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 REPLY BRIEF OF PLAINTIFF-APPELLANT RAFAEL BENITEZ

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INTRODUCTION

Rafael Benitez spent five years of his life sitting in jail—neither accused of crime nor serving a sentence—while the state prepared its civil-commitment case against him. Defendants do not dispute that. In fact, Defendants effectively concede:

- that for the first four years of Benitez's detention, the Orange County Jail's policy was to treat civil detainees as part of its general criminal population, *see* Dkt. 36 (Br.) at 7–14;
- that such conditions were punitive, *see* Br. 11–14;
- that Sheriff Sandra Hutchens was in charge of the OCJ's policies, *see* Br. 19–22; and
- that Benitez substantially complied with California's rules for serving Hutchens in her individual capacity, *see* Br. 14–19.

That much is enough for Benitez to survive the pleading stage and begin discovery. This Court should let him proceed.

ARGUMENT

1. Benitez has plausibly alleged that Orange County is liable for the conditions in which it jailed him.

Defendants do not dispute that for the first four years of Benitez's detention, until May 2012, the OCJ's policy was to jail civil detainees together with its general criminal population. Br. 7–14. Instead, Defendants argue that *after* May 2012, the Jail's policy prohibited that. Br. 7–10. True enough, but that hardly detracts from Benitez's allegations about the previous four years. *See* ER 71 ¶ 10; ER 75 ¶ 13; *cf.* Br. 10. In fact, the May 2012 policy announced that it was "completely new," thus confirming that the previous policy did not differentiate between civil detainees and criminal inmates. ER 57. That much, alone, is enough for Benitez's claims to survive the pleading stage.

Defendants next argue that the Court should reject the possibility that the OCJ's pre-2012 policy was unwritten. Br. 9–10. They cast this as an argument about appellate forfeiture—contending, for instance, that "the allegation that an unwritten policy existed was made for the first time on appeal." Br. 21, 9–10. But they neither cite Benitez's district-court briefing nor supply it in their Supplemental Excerpts of Record. *See generally id.*; SER 3. Even if they had, no doctrine limits Benitez to the "precise arguments" he made in the trial court. *Yee v. City of Escondido*, 503 U.S. 519, 534–35 (1992). Benitez is free to support his

properly presented conditions-of-confinement claim with different arguments on appeal. *See id.*

The more charitable reading of Defendants' argument here is that because Benitez neither cited the written policy number that governed how he was held before May 2012, nor alleged expressly that the policy was unwritten, the Court should flunk his claim. *See* Br. 10–11. But to demand that level of specificity at the pleading stage "asks too much." *OSU Student All. v. Ray*, 699 F.3d 1053, 1077–78 (9th Cir. 2012). Benitez had no way of knowing what form the policy took. What he knew was that he, like all civil detainees, was held in the general criminal population of the jail. ER 71 ¶ 10; ER 75 ¶ 13. He also knew, because jail staff told him, that the jail had nowhere else to put civil detainees, and that that was in accordance with the jail's policies, which "permitted the treating of those awaiting civil commitment proceedings as inmates convicted of crimes or awaiting criminal trials." ER 76 ¶¶ 14–15.

Those are specific factual charges. Accepting them as true, Benitez has plausibly alleged that Orange County is liable for the conditions in which it jailed him. *See Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 404–05 (1997) ("Where a plaintiff claims that a particular municipal action *itself* violates federal law, or directs an employee to do so, resolving these issues of fault and causation is straightforward."). That is enough to get discovery. *OSU*, 699 F.3d at 1078; *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

2. Benitez has plausibly alleged that conditions in the Orange County Jail were punitive.

Defendants argue that OCJ's conditions after May 2012 were not punitive. Br. 11–14. But just as above, Defendants do not dispute that conditions during the first four years—when they held Benitez in the general criminal population—were punitive. *See id.* (discussing only the 82 restrictions Benitez alleged during his final year at OCJ); *cf.* ER 72–75. This Court has been clear that conditions "identical to . . . those in which a civil pre-trial detainee's criminal counterparts are held" are "presumptively punitive." *King v. County of Los Angeles*, 885 F.3d 548, 557 (9th Cir. 2018) (quoting *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004)) (alteration omitted). Having failed to rebut the presumption, Defendants have effectively conceded the point.

Nor do Defendants rebut the presumption for the fifth year. Instead, they largely attack straw men, such as the proposition that "*any difference* between conditions at Coalinga State Hospital and the Jail is *per se* punitive." Br. 12–13 (emphasis in original). Of course there is no such *per se* doctrine; the rule is that more restrictive conditions are *presumptively* punitive. *King*, 885 F.3d at 557; Opening Br. 18.

Defendants also assert that "lack of access to video game consoles" is not punitive. Br. 12. Again, that's beside the point: Benitez alleged that his liberty was curtailed in much more severe ways. *See* Opening Br. 17–18. For just a few examples, he was jailed in a cell, monitored by

audio and video 24 hours a day, deprived of privacy while showering and using the toilet, and denied physical access to a law library. *Id.* Such restrictions dwarfed those at Coalinga. *Compare id.* at 9–10 (Coalinga), *with id.* at 17–18 (OCJ). And Defendants do not attempt to justify them as necessary to accomplish legitimate, non-punitive ends. *See* Br. 11–14; *cf. King*, 885 F.3d at 557.

Defendants suggest that Benitez was in the OCJ only on a temporary basis "to permit participation in the judicial process." Br. 13. But that cannot justify jailing a civil detainee for more than "a few months." *King*, 885 F.3d at 558. Here, Defendants booked Benitez into the OCJ in 2008—*six years* before his civil-commitment adjudication. ER 71 ¶ 6; *see People v. Benitez*, Case No. M-11715 (Orange Cty. Super. Ct. 2014).

Finally, Defendants imply in a parenthetical that "maintenance of jail security" justified the restrictive conditions for civil detainees. Br. 14. But to overcome the presumption of punitiveness, Defendants must explain why this supposedly non-punitive objective could not be achieved with "alternative and less harsh methods." *King*, 885 F.3d at 558 (quoting *Jones*, 393 F.3d at 934). Because Defendants never even attempt that exercise, they have failed to carry their burden.

3. Defendants do not dispute that Sheriff Hutchens was "in charge of" the Orange County Jail's policies.

Defendants' primary argument against Sheriff Hutchens's personal liability is just a redux of their argument that no one violated Benitez's rights at all. Br. 20. Their second-string argument is that Sheriff Hutchens would be liable only if she had personally booked Benitez into the general criminal population or personally directed her subordinates to do so. Br. 20–21. But "direct causation by affirmative action" is not necessary. *Castro v. County of Los Angeles*, 833 F.3d 1060, 1067 (9th Cir. 2016) (quotation marks omitted). This Court has held time and again that a supervisor can be liable in her individual capacity even if she is not "on the scene inflicting constitutional injury." *Larez v. City of Los Angeles*, 946 F.2d 630, 645 (9th Cir. 1991); *Starr*, 652 F.3d at 1205–06. What is necessary is that the supervisor be "in charge of" the policy and responsible for its "continued operation." *OSU*, 699 F.3d at 1076–77; *Starr*, 652 F.3d at 1208. Defendants do not dispute that Hutchens was. *See* Br. 19–22.

Nevertheless, Defendants argue that this case is unlike *OSU* because the supervisor there "enforced an unconstitutional policy . . . 'directly, *not through subordinates*.'" Br. 20–21 (quoting *OSU*, 699 F.3d at 1069–70) (emphasis added in original). Defendants are mistaken. *OSU* involved two distinct phases of unconstitutional activity: First, the supervisor's subordinates threw away the student plaintiffs' newsbins with

no notice, and later, the supervisor rejected the students' request to replace them. *OSU*, 699 F.3d at 1069–70. Because the supervisor rejected the students' pleas himself, the court held that he had violated their free-speech rights "directly," so the argument that he was personally liable under the First Amendment was "straightforward." *Id.*

But the students also brought a procedural-due-process claim that encompassed only the removal of their newsbins without notice. *Id.* at 1075. The court held that the supervisor was liable for that as well—not because he had violated the students' rights directly, but because he "was *in charge of* the newsbin policy and . . . the confiscation without notice was conducted pursuant to that policy." *Id.* at 1077 (emphasis added).

Just so here. Hutchens was in charge of the OCJ's policies for holding civil detainees. Cal. Gov. Code § 26605; 15 Cal. Code Regs. § 1050(a). Defendants do not deny it. And under those policies, Benitez was held in the OCJ's general criminal population (and later, in conditions not materially different). So Hutchens is liable in her personal capacity.

4. Sheriff Hutchens does not dispute that Benitez substantially complied with California's rules for serving her in her individual capacity.

Unable to fend off Benitez's claims on the merits, Sheriff Hutchens seeks to evade liability on account of supposedly defective service.

Br. 14–19. But she does not dispute that Benitez substantially complied with California's rule permitting service on an individual by leaving a copy at her usual place of business. *See* Cal. Code Civ. Proc. § 415.20(b); Opening Br. 38–39; *cf.* Br. 14–19. That means Benitez also substantially complied with Federal Rule of Civil Procedure 4(e)(1), which permits service on an individual in accordance with state law. And "substantial compliance" is all that this Court's cases require. *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982); *see Travelers Cas. & Sur. Co. of Am. v. Brenneke*, 551 F.3d 1132, 1135 (9th Cir. 2009). So the district court correctly asserted jurisdiction and reached individual liability on the merits, *see* ER 18–26; ER 2–6; SER 18–20, and this Court should do the same. And on the merits, it should decide that Benitez can hold Sheriff Hutchens liable.

CONCLUSION

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

Dated: February 18, 2020 Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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