No. 24-2673

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JONATHAN DIFRAIA,

Plaintiff-Appellant,

v.

KEVIN RANSOM, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
No. 1:23-cv-01187-JPW-EW
Hon. Jennifer P. Wilson

REPLY BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION

Defendants forcibly removed Plaintiff Jonathan DiFraia from his life-saving medication for opioid use disorder ("MOUD") for non-medical, disciplinary reasons. If Mr. DiFraia had another disability, like diabetes, denying him insulin for a disciplinary violation would be unimaginable. But because Defendants discriminate against individuals with opioid use disorder ("OUD"), Mr. DiFraia was removed from his medication and forced to endure painful withdrawal symptoms, relapse, and an increased risk of overdose and death.

Defendants do not dispute the governing law: The denial of medical care for non-medical reasons states a claim under the Americans with Disabilities Act ("ADA") and the Eighth Amendment. Rather, Defendants assert that Mr. DiFraia merely disagreed with the care he received. But, as alleged in the complaint, Mr. DiFraia received *no* care for his OUD after Defendants removed him from his medication. Accepting Mr. DiFraia's allegations as true and liberally construing his *pro se* complaint, Mr. DiFraia stated a claim under the ADA and Eighth Amendment.

ARGUMENT

I. Mr. DiFraia stated a plausible ADA claim because he was stripped of his MOUD for disciplinary, not medical, reasons.

Mr. DiFraia plausibly alleged an ADA violation in his complaint, which details being stripped of his essential medication because of a disciplinary violation, rather than his individual medical needs. To state a claim under Title II of the ADA, a plaintiff must plausibly allege that "he is a [1] qualified individual [2] with a disability, [3] who was precluded from participating in a program, service, or activity, or otherwise was subject to discrimination, by reason of his disability." *Furgess v. Pa. Dep't of Corr.*, 933 F.3d 285, 288–89 (3d Cir. 2019). When seeking compensatory damages, a plaintiff must also plausibly allege deliberate indifference. *Durham v. Kelley*, 82 F.4th 217, 225 (3d Cir. 2023).

Neither the Commonwealth Defendants nor Dr. Kross dispute that Mr. DiFraia is a qualified individual with a disability. Commonwealth Br. 18 n.3; Kross Br. 20–22. Nor do they make any argument about deliberate indifference. Commonwealth Br. 18–22; Kross Br. 20–22. Indeed, Mr. DiFraia's OUD substantially limits his major life activities and is thus a disability. *New Directions Treatment*

Servs. v. City of Reading, 490 F.3d 293, 308 (3d Cir. 2007); JA031–32, JA035. Mr. DiFraia, like all incarcerated individuals, was qualified for prison healthcare. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Durham*, 82 F.4th at 225. And, because the Defendants themselves provided MOUD and forcibly removed him from this medication for non-medical reasons, the Defendants were deliberately indifferent. *Durham*, 82 F.4th at 226.

The Commonwealth Defendants, however, raise a hodgepodge of conclusory arguments asserting that their conduct did not amount to disability discrimination. Meanwhile, Dr. Kross's only contention related to the ADA is that Defendants may not be sued in their individual capacities—which fails to address Mr. DiFraia's argument that his complaint names all Defendants in both their official and individual capacities. Accepting the allegations in the complaint as true and drawing all inferences in Mr. DiFraia's favor, Mr. DiFraia adequately alleged that Defendants engaged in disparate treatment and failed to accommodate him, violating the ADA.[1]

[1] In its recitation of the standard of review, the Commonwealth Defendants note than an order regarding leave to amend is reviewed for an abuse of discretion. Commonwealth Br. 12. However, Mr. DiFraia

A. Mr. DiFraia adequately alleged that Defendants discriminated against him on the basis of disability.

1. Mr. DiFraia alleged with specificity facts that give rise to an ADA claim.

Mr. DiFraia made detailed factual allegations in his *pro se* complaint, which are more than sufficient to state an ADA claim. The Commonwealth Defendants suggest that Mr. DiFraia's ADA claim consisted of a "single sentence" that was therefore not sufficient to state a claim. Commonwealth Br. 18. In fact, Mr. DiFraia alleged that:

- He received MOUD while incarcerated in the Pennsylvania Department of Corrections. JA031.
- While waiting in line to receive MOUD, officers strip-searched Mr. DiFraia and found an e-cigarette with its cap in his pocket, for which he received a misconduct report for possession of contraband. *Id.*
- One week later, Mr. DiFraia was again in line for MOUD. After Mr. DiFraia took his medication, Officer Osmulski accused him of having an e-cigarette cap. *Id.* Mr. DiFraia did not have an e-

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has not challenged any order regarding a leave to amend, so this standard is not relevant.

cigarette cap. *Id.* Nevertheless, Mr. DiFraia received a second misconduct report for possession of contraband. *Id.*

- Three days later, Dr. Kross informed Mr. DiFraia that he would be removed from his MOUD "for diversion," after which he received a seven-day taper and then no care at all for his OUD. *Id.*
- Mr. DiFraia wrote to Defendants Deputy Superintendent for Centralized Services Kevin Ransom, Deputy Jasen Bohinski, Corrections Classification Program Manager Wayne Innis, Drug and Alcohol Treatment Specialist Rawlings, and Dr. Kross, and asked to be put back on his medication. *Id.*
- The officials refused, telling him that he "did not have to actually be caught diverting to be considered a diverter." *Id.*
- Mr. DiFraia suffered painful withdrawal symptoms, relapsed, and deteriorated physically and mentally. JA032, JA035.
- Mr. DiFraia alleged that this conduct constituted an ADA violation. JA032.

Given these factual allegations, the Court must apply the relevant ADA law, "irrespective of whether a pro se litigant has mentioned it by name," *Higgins v. Beyer*, 293 F.3d 683, 688 (3d Cir. 2002) (quotation

marks and citation omitted), because the complaint "allege[s] sufficient facts . . . to support a claim." *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 245 (3d Cir. 2013).

2. Mr. DiFraia sufficiently alleged disability-based discrimination through both disparate treatment and failure to accommodate.

Disability discrimination can be demonstrated several ways. Here, Defendants discriminated against Mr. DiFraia through both disparate treatment and failure to accommodate. 28 C.F.R. § 35.130(b); *see Haberle v. Troxell*, 885 F.3d 170, 180 (3d Cir. 2018). Neither the Commonwealth Defendants nor Dr. Kross directly contend with *any* of the substantive law governing Mr. DiFraia's claims.

Defendants engaged in disparate treatment against Mr. DiFraia on the basis of his disability by stripping him of his MOUD for disciplinary reasons, when they do not strip individuals with other disabilities of medication for disciplinary reasons. *C.G. v. Pa. Dep't of Educ.*, 734 F.3d 229, 236 (3d Cir. 2013) (noting that the ADA prohibits discrimination against one subgroup of disabled people compared to another). Defendants also discriminated against Mr. DiFraia on the basis of disability by outright denying him medical services. *Kiman v.*

N.H. Dep't of Corr., 451 F.3d 274, 286–287 (1st Cir. 2006) (holding that withholding prescription medications is not a medical judgment and can amount to disability discrimination). Mr. DiFraia therefore adequately alleged that he was treated differently because of his disability when he was denied MOUD for an alleged disciplinary violation, rather than his individual medical needs, stating an ADA claim. JA031; *see, e.g.*, *Strickland v. Delaware Cnty.*, No. CV 21-4141, 2022 WL 1157485, at *4 (E.D. Pa. Apr. 19, 2022) (holding that denial of an incarcerated person's MOUD for reasons unrelated to individual medical need states a claim under the ADA); *Taylor v. Wexford Health Sources, Inc.*, 737 F. Supp. 3d 357, 376 (S.D.W. Va. 2024) (same); *Smith v. Aroostook Cnty.*, 376 F. Supp. 3d 146, 160 (D. Me. 2019), *aff'd*, 922 F.3d 41 (1st Cir. 2019) (same and granting preliminary injunction); *P.G. v. Jefferson Cnty.*, No. 5:21-CV-388, 2021 WL 4059409, at *5 (N.D.N.Y. Sept. 7, 2021) (same). Neither the Commonwealth Defendants nor Dr. Kross dispute this.

Defendants also failed to reasonably accommodate Mr. DiFraia by refusing to reinstate his MOUD and by failing to ensure the disciplinary process would not result in the loss of his medication for non-medical reasons. Public entities may not offer a service that is "not as effective

in affording equal opportunity to . . . gain the same benefit . . . as that provided to others." 28 C.F.R. § 35.130(b)(1)(iii). Officials are thus required to take "certain pro-active measures" to ensure that people are not discriminated against because of their disability. *Williams v. Sec'y Pa. Dep't of Corr.*, 117 F.4th 503, 548 (3d Cir. 2024) (quoting *Chisolm v. McManimon*, 275 F.3d 315, 324–25 (3d Cir. 2001)). Here, Mr. DiFraia adequately alleged that he requested his MOUD to be reinstated and this request—which would have allowed him to equally benefit from prison healthcare—was denied. JA031. Defendants took no affirmative steps to ensure that the disciplinary process would not result in him being denied his medication for non-medical reasons. And Defendants' refusal to reinstate his MOUD caused Mr. DiFraia to experience painful withdrawal symptoms and relapse, denying him equal access to prison healthcare and prison life more generally. JA032, JA035; *Smith*, 376 F. Supp. 3d at 159–60 (holding that providing MOUD to an incarcerated person is a reasonable accommodation for individuals with OUD, so they can equally enjoy the benefit of prison healthcare); *Strickland*, 2022 WL 1157485, at *3 (similar); *P.G.*, 2021 WL 4059409, at *4–5

(similar). Neither Commonwealth Defendants nor Dr. Kross dispute this either.

Rather, the Commonwealth Defendants argue that, because Mr. DiFraia initially received MOUD, received a seven-day taper after they cut off his MOUD for non-medical reasons, and thereafter had vague "access to medical providers[,]" he could not have been "denied" a service for ADA purposes. Commonwealth Br. 21. This argument, for which the Commonwealth Defendants provide no legal support, fails for two reasons. First, Title II does not require Mr. DiFraia to allege that he entirely lost access to prison healthcare. 42 U.S.C. § 12132. Rather it is sufficient to plausibly allege that the medical care he received was not equal to what is afforded to others. *See id.* (prohibiting being "subjected to discrimination"); 28 C.F.R. § 35.130(b)(1)(iii) (prohibiting being provided a service "that is not as effective in affording equal opportunity to . . . gain the same benefit"). Second, Mr. DiFraia alleged that, after a seven-day taper from his medication, he received no treatment at all for OUD. JA032, JA035. Thus, he was, in fact, denied equal opportunity to access prison healthcare and services because of his OUD.

The Commonwealth Defendants then grasp for facts outside the complaint to allege, without support, that there was no causal nexus between Mr. DiFraia's removal from the MOUD program and his disability because of unspecified "rules" regarding the "administration" of MOUD. Commonwealth Br. 21–22. Thus, they argue, any denial of MOUD was not on the basis of his disability. *Id.* This argument, too, should be rejected.

First, it assumes facts outside the pleadings regarding unspecified criteria for the MOUD program and flips the motion to dismiss standard on its head. *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (noting general rule that courts may not consider factual allegations outside the pleadings). Moreover, to the extent the Commonwealth Defendants are suggesting there are stricter criteria to receive MOUD than to receive medications for other disabilities, that itself amounts to disability discrimination, and contradicts their argument that Dr. Kross made an individualized medical determination. *New Directions Treatment Servs.*, 490 F.3d at 305 (holding that a law that singles out MOUD clinics for different zoning procedures facially discriminates under the ADA).

Second, it ignores that Mr. DiFraia was indisputably entitled to prison healthcare. *See Estelle*, 429 U.S. at 104. Mr. DiFraia does not refer to the MOUD program itself as the relevant program, service, or activity; rather, he alleges that Defendants denied him equal access to prison healthcare and prison life.[2] And as the Supreme Court admonished, "[t]he benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled." *Alexander v. Choate*, 469 U.S. 287, 301 (1985).[3]

Third, to the extent that the Commonwealth Defendants suggest Mr. DiFraia was not discriminated against on the basis of disability

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[2] Nor does Mr. DiFraia assert that the ADA "entitle[s]" him "to receive whatever medication [he] see[s] fit to demand." Commonwealth Br. 22. Rather, Mr. DiFraia argues a right to be free from disparate treatment and to be reasonably accommodated for his disability. Opening Br. 20–29. *Cf. Kiman*, 451 F.3d at 287 (holding that withholding plaintiff's prescribed medications was not a medical judgment, but "an outright denial of medical services" that could violate the ADA).

[3] *Alexander* was considering the Rehabilitation Act, which prohibits disability discrimination by the federal government and entities that receive federal funding, and has "identical substantive standards of liability" as the ADA. *Berardelli v. Allied Servs. Inst. of Rehab. Med.*, 900 F.3d 104, 114 (3d Cir. 2018).

because of the alleged disciplinary infraction, this Court has already held that a "prisoner's misconduct does not strip him of his right to reasonable accommodations" — which the Commonwealth, again, does not dispute. *Furgess*, 933 F.3d at 291.

B. The Commonwealth's remaining arguments are conclusory and meritless.

The Commonwealth Defendants make additional meritless assertions with little or no legal or factual support.

The Commonwealth Defendants assert that the ADA may not be used as a "back door" to bring a claim under Section 1983, citing an employment case, *Williams v. Pa. Hum. Rels. Comm'n*, 870 F.3d 294, 299 (3d Cir. 2017), where the plaintiff used Section 1983 to allege a disability discrimination claim. Commonwealth Br. 22. Here, Mr. DiFraia's disability claims are made under the ADA itself, not Section 1983, and he does not make any employment claims. *Williams* has no bearing on this case.

Additionally, the Commonwealth Defendants allege that Mr. DiFraia attempts to "plead allegations that were not before the trial court," citing two cases about waiver. Commonwealth Br. 20 (citing *MD Mall Assocs., LLC v. CSX Transp., Inc.*, 715 F.3d 479, 486 (3d Cir.

2013), *as amended* (May 30, 2013); *Birdman v. Off. of the Governor*, 677 F.3d 167, 173 (3d Cir. 2012)). However, the Commonwealth Defendants point to no new facts that Mr. DiFraia pleads. Mr. DiFraia stands on the allegations in his complaint and asks this Court to apply the relevant law. *Higgins*, 293 F.3d at 688.

C. Mr. DiFraia properly sued Defendants in both their individual and their official capacities.

Mr. DiFraia's complaint, properly construed, named all Defendants in both their individual and official capacities. Individuals may be sued under Title II of the ADA in their official capacities, so long as sovereign immunity is validly abrogated. *Durham*, 82 F.4th at 224. Thus, for purposes of the ADA claim, this suit is "in all respects other than name, to be treated as a suit against the entity" and is "*not* a suit against the official personally." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (citation omitted). Yet Defendants ignore this, simply asserting Mr. DiFraia's ADA claims cannot go forward because there is no individual liability under the ADA.[4] Commonwealth Br. 19; Kross Br. 20–22.

[4] Mr. DiFraia addresses here only the specific defense raised by Defendants. Commonwealth Br. 19; Kross Br. 20–22. Whether the claim

Mr. DiFraia's *pro se* complaint does not specify the capacity in which each Defendant is sued. When a complaint is ambiguous about the capacity in which a defendant is named, the Court looks to the "course of proceedings" to determine "the nature of liability sought to be imposed." *Graham*, 473 U.S. at 167 n.14. Mr. DiFraia sought relief under Title II, which is only available when suing individuals in their official capacities, as well as under the Eighth Amendment. His overall claims thus demonstrate the intent to sue the Defendants in both their individual and official capacities. As such, based on the "course of proceedings" and the liberal construction of Mr. DiFraia's *pro se* complaint, the Court should construe Mr. DiFraia's complaint to name Defendants in both their individual and official capacities. *Mala*, 704 F.3d at 244–45 (emphasizing the "flexibility" afforded to incarcerated *pro se* plaintiffs).[5]

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against Dr. Kross, a former employee of Wellpath, may be treated as a suit against that entity is a question of statutory interpretation that appears to be unsettled in this Circuit. *See Matthews v. Pennsylvania Dep't of Corr.*, 613 F. App'x 163, 170 (3d Cir. 2015) (nonprecedential).

[5] The Commonwealth Defendants also argue that the complaint does not say why the seven Commonwealth Defendants are parties to this matter. Commonwealth Br. 21. However, the complaint alleges that Mr. DiFraia wrote to four Commonwealth Defendants (Ransom, Bohinski,

II. Mr. DiFraia plausibly stated an Eighth Amendment claim because Defendants denied him medical treatment for non-medical reasons, demonstrating deliberate indifference to his serious medical needs.

Deliberate indifference to an incarcerated patient's serious medical needs violates the Eighth Amendment. *Estelle*, 429 U.S. at 104. Mr. DiFraia alleged that he has OUD, a serious medical need, and that the Defendants denied him medical care for disciplinary, non-medical reasons, following false accusations of diversion. This denial resulted in withdrawal, relapse, and serious mental and physical pain. These allegations adequately assert an Eighth Amendment claim.

Dr. Kross and the Commonwealth Defendants primarily assert that Mr. DiFraia's allegations concern nothing more than a dispute over the adequacy of treatment and that the Court must therefore defer to Dr. Kross's professional judgment. This argument is doubly wrong. First, Mr. DiFraia alleged a complete denial of treatment for his OUD; thus, no deference is required. Second, Mr. DiFraia alleged that he was denied MOUD for non-medical reasons, and no medical judgment was

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Inniss, and Rawlings) requesting a reasonable accommodation. JA031. The three other Commonwealth Defendants (Bower, Osmulski, and Doe) issued the disciplinary violations that ultimately led to him being stripped of his medication. *Id.*

exercised at all. The Commonwealth Defendants additionally assert that blind deference to medical professionals immunizes them from Eighth Amendment liability. But where, as here, non-medical staff are on notice of medical staff's failure to treat a patient's serious medical need, they are independently liable under the Eighth Amendment. Mr. DiFraia's complaint, properly construed, adequately alleged that all Defendants violated his Eighth Amendment rights.

A. Mr. DiFraia has a serious medical need.

Mr. DiFraia adequately alleged that he has OUD—a serious medical need. None of the Defendants nor the District Court previously disputed this. Before this Court, Dr. Kross again does not dispute—or even address—this portion of the Eighth Amendment analysis. *See generally* Kross Br. The Commonwealth Defendants, for their part, appear to simultaneously concede and dispute the point. *See* Commonwealth Br. 15. But the Commonwealth's undeveloped and unsupported argument that Mr. DiFraia's OUD was not serious enough to establish an Eighth Amendment violation should be disregarded. *Higgins v. Bayada Home Health Care Inc.*, 62 F.4th 755, 763 (3d Cir. 2023) (deeming forfeited argument that party "failed to develop" before

district court and "made only passing reference to" on appeal). In any event, it has no merit.

A serious medical need is one that, as here, has been "diagnosed by a physician as requiring treatment[.]" *Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987); JA031 (demonstrating Mr. DiFraia had been prescribed and was receiving medication to treat his OUD while incarcerated). In addition, a serious medical need can be shown where, as here, the denial of medical treatment results in "unnecessary and wanton infliction of pain." *Lanzaro*, 834 F.2d at 347 (quoting *Estelle*, 429 U.S. at 103); JA032, JA035 (alleging serious withdrawal symptoms resulting from the denial of treatment). As such, lower courts in this circuit have held that plaintiffs with OUD have sufficiently alleged a serious medical need. *See, e.g.*, *Smith v. Fed. Bureau of Prisons*, No. 24-CV-10269 (EP) (JRA), 2024 WL 5197196, at *4 (D.N.J. Dec. 20, 2024); *Miller v. Chester Cnty. Comm'rs*, Civ. Act. No. 23-4192, 2024 WL 3606334, at *4 (E.D. Pa. July 31, 2024); *Schiavone v. Luzerne Cnty.*, No. 21-CV-01686, 2022 WL 3142615, at *3 n.3 (M.D. Pa. Aug. 5, 2022).

The Commonwealth Defendants' single supporting citation is not to the contrary. Commonwealth Br. 15. Indeed, *Griffin v. Vaughn*, 112 F.3d 703, 709 (3d Cir. 1997), is not about the provision of medical care at all. And it does not purport to limit the Eighth Amendment's application only to "torturous, uncivilized, and indecent conditions." *See* Commonwealth Br. 15. Nor could it, given the Supreme Court's longstanding admonition that the Eighth Amendment "proscribes more than physically barbarous conditions" and requires that the government provide adequate medical care to incarcerated patients. *Estelle*, 429 U.S. at 102.

B. Mr. DiFraia sufficiently alleged that Defendants denied him critical medication for disciplinary, non-medical reasons without exercising any individualized medical judgment.

Mr. DiFraia alleged that he was removed from his MOUD, not based on any medical judgment, but solely for non-medical, disciplinary reasons. This states an Eighth Amendment claim.

The delay or denial of medical care for non-medical reasons can demonstrate deliberate indifference. *Rouse v. Plantier*, 182 F.3d 192,197 (3d Cir. 1999). *See also, e.g.*, *Durham*, 82 F.4th at 230 (holding failure to provide medical care "for non-medical reasons" demonstrated deliberate

indifference); *Durmer v. O'Carroll*, 991 F.2d 64, 69 (3d Cir. 1993) ("If the failure to provide adequate care . . . was deliberate, and motivated by non-medical factors, then [plaintiff] has a viable claim."). In his Complaint, Mr. DiFraia asserts that he received two misconduct reports accusing him of possessing contraband while waiting in line to receive MOUD. JA031. Three days after Mr. DiFraia received the second misconduct report, Dr. Kross removed him from MOUD, forcibly tapering him off his medication, and thereafter provided no treatment for his OUD. *Id.* Mr. DiFraia then contacted Dr. Kross and four Commonwealth Defendants, explained the issue, and requested his medication. *Id.* They refused. *Id.*

These allegations sufficiently allege deliberate indifference based on the denial of medical care for non-medical reasons. *See Durham*, 82 F.4th at 230.

Neither Dr. Kross nor the Commonwealth Defendants dispute that the denial of medical care for non-medical reasons states an Eighth Amendment claim. Instead, they misconstrue the facts alleged in Mr. DiFraia's complaint—primarily arguing that the Court must defer to Dr. Kross's professional judgment because Mr. DiFraia's allegations

amount to nothing more than a disagreement about the type of treatment received. This argument should be rejected.

First, the complaint does not suggest a mere disagreement with the type of care provided. It asserts a denial of care. Mr. DiFraia alleges that Defendants removed him from MOUD and thereafter provided *no treatment at all* for his OUD. JA031. "[A] delay or denial of medical treatment claim must be approached differently than an adequacy of care claim." *Pearson v. Prison Health Serv.*, 850 F.3d 526, 537 (3d Cir. 2017). The deference Defendants seek is only appropriate where "a prisoner has received *some* medical attention and the dispute is over the adequacy of treatment[.]" *Palakovic v. Wetzel*, 854 F.3d 209, 227–28 (3d Cir. 2017) (emphasis added) (citation omitted). Where, as here, treatment is denied, "there is no presumption that the defendant acted properly." *Pearson*, 850 F.3d at 537.

The cases cited by Dr. Kross and the Commonwealth are therefore inapposite. Each addressed situations where the patients received various forms of treatment yet disagreed with the type of treatment provided or the failure to provide additional treatment. *See Gause v. Diguglielmo*, 339 F. App'x 132, 135 (3d Cir. 2009); *Innis v. Wilson*, 334

F. App'x 454, 456 (3d Cir. 2009); *Layne v. Vinzant*, 657 F.2d 468, 474 (1st Cir. 1981); *Norris v. Frame*, 585 F.2d 1183, 1186 (3d Cir. 1978).[6] But here, Defendants denied Mr. DiFraia *all* medical treatment for OUD. JA031.

The Commonwealth's additional reliance on *Lanzaro*, 834 F.2d at 346, is similarly misplaced. Indeed, *Lanzaro* supports Mr. DiFraia, not the Defendants. There, the Court held that where medical care is simply *delayed* for non-medical reasons, "a case of deliberate indifference has been made out." *Lanzaro*, 834 F.2d at 346 (holding that the imposition of administrative barriers that caused the delay and ultimate denial of care constituted deliberate indifference) (citation

[6] Dr. Kross also relies on *Young v. Quinlan*, 960 F.2d 351 (3d Cir. 1992) and *Banks v. Mozingo*, Civ. Act. No. 08-4E, 2010 WL 11914707, at *17 (W.D. Pa. Feb. 26, 2010), *report and recommendation adopted*, No. 1:08CV04, 2010 WL 11914706 (W.D. Pa. Mar. 18, 2010), *aff'd*, 423 F. App'x 123 (3d Cir. 2011). Kross Br. 16. But *Young*'s discussion of medical care was contained solely in a footnote summarily affirming the district court's grant of summary judgment to the defendants without any presentation of the facts or analysis of law. *Young*, 960 F.2d at 358 n.18. And *Banks* supports Mr. DiFraia's position, holding that the "intentional refusal to provide *any* medical treatment . . . manifests deliberate indifference and is actionable under the Eighth Amendment[.]" 2010 WL 11914707, at *17 (emphasis added).

omitted). Here, Mr. DiFraia alleges not just delay, but the total denial of care for non-medical reasons.

Second, Defendants' arguments rely on factual assertions that are untethered from the Complaint's allegations. Dr. Kross asserts that he exercised his "professional medical judgment" and "deduce[ed]" that Mr. DiFraia no longer had a medical need for his prescribed medication. Kross Br. 15. Dr. Kross cites no allegations in the Complaint to support these self-serving statements. Similarly, the Commonwealth Defendants assert that Dr. Kross "determined that DiFraia was a diverter" who no longer needed treatment. Commonwealth Br. 16. Like Dr. Kross, the Commonwealth Defendants cite no allegations to support these assertions.[7]

Indeed, the Complaint illustrates that there was no information—available to Dr. Kross or otherwise—demonstrating that Mr. DiFraia had actually diverted medication or that he no longer had a medical need for MOUD. In fact, Mr. DiFraia was told he "did not have to

[7] Courts generally "may not consider matters extraneous to the pleadings" when deciding a motion to dismiss. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1426. And regardless, "[c]ounsel's unsupported assertions" in a brief "do not establish" a factual basis for legal arguments. *I.N.S. v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984).

actually be caught diverting to be considered a diverter." JA031. And once removed from his prescribed medication, Mr. DiFraia's medical need for the treatment was only reinforced, as he experienced serious withdrawal symptoms including self-inflicted sores on his arms, severe anxiety, depression, relapse, and physical and mental pain. JA032, JA035.

Moreover, accepting Defendants' unsupported assertions would require the Court to draw numerous inferences *against* Mr. DiFraia and in favor of the Defendants—which is improper at this stage in the proceedings. *McTernan v. City of York,* 577 F.3d 521, 526 (3d Cir. 2009) ("[I]n deciding a motion to dismiss, all well-pleaded allegations of the complaint must be taken as true and interpreted in the light most favorable to the plaintiffs, and all inferences must be drawn in favor of them." (internal quotation marks and citation omitted)). And a determination about whether professional judgment was employed requires inquiry into Dr. Kross's state of mind and his credibility—determinations that must be made by the factfinder based on evidence not yet developed. *Durmer*, 991 F.2d at 69 (holding that prison doctor's "intent becomes critical" to determining whether inadequate care

resulted from "an error in medical judgment" or was "motivated by non-medical factors").

The cases relied on by Dr. Kross are thus inapposite. Each addressed claims characterized by the Court—with the benefit of substantial evidence presented at trial or through summary judgment proceedings—as challenging the "deficient professional judgment" rather than the "failure to exercise medical judgment." *Brown v. Borough of Chambersburg*, 903 F.2d 274, 278 (3d Cir. 1990). *See also Gindraw v. Dendler*, 967 F. Supp. 833, 837 (E.D. Pa. 1997) (characterizing claim on summary judgment as "a quarrel with the quality of treatment" but noting plaintiff received "extensive[]" treatment). In contrast, here, Mr. DiFraia alleges a failure to exercise medical judgement.

Moreover, in *White v. Napoleon*, relied on by Dr. Kross, this Court held that allegations that a prison doctor withheld medical care and provided ineffective medical care for "no medical reason" were sufficient to allege deliberate indifference in violation of the Eighth Amendment. 897 F.2d 103, 109 (3d Cir. 1990).

At trial, Defendants will be free to present evidence (if any exists) demonstrating that they did not act with deliberate indifference to Mr. DiFraia's serious medical needs. *See id.* But "at this juncture," Mr. DiFraia has "made the bare showing in the allegations of the [] complaint required to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6)." *Id.*

C. Mr. DiFraia sufficiently stated a claim against the Commonwealth Defendants, who were on actual notice that he was denied medical care for non-medical reasons.

The Commonwealth Defendants argue that they simply deferred to Dr. Kross's medical judgment, and that the law entitles them to do so. Commonwealth Br. 15–16, 17. But neither the facts nor the law support this position. As discussed above, no medical judgment was exercised; rather, Defendants denied Mr. DiFraia critical medical care for disciplinary, not medical reasons. And the allegations demonstrate that the Commonwealth Defendants issued an unsubstantiated misconduct citation to Mr. DiFraia and falsely accused him of diverting medication. JA031. They were thus a driving force behind the events culminating in the denial of Mr. DiFraia's medical care for disciplinary reasons. *Id.* The Complaint further demonstrates that the

Commonwealth Defendants then refused to remedy the situation once Mr. DiFraia put them on actual notice of what took place and the complete denial of medical care. *Id.*

As the Commonwealth Defendants concede, Commonwealth Br. 16, prison officials who have "a reason to believe (or actual knowledge)" that a patient is receiving inadequate medical care may be liable under the Eighth Amendment. *Spruill v. Gillis*, 372 F.3d 218, 236 (3d Cir. 2004). In other words, "nonmedical prison officials may 'be chargeable with the Eighth Amendment scienter requirement of deliberate indifference'" when, as here, "they possess actual knowledge or have reason to believe that prison medical staff are mistreating or failing to treat inmates' serious medical conditions." *Barkes v. First Corr. Med., Inc.*, 766 F.3d 307, 329 (3d Cir. 2014), *rev'd on other grounds sub nom. Taylor v. Barkes*, 575 U.S. 822 (2015).

Moreover, the Commonwealth's position finds no support in the cases it cites. *Inmates of Allegheny County Jail v. Pierce* provides that a court's deference to prison medical providers is only appropriate where "such an informed judgment has, in fact, been made." 612 F.2d 754, 762 (3d Cir. 1979). Here, Mr. DiFraia's allegations demonstrate that no

medical judgment was made; rather, Mr. DiFraia was denied all medical care for his OUD for disciplinary reasons. JA031.

And *Durmer v. O'Carroll*, where the Court granted summary judgment to two non-medical defendants with limited analysis under factually distinct circumstances, provides little direction. 991 F.2d at 69. In *Durmer*, the patient was receiving most, but not all, of the medical care recommended. *Id.* at 66. The "only allegation" against the non-medical defendants was a failure to respond to letters. *Id.* at 69 (holding non-medical defendants not liable for failing to respond to patient "who was already being treated by the prison doctor.").

By contrast here, each of the Commonwealth Defendants was on actual notice that Mr. DiFraia was receiving *no treatment at all* for his OUD. JA031. Yet in response to Mr. DiFraia's entreaties, they affirmatively refused to address the situation. *Id*. The Commonwealth Defendants therefore cannot avoid liability because they had both "reason to believe" and "actual notice" of the complete denial of medical care. *Spruill*, 372 F.3d at 237, 237 n.12; *Barkes*, 766 F.3d at 329.

Indeed where, as here, "prison authorities deny reasonable requests for medical treatment" and that denial "exposes the inmate to

undue suffering or the threat of tangible residual injury, deliberate indifference is manifest." *Lanzaro*, 834 F.2d at 346 (internal quotation marks and citation omitted).

III. Forthcoming Supreme Court law may compel this Court to reverse the District Court's dismissal of Mr. DiFraia's medical malpractice claim.

In his opening brief, Mr. DiFraia argues that Pennsylvania's certificate-of-merit ("COM") requirement should not apply in federal court. Opening Br. 42–47. Mr. DiFraia acknowledged that his argument was foreclosed by precedent but made clear he was presenting it to preserve the issue in light of a pending Supreme Court case. *Id.* at 42–43 n.17.[8] Rather than engage with the merits of Mr. DiFraia's argument, Dr. Kross appears to argue that Mr. DiFraia's failure to assert this argument below constitutes a waiver such that this Court should not reach it. Kross Br. 25–27. Dr. Kross is wrong twice over.[9]

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[8] Oral argument in *Berk v. Choy*, No. 24-440 (U.S. cert. granted Mar. 10, 2025), is scheduled for October 6, 2025.

[9] Mr. DiFraia also argued that, even if the COM requirement is properly applied in federal court, the dismissal of his professional negligence claim should still be reversed because failure to file a COM is not a proper basis for dismissal under Rule 12(b)(6). Opening Br. 47. Dr. Kross does not dispute this.

First, Mr. DiFraia's failure to raise his COM argument below would at most constitute forfeiture, not waiver. *See Barna v. Bd. of Sch. Dirs. of the Panther Valley Sch. Dist.*, 877 F.3d 136, 147 (3d Cir. 2017) (explaining that "[f]orfeiture is the failure to make the timely assertion of a right," while "[w]aiver, in contrast, is the intentional relinquishment or abandonment of a known right") (internal citation and quotation marks omitted); *State Dep't of Nat. Res. & Envtl. Control v. U.S. Army Corps of Eng'rs*, 685 F.3d 259, 280 n.22 (3d Cir. 2012) ("A party's failure to raise an issue in district court typically results in forfeiture of the claim.").

Second, this Court can reach forfeited issues under "exceptional circumstances" and is more willing to do so when the issue is a "pure question of law." *Barna*, 877 F.3d at 147. Whether Pennsylvania's COM requirement should be applied in federal court is a quintessential pure question of law.

Moreover, this Court has endorsed "intervening change[s] in the law" as an exceptional circumstance warranting consideration of forfeited issues. *Id.* Here, Mr. DiFraia concedes that an intervening change in the law is required for him to prevail on his COM argument.

Should that change occur during the pendency of this appeal, the Court should reach Mr. DiFraia's argument and apply the new legal rule. This Court is "compelled to apply the law announced by the Supreme Court as we find it on the date of our decision." *Karns v. Shanahan*, 879 F.3d 504, 514–15 (3d Cir. 2018) (quoting *United States v. Tann*, 577 F.3d 533, 541 (3d Cir. 2009)).

IV. Mr. DiFraia had no obligation to amend his complaint.

Defendants take issue with Mr. DiFraia's decision not to file an amended complaint, *see* Commonwealth Br. 22–24; Kross Br. 25–26, but their arguments are directly at odds with this Court's precedents. Indeed, "a plaintiff is always free to decline an invitation to amend a seemingly defective complaint and, instead, seek a final appealable order." *Weber v. McGrogan*, 939 F.3d 232, 238 (3d Cir. 2019).

Under the "stand on the complaint" doctrine, a plaintiff whose complaint is dismissed with leave to amend can convey his intention to stand on his complaint by (1) taking no action and allowing a set amendment deadline to pass, when a court explicitly states that a final dismissal with prejudice will be issued if no amended pleading is filed by the deadline, or (2) notifying the court of his "clear and unequivocal

intent to decline amendment and immediately appeal." *Id.* at 240. Both scenarios are applicable here.

The District Court dismissed Mr. DiFraia's complaint on July 9, 2024—dismissing his ADA claim with prejudice, and his Eighth Amendment and medical malpractice claims without prejudice— and granted him leave to file an amended complaint repleading the claims that were dismissed without prejudice. JA019–021.[10] The District Court stated that if Mr. DiFraia did not file an amended complaint by August 9, 2024, his complaint would be dismissed with prejudice. JA021. On August 26, 2024, having not received an amended complaint from Mr. DiFraia, the District Court issued an order dismissing Mr. DiFraia's complaint with prejudice and directing the Clerk to close the case. JA022.

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[10] Dr. Kross's argument that Mr. DiFraia could have repleaded his ADA claim, which was dismissed *with* prejudice, is therefore unavailing. *See* Kross Br. 27. Equally unavailing is Dr. Kross's argument that Mr. DiFraia needed to present the arguments he now asserts in a motion for reconsideration in order to preserve them for appellate review. *See* Kross Br. 27. Dr. Kross cites no authority for this proposition—because none exists. *See* 28 U.S.C. § 1291; *see also, e.g.*, *United States v. Fiorelli*, 337 F.3d 282 (3d Cir. 2003) (explaining the impact of a motion for reconsideration on the notice-of-appeal deadline and thus making clear that the filing of a motion for reconsideration is not required).

Although not necessary, Mr. DiFraia *also* filed a notice stating that he did "not intend to file an amended complaint" and instead wanted the court to "issue a final order" so he could file an appeal. JA081.[11] This is exactly the sort of notice this Court has countenanced. *See, e.g.*, *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 702, 705 (3d Cir. 1996).[12]

Defendants' contention that—in following the precise path set forth by this Court's precedents—Mr. DiFraia has somehow engaged in "gamesmanship" or waived his appellate rights, is therefore without merit.[13] Indeed, this Court regularly considers claims dismissed without prejudice and appealed after plaintiffs chose to stand on their complaints. *See, e.g.*, *Palakovic*, 854 F.3d at 218–19, 229–34

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[11] Mr. DiFraia's notice was dated August 25, 2024, postmarked August 26, 2024, and marked "FILED" by the District Court on August 30, 2024. JA081–082. He therefore had not received the District Court's final dismissal order yet when he filed his notice.

[12] Indeed, Defendants appropriately do not dispute that this Court has appellate jurisdiction under 28 U.S.C. § 1291. Commonwealth Br. 1; Kross Br. 1.

[13] It is not clear to what the Commonwealth Defendants are referring when they say that Mr. DiFraia "*now* wants the same leave to amend that he explicitly rejected in August 2024." Commonwealth Br. 23. Mr. DiFraia's opening brief does not include a request for leave to amend.

(considering arguments that vulnerability-to-suicide and failure-to-train claims were improperly dismissed even though plaintiffs had been granted leave to replead them but opted not to); *Remick v. Manfredy*, 238 F.3d 248, 254, 263 (3d Cir. 2001) (same, with respect to tortious interference claim); *In re Westinghouse*, 90 F.3d at 702–03 (similar, with respect to claims dismissed under Rule 8).

Mr. DiFraia did nothing improper in electing to stand on his complaint rather than filing an amended complaint, and his doing so erects no barriers to this Court considering the arguments he has presented on appeal.

CONCLUSION

For the foregoing reasons, and those contained in Mr. DiFraia's opening brief, the Court should reverse the District Court's dismissal of Mr. DiFraia's Americans with Disabilities Act, Eighth Amendment, and medical malpractice claims, and remand for further proceedings.

Dated: August 25, 2025

Respectfully submitted,

/s/ Joseph K. Longley

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CERTIFICATES OF COMPLIANCE

In accordance with Fed. R. App. P. 32(g) and L.A.R. 31.1.(c), I certify that this brief:

(i) complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because it contains 6,478 words, excluding the parts exempted by Fed. R. App. P. 32(f);

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface with 14-pt Century Schoolbook font.

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Pursuant to L.A.R. 28.3(d), I certify that I am a member in good standing of the bar of the Third Circuit.

Dated: August 25, 2025

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CERTIFICATE OF SERVICE

I certify that on August 25, 2025, this brief and accompanying appendix was served on counsel for Appellees, Christine C. Einerson, Kathleen A. Wilde LaBay, Samuel H. Foreman, and Benjamin M. Lombard, using the Court's CM/ECF system.

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