NO. 20-20408

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN ANTHONY BUCHANAN,
Plaintiff–Appellant,

v.

CORONDA HARRIS; DETENTION OFFICER WANG, #130996; NURSE BRANDI HAWKING; DEPUTY SHERIFF SERGEANT J. WHEELER; WILLIAM LAWS; DETENTION OFFICER W. GIBSON; DETENTION OFFICER SERGEANT PICKENS-WILSON; DETENTION OFFICER MENDOZA,
Defendants–Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS
NO. 4:19-CV-04571

APPELLANT'S BRIEF

Easha Anand
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
2443 Fillmore Street, #380-15875
San Francisco, CA 94115
(510) 588-1274
easha.anand@macarthurjustice.org

Daniel M. Greenfield
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-8538
daniel-greenfield@law.northwestern.edu

Attorneys for Plaintiff-Appellant

ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate any potential disqualification or recusal.

Name of Interested Party	**Connection And Interest**
Easha Anand	Counsel for Plaintiff-appellant
John Anthony Buchanan	Plaintiff-appellant
Defendant Officer W. Gibson	Defendant-appellee
Daniel Greenfield	Counsel for Plaintiff-appellant
Coronda Harris	Defendant-appellee
Harris County Sheriff's Office	Defendant (terminated)
Nurse Brandi Hawking	Defendant-appellee
William Laws	Defendant-appellee
Detention Officer Mendoza	Defendant-appellee
Detention Officer Sergeant Pickens-Wilson	Defendant-appellee
Detention Officer Wang	Defendant-appellee
Deputy Sheriff Sgt. J. Wheeler	Defendant-appellee

s/ Daniel M. Greenfield
Daniel M. Greenfield
Attorney of Record for Plaintiff-Appellant

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-appellant John Anthony Buchanan respectfully requests that this Court grant oral argument. Buchanan has obtained *pro bono* counsel on appeal and believes oral argument will substantially aid the correct resolution of this case for four reasons.

First, this case raises an important statutory interpretation question: Does 42 U.S.C. §1997e(e)'s physical injury requirement demand a "more-than-de-minimis" injury? District courts dismiss cases based on that "more-than-de-minimis" requirement on a monthly basis, yet this Court has never ascertained whether the text of the statute can bear such a meaning.

Second, Buchanan is a transtibial amputee, and he alleges that Harris County jail officials punished him by placing him for four months in a series of cells that lacked accessibility features to allow him to safely shower, use the toilet, and get into bed. Allegations like Buchanan's have been deemed sufficient to state claims under the Americans with Disabilities Act (ADA) in this Court and several of its sister circuits.

And third, Buchanan's appeal raises important constitutional questions, including about the scope of the First Amendment's protection

for filing grievances and whether the Fourteenth Amendment tolerates placing a transtibial amputee in cells that do not have the features necessary for him to clean his limb stump.

If a response brief would assist the court in deciding the issues on appeal, this Court may direct respondents to file a brief. *See, e.g.*, Order, *Winblad v. Davila*, No. 10379 (5th Cir. Mar. 31, 2017); Order, *Samford v. Dretke*, No. 06-20443 (5th Cir. Dec. 13, 2007).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF JURISDICTION

John Buchanan brought this action under 42 U.S.C. § 1983 and the Americans with Disabilities Act (ADA). ROA.6-7. The district court had jurisdiction under 28 U.S.C. § 1331. On July 1, 2020, the district court dismissed Buchanan's complaint. ROA.194. Buchanan filed a motion to alter the judgment on July 22, 2020, and a notice of appeal on July 30, 2020. ROA.216, ROA.237. This Court held Buchanan's case in abeyance until the district court denied his motion to alter the judgment on September 21, 2020. ROA.367; Fed. R. App. P. 4(a)(4)(B)(i). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

John Buchanan is a transtibial amputee housed in Harris County's jail system. He alleges that, after he threatened to file a grievance, defendants moved him from his accessible cell—which had handrails to allow him to safely shower and use the toilet and a bottom bunk for him to sleep in—to a series of non-accessible cells that lacked those features and where he developed sores on his limb stump from being unable to properly clean it.

The issues on appeal are:

I. Whether Buchanan's allegations that correctional officials moved him to a non-accessible cell outside of the usual processes for cell transfers and immediately after his attempt to file a prison grievance are sufficient to raise an inference of retaliation in violation of the First Amendment.

II. Whether Buchanan's complaint states a claim for a violation of the Americans with Disabilities Act, where (A) the cells in which he was housed for nearly four months lacked reasonable accommodations necessary for him to shower, use the toilet, and get into bed safely; (B) his transfer to a non-accessible cell punished him in a way that targeted his disability, thereby discriminating against him on the basis of his status as an amputee; and (C) he is entitled to both compensatory damages and injunctive relief.

III. Whether, drawing all inferences in Buchanan's favor, his allegations amount to a violation of the Fourteenth Amendment, where (A) Defendants knew that consigning Buchanan to cells where he could not safely defecate, get into bed, or clean himself

deprived him of life's basic necessities; and (B) Defendants imposed that significant hardship on Buchanan without any process.

IV. Whether the physical-injury requirement under 42 U.S.C. § 1997e(e)—which forbids prisoners from recovering for "mental or emotional injury . . . without a prior showing of physical injury"—(A) incorporates an atextual requirement that the injury be "more than de minimis," as the district court held; (B) if so, whether the painful and dangerous sores Buchanan developed because he could not clean his residual limb in non-accessible cells are "more than de minimis"; and (C), if not, whether § 1997e(e) applies at all to Buchanan's ADA claims, First Amendment claim, and claims for nominal and punitive damages and injunctive and declaratory relief.

INTRODUCTION

John Buchanan, currently in pretrial detention at the Harris County Jail, depends on a walker and a prosthetic limb for mobility because his right leg is amputated below the knee. For ten months, Buchanan was housed in a cell made accessible to someone with his disability: It had grab bars that allowed him to hoist himself onto the toilet, a lower bunk so he could climb into bed, a shower with handrails , and other accommodations that allowed him to safely tend to daily needs many of us take for granted.

On November 8, 2019, however, Buchanan attempted to file a grievance, and in retaliation, officers banished Buchanan from his accessible cell. For the subsequent four months, he was confined in cells that lacked any accessibility features, preventing him from properly caring for his residual limb stump and forcing him to contort himself simply to use the toilet, sleep, and shower. As a result, Buchanan faced the constant risk of falling and developed painful, dangerous sores.

That sequence of events, alleged in Buchanan's complaint, suffices to state claims on which relief can be granted under three sources of law. First, defendants violated the First Amendment because they retaliated

against Buchanan for attempting to exercise his constitutional right to file a grievance. Second, defendants violated the ADA, both because Buchanan was housed in cells that did not provide a reasonable accommodation for his disability and because punishing Buchanan in a way that targeted his disability—in a way that a non-amputee could not be punished—constitutes disability discrimination. And third, defendants violated the Fourteenth Amendment because they kept Buchanan in cells where he was unable to meet his bodily needs and because they removed him from his accessible cell without adequate process. The district court dismissed Buchanan's complaint in part because it deemed such claims deficient, but Buchanan plausibly alleged facts that make out those claims.

The district court's dismissal was also based on a finding that Buchanan was not entitled to damages. Under 42 U.S.C. § 1997e(e), a prisoner may not seek compensatory damages "for mental or emotional injury . . . without a prior showing of physical injury." Buchanan alleged a physical injury: He developed painful sores on his residual limb from being unable to properly clean it in non-accessible cells. The district court found that allegation insufficient, claiming that "the 'physical injury'

required by § 1997e(e) 'must be more than *de minimus* [sic].'" ROA.179. But the text of § 1997e(e) imposes no such requirement. Indeed—and in notable contrast to a provision in the same statutory scheme that *does* require a "serious" physical injury, *see* 28 U.S.C. § 1915g—§ 1997e(e) does not require an injury of any particular severity, and Fifth Circuit case law requiring a "more-than-de-minimis" injury is impossible to square with intervening Supreme Court precedent. In any event, the sores Buchanan described are far more than de minimis—residual limb sores are painful and can cause potentially life-threatening infections that amputees must take pains to prevent.

On each of these bases, the district court erred in dismissing Buchanan's case at the screening stage. This Court should reverse and remand for further proceedings.

STATEMENT OF THE CASE

I. Factual Background.

Buchanan is a "transtibial" amputee, meaning his "right leg is missing below the knee." ROA.93; ROA.138. Buchanan relies on a prosthetic leg and a walker. ROA.138-139. Even so, walking, climbing, and standing remain challenging. ROA.138. Buchanan has a particularly

hard time using the toilet, getting into bed, and showering, and he cannot safely accomplish those tasks without handrails and other assistive devices. ROA.138. Buchanan also has "severe muscle atrophy" in his hand resulting in "extreme loss of use." ROA.138-139.

In light of Buchanan's obvious disabilities, he was assigned to an accessible cell while awaiting trial. ROA.77. That cell featured "toilets with rails," "handicap sinks," "shower[s] with a seat [or] handrails," an accessible bed, and other accommodations, which, taken together, permitted him to use the toilet, sleep, and cleanse himself without unduly risking injury. ROA.140.

On November 8, 2019, Buchanan was jolted awake by a correctional officer who asked him to respond to unspecified disciplinary allegations. ROA.96-97. When Buchanan approached multiple correctional officers to ask for more information about the allegation or documentation thereof, he was ignored or refused. ROA.96-98. Buchanan then asked to file a grievance protesting the lack of notice. ROA.97.

In response, Defendant Mendoza swore at Buchanan and directed him back to his cell. Defendant Wong joined Defendant Mendoza jeering and laughing at plaintiff. ROA.98. Shortly after, Defendant Wong called

Defendant Pickens-Wilson and "erupt[ed] with hysterical laughter" while relaying Buchanan's actions over the phone. ROA.98.

Hours later, Buchanan was informed that he would be transferred from the accessible cell where he had been for nearly 10 months to one that was accessible only by stairs and that lacked any accommodations for his disability. ROA.99. Concerned that the new cell would not accommodate his disabilities, Buchanan asked Defendant Gibson, who was working in classification, why he was being transferred "when the classification department is fully aware of him being a transtibial amputee." ROA.99. Gibson claimed that Buchanan's accessible cell was needed for an unidentified elderly "man with glaucoma," ROA.99, but Buchanan alleges that Gibson said so in a manner that made clear the justification was pretext, ROA.36. Buchanan also notified Defendant Wheeler that the new cell could not accommodate his disability. ROA.100. Wheeler said there was nothing he could do and threatened to "drag" Buchanan, handcuffed, to the new cell. ROA.100. Neither Gibson nor Wheeler nor any of the other defendants followed any of the customary procedures for transferring detainees. ROA.136.

Buchanan's concerns were borne out. ROA.100-101. His new cell lacked a toilet with a handrail, handicap-accessible sinks, a shower with a seat or handrail, and even a lower bunk. ROA.100-101. The lack of handrails made the simple act of relieving himself unsafe and "caus[ed] him discomfort." ROA.101. Deprived of a lower bunk, Buchanan struggled to safely access his bed. ROA.101. And without a shower seat or grab bars, Buchanan was wholly "unable" to shower. ROA.101. After 5 days, officials provided him with a "white, flimsy chair" to use in the shower, but that unstable chair did little to make the shower safe. ROA.102; ROA.140.

For the next four months, Buchanan attempted to return to a cell that accommodated his disability. ROA.140. He lodged grievances with Defendants Laws and Harris, both ADA compliance coordinators, but the grievances were ignored. ROA.100-101. When Defendant Harris eventually responded, she disclaimed responsibility for ADA compliance. ROA.101. And when Buchanan sought the assistance of other jail personnel, he was instructed "not to submit any more requests for accommodation." ROA.39. As a predictable consequence of Defendants' decision to imprison Buchanan where he could not safely reside, he

developed painful sores on his residual limb stump. ROA.101. But when Buchanan reported these sores, and requested medical care for them, he was ignored. ROA.140.

Buchanan was finally returned to accessible housing on March 11, 2020, more than four months after being ejected.[1] ROA.140.

II. Proceedings Below.

Buchanan filed suit in 2019 against the jail personnel who had retaliated against him, moved him to non-accessible housing, and thereafter ignored his pleas for help, suing each in their official and individual capacities and asking for compensatory damages, injunctive relief, and "any other relief the Court deems appropriate." ROA.106-107. Buchanan raised First Amendment, ADA, and Fourteenth Amendment claims. ROA.102-105. He twice amended his complaint and responded to the district court's order for a more definite statement of the facts. ROA.30, ROA.91, ROA.134.

[1] The district court appeared to assume that Buchanan was subjected to inadequate conditions for no more than five weeks. ROA.183-84. The district court surmised that by relying on Buchanan's allegation that on Dec. 20, 2019, defendant Laws taunted him—"with deliberate intent to deceive"—by stating "I am the reason why you are over here" in a cell with "all the accommodations you request." ROA.83. But construed in Buchanan's favor, the complaint alleges that Laws was lying ("deliberate intent to deceive")—*i.e.*, Buchanan had not been provided necessary accommodations. In fact, Buchanan alleged that he was in non-accessible cells for four months. ROA.140.

The district court dismissed Buchanan's complaint under the screening provisions of the Prison Litigation Reform Act (PLRA). First, the district court held that 42 U.S.C. § 1997e(e)—which forbids prisoners from recovering "for mental or emotional injury . . . without a prior showing of physical injury"—barred Buchanan's request for compensatory damages. ROA.178-180. Even though Buchanan *had* alleged a physical injury—the painful and dangerous sores caused by being unable to properly clean his stump—the district court held that physical injury was not sufficiently serious. ROA.180. In the district court's view, only those injuries "requir[ing] medical care" satisfy the Fifth Circuit's more-than-de-minimis standard, and it erroneously believed that Buchanan had not alleged a medical need. ROA.180.

Second, the district court held that Buchanan failed to state a claim against defendants in their official capacity under the ADA: The district court held that providing Buchanan with a "white, flimsy chair" five days into his four months in non-accessible cells sufficed to provide a "reasonable accommodation," and that even if it did not, Buchanan could claim neither damages (because of § 1997e(e)) nor injunctive relief (because he was eventually returned to an accessible cell). ROA.183-185.

Third, the district court dismissed Buchanan's First Amendment retaliation claim. ROA.189-192. Buchanan had alleged that prison officials moved him out of his accessible cell because they were angry at him for threatening to grieve, citing, as evidence, officers' overheard conversations, officers' demeanor, and the fact that the cell move did not go through the usual protocols for transferring detainees. ROA.136, ROA.189-192. The district court held that any such grievance would have been frivolous and that Buchanan had supplied insufficient evidence of retaliatory motive. ROA.189-192.

And finally, the district court dismissed Buchanan's Fourteenth Amendment. ROA.182-83. Without analysis, the district court held that Buchanan "cannot bring an individual-capacity claim for damages under § 1983 against these defendants based on his housing accommodations." ROA.182. The district court dismissed Buchanan's claim that Defendants violated his procedural due process rights by transferring him to a non-accessible cell without process on the basis that he had not alleged the

"atypical and significant hardship" necessary to create a liberty interest.[2] ROA.188.

Buchanan moved to alter the judgment, and his request was denied. ROA.367-368. This appeal followed.

STANDARD OF REVIEW

Buchanan's complaint was dismissed under 28 U.S.C §1915A and 28 U.S.C. §1915(e)(2) in part for failure to state a claim and in part for frivolousness. ROA.177-178; ROA.183-185. Such "mixed" dismissals are reviewed de novo. *See Samford v. Dretke*, 562 F.3d 674, 678 (5th Cir. 2009) (per curiam). This Court takes all allegations in the complaint as true, draws all inferences in plaintiff's favor, and should affirm a dismissal only if those facts and inferences do not state a claim that is plausible on its face. *Cherry Knoll LLC v. Jones*, 922 F.3d 309, 316 (5th Cir. 2019). Moreover, a complaint by a pro se litigant is to be construed liberally. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

[2] The district court also dismissed Buchanan's ADA claims against defendants in their individual capacities, his Equal Protection Clause claims, and his Due Process Clause claims regarding failure to investigate his grievances and verbal threats. ROA.180-182; ROA.185-189. Those rulings are not at issue in this appeal.

SUMMARY OF THE ARGUMENT

Buchanan's allegations—that he was removed from his accessible cell and housed in a series of non-accessible cells for more than four months because of his request to file a grievance—state at least five claims on which relief can be granted.

I. First, Buchanan's allegations state a First Amendment claim. It is well-established that attempting to file a grievance is protected activity under the First Amendment. *Butts v. Martin*, 877 F.3d 571, 589 (5th Cir. 2017). Based on the timing of the cell move, Defendants' evident anger with Buchanan, and Buchanan's assertion that the cell move did not follow the ordinary process for intra-jail transfers, a court can infer that Buchanan's cell transfer was motivated by retaliation for attempting to invoke the grievance process. *See Petzold v. Rostollan*, 946 F.3d 242, 253-54 (5th Cir. 2019); *Butts*, 877 F.3d at 589.

II. Second, Buchanan has stated two claims under the ADA. **A.** Buchanan's disability was "open and obvious"—his status as an amputee was visible to officers—yet jail personnel denied him a cell that would accommodate that disability. *See Cadena v. El Paso Cty.*, 946 F.3d 717, 724 (5th Cir. 2020). For four months, Buchanan did not have access

to a bottom bunk, so he was placed at serious risk of harm at least twice per day as he attempted to maneuver into and out of bed. For four months, he could not safely defecate because his toilet did not have grab bars. And for four months, Buchanan could not safely get into and out of the shower because it did not have a seat or grab bars. **B.** Moreover, moving Buchanan from an accessible cell into one that did not have any accessibility features violated the ADA because it punished him in a way that it would be impossible to punish someone without a transtibial amputation—the very definition of disability discrimination.

III. Finally, Buchanan's complaint states two claims under the Fourteenth Amendment. **A.** Defendants held Buchanan in a series of non-accessible cells for four months. **1.** That housing assignment was, objectively, a sufficiently serious deprivation of Buchanan's fundamental human needs—he could not safely shower, use the toilet, or access his bed. **2.** Defendants were also, subjectively, deliberately indifferent to that deprivation. Buchanan frequently alerted them to the risks of his housing assignment and its impact on his health but was routinely ignored.

B. Defendants' conduct also denied Buchanan procedural due process. **1.** For a transtibial amputee, being housed in a non-accessible

cell is sufficiently uncomfortable and, indeed, unsafe as to qualify as an "atypical and significant hardship." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). **2.** And Buchanan was subjected to that hardship without *any* process, let alone process that would satisfy the Constitution.

IV. The district court held that 42 U.S.C. § 1997e(e), which bars recovery "for a mental or emotional injury . . . without a prior showing of a physical injury," foreclosed Buchanan's claims. Buchanan alleged a physical injury: the painful sores he developed as a result of not being able to properly clean his residual limb stump. But the district court held that § 1997e(e) requires not only a physical injury, but a physical injury that is "more than de minimis." **A. 1.** That requirement finds no basis in the text of the statute, which, by contrast to other provisions of the Prison Litigation Reform Act that require a "serious" physical injury, imposes no limitation on the types of physical injuries that qualify. **2.** In *Siglar v. Hightower*, 112 F.3d 191 (5th Cir. 1997), this Court justified the "more-than-de-minimis" requirement because it believed § 1997e(e) somehow incorporated the Eighth Amendment standard for cruel and unusual punishment. *Id.* at 193. Even assuming that were true, the Supreme Court in *Wilkins v. Gaddy*, 559 U.S. 34 (2010) has since made clear that

the Eighth Amendment may be violated by even a de minimis injury, thus overruling *Siglar*. *Id.* at 39.

B. Even if § 1997e(e) has a more-than-de-minimis requirement for the physical injury showing, Buchanan's sores satisfy that requirement. Minor skin irritation can be life-threatening for an amputee; the sores Buchanan describes are even more painful and dangerous. **C.** In any event, § 1997e(e) only bars compensatory damages "for mental and emotional injury." It does not apply to requests for injunctive relief, declaratory relief, nominal damages, or punitive damages. *See Geiger v. Jowers*, 404 F.3d 371, 375 (5th Cir. 2005); *Hutchins v. McDaniels*, 512 F.3d 193, 198 (5th Cir. 2007). And it should not apply to his ADA or First Amendment claims, neither of which are claims for "mental or emotional injury."

ARGUMENT AND AUTHORITIES

I. Moving Buchanan To A Non-Accessible Cell In Retaliation For His Threat To File A Grievance Violated The First Amendment.

When Buchanan was asked to respond to an unspecified disciplinary allegation, he requested documentation of that allegation, but officers refused to provide it. ROA.96-97. So Buchanan asked for a

grievance form to complain about the Kafkaesque request to respond to a secret charge. ROA.97. But officers ridiculed him and became angry and, when he returned to his cell, he saw one of the officers call another while laughing at and talking about him. ROA.98.

Four hours later, Buchanan was notified that he was being ejected from the accessible cell where he had been housed for 10 months. ROA.99. Despite repeatedly informing Defendants that he could not safely reside in a non-accessible cell, Buchanan was transferred—under threat of being "drag[ged]"—to a different unit and a non-accessible cell. ROA.99-101; ROA.138; ROA.140. Ordinarily, cell moves, particularly between units and classifications, are accompanied by process; this move was not. ROA.136 (citing 37 Tex. Admin. Code § 271.1(a)(3), (b)(3)). Buchanan was confined in a non-accessible cell for four months. ROA.100-101; ROA.140.

Those allegations state a quintessential First Amendment retaliation claim. To state such a claim, "a prisoner must allege (1) a specific constitutional right, (2) the defendant's intent to retaliate against the prisoner for his or her exercise of that right, (3) a retaliatory adverse act, and (4) causation." *Bibbs v. Early*, 541 F.3d 267, 270 (5th Cir. 2008). Buchanan's complaint satisfies each of those elements.

As to the first, a specific constitutional right, it is settled law that attempting to file a grievance is a constitutionally protected activity. *Butts*, 877 F.3d at 589. The district court claimed that any grievance Buchanan could file would have been "frivolous" and therefore unprotected by the First Amendment. ROA.190-191. But Buchanan's grievance would not have been frivolous. Drawing all inferences in his favor, as this Court must at this junction, Buchanan alleges that he was in the process of being written up for a disciplinary violation, but he had no idea—and no one would tell him—what rule he had allegedly violated. Buchanan attempted to grieve that absurd state of affairs. Far from frivolous, a grievance complaining that a detainee received no notice of the allegations against him would state a violation of both Texas law—37 Tex. Admin. Code § 283.1(3)(C) (detainees are entitled to prompt "written notice" of an alleged violation)—and the Constitution—*Wolff v. McDonnell*, 418 U.S. 539, 564 (1974) ("advance written notice of the claimed violation" is a "minimum requirement[] of procedural due process").

Buchanan's complaint also alleges the second requirement: retaliatory motive. A detainee need not present direct evidence of motive;

he may instead "allege a chronology of events" from which retaliatory motive "may plausibly be inferred." *Wood v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995). Here, Buchanan presented three pieces of evidence that Defendants acted to punish him for threatening to file a grievance. First, the chronology he alleges—a threat to grieve around 5:00 a.m., followed by a cell transfer at 9:20 a.m., *see* ROA.96-100—is at least as close in time as in cases this Court has found sufficiently alleged retaliatory motive. *See Petzold v. Rostollan*, 946 F.3d 242, 253-54 (5th Cir. 2019) ("tight[] chain of events' between the predicate events and alleged retaliatory acts—ranging from less than an hour to almost a month"—sufficient to survive summary judgment on question of motive); *Butts*, 877 F.3d at 589 (fact issue remains on question of motive where false accusations came within two hours of exercise of First Amendment right). Second, Buchanan alleged that the usual protocols for moving detainees were not followed, which raises an inference that Defendants were acting outside the normal scope of jail operations. ROA.136 (citing 37 Tex. Admin. Code § 271.1(a)(3), (b)(3)). And finally, Defendants' anger at Buchanan for commencing the grievance process and subsequent disregard of his pleas

not to be transferred at least plausibly suggests that the cell move was retaliatory. ROA.99-101.

Buchanan's complaint alleges the third element, a "retaliatory adverse act." The adverse act he alleges—being transferred from an accessible cell into one without the basic infrastructure he needed—is far more significant in both adversity and duration than acts this Court has held sufficient. In *Hart v. Hairston*, 343 F.3d 762, 764 (5th Cir. 2003), defendants retaliated against a prisoner who filed a grievance, and this Court found that 27 days of commissary and cell restrictions were a "retaliatory adverse act"; here, Buchanan's ouster from his cell lasted four times as long and, whereas the *Hart* plaintiff was restricted in what he could purchase, Buchanan was restricted in his ability to meet basic human needs. In *Jackson v. Cain*, 864 F.2d 1235, 1248 (5th Cir. 1989), this Court found a "retaliatory adverse act" where a prisoner who had a light labor job was given a less desirable job for 47 days—a fraction of the time Buchanan was consigned to non-accessible cells and a far lesser deprivation than the one Buchanan endured.

Finally, Buchanan has sufficiently alleged the fourth element, causation. His complaint makes clear that, aside from retaliatory motive,

there would be no reason to expel him from his accessible cell—his disabilities, and therefore his need for accessibility features, had not become any less acute. The district court held that he had not satisfied the causation element because one official told Buchanan that the switch was necessary so he could give Buchanan's cell to a 75-year-old detainee with glaucoma. ROA.192. But this Court is not obligated to credit defendants' alternative explanation for an adverse act. In *Jackson*, for instance, prison supervisors argued that the plaintiff's unsatisfactory job performance, not retaliatory motive, caused the change in work assignment. 864 F.2d at 1248. Yet this Court held—at the more demanding summary judgment stage—that plaintiff's say-so that the unsatisfactory performance review was pretextual sufficed to go to a jury. *Id.*

Here, too, Buchanan has alleged that the rationale provided by defendants was "a pretext to disguise the retaliation"—*i.e.*, that there was no 75-year-old detainee with glaucoma in need of his cell. ROA.36. When Captain Renault says he's shutting down Rick's Café because he is "shocked, *shocked* to find that gambling is going on in here!" everyone knows that Renault's justification is pretext. *Casablanca* (1942).

Buchanan alleges the same was true here: Gibson spoke with a "deliberate malicious intent" that made clear he was not telling the truth. ROA.99. At the pleading stage, Gibson's justification is entitled to no more weight than Renault's.

II. Buchanan Was Subjected To Disability Discrimination When He Was Transferred To A Non-Accessible Cell.

The ADA is "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Delano-Pyle v. Victoria Cty., Tex.*, 302 F.3d 567, 574 (5th Cir. 2002). Buchanan's complaint alleges conduct that violates that national mandate: In order to punish him, jail officials transferred him from a cell that accommodated his disability to one that did not. That conduct violates the ADA in two ways. First, the cell to which Buchanan was transferred did not provide a "reasonable accommodation" for his disability. And second, punishing Buchanan by moving him to a non-accessible cell discriminates against him on the basis of his disability—it imposes a punishment that could not be imposed on someone without his disability.

A. Jail Officials Failed To Reasonably Accommodate Buchanan's Disability.

Title II of the ADA "impose[s] upon public entities an affirmative obligation to make reasonable accommodations for disabled individuals." *Cadena v. El Paso Cty.*, 946 F.3d 717, 723 (5th Cir. 2020). To state a Title II claim, a plaintiff must show (1) "he is a qualified individual within the meaning of the ADA"; (2) "he is being excluded from participation in, or being denied benefits of, services, programs, or activities for which [a] public entity is responsible"; (3) "the entity knew of the disability and its consequential limitations, either because the plaintiff requested an accommodation or because the nature of the limitation was open and obvious"; and (4) defendant did not provide a "reasonable" accommodation—that is, an accommodation that "give[s] 'meaningful access to the benefit that the [defendant] offers' without posing an undue burden to the [defendant]."[3] *Id.* at 723-25.

[3] This Court sometimes describes the elements of Title II using a three-part framework: (1) qualified individual; (2) excluded from a public entity's services; (3) "by reason of his disability." *See, e.g.*, *Windham v. Harris Cty.*, 875 F.3d 229, 235-37 (5th Cir. 2017). This Court has been clear, however, that in a failure to accommodate case, the third element is proven by showing that the disability and its limitations are open and obvious and that any accommodation was not reasonable. *Id.* The three- and four-part tests are thus the same.

The district court did not dispute that Buchanan's complaint adequately alleged the first three elements. As to element (1), a "qualified individual" is someone who has a "physical or mental impairment that substantially limits one or more major life activities," which include "caring for oneself," "walking," and "standing." 42 U.S.C. §§ 12131, 12102(1)(A), 12102(2)(A). This Court has held that a plaintiff with a broken leg is a "qualified individual." *Cadena*, 946 F.3d at 724. Buchanan —a transtibial amputee—surely faces limitations as "substantial[]" as that plaintiff.[4]

Nor is there any doubt that Buchanan alleged the second element, that he was "excluded from participation in, or being denied benefits of, services, programs, or activities for which [a] public entity is responsible." *Id.* at 723. Buchanan alleges that he was not able to safely access his toilet, his bed, or a shower, all "services, programs, or activities" within the meaning of the ADA. *See Pierce v. Cty. of Orange*, 526 F.3d 1190, 1218 (9th Cir. 2008) (toilets); *Kiman v. New Hampshire Dept. of Corr.*, 451 F.3d

[4] Buchanan also alleged that "severe muscle atrophy" in has hand resulted in "extreme loss of [its] use." ROA.139. Such disabilities made the non-accessible cells even more perilous, and constitute additional "substantial limitations" Defendants were required to accommodate.

274, 289-90 (1st Cir. 2006) (beds); *Jaros v. Illinois Dep't of Corr.*, 684 F.3d 667, 672 (7th Cir. 2012) (showers). And the Harris County Jail is a "public entity" responsible for those "services." *See Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998); 28 C.F.R. § 35.152(a).

There can be no serious dispute as to the third element, that Defendants "knew of the disability and its consequential limitations." In *Cadena*, this Court held that a broken leg was an "open and obvious" disability. 946 F.3d at 724. Surely, an amputated leg is at least as "open and obvious." *See also Windham v. Harris Cty.*, 875 F.3d 229, 238 (5th Cir. 2017) ("[O]utwardly visible disabilities like . . . being wheelchair-bound" are "open [and] obvious."). And Buchanan's case is even stronger than *Cadena*: In *Cadena*, there was some doubt that all defendants understood that plaintiff could not use crutches—one of the "consequential limitations" of the plaintiff's injury—but this Court nonetheless found that plaintiff had presented sufficient evidence to survive summary judgment. 946 F.3d at 725-26. Here, by contrast, Defendants had *already* recognized the "consequential limitations" of Buchanan's disability by placing him in an accessible cell. *Cf. Kiman*, 451 F.3d at 288 ("The defendants acknowledged, through the issuance of a

shower chair pass, [plaintiff's] serious disability-related needs."). And Buchanan had repeatedly voiced his "consequential limitations"—the reasons that his non-accessible cell was inadequate—to Defendants. ROA.100-101; ROA 140.

The district court dismissed Buchanan's claim based on the fourth element, finding that jail personnel had provided a "reasonable accommodation." ROA.183-185. But Buchanan's placement was not a "reasonable accommodation," that is, one that gives "meaningful access." *See Cadena*, 946 F.3d at 723-25. Whereas the cell he occupied before November 2019, had "toilets with rails," "handicap sinks," "shower[s] with a seat [and] handrails," and an accessible bed, ROA.140, his subsequent housing lacked any such features. ROA.100-101. Their absence deprived Buchanan of "meaningful access" to three "benefit[s]": the ability to safely relieve himself, get into and out of bed, and clean himself. *See*, *e.g.*, *Pierce,* 526 F.3d at 1219; *Cadena*, 946 F.3d at 745.

First, Buchanan was deprived of "meaningful access" to a toilet because the toilets in his cells did not include handrails. Without them, Buchanan could not safely move between his wheelchair and the toilet, could not support himself while on the toilet, and had "difficulty with

defecation." ROA.41, ROA.100-101. Faced with similar facts, courts have found that toilets without grab bars are not a reasonable accommodation. In *Pierce*, for instance, the Ninth Circuit found that even where a jail *had* provided grab bars alongside toilets, it was still not clear that the accommodation was sufficient because one expert testified that the grab bars were not properly positioned. 526 F.3d at 1224 & n.44; *see also Jaros*, 684 F.3d at 672 (denying summary judgement to jailers who failed to provide prisoner access to toilet with grab bars); U.S. Dep't. of Justice, 2010 ADA Standards for Accessible Design §§ 604.5, 609, 807.2.4 (2010) (hereinafter "2010 ADA Standards") (accessible toilet facilities require grab bars; specifying size and position).[5]

Second, Buchanan was deprived of "meaningful access" to a bed because there was no bottom bunk available. ROA.101. He was forced to clamber up or down a ladder at least twice a day, each time facing a serious risk of harm. Courts have found the denial of a bottom bunk to a disabled prisoner an ADA violation: In *Kiman*, for instance, the First

[5] Because Harris County Jail was constructed before 1991, it is not required to adopt the 2010 ADA Standards. 28 C.F.R. § 35.150(b)(1). Whatever alternatives to those standards it chooses, though, must be equally "effective in achieving compliance" with the ADA. *Id.*; *see also* 28 C.F.R. § 35.152(b)(3) (2010 ADA Standards apply to jails).

Circuit reversed a grant of summary judgment where an inmate presented evidence that he "had mobility problems" but corrections officers did not grant his bottom-bunk request. 451 F.3d at 289-90.

Third, Buchanan did not have "meaningful access" to showers because there was no stable seat or handrail. ROA.100-101. Here, too, courts have found that denying a disabled prisoner stability features in a shower denies them a reasonable accommodation. For instance, in *Jaros*, a prisoner alleged that a jail's showers lacked handrails and that his fear of falling as a result prevented him from showering regularly. 684 F.3d at 669. The Seventh Circuit found that such allegations plausibly stated an ADA violation. *Id.* at 672; *see also* 2010 ADA Standards, §§ 610, 807.2.4 (mandating shower seats and grab bars; detailing form and strength requirements).

The district court held that Buchanan could not show a failure to accommodate his disability because, five days into his four-month expulsion from an ADA-accessible cell, the jail provided him with a "white, flimsy chair" to use in the shower. ROA.102; ROA.183-184. That was error. For starters, that chair did not provide Buchanan with the

requisite "meaningful access" to his toilet or bed. Moreover, that chair did not offer "meaningful access" to showers for at least three reasons.

First, Buchanan waited five days for that chair. Defendants violated the ADA during that time—cases are uniform that forcing a disabled prisoner to shower without a chair constitutes a failure to reasonably accommodate. *See, e.g.*, *Kiman*, 451 F.3d at 288; *Kaufman v. Carter*, 952 F. Supp. 520, 532-33 (W.D. Mich. 1996); *Douthit v. Dean*, CIV.A. H-12-2345, 2012 WL 4765793, at *4 (S.D. Tex. Oct. 8, 2012); *Schmidt v. Odell*, 64 F. Supp. 2d 1014, 1032 (D. Kan. 1999); *see also Bradley v. Puckett*, 157 F.3d 1022, 1026 (5th Cir. 1998) (denial of shower chair states Eighth Amendment claim).

The district court thought a five-day deprivation was too brief to state a claim. ROA.184. But there is no minimum time before the denial of a reasonable accommodation becomes actionable. In *Cadena*, for instance, plaintiff was wrongly given crutches instead of a wheelchair for only two days, less than half the time that Buchanan went without a shower chair. 946 F.3d at 726. Yet defendants were still liable for the injuries that the plaintiff incurred during those two days—there was no "too short a time" exception to the ADA. *Id.* In this case, Buchanan

notified at least three officials on November 8, that he could not use the shower, filed a written grievance on November 9, and told a nurse about it on November 10, but it was not until November 13 that he received even the flimsy chair. ROA.102. That five-day period was sufficient for Buchanan to develop serious and potentially life-threatening sores on his residual limb, *see infra*, 42-43, and more than sufficient to state a Title II claim. *See Cadena*, 946 F.3d at 726; *cf. Palmer v. Johnson*, 193 F.3d 346, 353-54 (5th Cir. 1999) (depriving prisoners of the "basic elements of hygiene" for seventeen hours states Eighth Amendment claim).

And even after getting the chair, Buchanan could not "meaningfully access" the shower as required by the ADA. Just because a jail provides *some* accommodation for a disability doesn't mean that accommodation is reasonable. *See*, *e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998) (ADA "addresses substantial limitations on major life activities, not utter inabilities.") In *Cadena*, for instance, officials attempted to accommodate the plaintiff by providing crutches, but those crutches were not "reasonable" accommodations because they did not sufficiently allow her to access one of the prison's services. 946 F.3d at 725-26. So too, here. The flimsy plastic chair was not attached to the wall, meaning that it could

easily topple or slide. *See Pierce v. Cty. of Orange*, 761 F. Supp. 2d 915, 924, 930 (C.D. Cal. 2011) ("plastic shower chair" not an acceptable accommodation because it "pose[s] a hazard"; "fixed seat" was required "to transfer properly into and out of the shower"). And even a wall-mounted chair would not obviate the need for handrails to help an amputee enter and exit the shower.

Defendants thus did not provide Buchanan "meaningful access" to three key services—a toilet, a bed, and a shower.[6] And that access was particularly important given that Buchanan was incarcerated: "[D]etention and correctional facilities are unique facilities" under the ADA because "[i]nmates cannot leave the facilities and must have their needs met by the corrections system, including needs relating to a disability." 28 C.F.R. § Pt. 35, App. A. For the four months he was held in non-accessible cells, ROA.140, Buchanan's needs were not met.

[6] At summary judgment, of course, Defendants are entitled to the affirmative defense that accommodating Buchanan's disability would have been unreasonably burdensome. *Frame v. City of Arlington*, 657 F.3d 215, 233 & n.86 (5th Cir. 2011); *see* 28 C.F.R. § 35.130(7)(i) (public entity has burden of demonstrating that reasonable modifications would "fundamentally alter" the nature of the service). At the pleading stage, though, this Court must take as true Buchanan's allegation that Defendants' only potential justification—that a man with glaucoma required his cell—was false and pretextual. ROA.36.

B. Transferring Buchanan To A Non-Accessible Cell Constitutes Discrimination On The Basis Of Disability.

Transferring Buchanan to a cell that did not accommodate his disability violates the ADA for yet another reason: It punished him in a way that a detainee who did not have a physical disability could not be punished.

The ADA stipulates that "no qualified individual with a disability shall, by reason of such disability . . . be subjected to discrimination" by a public entity. 42 U.S.C. § 12132. Buchanan has shown such discrimination here. By transferring Buchanan, a transtibial amputee, to cell without accessibility features, Defendants imposed a punishment that could only be applied to a disabled detainee. Even assuming that the reason for the punishment were valid, *but see supra*, §I, the punishment targeted and exploited Buchanan's disability. While a non-disabled detainee might be frustrated by such a cell transfer, the transfer would not prevent her from safely bathing, sleeping, and using the toilet, the way that it prevented Buchanan from doing those things.

To be sure, in the typical disability discrimination case, the animus toward the disabled person is prompted by their disability, whereas here, Buchanan does not allege that jail officials had animus against

transtibial amputees. But "Congress had a more comprehensive view of the concept of discrimination advanced in the ADA" than solely discrimination motivated by animus toward the disabled. *Olmstead v. L.C.*, 527 U.S. 581, 598 (1999).

In *Olmstead*, for instance, the Supreme Court held that confining two patients in a psychiatric unit constituted discrimination "by reason of disability": Whereas individuals without "mental disabilities" could receive medical services in an outpatient setting, individuals with such disabilities must "relinquish participation in community life." 527 U.S. at 593-94, 601. Defendants argued that the patients did not suffer disability discrimination—the patients were not denied community placement by virtue of animus toward the disabled, but rather because there were no community treatment spots available. *Id.* at 598. But the Supreme Court rejected that argument, finding that "[d]issimilar treatment" in a "key respect" sufficed to establish discrimination "by reason of disability." *Id.* at 601.

So, too, here. Whereas non-disabled prisoners would be unaffected by being moved from an accessible cell to a non-accessible cell, the effect for Buchanan was that he was forced to choose between risking injury

and attending to his needs. That Defendants were motivated by their irritation with Buchanan rather than hatred toward the disabled is immaterial. Buchanan has shown "dissimilar treatment" in a "key respect" from non-disabled inmates, and that is sufficient to state a claim at this junction.

C. Buchanan Is Entitled To Both Damages And Injunctive Relief Under the ADA.

1. Buchanan is eligible for compensatory damages under the ADA. Damages are available under the ADA where a plaintiff shows "intentional discrimination." *Delano-Pyle,* 302 F.3d at 574.

In *Delano-Pyle*, for instance, this Court considered a case where an officer administered three sobriety tests to a hearing-impaired plaintiff "without asking [plaintiff] which form of communication would be effective for him." 302 F.3d at 570. It was apparent that the plaintiff could not understand the officer, and the officer admitted that he did not know if plaintiff understood him. *Id.* at 575-76. That was sufficient to uphold a jury verdict finding intentional discrimination and eligibility for damages. *Id.* In *Cadena*, too, this Court reversed a grant of summary judgment on the damages question, finding sufficient evidence of intentional discrimination because plaintiff told the facility that crutches

were inadequate and because correctional officials put the plaintiff in a wheelchair at various points, thereby demonstrating that they understood her need for more accommodation. 946 F.3d at 726.

In this case, taking Buchanan's allegations as true, officers were on far more notice that the officers in *Delano-Pyle* and *Cadena*. Buchanan's disability was obvious. He had previously been placed in an accessible cell, which showed that correctional officers understood his need for accommodation. And he *told* officers, repeatedly to their faces and later via grievance forms, that his new cell was not an adequate accommodation. Buchanan is thus eligible for compensatory damages under the ADA.

2. Buchanan is also eligible for injunctive relief. The Supreme Court has recognized that, although "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, . . . past wrongs *are* evidence bearing on whether there is a real and immediate threat of repeated injury." *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974) (emphasis added). Such a "real and immediate threat of repeated injury" suffices to seek injunctive relief. *Id.*

In *Perez v. Doctor's Hospital at Renaissance, Ltd.*, for instance, this Court found that injunctive relief was proper where a hospital repeatedly failed to provide an interpreter for a deaf patient with a chronic illness. 624 F. App'x 180, 183 (5th Cir. 2015) (unpublished). By summary judgment, it had been a full year since the hospital had declined to provide plaintiff with an interpreter. *Id.* But this Court found sufficient evidence of such a "real and immediate threat" of repeated injury because the plaintiff's infant daughter was a recurring patient in the hospital and there was no evidence the hospital had changed its practices, both of which created "a possible inference that the plaintiffs' problems . . . will continue in the future." *Id.* at 184.

Buchanan's case for injunctive relief is even stronger. Although the *Perez* plaintiff's daughter was a recurring patient at the hospital, he could have chosen to visit other hospitals. By contrast, Buchanan is incarcerated—against his will and without a conviction—and so has no choice but to remain housed in the Harris County jail complex. And there is no evidence that the guards who shuttled him between dangerous, non-accessible cells for four months have changed their practices or that Harris County has done anything to mitigate the possibility that he will

yet again be moved to a cell where he cannot defecate, sleep, or shower safely.

The district court found that Buchanan's claims were moot because he had been returned to his accessible cell in March 2020, citing to *Herman v. Holiday*, 238 F.3d 660, 665 (5th Cir. 2001), and *Flaming v. Alvin Comm. College*, 777 F. App'x 771, 772 (5th Cir. 2019). Neither case is on point. In each case, the plaintiff was no longer under the control of the public entity whose conduct he was challenging. *See Herman*, 238 F.3d at 665 (plaintiff transferred to another prison); *Flaming*, 777 F. App'x at 772 (plaintiff graduated from defendant college). Buchanan, by contrast, remains incarcerated within the Harris County jail system, meaning he has no reason to believe that the challenged conduct will not recur.

III. Buchanan Adequately Alleged That Defendants Violated The Fourteenth Amendment By Subjecting Him To Intolerable Conditions Of Confinement And Denying Him Due Process.

Buchanan alleged that Defendants knowingly banished him to cells that were hazardous to his health without a bona fide opportunity to challenge their decision. His complaint thus states quintessential

conditions of confinement and procedural due process claims under the Fourteenth Amendment.

A. Defendants Subjected Buchanan To Unconstitutional Conditions Of Confinement.

Because Defendants housed Buchanan where he could not safely reside, Buchanan developed painful—indeed, potentially life-threatening—sores on his residual limb stump. Buchanan alerted Defendants to his inadequate conditions, but they refused to mitigate his suffering. Likewise, Defendants refused to provide Buchanan with medical care necessary to treat the sores caused by their indifference. Such allegations are more than sufficient to state a conditions of confinement claim under the Fourteenth Amendment because they encompass both the objective (*i.e.*, a sufficiently serious risk of harm) and the subjective (*i.e.*, defendants are deliberately indifferent) components of such claims. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

This Court has previously deemed similar allegations sufficient to state a claim. In *Bradley v. Puckett*, for instance, a disabled prisoner reliant on a leg brace sued after prison officials placed him for one or two months in a cell without a shower chair, "rendering it dangerous for him to take a shower." 157 F.3d 1022, 1024, 1026 (5th Cir. 1998). Without

accommodations "needed to sanitize himself," the plaintiff developed a "fungal infection and blisters." *Id.* at 1024. Defendants delayed in getting him medical care. *Id.* This Court held that the *Bradley* plaintiff adequately alleged Eighth Amendment violations based on his conditions of confinement and inadequate medical care because prison officials "were aware of his special needs" but ignored them. *Id.* at 1025-26.

Buchanan's allegations are at least as strong as those at issue in *Bradley*: Whereas the prisoner-plaintiff in *Bradley* was housed in a non-accessible cell for between one and two months, Buchanan was kept in such a cell for four months, and whereas the *Bradley* defendants eventually provided proper medical care, Defendants in this case never did so. This Court should therefore reverse the district court's dismissal of Buchanan's conditions of confinement claims.

1. Defendants subjected Buchanan to an objectively serious risk of harm.

To satisfy the objective prong of a conditions claim, Buchanan must allege an "objectively, 'sufficiently serious'" deprivation. *Farmer*, 511 U.S. at 834. The *risk* of harm from such a deprivation is enough—a prisoner "does not have to await the consummation of threatened injury." *Id.* at 845. Buchanan's deliberate indifference claim "must be measured in

light of his personal disability." *Bradley*, 157 F.3d at 1026 (citing *Farmer*, 511 U.S. at 826).

Buchanan alleges that Defendants subjected him to a non-accessible cell, where Buchanan was unable to attend to his fundamental needs. Deprived of a lower bunk, Buchanan struggled to safely access his bed. The lack of handrails made emptying his bowels challenging. And Buchanan could not shower at all for five days, and without risking injury for four months, because the showers lacked grab bars and a proper chair.

Those deprivations alone "violated contemporary standards of decency." *Bradley*, 157 F.3d at 1025-26. Jails are required to furnish detainees with the "minimal civilized measure of life's necessities." *Farmer*, 511 U.S. at 834. Among those are access to bedding, toilets, and showers that a prisoner can safely use. *See Bradley*, 157 F.3d at 1026-27 (showers); *Pierce*, 526 F.3d at 1218 (toilets); *Kiman*, 451 F.3d at 289-90 (beds). And such a deprivation need not be measured in months, as Buchanan's was; hours is enough to violate the Constitution. *Palmer v. Johnson*, 193 F.3d 346, 353-54 (5th Cir. 1999) ("clearly established" that officials may not deprive prisoners of the "basic elements of hygiene" for seventeen hours).

But that isn't all. As a consequence of Buchanan's inability to cleanse himself, he developed residual limb sores that caused him "great pain and discomfort." ROA.101. Such sores pose a sufficiently serious risk of harm to satisfy the objective element of a conditions claim. *See Lawson v. Dallas Cty.*, 286 F.3d 257, 262 (5th Cir. 2002) (describing as "common medical knowledge" that bed sores are "serious, even life-threatening"). Physicians interpret even "minor [skin] irritation" to a residual limb as a "dangerous symptom" of a serious medical condition requiring immediate treatment. S. William Levy, *Skin Problems of the Amputee*, Atlas of Limb Prosthetics: Surgical, Prosthetic, and Rehabilitation Principles ch. 26 (Bowker & Michael eds., 2d ed, 2002). This is so because residual limb "infections can lead to further complications or surgery or even death." Amputee Coalition of America, *Wound Care Fact Sheet* (2009); *see also*, *e.g.*, *The Next Step, The Rehabilitation Journey After Lower Limb Amputation*, United States Department of Defense and Veterans Administration 83 (2018).[7]

Thus, the Veterans Affairs Administration instructs amputees to inspect residual limbs "throughout the day to make sure [they] are not

[7] Available at https://www.qmo.amedd.army.mil/amp/Handbook.pdf.

developing sores" and to immediately "[r]eport any skin problems to a member of [their] rehabilitation team." *Id.* at 59. Should an amputee "notice open sores or blisters" they must discontinue the use of a prosthesis immediately. *Id.* at 73. To guard against such developments, amputees must "always . . . pay special attention to the hygiene" of their residual limb and prosthetic equipment, thoroughly cleansing both daily. *Wound Care Fact Sheet*, *supra*; *see also Skin Problems of the Amputee*, *supra* (similar); Jan Stokosa, *Skin Care of the Residual Limb*, Merck Manual (Jan. 2021). Absent such care, the consequences can be "disastrous." *Skin Problems of the Amputee*, *supra*.

The conditions of Buchanan's confinement thus created an objectively serious risk of harm by exposing him to the risk of falling and by preventing him from properly caring for his residual limb, resulting in life-threatening sores.

2. Defendants turned a blind eye to an objectively serious risk of harm.

To satisfy the subjective prong of a conditions claim, Buchanan must allege that Defendants were "deliberately indifferen[t]"—*i.e.*, they

"disregard[ed]" the risks to which they exposed Buchanan.[8] *Farmer*, 511 U.S. at 837. No "smoking gun" is required. *Moore v. Mabus*, 976 F.2d 268, 271 (5th Cir. 1992). Rather, where risk is "open and obvious," deliberate indifference can be presumed. *Hinojosa v. Livingston*, 807 F.3d 657, 665-66 (5th Cir. 2015); *see also Farmer*, 511 U.S. at 842. That a "prisoner faced the risk for reasons personal to him"—as opposed to risks faced by prisoners, generally—is "irrelevant" to the deliberate indifference analysis. *Bradley*, 157 F.3d at 1026 (citing *Farmer*, 511 U.S. at 826). A presumption of deliberate indifference is also appropriate where, as here, the challenged conduct lacks a valid penological purpose. *See Rhodes v.*

[8] In *Kingsley v. Hendrickson*, 576 U.S. 389, 400-01 (2015), the Supreme Court held that whereas prisoners incarcerated post-conviction bringing excessive force claims under the Eighth Amendment must prove deliberate indifference, pretrial detainees, incarcerated prior to any conviction, need prove only that the use of force was objectively unreasonable. The different requirements were because postconviction prisoners may be subjected to punishment, so long as it is not "cruel and unusual," whereas pretrial detainees may not be punished at all. *Id.*; *see Bell v. Wolfish,* 441 U.S. 520, 535 (1979). Several circuits have since recognized that the logic of *Kingsley* applies to other Fourteenth Amendment claims brought by brought by pretrial detainees. *E.g.*, *Charles v. Orange Cty.*, 925 F.3d 73 (2d Cir. 2019) (medical care); *Darnell v. Pineiro*, 849 F.3d 17 (2d Cir. 2017) (conditions); *Miranda v. Cty. of Lake*, 900 F.3d 335 (7th Cir. 2018) (medical care); *Gordon v. Cty. of Orange*, 888 F.3d 1118 (9th Cir. 2018) (medical care); *Castro v. Cty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (failure to protect). This Court, however, continues to require pretrial detainees to prove deliberate indifference. *See Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415 (5th Cir. 2017). Although Buchanan prevails under either standard, appellant preserves for further review the argument that *Kingsley*'s objectively unreasonable standard governs his Fourteenth Amendment claim.

Chapman, 452 U.S. 337, 345-46 (1981). For three reasons, Buchanan's complaint suffices to establish deliberate indifference at this early stage.

First, Buchanan alleged that he informed jail personnel that non-accessible housing was dangerous in light of his disability, but was systematically ignored. ROA.99-100. Buchanan asked Gibson why he was transferring him to a non-accessible cell when he was "fully aware of him being a transtibial amputee," but Gibson told Buchanan take it up with a supervisor. ROA.99. When Buchanan complained to Wheeler, Wheeler threatened to "drag" Buchanan to a non-accessible cell. ROA.100. And Buchanan lodged a grievance with Laws and Harris, but they passed the buck. ROA.100-101. Officials were "aware of [Buchanan's] needs when they changed his custody conditions" but did nothing to attend to those needs. *Bradley*, 157 F.3d at 1026. That is textbook deliberate indifference. *Id.*

Buchanan likewise alleged that Defendants ignored his request for medical care to treat his dangerous residual limb sores. ROA.140. That sores are potentially catastrophic is "common medical knowledge." *Lawson*, 286 F.3d at 262; *see also Gobert v. Caldwell*, 463 F.3d 339, 349 (5th Cir. 2006) ("health risk inherent" to "open wound[s]" is sufficiently

obvious to establish the "requisite awareness" of an objectively serious danger). In *Bradley*, this Court held that the plaintiff stated a deliberate indifference claim when prison officials merely delayed medical care for the blisters he developed when they denied him a shower chair. *Bradley*, 157 F.3d at 1025-26. Here, Defendants did not even bother to provide medical care at all.

Second, the risks posed by non-accessible housing were sufficiently open and obvious that Buchanan need not have alerted officials to the dangers he faced. *Hinojosa*, 807 F.3d at 665-68. Buchanan is an amputee dependent upon a prosthetic leg for mobility, assistive devices for attending to hygiene, and a lower bunk for sleeping. The risks of holding a transtibial amputee in a cell designed for prisoners who are not disabled are sufficiently obvious that deliberate indifference can be presumed. *See Lawson*, 286 F.3d at 262 (housing a disabled person in a non-accessible cell and failing to provide "adequate mobility equipment" both evidence of deliberate indifference"); *Bradley*, 157 F.3d at 1026.

Third, Buchanan plausibly alleges that Defendants expelled him from an accessible cell out of animus. Conduct motivated by animus

rather than penological utility is the very definition of deliberate indifference. *Rhodes*, 425 U.S. at 345-46.

In short, Buchanan's complaint supplies sufficient evidence to state a claim as to both the objective and subjective prongs of a Fourteenth Amendment conditions of confinement claim.

B. Defendants Denied Buchanan The Fundamental Elements Of Due Process.

To plead a procedural due process claim, Buchanan was required to allege two things. First, that the circumstances of his confinement were sufficiently different from those ordinarily to be expected in detention as to implicate a liberty interest. *Wilkinson v. Austin*, 545 U.S. 209, 222-23 (2005). Second, that the process he was afforded in relation to that liberty interest did not comport with the Constitution. *Id.* Buchanan's complaint alleges both.

1. The circumstances of Buchanan's confinement created a liberty interest.

This Court must first assess whether a four-month detention in cells that lack accessibility features—and are thus unsafe for a transtibial amputee—"impos[ed] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v.*

Conner, 515 U.S. 472, 484 (1995). Whether a given restraint imposes an "atypical and significant hardship"—and thus infringes a cognizable liberty interest—ultimately depends on multiple factors, including a detainee's personal characteristics. *Serrano v. Francis*, 345 F.3d 1071, 1079 (9th Cir. 2003) ("[T]he conditions imposed on [plaintiff] in the SHU, by virtue of his disability, constituted an atypical and significant hardship on him.")

The district court assumed that Buchanan's confinement did not amount to an atypical and significant hardship.[9] ROA.188. The court reached that conclusion only by ignoring a fundamental aspect of Buchanan's confinement: the particular hardship it imposed on a transtibial amputee. Buchanan's housing may not have constituted an atypical and significant hardship for an ordinary prisoner, but for Buchanan, the cell move denied him the ability to safely tend to his basic human needs. *Serrano*, 345 F.3d at 1079; *Wheeler v. Butler*, 209 F. App'x 14, 16 (2d Cir. 2006) ("medical need may bear upon the atypicality of

[9] The district court also dismissed Buchanan's claim on the basis that he did not allege "the loss of good time credit." ROA.188. But although the loss of good time credits may help establish a liberty interest, it is not the only way to do so. *Wilkinson*, 545 U.S. at 224.

[plaintiff's] punishment"); *cf. Bradley*, 157 F.3d at 1026 (Eighth Amendment violated where conditions inadequate for "reasons personal" to particular prisoner). By contrast, prior to being banished from his accessible cell, Buchanan could shower without fear, keep his stump clean, use the toilet without discomfort, and get into bed without risk.

The non-accessible cell was thus an atypical and significant departure from the ordinary incidents of Buchanan's life behind bars and, thus, create a liberty interest.

2. Buchanan was denied the fundamental elements of procedural due process.

Because Buchanan's confinement implicated a liberty interest, he was entitled to procedural protections. *Wilkinson*, 545 U.S. at 222-23. Whether Buchanan's expulsion from accessible housing was disciplinary or administrative in nature, he was entitled to notice and a meaningful opportunity to challenge the decision. *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974) (describing formal process requirements); *Hewitt v. Helms*, 459 U.S. 460, 476 (1983) (describing informal process requirements).

Defendants fell far short of those benchmarks. In lieu of meaningful notice, Buchanan was offered a pretextual explanation. When Buchanan sought to plead his case, one defendant threatened to "drag" him to non-

accessible housing and others ignored him. That amounts to no process at all. Buchanan's complaint thus states a claim for a violation of the Due Process clause.

IV. Section 1997e(e) Of The Prison Litigation Reform Act Poses No Obstacle To Buchanan's Recovery.

42 U.S.C. § 1997e(e), a provision of the Prison Litigation Reform Act, provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." Buchanan pleaded that he suffered a "physical injury": painful sores on the residual limb of his amputated leg. But the district court found that those sores were "de minimis" and therefore did not qualify as a "physical injury" within the meaning of § 1997e(e), and so concluded that Buchanan could not recover on his claims. ROA.180.

That was error for three reasons. First, the district court's "more-than-de-minimis" requirement finds no support in the text of the statute. Second, even assuming the district court was correct that de minimis injuries cannot satisfy § 1997e(e), Buchanan's sores weren't de minimis—they were painful, serious, and possibly life-threatening. And third, § 1997e(e) doesn't apply at all to several of Buchanan's claims.

A. Section 1997e(e) Requires Only A Physical Injury, Not A Serious Physical Injury.

1. Basic principles of statutory interpretation foreclose imposing a "more-than-de minimis" requirement on § 1997e(e).

The text, structure, and history of § 1997e(e) make clear that the provision requires only a showing of physical harm or damage to one's body, not an injury that is "more than de minimis."

The ordinary meaning of "physical injury" in 1996, when the PLRA was passed, included bodily injury of *any* severity. Black's Law Dictionary defined "physical injury" as: "[b]odily harm or hurt, excluding mental distress, fright, or emotional disturbance"—no particular level of severity necessary. BLACK'S LAW DICTIONARY 1147 (6th ed. 1990). "Injury," moreover, reads "[a]ny wrong or damage done to another, either in his person, rights, reputation, or property." *Id.* at 785.[10] Non-legal dictionaries are similarly inclusive. In one, for instance, "injury" is

[10] *See also* BODILY INJURIES, James A. Ballentine, *Ballentine's Law Dictionary* (William S. Anderson ed., 3d ed.) (encompasses "various degrees of harm").

defined, in relevant part, as "an act that damages or hurts." INJURY, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 602 (10th ed. 1993).[11]

The structure of the PLRA confirms that there is no "more-than-de-minimis" requirement. Where Congress wanted to require an injury of a particular degree of severity, it knew how to do so: In a separate portion of the PLRA, limiting access to federal courts, Congress required a showing of a "*serious* physical injury." OMNIBUS CONSOLIDATED RESCISSIONS AND APPROPRIATIONS ACT OF 1996, PL 104–134, April 26, 1996, 110 Stat 1321 § 804(d) (codified as 28 USC § 1915g) (emphasis added); *see Jama v. Imm. & Customs Enforcement*, 543 U.S. 335, 341 (2005) (courts should not infer a requirement outside a statute's text "when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest").

That understanding of the PLRA is consistent with the way the phrase "physical injury" is used in other settings, as well. Under common-law tort principles, an "injury" is "the invasion of any legally protected

[11] *See also* INJURY, *The Oxford English Dictionary* (2d ed. 1989) ("Hurt or loss caused to or sustained by a person or thing."); INJURY, *The Random House Dictionary of the English Language* (2d unabridged ed. 1987) ("[H]arm or damage that is done or sustained.").

interest." Restatement (Second) of Torts § 7(1). The term "injury" is specifically distinguished from the term "harm": An injury can occur with *no* showing of any harm, let alone more-than-de-minimis harm. *Id.* § 7 cmt. a. The Model Penal Code defines "bodily injury"—synonymous, per Black's Law Dictionary, with "physical injury," *see* BLACK'S LAW DICTIONARY 175, 1147—as "physical pain, illness or any impairment of physical condition," no particular severity required. Model Penal Code § 210.0. And the term "bodily injury" is defined in various portions of the United States Code to include such minor injuries as "a cut, abrasion, bruise" or "any other injury to the body, no matter how temporary." *See, e.g.*, 18 U.S.C. §§ 831(g)(5); 1365(h)(4); 1515(a)(5); 1864(d)(2). In other settings, too, drafters routinely distinguish between "physical injury"—read capaciously to include any bodily harm, however minor—and "serious" or "significant" physical injuries.[12]

[12] *See, e.g.,* Model Penal Code § 210.0 (distinguishing between "bodily injury" and "serious bodily injury"); CONN. GEN. STAT. ANN. § 53a-3 (distinguishing between "physical injury" and "serious physical injury"); 18 U.S.C. § 2702 (creating an exception to disclosure prohibitions under the Stored Communications Act in case of a danger of "*serious* physical injury"); U.S. Sentencing Guidelines Manual § 5K2.2 (U.S. Sentencing Comm'n 2018) (permitting increase above sentencing guideline range "if *significant* physical injury resulted" (emphasis added)); *cf. U.S. v. Singleton*, 917 F.2d 411, 413-14 (9th Cir. 1990) ("[I]t is clear that a 'significant' physical injury . . . must mean something more than 'physical injury' standing alone. Surely,

All indications are thus that § 1997e(e) was intended to require only that the plaintiff show a physical injury—nothing more. Grafting a more-than-de-minimis requirement onto 1997e(e) is beyond a court's purview. *Cf. Ebert v. Poston*, 266 U.S. 548, 554 (1925) ("A *casus omissus* does not justify judicial legislation").

2. The case imposing a "more-than-de minimis" requirement on § 1997e(e) has been overruled by intervening Supreme Court precedent.

In imposing its "more-than-de-minimis" requirement on § 1997e(e), the district court cited to this Court's decision in *Siglar v. Hightower*, 112 F.3d 191 (5th Cir. 1997); ROA.179. *Siglar* addressed an excessive force claim under the Eighth Amendment and was asked to decide whether a prisoner's bruised ear amounted to a "physical injury" under § 1997e(e). *Id.* at 193. Without reference to the text of §1997e(e), the *Siglar* panel announced that "Eighth Amendment standards guide our analysis" and then concluded that §1997e(e) therefore required an injury that was "more than *de minimus* [sic], but need not be significant." *Id.* (citing *Hudson v. McMillian,* 503 U.S. 1, 10 (1992)).

---

not just any damage or hurt of a physical kind can satisfy the Guidelines, for that would encompass every physical injury.")

If *Siglar* was ever good law,[13] it has since been overruled. *Siglar* assumed that "the Eighth Amendment standard" requires an injury that is more than de minimis. But in *Wilkins v. Gaddy*, the Supreme Court made clear that understanding was wrong, holding that an injury held by the lower court to be "*de minimis*"—the plaintiff "nowhere asserted that his injuries had required medical attention"—could support a claim of excessive force under the Eighth Amendment. 559 U.S. 34, 35, 39 (2010). The court did not mince words:

> The Fourth Circuit's strained reading of *Hudson* is not defensible . . . [*Hudson*] did not . . . merely serve to lower the injury threshold for excessive force claims from "significant" to "non-*de minimis*"—whatever those ill-defined terms might mean. Instead, the Court aimed to shift the "core judicial inquiry" from the extent of the injury to the nature of the force.

Id. at 39 (*quoting Hudson,* 503 U.S. at 7).

[13] *Siglar* was questionable even at the time it was issued. For one thing, the *Siglar* court gave no explanation for why Congress would incorporate the Eighth Amendment test for "cruel and unusual punishment" into § 1997e(e) by using the phrase "physical injury." Moreover, *Siglar* cited *Hudson* for the proposition that the Eighth Amendment did not recognize de minimis injuries, but the court in *Hudson* noted only that "de minimis *uses of physical force*" are not cognizable. 503 U.S. at 10 (emphasis added). In fact, *Hudson* made clear that "[t]he absence of serious injury is therefore relevant to the Eighth Amendment inquiry, but does not end it." *Id.* at 7. Justice Blackmun's concurrence lauded the court for "put[ting] to rest a seriously misguided view that pain inflicted by an excessive use of force is actionable under the Eighth Amendment only when coupled with 'significant injury.'" *Id.* at 13 (Blackmun, J., concurring).

In this circuit, a three-judge panel—as opposed to the circuit sitting en banc—may overrule prior circuit precedent if it is "irreconcilable" with a later Supreme Court opinion. *Carter v. S. Cent. Bell*, 912 F.2d 832, 840 (5th Cir. 1990). That is precisely what has happened here. The foundation of *Siglar*—the idea that *Hudson* requires that "the injury must be more than de minimis"—cannot be reconciled with *Wilkins*.

In *Stokes v. S.W. Airlines,* for instance, this court considered whether a prior Fifth Circuit case inferring a private right of action remained good law in light of an intervening Supreme Court case explaining how to evaluate private rights of action. 887 F.3d 199, 204 (5th Cir. 2018); *id.* (discussing *Shinault v. Am. Airlines, Inc.*, 936 F.2d 796, 800 (5th Cir. 1991)). *Stokes* noted that the prior Fifth Circuit case lacked firm footing when it was decided, relying on "legislative history, [and] historical congressional practice" to infer a private right of action notwithstanding the text of the statute. *Id.* Though the intervening Supreme Court case was about an altogether different statute, *Stokes* nonetheless held that it so undermined the reasoning of the prior Fifth Circuit case that the two were irreconcilable. *Id.*

Like the case overruled in *Stokes*, *Siglar* lacked a firm footing when it was decided, ignoring the text of the statute in question. And as in *Stokes*, the Supreme Court's decision in *Wilkins* entirely undermined *Siglar*'s sole reason for adopting an atextual more-than-de-minimis requirement. As in *Stokes*, then, this Court is obliged to recognize that *Siglar* is irreconcilable with intervening Supreme Court precedent and should be overruled.[14]

Allowing *Siglar* to remain on the books, even though it has been overruled, has had grave consequences. Even looking at only the small percentage of trial court orders that make their way onto Westlaw, a case alleging a physical injury is dismissed somewhere in the Fifth Circuit on an almost monthly basis because the physical injury is not thought to be more-than-de-minimis.[15]

---

[14] Since *Siglar*, this Court has relied on the "more-than-de-minimis" requirement only thrice in published opinions, none of which cite *Wilkins*. *See Taylor v. Stevens*, 946 F.3d 211, 225 (5th Cir. 2019), *cert granted, judgment vacated on other grounds sub nom. Taylor v. Riojas*, 141 S. Ct. 52 (2020); *Alexander v. Tippah Cty.*, 351 F.3d 626, 631 (5th Cir. 2003); *Gomez v. Chandler*, 163 F.3d 921, 924-25 (5th Cir. 1999). "An opinion restating a prior panel's holding does not *sub silentio* hold that the prior ruling survived an uncited Supreme Court decision." *Gahagan v. United States Citizenship & Imm. Servs.*, 911 F.3d 298, 302 (5th Cir. 2018).

[15] In the past year, for instance, at least 10 cases have been dismissed on the grounds that the alleged injury did not meet the more-than-de-minimis requirement. *See Roy v. Cobb*, 2020 WL 2045791 (W.D. La. Apr. 7, 2020); *Price v. Lofton*, 2020 WL 1482464

And district courts in this circuit have interpreted the more-than-de-minimis injury requirement to eliminate cases that are of a different order of magnitude than the frivolous suits the PLRA's drafters intended to eliminate with § 1997e(e). *See* 141 Cong. Rec. S14408-01, S14413 (1995) (statement of Sen. Dole) (decrying cases about "insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety"). One district court dismissed as "de minimis" a prisoner's bleeding tongue, abrasions to his arm, swelling in his wrists, cut on his face and bloody nose—both from being assaulted with a broomstick—and medical record of "cuts, scratches, abrasions, lacerations, redness and bruises to his back, chest, and right arm . . ., and trauma to the left leg." *Luong v. Hatt*, 979 F. Supp. 481, 485 (N.D. Tex. 1997). Another held that "a knot on the back of his head, a sore neck, a

(W.D. La. Mar. 2, 2020); *Barela v. Underwood*, 2020 WL 4550417 (N.D. Tex. July 9, 2020); *Miller v. Tigner,* 2020 WL 2843934 (W.D. La. May 19, 2020); *Lloyd v. Jackson Parish Corr. Ctr.*, 2020 WL 396691 (W.D. La. June 25, 2020); *LaVergne v. McDonald*, 2020 WL 7090064 (M.D. La. Nov. 23, 2020); *Spears v. Martin*, 2020 WL 6277308 (M.D. La. Oct. 1, 2020); *Senkowski v. United States*, No. 4:18-CV-639-P, 2020 WL 6504666 (N.D. Tex. Nov. 5, 2020); *Minchey v. LaSalle Sw. Corr.,* 2020 WL 3065937 (N.D. Tex. May 20, 2020); *Bingham v. LaSalle Sw. Corr.*, 2020 WL 6552063 (N.D. Tex. July 17, 2020).

headache and loss of vision in his left eye"—all resulting from a prison official "striking [plaintiff] in the head with an iron bar, punching him in the back and twisting his neck"—were "nothing more than *de minimis* injuries." *Wallace v. Brazil,* No. 7:04-CV-187-R, 2005 WL 4813518, at *1 (N.D. Tex. Oct. 10, 2005).

This Court's more-than-de-minimis standard thus not only contravenes the text of the PLRA, but also licenses district courts to disregard injuries that aren't de minimis at all, based entirely on a judge's subjective sense of the injuries. This Court should take this opportunity to clarify that the PLRA contains no such more-than-de-minimis requirement.

B. Buchanan's Sores Were Life-Threatening, Not De Minimis.

The district court concluded that Buchanan's residual limb sores were de minimis because he purportedly did not "require[] medical care" to treat them. ROA.180. But Buchanan alleged that he *did* require medical care, requested such care, and was wholly ignored. ROA.140. Buchanan's allegation should end the inquiry: as the district court recognized, ROA.180, this Court has consistently held that injuries warranting medical attention are, as a matter of law, non-de minimis.

See Taylor v. Stevens, 946 F.3d 211, 225 (5th Cir. 2019) (distended bladder more than de minimis injury because plaintiff had to be catheterized) *rev'd on other grounds*, *Taylor v. Riojas*, 141 S. Ct. 52 (2020); *Edwards v. Stewart*, 37 F. App'x 90, 2002 WL 1022015, at *2 (5th Cir. 2002) (holding cuts, neck pain, and headache more than de minimis because "medical treatment" was needed).

Even absent a request for medical care, Buchanan's residual limb sores would exceed the de minimis threshold set by this Court's cases. In the Fifth Circuit, injuries characterized as de minimis include short-term nausea from exposure to a foul stench, *Alexander v. Tippah County*, 351 F.3d 626, 631 (5th Cir. 2003), and a bruised, tender ear, *Siglar*, 112 F.3d at 193. By contrast, this circuit has held injuries exceeding the de minimis threshold include cuts, scrapes, and bruises, *Gomez v. Chandler*, 163 F.3d 921, 925 (5th Cir. 1999); lower back and neck pain with "no visible sign of injury," *Frank v. Prestonbach*, 220 F.3d 585 (5th Cir. 2000) (unpublished); and a distended bladder, *Taylor*, 946 F.3d at 225.

Residual limb sores hinder mobility by rendering a prosthetic limb unusable. *See supra*, 42-43. They also impose a grave risk of catastrophic infection or even death. *See id.*; *cf. Pierce v. County of Orange*, 526 F.3d

1190, 1224 & n.43 (9th Cir. 2008) (holding "bed sores and bladder infections" are more than de minimis under § 1997e(e) and that "particular injuries pose different, and possibly more substantial, risks than they might to an average prisoner" where plaintiff is a paraplegic). Buchanan's sores thus far more closely resemble the injuries *Gomez*, *Frank*, and *Taylor* deemed more than de minimis than those this Court has rejected as de minimis.

Moreover, § 1997e(e) is an affirmative defense, not a jurisdictional limitation or an element of plaintiff's claims. *See Douglas v. Yates*, 535 F.3d 1316, 1320-21 (11th Cir. 2008). Thus, the district court could only dismiss Buchanan's complaint under § 1997e(e) at the screening stage if "its allegations, on their face, show" that § 1997e(e) "bars recovery." *Id.* at 1321. The complaint alleges that Buchanan developed painful sores on his residual limb stump from being unable to properly clean it. ROA.101. As explained *supra*, 42-43, those allegations do not, "on their face, show" that §1997e(e) "bars recovery." To the contrary: The sores that Buchanan alleged are dangerous to the point of being life-threatening and thus satisfy even a reading of § 1997e(e) that requires a more-than-de-minimis injury.

C. Section 1997e(e) Applies Only To A Subset Of Buchanan's Claims.

By its own terms, § 1997e(e) applies only to actions "for mental or emotional injuries." Section 1997e(e) thus is entirely inapplicable to three groups of claims.

1. First, § 1997e(e) is inapplicable to claims for equitable relief, punitive damages, and nominal damages. *Hutchins v. McDaniels*, 512 F.3d 193, 198 (5th Cir. 2007). Buchanan requested, in addition to compensatory damages, both injunctive relief and "[a]ny other relief this Court deems appropriate," a request that encompasses nominal and punitive damages. ROA.102-107. *See*, *e.g.*, *Calhoun v. DeTella*, 319 F.3d 936, 942-43 (7th Cir. 2003); *Allah v. Al-Hafeez*, 226 F.3d 247, 251 (3d Cir. 2000). That general interpretive rule applies with special force in light of Buchanan's pro se status. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

2. Second, § 1997e(e) also does not apply to Buchanan's ADA claims. By its terms, § 1997e(e) applies only to "mental or emotional" harm, the quintessential form of which is "fright or anxiety." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 544-45 (1994). Buchanan has alleged two ADA claims—one for a failure to accommodate, *supra*, §II.A, and one for

disability discrimination, *supra*, §II.B—neither of which is "mental or emotional" in nature.

Start with Buchanan's reasonable accommodation claim. A failure to accommodate is a claim that the plaintiff was denied access to a public service. *See Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 756 (2017) ("essence" of ADA claim is "equality of access to public facilities"); *Doucette v. Georgetown Pub. Sch.*, 936 F.3d 16, 26 (1st Cir. 2019). At common law, the closest analogue—discrimination in providing access to public facilities—required no showing of mental or emotional distress; rather, the denial itself was the compensable injury. *See* Restatement (Second) of Torts § 866.

Buchanan's disability discrimination claim isn't for "mental or emotional" harm either. As the Supreme Court "has repeatedly emphasized, discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore less worthy participants in the political community, can cause serious non-economic injuries." *See Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (citation omitted). As a result, discrimination claims have long been classified as "dignitary

torts" entirely distinct from "emotional distress" torts. Dan R. Dobbs & Caprice L. Roberts, Law of Remedies: Damages—Equity—Restitution § 7.3(1) (3d ed. 2018); *see also Carello v. Aurora Policemen Credit Union*, 930 F.3d 830, 833-34 (7th Cir. 2019) (describing discrimination as a "dignitary harm"); *Griffin v. Dep't of Labor Fed. Credit Union*, 912 F.3d 649, 654 (4th Cir. 2019) (explaining that the ADA guards against "stigmatic injury").

3. Finally, in alleging First Amendment retaliation, Buchanan also asserts a constitutional harm to his liberty that cannot be characterized as a "mental or emotional injury" and that thus falls outside the scope of § 1997e(e). Buchanan recognizes that this circuit has held that § 1997e(e) bars relief for First Amendment injuries absent a showing of a "physical injury." *See Geiger v. Jowers*, 404 F.3d 371, 374-75 (5th Cir. 2005). However, Buchanan preserves the right to challenge this Court's rule that First Amendment harms are "mental or emotional injur[ies]" under § 1997e(e), a rule which conflicts with the law of other circuits. *See Carter v. Allen*, 940 F.3d 1233, 1235 (11th Cir. 2019) (W. Pryor, J., concurring in the denial of rehearing en banc) (calling for Eleventh Circuit to reconsider whether § 1997e(e) applies to First Amendment harms and

collecting cases from the D.C., Sixth, Seventh, and Ninth circuits); *Hoever v. Carraway*, 815 F. App'x 465, 466 (11th Cir. 2020), *reh'g en banc granted,* 977 F.3d 1203 (11th Cir. 2020).

CONCLUSION

For the aforementioned reasons, this Court should reverse the district court's order dismissing Buchanan's case.

Respectfully Submitted,

s/ Daniel M. Greenfield
Daniel M. Greenfield *
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-8538
daniel-greenfield@law.northwestern.edu

Easha Anand
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
2443 Fillmore St., #380-15875
San Francisco, CA 94115
Easha.Anand@macarthurjustice.org

* Northwestern Law students Eryn Mascia and Miranda Roberts contributed significantly to the preparation of this brief.

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. There are no other counsel of record.

Date: February 5, 2021

/s/ Daniel M. Greenfield
Daniel M. Greenfield

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a) and 5th Cir. R. 32.3, I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,984 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Century Schoolhouse typeface.

Date: February 5, 2021

/s/ Daniel M. Greenfield
Daniel M. Greenfield