confinement, but for the kicks and punches of individual prison guards. *Id.*

Benitez's allegations differ materially in both respects. He seeks to hold accountable not the attorney general but the county sheriff. And he alleges not individual mistreatment, which may frequently be meted out by rogue officers, but longstanding, established conditions that applied *generally* to all "similarly situated individuals held pursuant to the SVPA." ER 71 ¶¶ 10–11; *see* ER 76 ¶ 16. The allegation that Sheriff Hutchens was in charge of where and how to house civil detainees is a

far cry from the notion that the attorney general of the United States had a hand in specific physical mistreatment suffered by an individual inmate. For one thing, state law *put* Sheriff Hutchens in charge of "properly assign[ing] inmates to housing units." *E.g.*, 15 Cal. Code Regs. § 1050(a). For another, the May 2012 policy change—the only written policy in the record—issued under her name. ER 57.

Benitez adds other specific allegations to bolster his claim. All the municipal authorities he asked told him he was being held "in accordance with [Hutchens's] policies." ER 71 ¶ 8; ER 76 ¶ 14. OIR reached out to Hutchens about the conditions of civil detainees' confinement and she responded only that she did not believe they were unlawful. ER 76–77 ¶¶ 17–19. Even after Benitez filed his complaint, she refused to change the policy. ER 77 ¶ 20.

A supervisor can be held liable in her individual capacity for "knowingly refusing to terminate" a practice that will cause constitutional injury. *Starr*, 652 F.3d at 1207–08 (cleaned up). And she need know only of the practice, not of its "application against the plaintiff in particular." *OSU*, 699 F.3d at 1076. For the first four years of Benitez's confinement, it is implausible that Hutchens did not know that her jail locked civil detainees up with criminal inmates—it had nowhere else to put them. And for the final year, Benitez has alleged that she knew of the punitive conditions both through OIR and then his complaint. ER 76–77 ¶¶ 17–20.

These allegations, combined with state law and the policies in the record, do much more than "nudge[]" Benitez's claim against Hutchens over the line from conceivable to plausible. *Cf. Iqbal*, 556 U.S. at 678 (quotation marks omitted). They *hurl* it over. Even so, the district court held that Benitez had failed to state a claim. It reasoned that "nothing in the Third Amended Complaint plausibly shows that defendant Hutchens ever had any direct contact with plaintiff." ER 19. That contradicts this Court's repeated and unequivocal instruction that a supervisor need not personally administer the constitutional injury to be liable for it. *Castro*, 833 F.3d at 1067; *Starr*, 652 F.3d at 1205; *Larez*, 946 F.2d at 645.

The district court also faulted Benitez for failing to allege that "*the defendant*, as an individual, . . . personally created, promulgated, implemented, or advanced, a particular policy during the First Time Period." ER 20. That, too, conflicts with this Court's precedents: A supervisor need not personally "devise" a policy as long as she is responsible for its "continued operation." *OSU*, 699 F.3d at 1076–77. And indeed, the facts alleged in *OSU*—the defendant's position atop the department hierarchy, the policymaking and enforcement responsibilities assigned to that position, the defendant's later involvement with the policy—are all analogous to Benitez's case. *See id.* at 1077; ER 71–77 ¶¶ 8–20; *see* ER 57. There, the court held that "[t]he inference that [the defendant]

oversaw enforcement of the policy flows naturally from these facts." *OSU*, 699 F.3d at 1077. Just so here.

The district court also speculated that even though Benitez was *told* he was held according to official policy, perhaps he was *actually* held according to the whims of rogue officers. ER 21; ER 23. But nothing—neither *Iqbal* nor *Starr* nor any other case applying Federal Rule of Civil Procedure 12(b)(6)—requires a plaintiff to refute in his complaint all alternative theories of the case. Indeed, just the opposite is true: To secure dismissal, the defendant must present an alternative theory "so convincing" as to render the plaintiff's allegations "*im*plausible." *Starr*, 652 F.3d at 1216–17.[15]

The district court supported its alternative theory with the observation that California Penal Code § 4002 dictates that civil detainees and criminal inmates must be kept separate. But the existence of the statute is no kind of proof that OCJ followed it: *Jones* announced the

[15] Elsewhere, the district court cited *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104 (9th Cir. 2013), for the proposition that a plaintiff's complaint must "tend to exclude" alternative explanations. ER 19–20 (quotation marks omitted). But as the *Century Aluminum* court itself acknowledged in an amendment, "[i]f there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, *both of which are plausible*, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6)." 729 F.3d at 1108 (quoting *Starr*, 652 F.3d at 1216). The court's skepticism of the complaint in that case was driven entirely by its perception that the plaintiffs' allegations were in fact "impossible" to prove. *Id.* at 1107 (quotation marks omitted).

standard for holding civil detainees in 2004, and 18 years later Los Angeles County still had not complied. 393 F.3d at 932–33; *King*, 885 F.3d at 557–59. Lacking any footing in the complaint or the record, the district court's alternative theory is nothing but conjecture. It cannot be the sort of powerful alternative explanation that renders Benitez's allegations implausible.

The district court also noted that the jail's written policy did not "expressly" "require" certain punitive conditions. *See* ER 23–25.[16] But just as in *OSU*, a supervisor is as liable for implicit or unwritten policies as express ones. *OSU*, 699 F.3d at 1076. Finally, the district court noted that Benitez had not alleged how the conditions of his confinement were "excessive in light of the inherent constrictions of detention itself." ER 26. But he doesn't have to: He is entitled to the *presumption* that they are. *Jones*, 393 F.3d at 933. Sheriff Hutchens must refute the presumption; she did not even address it below. ER 41–51; ER 34–38.

In sum, state law, the written policies in the record, and pages of specific allegations all back Benitez's individual-capacity claim against

[16] Relatedly, the district court also suggested that some of Benitez's allegations about conditions after May 2012 seemed inconsistent with the cited sections of the JOM. ER 23–25. Those supposed inconsistencies are addressed above in Part 2.3. In any event, minor inconsistencies are not fatal to a complaint. *Lacey*, 693 F.3d at 924; *see Jackson*, 749 F.3d at 763–64 ("[W]e continue to construe *pro se* filings liberally when evaluating them under *Iqbal*, particularly in civil rights cases." (quotation marks omitted)).

Sheriff Hutchens. To require more would "overstate what needs to be alleged to state a claim at the beginning of a lawsuit before discovery," especially given the liberal pleading requirements for *pro se* litigants. *Disability Rights Montana, Inc. v. Batista*, 930 F.3d 1090, 1098 (9th Cir. 2019); *Jackson*, 749 F.3d at 763–64. At a minimum, the district court erred in denying Benitez leave to amend. *See Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1102 (9th Cir. 2018). But no amendment is necessary: Benitez is entitled to litigate his claim.

3.3. Sheriff Hutchens was properly served in her individual capacity and the Court should overlook any technical defect.

In the district court and in an earlier round of briefing in this Court, Sheriff Hutchens claimed that she was insufficiently served in her individual capacity. *See* ER 40; Dkt. 13 at 5 n.1. But she neither moved to dismiss for insufficient service nor otherwise explained why she had not properly been served. Instead, she simply dropped a footnote in her motion to dismiss stating that she had been served "in her official capacity only" and otherwise ignored Benitez's claim against her in her individual capacity. ER 41 & n.2 (motion to dismiss the TAC); ER 83 & n.2 (motion to dismiss the FAC). The district court ignored this sidelong argument and reached individual liability on the merits. *See* ER 18–26; ER 2–6. This Court should do the same.

If the Court chooses to address the issue, Sheriff Hutchens is mistaken: The U.S. Marshals served her on behalf of Benitez in accordance with state law, as authorized by Federal Rule of Civil Procedure 4(e)(1). *See* ER 101. Even if there were some defect, this Court should do as the district court implicitly did and overlook it under the solicitous standards afforded *pro se* litigants. *See Borzeka v. Heckler*, 739 F.2d 444, 447 & n.2 (9th Cir. 1984); *Travelers Cas. & Sur. Co. of Am. v. Brenneke*, 551 F.3d 1132, 1135 (9th Cir. 2009) ("Rule 4 is to be liberally construed to uphold service." (quotation marks omitted)).

Rule 4(e)(1) permits service on an individual in accordance with state law. California law, in turn, permits service on an individual by leaving a copy at her "usual place of business" in the presence of "a person apparently in charge." Cal. Code Civ. P. § 415.20(b). That much Benitez did: After he filed his First Amended Complaint (FAC), the district court authorized service upon "Defendant Sheriff Sandra Hutchens" and issued Benitez a USM-285 form for service by U.S. Marshals. ER 104; ER 101. He dutifully completed it. ER 104. The Marshals then served the FAC upon Hutchens through the clerk of the Orange County Board of Supervisors. ER 101.

Section 415.20(b) also requires that the complaint be mailed afterwards to the same address. Hutchens did not argue below that such a mailing did not occur. She has thus waived any argument about it on

appeal. *See* 5C Wright & Miller, Fed. Prac. & Proc. Civ. § 1391 (3d ed. August 2019 Update).

Even if there were some technical defect, the Court should construe Rule 4 liberally and uphold service. *See Travelers*, 551 F.3d at 1135. This Court overlooks such defects if

> (a) the party that had to be served personally received actual notice, (b) the defendant would suffer no prejudice from the defect in service, (c) there is a justifiable excuse for the failure to serve properly, and (d) the plaintiff would be severely prejudiced if his complaint were dismissed.

See Borzeka, 739 F.2d at 447. And it applies this test more flexibly for *pro se* litigants. *Id*. n.2.

Benitez meets all four elements. Hutchens had actual notice because she received the FAC and the TAC, both of which state that Benitez is suing her in her individual and her official capacities. ER 108; ER 70. Even though § 1983 doctrine distinguishes between the two, Hutchens is in the end only one natural person. If she had actual notice in her official capacity, she could not hide it from herself in her individual capacity. And she had enough notice to disclaim individual service—if only in desultory fashion—in her motion to dismiss. ER 83 & n.2.[17]

[17] Further showing that she had actual notice, Sheriff Hutchens filed a "Notice of Interested Parties" listing herself and Orange County *separately* as having a "pecuniary interest" in the outcome of the case. ER 99.

Because she received actual notice, Sheriff Hutchens could have fully argued the merits of her case before the district court. Indeed, she will have the same chance on appeal. So she cannot show that she will suffer any prejudice if the Court overlooks a defect in service. *See United Food & Commercial Workers Int'l Union, AFL-CIO v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984).

Benitez also has a "justifiable excuse": He fully complied with the district court's instructions for service. *See* ER 104; ER 101. Perceiving that he had sued a single defendant, the court sent him a single copy of the USM-285 form and assured him that once he filled it out, "[t]he Court will direct the United States Marshal to serve the above-named Defendants pursuant to Fed.R.Civ.P.4." ER 104. It affirmatively told him that he "need not attempt service on Defendant(s) named in this Order." *Id.* Because Benitez obeyed the court's instructions, even if there was some defect in service, it was justified.[18] *See Hart v. United States*, 817 F.2d 78, 81 (9th Cir. 1987) (explaining that "third-party error" makes for a justifiable excuse).

And Benitez would suffer severe prejudice if his individual-liability claim were dismissed solely on the basis of a hyper-technical defect in service. Suits against officers in their official capacity have different

[18] For the same reason, Benitez "substantially complied" with Rule 4(e)(1) and Cal. Code Civ. P. § 415.20(b). *Cf. Travelers*, 551 F.3d at 1135.

elements of proof, are subject to different defenses, and permit recovery of fees under different circumstances than suits against officers individually. *See Kentucky v. Graham*, 473 U.S. 159, 165–68 (1985).

In sum, Benitez properly served Hutchens in her individual capacity under state law, and even if there were some technical defect, this Court should overlook it under a liberal construction of Rule 4 and the solicitous standards afforded *pro se* litigants. *Travelers*, 551 F.3d at 1135; *Borzeka*, 739 F.3d at 447 n.2. It should therefore evaluate his claim against her in her individual capacity on the merits. And on the merits, it should hold that he has stated a claim. *See* Part 3.2, *supra*.

CONCLUSION

For all these reasons, the judgment of the district court should be reversed.

Dated: October 25, 2019

Respectfully submitted,

By: */s/Athul K. Acharya*
Athul K. Acharya
Matthew B. Borden

BRAUNHAGEY & BORDEN LLP
Counsel for *Plaintiff*

STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Rule 28-2.6, counsel for Rafael Benitez is unaware of any related cases pending in this Court.

Dated: October 25, 2019

Respectfully submitted,

By: */s/Athul K. Acharya*
Athul K. Acharya
Matthew B. Borden

BRAUNHAGEY & BORDEN LLP
Counsel for *Plaintiff*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM

TABLE OF CONTENTS

Page

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Cal. Const. art. XI, § 1(b)

(b) The Legislature shall provide for county powers, an elected county sheriff, an elected district attorney, an elected assessor, and an elected governing body in each county. Except as provided in subdivision (b) of Section 4 of this article, each governing body shall prescribe by ordinance the compensation of its members, but the ordinance prescribing such compensation shall be subject to referendum. The Legislature or the governing body may provide for other officers whose compensation shall be prescribed by the governing body. The governing body shall provide for the number, compensation, tenure, and appointment of employees.

Cal. Gov. Code § 815.2

(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

(b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.

Cal. Gov. Code § 23013

The board of supervisors of any county may, by resolution, establish a department of corrections, to be headed by an officer appointed by the board, which shall have jurisdiction over all county functions, personnel, and facilities, or so many as the board names in its resolution, relating to institutional punishment, care, treatment, and rehabilitation of prisoners, including, but not limited to, the county jail and industrial farms and road camps, their functions and personnel.

The boards of supervisors of two or more counties may, by agreement and the enactment of ordinances in conformity thereto, establish a joint department of corrections to serve all the counties included in the agreement, to be headed by an officer appointed by the boards jointly.

Cal. Gov. Code § 25303

The board of supervisors shall supervise the official conduct of all county officers, and officers of all districts and other subdivisions of the county, and particularly insofar as the functions and duties of such county officers and officers of all districts and subdivisions of the county relate to the assessing, collecting, safekeeping, management, or disbursement of public funds. It shall see that they faithfully perform their duties, direct prosecutions for delinquencies, and when necessary, require them to renew their official bond, make reports and present their books and accounts for inspection.

This section shall not be construed to affect the independent and constitutionally and statutorily designated investigative and prosecutorial functions of the sheriff and district attorney of a county. The board of supervisors shall not obstruct the investigative function of the sheriff of the county nor shall it obstruct the investigative and prosecutorial function of the district attorney of a county.

Nothing contained herein shall be construed to limit the budgetary authority of the board of supervisors over the district attorney or sheriff.

Cal. Gov. Code § 26605

Notwithstanding any other provision of law, except in counties in which the sheriff, as of July 1, 1993, is not in charge of and the sole and exclusive authority to keep the county jail and the prisoners in it, the sheriff shall take charge of and be the sole and exclusive authority to keep the county jail and the prisoners in it including persons confined to the county jail pursuant to subdivision (b) of Section 3454 of the Penal Code for a violation of the terms and conditions of their postrelease community supervision, except for work furlough facilities where by county ordinance the work furlough administrator is someone other than the sheriff.

Cal. Gov. Code § 26610

The sheriff of any county which maintains a jail in another county has the same control and supervision of the property, personnel, and inmates that he would have if the jail were located within the boundaries of the county which maintains it.

Cal. Pen. Code § 4000

The common jails in the several counties of this state are kept by the sheriffs of the counties in which they are respectively situated, and are used as follows:

1. For the detention of persons committed in order to secure their attendance as witnesses in criminal cases;
2. For the detention of persons charged with crime and committed for trial;
3. For the confinement of persons committed for contempt, or upon civil process, or by other authority of law;
4. For the confinement of persons sentenced to imprisonment therein upon a conviction for crime.

5. For the confinement of persons pursuant to subdivision (b) of Section 3454 for a violation of the terms and conditions of their postrelease community supervision.

Cal. Pen. Code § 4002(b)

(b) Inmates who are held pending civil process under the sexually violent predator laws shall be held in administrative segregation. For purposes of this subdivision, administrative segregation means separate and secure housing that does not involve any deprivation of privileges other than what is necessary to protect the inmates and staff. Consistent with Section 1610, to the extent possible, the person shall continue in his or her course of treatment, if any. An alleged sexually violent predator held pending civil process may waive placement in secure housing by petitioning the court for a waiver. In order to grant the waiver, the court must find that the waiver is voluntary and intelligent, and that granting the waiver would not interfere with any treatment programming for the person requesting the waiver. A person granted a waiver shall be placed with inmates charged with similar offenses or with similar criminal histories, based on the objective criteria set forth in subdivision (a).

Cal. Pen. Code § 4006

A sheriff, to whose custody a prisoner is committed as provided in the last section, is answerable for his safekeeping in the courts of the United States, according to the laws thereof.

15 Cal. Code Regs. § 1006 (relevant portion)

. . .

"Administrative segregation" means the physical separation of different types of inmates from each other as specified in Penal Code Sections 4001 and 4002, and Section 1053 of these regulations. Administrative segregation is accomplished to provide that level of control and security necessary for good management and the protection of staff and inmates.

. . .

15 Cal. Code Regs. § 1050

(a) Each administrator of a temporary holding, Type I, II, or III facility shall develop and implement a written classification plan designed to properly assign inmates to housing units and activities according to the categories of sex, age, criminal sophistication, seriousness of crime charged, physical or mental health needs, assaultive/non-assaultive behavior, risk of being sexually abused or sexually harassed, and other criteria which will provide for the safety of the inmates and staff. Such housing unit assignment shall be accomplished to the extent possible within the limits of the available number of distinct housing units or cells in a facility.

The written classification plan shall be based on objective criteria and include receiving screening performed at the time of intake by trained personnel, and a record of each inmate's classification level, housing restrictions, and housing assignments.

Each administrator of a Type II or III facility shall establish and implement a classification system which will include the use of classification officers or a classification committee in order to properly assign inmates to housing, work, rehabilitation programs, and leisure activities. Such a plan shall include the use of as much information as is available about the inmate and from the inmate and shall provide for a channel of appeal by the inmate to the facility administrator or designee. An inmate who has been sentenced to more than 60 days may request a review of his classification plan no more often than 30 days from his last review.

(b) Each administrator of a court holding facility shall establish and implement a written plan designed to provide for the safety of staff and inmates held at the facility. The plan shall include receiving and transmitting of information regarding inmates who represent unusual risk or hazard while confined at the facility, and the segregation of such inmates to the extent possible within the limits of the court holding facility.

(c) In deciding whether to assign an inmate to a housing area for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the

placement would present management or security problems. An inmate's own views with respect to his or her own safety shall be given serious consideration.

15 Cal. Code Regs. § 1053

Except in Type IV facilities, each facility administrator shall develop written policies and procedures which provide for the administrative segregation of inmates who are determined to be prone to: promote activity or behavior that is criminal in nature or disruptive to facility operations; demonstrate influence over other inmates, including influence to promote or direct action or behavior that is criminal in nature or disruptive to the safety and security of other inmates or facility staff, as well as to the safe operation of the facility; escape; assault, attempted assault, or participation in a conspiracy to assault or harm other inmates or facility staff; or likely to need protection from other inmates, if such administrative segregation is determined to be necessary in order to obtain the objective of protecting the welfare of inmates and staff. Administrative segregation shall consist of separate and secure housing but shall not involve any other deprivation of privileges than is necessary to obtain the objective of protecting the inmates and staff.

Fed. R. Civ. P. 4(e)(1)

(e) Serving an Individual Within a Judicial District of the United States.

Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; . . . .

Cal. Code Civ. P. § 415.20(b)

(b) If a copy of the summons and complaint cannot with reasonable diligence be personally delivered to the person to be served, as specified in Section 416.60, 416.70, 416.80, or 416.90, a summons may be

served by leaving a copy of the summons and complaint at the person's dwelling house, usual place of abode, usual place of business, or usual mailing address other than a United States Postal Service post office box, in the presence of a competent member of the household or a person apparently in charge of his or her office, place of business, or usual mailing address other than a United States Postal Service post office box, at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left. Service of a summons in this manner is deemed complete on the 10th day after the mailing.