No. 21-3198

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LOGAN EUGENE ROWE,

Plaintiff-Appellant,

v.

(FNU) CHURCH, Sergeant, Sumner County Detention Center, in his individual and official capacity; A. YODER, Lieutenant, Sumner County Detention Center, in his individual capacity; WESLEY BAUCOM, Sergeant, Sumner County Detention Center, in his individual capacity; JOHN/JANE DOES,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Kansas
No. 5:19-CV-03024-SAC
The Honorable Sam A. Crow

OPENING BRIEF OF PLAINTIFF-APPELLANT

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ORAL ARGUMENT REQUESTED

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. On September 28, 2021, the district court dismissed Rowe's complaint and entered judgment. A.122; A.139.[1] Rowe timely noticed his appeal on October 22, 2021, which was received by the district court and docketed on October 29, 2021.[2] A.140-41. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did Rowe state a deliberate indifference claim against a jail official who spread a false rumor that Rowe was a racist, with the predictable result that Rowe became the victim of racially motivated violence, threats, and harassment by other detainees?

2. Did Rowe adequately allege a deliberate indifference claim against two jail supervisors, Sergeant Baucom and Lieutenant Yoder,

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[1] Citations to the Appendix are in the style of A.#. If a document from the district court docket is not in the Appendix, it is cited to by the district court docket number as ECF #.

[2] Rowe's October 22, 2021, declaration makes his filing timely under Federal Rule of Appellate Procedure 4(c)(1)(a)(i).

who failed to investigate or take appropriate remedial actions after being repeatedly informed of the false rumor and the danger Rowe faced from other detainees as a result?

3. Did Rowe state a deliberate indifference claim against Yoder, where Yoder deliberately disregarded the jail's "flagging" system and ordered Rowe to be left alone in a hallway with a detainee who had recently victimized Rowe?

4. Did Rowe adequately allege a claim for denial of mental health care against Yoder, Baucom, and Church, who, for two-and-a-half-months, denied Rowe's repeated and increasingly desperate requests for treatment of the debilitating PTSD Rowe developed after being attacked by fellow detainees?

5. Did the district court err in finding that Rowe had failed to adequately allege causation for his retaliation claim against Yoder, given the substantial circumstantial evidence Rowe presented and the low bar for alleging causation at the screening stage under this Court's precedent?

6. Did the district court err in dismissing Rowe's state law claim of negligence on the sole ground that such claims cannot be brought under

42 U.S.C. § 1983, when black-letter law dictates that Rowe's state law claim was appropriately brought under the court's supplemental jurisdiction?

7. A provision of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(e), bars compensatory damages for mental or emotional injury without "a prior showing of physical injury." Did the district court err in imposing an atextual requirement that the "physical injury" be more than *de minimis*?

8. Did Rowe satisfy § 1997e(e)'s physical injury requirement, given that he (a) was physically assaulted by another detainee; (b) experienced ongoing chest pains; and (c) suffered from post-traumatic stress disorder, which is a physical as well as psychological disease?

STATEMENT OF THE CASE

I. Factual Background

A. A jail official, Defendant Doe, spreads a false rumor that Rowe is a racist.

Logan Rowe was arrested and booked at the Sumner County Detention Center (SCDC) in July 2018. A.18-19. Shortly after arriving, Rowe applied for work and commenced a routine of waking up early each day to exercise in the dayroom. A.19. Rowe, who is white, developed a

friendly relationship with several Black men housed in his pod, exercising with Terrill Lee Cooks in the morning and playing cards with Arrell Farmer in the evening. A.19-20.

On August 1, Rowe asked Sergeant Baucom, who managed hiring at SCDC, why he had not yet been hired into a jail job. A.20. Baucom replied that Rowe was no longer being considered for employment because a member of Baucom's staff had reported that Rowe was a racist. *Id.* After Rowe stated that this rumor was false, Baucom said that "he would look into it" and Rowe's application would be reconsidered. *Id.*

On August 2, Cooks approached Rowe in the dayroom, informing him that Defendant Doe had asked Cooks, via the speaker in Cooks's cell, whether he "would be willing to work in the kitchen with Rowe even though [Rowe] doesn't like blacks." A.20. Montgomery Bannister, who was also incarcerated at SCDC, confirmed Cooks's account. *Id.*

Recognizing that this false rumor placed him at risk for harm from the other men in his pod, Rowe immediately asked Deputy BeBe to work with his superiors to "take action to remedy the potential harm" Rowe faced from the false rumor. A.20-21. Bebe "agreed it was dangerous" and, later that afternoon, informed Rowe that he notified his superiors,

Baucom and Yoder, and they agreed to look into the issue. A.21. But despite their promise to Bebe, Baucom and Yoder took no actions to quash the rumor or to protect Rowe from harm that might come from other detainees who now falsely believed him to be racist. A.21-23.

B. Rowe is sexually harassed and physically assaulted.

On August 17, Rowe was watching a movie in the dayroom when Cooks demanded the TV remote from him. A.24. When Rowe refused, Cooks picked up a broom and told Rowe that he "was not always going to be around all his white friends." *Id.* Cooks then walked up the stairs to a cell where Farmer was being held separately on an unrelated disciplinary charge, all the while harassing and threatening Rowe—who is bisexual, A.28—calling him "a racist dick sucker," "a faggot," and "a bitch." A.24. Cooks threatened that he was going to "fuck [Rowe] in the ass with this broom" to "show him what a faggot he was" once Farmer was released from disciplinary lockdown. A.24-25.

For the next four hours, Cooks sat outside of Farmer's cell, and both men "continued to sexually harass and threaten" Rowe. A.25. At no time did SCDC staff intervene to stop the ongoing abuse. Rowe "had seen in other facilities situations like this that ended up with the victim either

raped or dead," and believed the same was about to happen to him. A.25. He had a "severe autonomic reaction"—he began shaking and suffered chest pains, an accelerated heart rate, anxiety, and sweaty palms. *Id.* When Farmer was let out of his cell four hours later, he and Cooks attempted to force Rowe into an off-camera area so that they could, in their words, "fuck him in the ass." *Id.* Farmer slapped Rowe across his face "and was about to grab him when [Sherriff's] deputies entered the Pod." *Id.* SCDC staff placed Rowe in a holding cell. A.25-26.

In the weeks following this episode, Rowe frequently experienced physical and psychological symptoms of PTSD. A.26, A.29-30. He suffered "constant symptoms," A.26, including chest pains, accelerated heart rate, and sweaty palms, A.25, which "would come on frequently through the day and night," A.30. Rowe found himself reliving and reexperiencing the trauma he endured on August 17, and he often awoke from nightmares experiencing physical PTSD symptoms. A.29-30.

On August 18, Rowe filed a complaint under the Prison Rape Elimination Act (PREA), under which he was supposed to be connected with a sexual abuse crisis counselor. A.28. He also "told patrol deputies he believed he was going to die." A.29. Nonetheless, Rowe did not receive

any mental health services for over two months. A.56; *see infra* at 8-9. Indeed, his symptoms persisted unabated until they were exacerbated on September 17, when he experienced a second traumatic event. A.33-35.

C. Yoder orders Rowe to be left alone in a hallway with Cooks only a month after Cooks attacked Rowe, despite the jail's system "flagging" them as needing to be kept separate.

After Rowe reported what happened in the dayroom on August 17, correctional staff "flagged" Rowe in the system as needing to be kept separate from Cooks and Farmer. A.26. But on September 17, Deputy Durham, following the orders of Yoder, pulled Rowe from his cell for a medical appointment and instructed him to wait in a hallway. A.33. Moments later, Durham placed Cooks in the same hallway, then left the two of them alone and unsupervised. *Id.* Cooks approached Rowe, "balled his fists," and told him he would "fucking kill him if he pressed charges," before calling him a "faggot" and threatening to rape him. *Id.* The rape threats, death threats, and sexual harassment continued for about 90 seconds, until Durham returned and separated the two. *Id.*

Yoder admitted to Rowe that he had ordered Durham to pull Rowe and Cooks at the same time, even though he was "fully aware" of Rowe's PREA complaint and the flag. A.39. Yoder called it a "mistake," telling

Rowe that because "nothing happened" (in Yoder's eyes), Rowe was "overreacting." *Id.*

The hallway incident exacerbated Rowe's PTSD symptoms and triggered another autonomic reaction. A.34. This incident increased both the intensity and frequency of Rowe's PTSD symptoms, particularly his state of hypervigilance and accompanying paranoia. A.34-35. Rowe began to sincerely fear that he would be killed, and he lay awake at night fearing that someone would come into his cell to "'finish' the job." A.35.

D. Rowe is refused mental health treatment for two-and-a-half months, despite his repeated and desperate requests for care.

After August 2018, when Rowe was first assaulted, sexually harassed, and threatened, he made many requests asking to be seen by a mental health professional or PREA crisis counselor over a two-and-a-half-month period before he finally received treatment.[3] Rowe repeatedly presented his request for mental health services directly to Yoder and Baucom "each time he saw [them]," but they ignored or disregarded them. A.45; *see* A.28-29, A.37-38, A.38-40, A.46; A.46-48; *see also* A.36-37. And when Rowe was finally taken to meet with Sergeant Church, the Sumner

[3] A.29, A.37, A.40, A.46, A.47-48, A.49-50, A.51-52, A.53.

County Sheriff's Office PREA investigator, Church too rejected Rowe's pleas for treatment, despite Rowe telling Church that he was "experiencing serious emotional and mental distress" and that crisis counseling was required to be provided under PREA. A.49-53.

Due to his inability to obtain mental health treatment, Rowe's PTSD symptoms continued to worsen. A.45. Finally, on October 31, Rowe saw a mental health provider—although one unfamiliar with PREA and who did not have training on sexual abuse, *see* A.56—who diagnosed him with PTSD stemming from the physical assault and sexual harassment he experienced on August 17, and exacerbated by the threats and further sexual harassment he experienced on September 17. A.56. The mental health provider told Rowe that he would likely have to deal with PTSD for the rest of his life. *Id*. The provider prescribed Rowe medication to treat his PTSD, although Rowe never received it. *Id.*

E. Yoder retaliates against Rowe for filing grievances, pursuing PREA complaints, and contacting an outside reporting agency.

Fed up with SCDC's lack of appropriate response to his PREA complaints and grievances, on November 2, Rowe notified an outside reporting agency that SCDC was denying him crisis counseling and

contact with outside reporting mechanisms; that agency then called SCDC and notified SCDC officials of their obligations under PREA. A.63. Rowe also filed another PREA complaint that day, explaining that he had spoken to an outside reporting agency, which had contacted SCDC officials to educate them on Rowe's rights. *Id.* Later that same day, acting under Yoder's orders, SCDC officials, brandishing tasers, put Rowe in handcuffs and forced him against his will to enter administrative segregation, where he remained for fourteen days, and was denied access to reading material. A.64-66.[4]

But that was not the only adverse action Yoder took in response to Rowe's months of self-advocacy in the form of grievances, requests for counseling and mental health services, and PREA complaints. The day before, despite Rowe being a "model inmate" who had never been written up for misconduct, Yoder emailed the district attorney in charge of Rowe's case and stated that Rowe was "causing problems" at the jail. A.62. Rowe's defense attorney told him that because of this email, the district attorney's office intended to add charges to Rowe's criminal case. *Id.*

[4] The PREA policies do not mandate involuntary segregation. *See* A.64; *see also* 28 C.F.R. § 115.43 (discussing the use of involuntary segregation as a last resort).

II. Proceedings Below

Rowe brought suit *pro se* against SCDC officials Doe, Baucom, Church, and Yoder. He alleged that Doe was deliberately indifferent by spreading unfounded rumors that Rowe is a racist; that Baucom and Yoder were deliberately indifferent to the risk of harm that he faced after they let this rumor spread unchecked and did nothing to abate the danger Rowe faced; and that Yoder was deliberately indifferent by ordering Rowe and Cooks to be left alone together, despite Cooks's prior attack on Rowe and Yoder's knowledge that they needed to be kept separate. *See* A.16-17, A.23-24, A.31-32. Rowe further alleged that Baucom, Yoder, and Church repeatedly denied him access to mental health services, and that Yoder retaliated against him for filing grievances and pursuing a PREA complaint.[5] A.41-42, A.57. He also alleged a state law claim of negligence under the Kansas Tort Claims Act. A.69-70. Rowe requested declaratory, injunctive, and monetary relief, including nominal, compensatory, and punitive damages. *See* A.71-73.

[5] Rowe also brought a retaliation claim against Church, but does not pursue that claim on appeal.

The district court ordered Rowe to file an amended complaint, faulting Rowe for not complying with Rule 8's requirements for "short and plain statement[s]" and "concise" allegations, and identifying several other concerns with his original complaint. ECF 7 at 10-11. Rowe timely filed an amended complaint in response.[6] A.9. Without serving the complaint upon them, the district court ordered Defendants to submit a *Martinez* report to aid in screening under 28 U.S.C. § 1915A. ECF 13. After Defendants submitted their *Martinez* report, A.74, the district court ordered Rowe to show cause why his complaint should not be dismissed for failure to state a claim, A.90. After Rowe timely responded, A.107, the district court dismissed Rowe's complaint. A.122.

At the outset, the district court dismissed Rowe's state law claim of negligence under the Kansas Tort Claims Act, *see* A.69-70, on the sole ground that a state negligence claim "is not a claim that may be brought under § 1983." A.125. The court also held that Rowe's request for compensatory damages was barred under 42 U.S.C. § 1997e(e), which requires "a prior showing of physical injury or the commission of a sexual

[6] Unless otherwise noted, all subsequent references to the "complaint" refer to the operative amended complaint.

act." While the court noted in a prior order that "Farmer slapped [Rowe] across his face," A.93, its order dismissing Rowe's complaint made no mention of this physical injury. And though the court acknowledged that Rowe experienced chest pains and other physical symptoms of PTSD following the abuse and harassment that he experienced at the hands of fellow detainees, *see* A.92-93, the court concluded that "PTSD and the physical manifestations thereof . . . do not satisfy the 'physical injury requirement'" of § 1997e(e). A.127 (footnote omitted).

The district court also found that Rowe's deliberate indifference claims were not adequately alleged. A.131-36. The court first addressed Rowe's failure-to-protect claim against Doe for creating and spreading the false rumor that Rowe was a racist, despite Doe knowing from his training, professional experience, and obviousness that the rumor would present a serious risk to Rowe. On this claim, the district court found that even if the objective prong of the deliberate indifference test were met, the subjective prong was not, because, according to the district court, Rowe's claim did not "support a plausible conclusion that Defendant Doe actually drew the inference that [spreading the rumor] could place [Rowe] at substantial risk of serious harm." A.131-32.

Second, as to Rowe's deliberate indifference claim against Baucom and Yoder related to the dayroom incident, the court stated without elaboration that Rowe's allegations did "not establish that [Rowe] endured conditions that 'pos[ed] a substantial risk of serious harm.'" A.132. The court also found that Rowe's allegations as to Baucom and Yoder's awareness of the risk the rumor posed were too "conclusory," A.132, despite Rowe alleging that another jail official had repeatedly informed Baucom and Yoder of the risks, A.21. The district court also relied on the account of the dayroom incident Defendants provided in their *Martinez* report, determining that Rowe "failed to plead facts that support a plausible inference" that the incident with Cooks was "related to the rumor" that he was racist, A.133-34—even though Cooks called Rowe "a racist dick sucker" and warned him he was "not always going to be around all his white friends," A.24.

Third, the district court found Rowe's allegations that Yoder disregarded a substantial risk of harm when he ordered Durham to pull Rowe and Cooks at the same time to be "merely conclusory." A.134. The court concluded that "a flag by itself does not appear to meet the objective prong of the deliberate indifference test," *id.*, and, in any event, "Cooks

threatening [Rowe] for approximately 90 seconds did not constitute serious harm," A.135. The court further concluded that even though "Yoder was aware of the flag," pulling Rowe and Cooks at the same time was just "a simple mistake." A.134-35.

The district court also dismissed Rowe's claim against Yoder, Baucom, and Church for denying Rowe access to mental health services, finding that Rowe failed to allege "specific dates and times that each specific defendant denied Plaintiff's requests for" such services, A.136, despite the complaint's many allegations with that information, *see, e.g.*, A.29, A.37, A.40, A.46, A.47-48, A.49-50, A.51-52, A.53.

Finally, the district court dismissed Rowe's claim that Yoder's adverse actions—ordering Rowe into administrative segregation for two weeks the very same day Rowe contacted an outside PREA agency and filed another PREA complaint, A.64, and sending an email to the district attorney saying Rowe was "causing problems" at the jail—were retaliatory. The court found Rowe's allegations reflected nothing more than a "personal belief" about Yoder's retaliatory motive, and stated that "temporal proximity alone is not sufficient to plausibly allege retaliatory motive." A.137.

SUMMARY OF ARGUMENT

I. The district court erred in dismissing Rowe's three failure-to-protect deliberate indifference claims at the screening stage. **I.A.** Rowe adequately alleged a deliberate indifference claim against Doe, who created and spread the false rumor that Rowe was a racist. This Court has long held that when jail officials spread dangerous rumors about a detainee, those officials may act with deliberate indifference to the risk of violence at the hands of other detainees. Like being labeled a "snitch," being falsely labeled as a racist poses an objectively serious risk of harm in the jail setting; it was thus unsurprising that Rowe was assaulted and credibly threatened with rape and murder by other detainees as a result of the rumor. And Rowe adequately stated the subjective prong of this claim, specifically alleging that Doe had received training on the potential for dangerous racial dynamics behind bars; that other SCDC officials confirmed that it was dangerous; and that the risk was obvious, because "[t]he racial component to prison violence is *impossible* for prison administrators to ignore." *Johnson v. California*, 543 U.S. 499, 532, 535 (2005) (Thomas, J., dissenting) (emphasis added).

I.B. Rowe also sufficiently pled a failure-to-protect claim against Baucom and Yoder, who were repeatedly informed of the false rumor and the objective danger it carried but did nothing to investigate or remediate the risk Rowe faced, resulting in Rowe being assaulted and harassed by other detainees. The district court's contrary finding rested on adopting Defendants' version of the facts from their *Martinez* report, something this Court has strictly forbidden.

I.C. Rowe adequately alleged another failure-to-protect claim against Yoder for ordering Rowe and Cooks to be placed in a hallway alone together, despite Cooks's recent victimization of Rowe and despite the existence of a "flag" in the jail's system mandating that the two be kept separate. The district court held that because they were "only" alone for 90 seconds and because Cooks "only" *threatened* to rape and murder Rowe and did not physically touch him, it was not objectively serious. That was wrong, because this Court's precedent dictates that it is the *risk* of harm that matters, because 90 seconds is plenty of time for serious or even deadly violence to take place, and because the incident significantly worsened Rowe's PTSD. Rowe also sufficiently alleged the subjective prong, because Yoder admitted that he was aware of the prior attack and

because this Court has held that knowingly failing to enforce jail safety policies—here, disregarding a jail's safety flagging system—can rise to the level of deliberate indifference.

II. Rowe adequately alleged a claim for denial of mental health care against Yoder, Baucom, and Church, who, for two-and-a-half-months, denied Rowe's repeated and increasingly desperate requests for treatment of the PTSD Rowe developed after being attacked by Cooks and Farmer. Rowe's need for PTSD treatment was sufficiently serious under this Court's precedent, because the mental health provider Rowe eventually saw prescribed "further treatment" after diagnosing him with PTSD. *See Lance v. Morris*, 985 F.3d 787, 793 (10th Cir. 2021). And the delay in treatment led to sufficiently substantial harm, because the delay resulted in Rowe's PTSD becoming much worse and caused him to suffer "constant" physical and psychological pain; moreover, the jail's mental health provider told him that his PTSD was expected to be a lifelong condition. The subjective prong is also satisfied, because Rowe repeatedly told Defendants that he was in "desperate" need of care for his debilitating PTSD and associated pain, and because Defendants received

PREA-mandated training on their obligation to provide victims of sexual abuse with mental health care.

III. Rowe adequately alleged all three elements of a retaliation claim against Yoder. The district court did not dispute the first two elements, nor could it have: Rowe's filing of PREA complaints and other grievances unquestionably satisfies the first prong of "protected conduct," and the second prong of "adverse action" is met by Yoder having placed Rowe in administrative segregation without cause for two weeks and by Yoder emailing the DA to encourage them to increase Rowe's criminal charges. As for the third prong—causation—this Court has held that at the screening stage, plaintiffs need only "specifically allege[]" that the retaliation was the "direct result" of protected activity. *Fogle v. Pierson*, 435 F.3d 1252, 1264 (10th Cir. 2006). Rowe did that and more, also providing damning circumstantial evidence, such as close temporal proximity and a pattern of interference with Rowe's ability to report PREA violations.

IV. The district court dismissed Rowe's state law claim of negligence under the Kansas Tort Claims Act on the sole ground that state law claims cannot be brought under § 1983. What the district court

ignored, of course, is that state law claims *can* be brought in federal court under 28 U.S.C. § 1367, the supplemental jurisdiction statute.

V. The district court erred in holding that 42 U.S.C. § 1997e(e), which bars incarcerated plaintiffs from seeking compensatory damages for mental or emotional injury suffered in custody without "a prior showing of a physical injury," precluded Rowe from recovering compensatory damages.

V.A. The district court appeared to believe that § 1997e(e) incorporates an atextual "more-than-*de-minimis*" physical injury requirement. But imposing such a requirement is incompatible with basic principles of statutory interpretation; it finds no support in the statute's text or history. This Court has never adopted a more-than-*de-minimis* requirement and should not do so now.

V.B. The district court ignored entirely that Rowe sustained a "physical injury" when he was physically assaulted by a fellow detainee, even if that assault did not cause a *severe* injury.

V.C. One of Rowe's recurrent PTSD symptoms was chest pain, which this Court has held to be a physical, rather than mental or emotional, injury. Moreover, the district court erred in imposing a

requirement that qualifying physical injuries cannot be manifestations of psychological illnesses, a limitation that finds no support in the statute's text or in precedent.

V.D. Rowe's post-traumatic stress disorder also qualifies as a "physical injury" within the meaning of § 1997e(e); although laypeople may more commonly understand PTSD to be a psychological disease, the science is clear that PTSD also inflicts an array of physical injuries, including brain damage, alteration of stress hormone levels and response, and accelerated cellular aging.

STANDARD OF REVIEW

This Court reviews de novo a district court's dismissal pursuant to 28 U.S.C. § 1915A for failure to state a claim upon which relief can be granted. *See McBride v. Deer*, 240 F.3d 1287, 1289 (10th Cir. 2001). The Court accepts the factual allegations in Rowe's *pro se* complaint as true, resolves all reasonable inferences in Rowe's favor, and liberally construes Rowe's pleadings. *Diversey v. Schmidly*, 738 F.3d 1196, 1199 (10th Cir. 2013).

ARGUMENT

I. The district court erred in dismissing Rowe's failure-to-protect claims.

The Supreme Court has long held that jail and prison officials are obligated to "protect prisoners from violence at the hands of other prisoners." *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). When jail officials do not fulfill this obligation, pretrial detainees can make out a failure-to-protect claim under the Due Process Clause.[7] These claims have both an objective and subjective prong. *Id.* at 834. The objective prong requires a plaintiff to demonstrate that "he is incarcerated under conditions posing a substantial risk of serious harm." *Id.* The subjective prong asks whether the defendants were deliberately indifferent to this substantial risk. *Id.* at 834-35. Jail officials act with deliberate indifference when they know of and disregard an excessive risk to

[7] For convicted prisoners, these claims arise under the Eighth Amendment. *See Farmer*, 511 U.S. at 832. Pretrial detainees receive at least the same protections against harm behind bars as convicted prisoners, but their constitutional rights come from the Fourteenth Amendment's Due Process Clause. *See Lopez v. LeMaster*, 172 F.3d 756, 759 n.2 (10th Cir. 1999), *abrogated in part on other grounds*, *Brown v. Flowers*, 974 F.3d 1178, 1182 (10th Cir. 2020). Failure-to-protect claims brought under the Due Process Clause are analyzed the same way as those brought under the Eighth Amendment. *Id.*

detainee health or safety; under this standard, officials must both have facts at their disposal to draw an inference of a substantial risk of harm, and actually draw that inference. *Id.* at 837. Knowledge may be "inferred from circumstantial evidence," or because the risk was "obvious." *DeSpain v. Uphoff*, 264 F.3d 965, 975 (10th Cir. 2001).

A. Rowe sufficiently pled a deliberate indifference claim against Doe for spreading a false rumor that Rowe was a racist.

This Court has long held that jail officials can act with deliberate indifference when they spread dangerous rumors about detainees to other detainees. *See Benefield v. McDowall*, 241 F.3d 1267, 1271 (10th Cir. 2001); *Northington v. Marin*, 102 F.3d 1564, 1567-68 (10th Cir. 1996). In *Benefield* and *Northington*, the dangerous rumor at issue was that the plaintiffs were "snitches"—a label known to carry "the potential for great harm." *Benefield*, 241 F.3d at 1271; *Northington*, 102 F.3d at 1566. Here, the dangerous false rumor Doe created and spread was that Rowe was a "racist." A.16. That label, no less than the "snitch" label, satisfies both the objective and subjective prongs of the deliberate indifference test.

As to the objective prong—which the district court assumed was satisfied, A.131—Rowe specifically alleged that because of the "racially tense" and "dangerous" conditions in jail, falsely labeling Rowe as a racist put him at substantial risk of serious harm at the hands of other detainees. *See* A.16. And indeed, as a predictable result of Doe's rumor, other detainees assaulted him and credibly threatened to rape and kill him, which are serious harms. A.25; A.33; *see Northington*, 102 F.3d at 1567-68; *Miller v. Kastelic*, 601 F. App'x 660, 663 (10th Cir. 2015) (objective prong satisfied where plaintiff was threatened and extorted by other prisoners because he was a known sex offender, and eventually assaulted); *Grieveson v. Anderson*, 538 F.3d 763, 778 (7th Cir. 2008) (being assaulted by other inmates is objectively serious).

As to the subjective prong, Rowe's complaint detailed that Doe "*is aware* either through training or through a generally understood public awareness" of the risk falsely labeling Rowe as a racist posed, yet Doe spread the rumor anyway. A.16 (emphasis added). Rowe specifically alleged that SCDC's training program teaches jail employees about racial dynamics in jails as well as health and safety risks to detainees, and thus the danger that spreading such a rumor would pose. A.16-18; *see* A.113;

see also Est. of Booker v. Gomez, 745 F.3d 405, 430-31 (10th Cir. 2014) (officer training can establish subjective prong). These allegations are supported by the fact that BeBe, another jail official who underwent the same training program as Doe, confirmed the dangerousness of the situation, told Rowe he would speak to his superiors about it, and promised to investigate accordingly. A.20-21. And racial tension and violence in jails and prisons is well-known by the public, let alone professional correctional officers. *See, e.g.*, *Johnson*, 543 U.S. at 532, 535 (Thomas, J., dissenting) ("[T]here is no more 'intractable problem' inside America's prisons than racial violence . . . . The racial component to prison violence is *impossible* for prison administrators to ignore." (emphasis added)). The district court nonetheless found that these allegations did not support a plausible conclusion that Doe "actually drew the inference of" serious harm. A.131-32. But knowledge may be "inferred from circumstantial evidence," or because the risk was "obvious." *DeSpain*, 264 F.3d at 975; *Howard v. Waide*, 534 F.3d 1227, 1239 (10th Cir. 2008) (subjective prong satisfied by "circumstantial evidence that all prison officials were aware of the general threat of [gang] violence and that they knew [plaintiff] had characteristics that made him a likely

target of such violence"). And Rowe "need not show that [Doe] acted or failed to act believing that harm actually *would* befall" Rowe, as long as Doe "should have understood the *possibility* that harm might ensue." *DeSpain*, 264 F.3d at 975 (emphasis added). Rowe thus sufficiently alleged Doe was "aware of facts from which the inference could be drawn that a substantial risk of serious harm existed," especially at the screening stage. *See Farmer*, 511 U.S. at 837 (cleaned up).

B. Rowe sufficiently pled a deliberate indifference claim against Baucom and Yoder for failing to protect him.

Rowe also adequately alleged a deliberate indifference claim against Baucom and Yoder for doing nothing to protect him from the serious, and predictable, consequences of Doe falsely labeling Rowe as a racist: that other detainees would victimize Rowe. The objective prong on this claim is met for the same reasons discussed above.[8] *See supra* at 24; *see also Grimsley v. MacKay*, 93 F.3d 676, 681 (10th Cir. 1996) (objective prong satisfied where officials "disregard repeated warnings of danger to a particular prisoner and continually refuse to make the situation safer").

[8] The district court briefly stated that "the facts alleged do not establish that [Rowe] endured conditions that 'pos[ed] a substantial risk of serious harm' because of [Defendants'] choice [to do nothing about the rumor]," A.132, but failed to provide any analysis on this front.

As for the subjective prong, the district court concluded that Rowe's allegations failed to make out the subjective prong for two reasons; both are incorrect. First, the court perceived Rowe as making "only conclusory allegations that Defendants Baucom and Yoder knew of the risk of harm to [Rowe] and chose to do nothing." A.132. That's not supported by the face of the complaint. Indeed, in addition to the allegations that would have put any jail official on notice of the risk, *see supra* at 24-25, Rowe included a number of specific allegations about Baucom and Yoder's awareness. Indeed, it was Baucom himself who first alerted Rowe to the rumor, and promised to "look into it." A.20. The next day, Rowe spoke with BeBe, who "agreed [that the rumor] was dangerous and promised to inform his superiors"—*i.e.*, Baucom and Yoder—"and to find a solution to the risk." A.21. BeBe then informed Rowe that he alerted Baucom and Yoder "specifically that [Rowe] was at risk from Terrill Cooks due to the rumor created by [Doe]," A.23—and that they said "they would look into the issue," A.21. That is, Baucom and Yoder were specifically and actually "made aware by [Rowe] through the chain of command that he felt he would or could be assaulted as a result of" Doe spreading the unfounded rumor. A.27.

Second, the district court believed that the alleged facts did not "support a plausible inference that the disagreement with Cook[s] was related to the rumor, so the disagreement with Cooks was not a risk of harm that the defendants could have foreseen or disregarded." A.134. In the district court's telling, the incident with Cooks was a dispute over the remote control, nothing more. A.132. This, again, is contrary to the complaint. Rowe "had a friendly relationship" with both Cooks and Farmer until the rumor began circulating, and the dayroom incident occurred shortly after Cooks told Rowe he had heard about the rumor. A.19-20, A.24-25. And during that incident, Cooks *called* Rowe a "racist," and suggested he "was not always going to be around all of his white friends" to protect him. A.24. So even if the dayroom incident in some sense involved a dispute about the remote control, it clearly was about more than just the remote.

The district court's sanitized view of the dayroom incident as being "just" about the remote—and not related to the racist rumors—was drawn directly from Defendants' *Martinez* report. *See* A.78 ("[T]he altercation arose over a dispute over the remote to the TV in the day room in the pod."). This Court has explained that although district courts may

employ *Martinez* reports as a means of understanding prison policies and procedures where challenged by a plaintiff, *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010), they cannot be used to refute facts pled by a plaintiff, *Swoboda v. Dubach*, 992 F.2d 286, 290 (10th Cir. 1993), resolve material disputed factual issues, *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991), or make credibility determinations, *Gee v. Estes*, 829 F.2d 1005, 1007 (10th Cir. 1987). In other words, "[i]t is improper to accept the prison officials' report of events" in a *Martinez* report when those reports are "in conflict with the pleadings." *Janke v. Price*, 43 F.3d 1390, 1392 (10th Cir. 1994). By giving credence to Defendants' view that the dayroom incident was about the remote—nothing more—the district court thus doubly erred.

C. Rowe sufficiently pled a deliberate indifference claim against Yoder for ordering Rowe and Cooks to be left alone together.

The district court concluded that Rowe failed to plead a deliberate indifference claim relating to Yoder's placement of Rowe and Cooks alone in the hallway despite Yoder's knowledge that they were "flagged" in the system as needing to be kept separate. A.134-35. Essentially, the court believed the objective prong of the test was not met because a flag in the

system "by itself" would not suggest plaintiff faced "conditions posing a substantial risk of serious harm," A.134 (quoting *Farmer*, 511 U.S. at 834), and that the 90 seconds of threats Rowe experienced did not constitute serious harm, A.135. Both conclusions were incorrect.

It was not the flag in and of itself that raised the risk of serious harm. Rather, it was the weeks of racially tense buildup from the time Cooks first heard the rumor, culminating in the dayroom incident, which *led* to the flag. A.32. Again, just a few weeks earlier, Cooks had subjected Rowe to four hours of threats and harassment—during which Cooks told Rowe he would "fuck [Rowe] in the ass with this broom" and called him a "racist dick sucker"—and then attempted to sexually assault Rowe before officers intervened. A.24-25. The question, then, is whether ordering Rowe and Cooks to be alone together in light of their recent history, and despite the flag, posed a serious risk of harm; at this stage of the litigation, the answer must be "yes."

The district court was also wrong to hold that the 90-second period in the hallway was not sufficiently serious, for three reasons. First, the question for a deliberate indifference claim is whether the situation "has the *potential* for great harm" given the "obvious danger associated with"

the situation. *Benefield*, 241 F.3d at 1271 (emphasis added). *Benefield* thus explicitly rejected the very same argument the district court here implicitly accepted: that a deliberate indifference claim can only lie where an assault is *actually* carried out, as opposed to just threatened. *Id.* at 1271-72; *Ramos v. Lamm*, 639 F.2d 559, 572 (10th Cir. 1980) ("[A]n inmate does have a right to be reasonably protected from constant threats of violence and sexual assaults from other inmates. Moreover, he does not need to wait until he is actually assaulted before obtaining relief.") (citations omitted). That's why the test is whether there is a "substantial *risk* of serious harm." *Farmer*, 511 U.S. at 834 (emphasis added). Second, the brevity of the period is of no moment—as Rowe alleged, he'd witnessed his cellmate at a different prison stab another prisoner to death with a shank within 30 seconds. A.39. And finally, given the history between Rowe and Cooks and the PTSD that Rowe was already suffering from as a result of that history, Rowe plausibly alleged that Cooks threatening to rape and kill him during the hallway incident constituted a serious harm under the circumstances—that is, because it significantly worsened Rowe's PTSD. A.34-35.

Rowe also sufficiently alleged the subjective prong. The district court disagreed, suggesting that Yoder's placement of Rowe in the hallway alone with Cooks "was a simple mistake." A.135. That conclusion is in serious tension with the allegation that Yoder told Rowe he ordered Rowe and Cooks to be alone in the hallway together "even though [he was] *fully aware* of [Rowe's] PREA complaint" about the dayroom incident. A.40 (emphasis added). At any rate, even assuming the hallway incident was the result of Yoder's "simple mistake," that does not insulate him from liability. After all, deliberate indifference is equivalent to "subjective recklessness." *Farmer*, 511 U.S. at 839-40. It is surely reckless to "overlook[]," A.40, a flagging system specifically designed to prevent inmate-on-inmate violence, A.32—as Yoder himself seemed to acknowledge when he told Rowe "I take responsibility" for what happened, A.40. Indeed, "[t]he knowing failure to enforce policies necessary to the safety of inmates may rise to the level of deliberate indifference." *Tafoya v. Salazar*, 516 F.3d 912, 919 (10th Cir. 2008) (citations omitted). Rowe's allegations on this front were more than sufficient to survive screening.

II. Rowe sufficiently stated a claim for denial of mental health care against Yoder, Baucom, and Church.

Under the Fourteenth Amendment, jail officials are prohibited from acting with deliberate indifference to a pretrial detainee's serious medical needs, judged by the same standard used for convicted prisoners in Eighth Amendment cases. *Lance*, 985 F.3d at 793. The duty to provide adequate medical care includes "psychological or psychiatric care." *Ramos*, 639 F.2d at 574; *see also Blackmon v. Sutton*, 734 F.3d 1237, 1245 (10th Cir. 2013) (Gorsuch, J.) (explaining that for decades, it has been "clearly established law that the deliberate disregard of a patient's psychological needs can violate a detainee's constitutional rights no less than the deliberate disregard of his physical needs").

As with failure-to-protect claims, medical care deliberate indifference claims have both an objective and subjective prong. *Lance*, 985 F.3d at 793. The objective prong is met where the medical need is "sufficiently serious," meaning that a medical professional "directed further treatment after diagnosing the condition" or the need for medical attention "would be obvious to a layperson." *Id.* The subjective prong requires that the defendants were "aware of a substantial risk of serious harm" and then "disregard[ed]" that risk." *Id.* at 794.

Here, Rowe alleged that he made multiple requests over a period of two-and-a-half months to be seen by a mental health professional or crisis counselor for treatment of his severe PTSD—during which time his PTSD "worsen[ed]" and caused him "constant[]" suffering and pain—after he was sexually harassed, assaulted, and threatened by Cooks and Farmer.[9] Rowe's allegations satisfy the objective prong, because when he *finally* saw a mental health provider for his debilitating PTSD after more than two months of being refused care, that provider "directed further treatment after diagnosing" Rowe with PTSD. *Lance*, 985 F.3d at 793; A.56 (provider prescribed Rowe medication for his PTSD).[10]

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[9] *See, e.g.*, A.28-29, A.37-38, A.38-39, A.42-44, A.46, A.47-48, A.49-53.

[10] Rowe's PTSD was also "sufficiently serious" under the objective prong's alternative test of whether the need for medical attention would be "obvious." *See Lance*, 985 F.3d at 793. Rowe repeatedly begged Defendants for mental health treatment and explained his worsening PTSD symptoms to them, describing his need for medical care as "critical" and "desperate". *See, e.g.*, A.46. Further, as this Court has explained, the test is whether the *harm* (here, PTSD) is sufficiently serious, not whether the *symptoms* displayed to the defendants were sufficiently serious. *Mata v. Saiz*, 427 F.3d 745, 753 (10th Cir. 2005). And as this Court's sister circuits and courts around the country have consistently held, PTSD, especially PTSD following prison sexual abuse, is "sufficiently serious." *See, e.g.*, *Nelson v. Shuffman*, 603 F.3d 439, 449 (8th Cir. 2010); *Lucas v. Chalk*, 785 F. App'x 288, 291-92 (6th Cir. 2019); *Casanova v. Maldonado*, No. 17 CV 1466 (NSR), 2019 WL 3286177, at *7

These allegations also satisfy the objective prong's requirement to "show that the delay resulted in substantial harm," which can include "lifelong handicap, permanent loss, or considerable pain." *Al-Turki v. Robinson*, 762 F.3d 1188, 1193 (10th Cir. 2014); *id.* ("pain experienced while waiting for treatment" satisfies objective prong). Over the course of Defendants' more than two-months delay in providing Rowe with treatment, Rowe's PTSD became "worse" and caused him to "suffer . . . constantly"; he even developed symptoms of paranoia and psychosis. A.45, A.34-35; *see also* A.47-48 (delay in mental health treatment "caus[ed] him unnecessary, constant, traumatic stress"); A.42 (denial of treatment caused his PTSD to "compound" and "elevate[d] the severity"). The unnecessary and worsening pain—both physical and mental—Rowe suffered from this delay in care would alone be enough to satisfy this standard. *Mata*, 427 F.3d at 755 ("pain and suffering" experienced during delay of medical treatment "is sufficient to establish the objective element"). But the delay Rowe suffered also meets this standard because his PTSD is expected to be a "lifelong handicap," *Al-Turki*, 762 F.3d at

(S.D.N.Y. July 22, 2019); *Bussy v. Fischer*, No. 9:10-CV-1021 NAM/DEP, 2011 WL 4862478, at *12 (N.D.N.Y Aug. 1, 2011).

1193. Indeed, the mental health provider Rowe finally saw told him that he would have to deal with PTSD for the rest of his life. A.56.

Rowe also adequately alleged the subjective prong: that Yoder, Baucom, and Church were "aware of a substantial risk of serious harm" and then "disregard[ed]" that risk." *Lance*, 985 F.3d at 794. The district court, for its part, appeared to dismiss this claim on the subjective prong by claiming Rowe had not "allege[d] specific dates and times that each specific defendant denied Plaintiff's requests for mental health services." A.136. This was both factually and legally wrong.

Factually wrong, because Rowe *did* unquestionably allege specific dates that he had requested mental health care from these specific Defendants, only to have them ignore or explicitly deny his requests. For example, Rowe alleged that on September 17, he told Baucom that he "desperately needed to speak to a mental health professional"; in response, Baucom told Rowe that he couldn't help him and that Rowe had to go up the "chain of command," but when Rowe then asked to speak to the sheriff (i.e., "up the chain of command"), Baucom denied his request. A.37-38. Similarly, Rowe alleged that on September 19, he reiterated to Yoder that he was "experiencing a serious need for emotional support"

and begged to see a crisis counselor, explaining that he had been filing requests and asking for crisis counseling for over a month, but Yoder simply brushed him off. A.38-40. Likewise, Rowe alleged that on October 11, he told Church he was "in desperate need" of a mental health counselor because he was suffering "serious emotional and mental distress," but Church "denied" his request. A.49-53.[11] It was also legally wrong, because this Court has never required that plaintiffs—especially incarcerated *pro se* plaintiffs—provide a timestamp of each request for medical care that they have made, nor did the district court cite any authority for that proposition.[12]

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[11] *See also, e.g.*, A.28-29 (on August 19, Rowe told Yoder that he needed to see a crisis counselor, but Yoder said that all Yoder was required to do was interview Rowe about the assault and that when the interview was done, "his responsibilities ended"); A.46 (on October 10, Rowe told Baucom he was in "desperate need" to see a crisis counselor, but Baucom brushed off his request, telling Rowe he couldn't help him); A.46-48 (on October 10, Rowe told Yoder he'd been "begging for two months to speak to someone" and needed "medical services," but Yoder did not help).

[12] To be sure, some medical care deliberate indifference claims *can* hinge on the exact time a request for medical care was made, because for certain medical conditions, a delay of hours or minutes in treatment can create a constitutional violation. *See Mata*, 427 F.3d at 755 (a minutes-long delay in treating cardiac arrest or an hours-long delay in treating a broken foot can be unconstitutional). But Rowe did not allege that his condition was one where constitutionally prompt care is measured in minutes or hours, or even days—instead, he alleged that delaying his

So, as detailed above, Rowe alleged that he had repeatedly begged Defendants for mental health treatment for his PTSD and told them that his need for care was "critical" and "desperate," only to be ignored or outright denied. A plaintiff's repeated requests for medical treatment and expressions of pain satisfy the subjective prong. *Lance*, 985 F.3d at 796; *McCowan v. Morales*, 945 F.3d 1276, 1292 (10th Cir. 2019). This is true even if the jail officials are laypeople. *See Lance*, 985 F.3d at 796; *McCowan*, 945 F.3d at 1292; *Rife v. Oklahoma Dep't of Public Safety*, 854 F.3d 637, 648-49 (10th Cir. 2017). Similarly, it is no excuse that Defendants "are not licensed mental health professionals and so could not have provided any mental health care" to Rowe. *Blackmon*, 734 F.3d at 1245. Defendants were the "gate keepers" of mental health care for Rowe, *id.*, and their repeated disregard of his desperate requests for care satisfies the subjective prong, particularly at this early stage in the proceedings.

In addition to Rowe having told Defendants about the "serious distress" he was experiencing and his "critical" need for mental health

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necessary care by *multiple months* was unconstitutional. Thus, unlike a claim for cardiac arrest or a broken limb, the precise time of day Rowe made his requests has no bearing on the merits of his claim.

care, the subjective prong is also bolstered by Rowe's allegations on the training Defendants would have received about their obligations under PREA, including the obligation to provide victims of jail sexual abuse with mental health care and trained counseling. *See* A.41-42, A.61. Rowe does not contend that he has a standalone cause of action for compliance with PREA, of course, but this Court has repeatedly looked to officer training, facility policies, and medical standards of care to establish the subjective prong. *See, e.g.*, *Gomez*, 745 F.3d at 430-31 (relying extensively on officers' training to establish subjective prong); *Mata*, 427 F.3d at 757 ("While published requirements for health care do not create constitutional rights, such protocols certainly provide circumstantial evidence that a prison health gatekeeper knew of a substantial risk of serious harm."); *Tafoya*, 516 F.3d at 919 (failure to enforce jail policies regarding detainee safety can constitute deliberate indifference). Rowe's claim thus should have been allowed to proceed past the screening stage.

III. Rowe adequately alleged a retaliation claim against Yoder.

"'[P]rison officials may not retaliate against or harass an inmate because of the inmate's exercise of his' constitutional rights." *Peterson v. Shanks*, 149 F.3d 1140, 1144 (10th Cir. 1998). "This principle applies

even where the action taken in retaliation would be otherwise permissible." *Smith v. Maschner*, 899 F.2d 940, 948 (10th Cir. 1990). To prove a claim of retaliation for the exercise of First Amendment rights, a plaintiff need only show: (1) he was engaged in a constitutionally protected activity; (2) the defendant caused him to "suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity"; and (3) the defendant's adverse action was "substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct." *Requena v. Roberts*, 893 F.3d 1195, 1211 (10th Cir. 2018).

Rowe adequately alleged all three elements against Yoder, and the only element the district court found lacking was the third element of causation. A.137. As to the first prong—constitutionally protected activity—Rowe's filing of PREA complaints and other grievances is protected conduct. *See Fogle*, 435 F.3d at 1264. As for the second prong—adequately chilling adverse action—Rowe alleged that, in retaliation, Yoder: (1) emailed the district attorney that Rowe was "causing trouble" in an effort to increase his sentence or punishment, A.62; and (2) ordered Rowe to be placed in administrative segregation (without reading

material) for fourteen days, A.64-66. These are both "adverse actions" under this Court's precedent. *See Smith*, 899 F.2d at 942, 947-48 (placement in administrative segregation); *Becker v. Kroll*, 494 F.3d 904, 925 (10th Cir. 2007) (inducement to prosecute).

That leaves the third prong: causation. To establish retaliatory motive, a plaintiff may offer circumstantial evidence of a defendant's state of mind, as direct evidence is "particularly difficult to establish." *See Smith*, 899 F.2d at 949. In *Smith*, for example, this Court concluded that circumstantial evidence was enough to survive summary judgement on causation; that evidence consisted of the "suspicious timing" of plaintiff's discipline, especially in light of his "prior good record"; coincidental transfers of witnesses and prison law clerks who had helped the plaintiff; and an alleged pattern by defendants of blocking plaintiff's access to legal materials and assistance. *Id.* at 948-49. And under this Court's precedent, a plaintiff needs far less to survive a screening-stage dismissal: "specifically alleg[ing] that the retaliation was a direct result of his protestations" will suffice. *Fogle*, 435 F.3d at 1264.

Rowe has more than met his burden of alleging causation at the screening stage. Under *Fogle*, all that Rowe was required to do was

"specifically allege[] that the retaliation was a direct result" of his protected conduct. *Id.* Rowe has unmistakably done so. *See* A.57; A.64; A.68; A.117. But he also went beyond that. As in *Smith*, "close temporal proximity" supports an inference of retaliatory motive; for example, Rowe alleged that on the *exact same day* he called an outside PREA reporting agency and filed another PREA complaint, Yoder forced him without cause into administrative segregation for fourteen days, where he was denied all reading material. A.64; *see Smith*, 899 F.2d at 948. And like *Smith*'s pattern of denying the plaintiff legal resources, 899 F.2d at 948, Yoder engaged in a pattern of denying Rowe the ability to report the abuse he endured as well as the jail's violations of PREA protocol, and denied him access to mental health resources. *See, e.g.*, A.66-67. And as in *Smith*, Yoder told the DA that Rowe was a troublemaker and punished him with two weeks in administrative segregation, despite Rowe's record as a "model inmate" with no writeups for misconduct. A.62-63; *Smith*, 899 F.2d at 948-49 (noting plaintiff's "sizeable" punishment for infraction "in spite of his prior good record"). Rowe's allegations as to all three elements of his retaliation claim were thus more than sufficient to survive the screening stage.

IV. The district court erred in dismissing Rowe's state law negligence claim.

In addition to his constitutional claims under § 1983, Rowe brought a state law negligence claim under the Kansas Tort Claims Act. A.69-70; *see* Kan. Stat. Ann. § 75-6103; *Thomas v. Cnty. Comm'rs of Shawnee Cnty.*, 262 P.3d 336, 347-48 (Kan. 2011) (explaining duty of jail officials to protect detainees from harm). The district court dismissed this claim on the *sole* ground that a state law claim of negligence "is not a claim that may be brought under § 1983." A.125; *see also* A.97. That's true, but irrelevant; state law claims may be brought in federal court under 28 U.S.C. § 1367, the supplemental jurisdiction statute. Given that Rowe's state law claim and federal constitutional claims "derive[d] from a common nucleus of operative fact," *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966), supplemental jurisdiction is appropriate. Thus, assuming this Court reinstates one or more of Rowe's federal claims, it should also reverse the district court's erroneous dismissal of Rowe's state law claim.

V. Section 1997e(e) does not preclude Rowe from recovering compensatory damages.

The district court erred in holding that 42 U.S.C. § 1997e(e), a provision of the Prison Litigation Reform Act (PLRA), barred Rowe from recovering compensatory damages. Section 1997e(e) provides that:

> No 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. . .

This provision does not foreclose Rowe's claims because he made "a prior showing of physical injury" within the meaning of the statute. To wit, Rowe (1) was physically assaulted by another detainee; (2) suffered recurrent chest pains; and (3) was diagnosed with post-traumatic stress disorder, which is a physical as well as psychological disorder.

In finding that Rowe had not suffered a physical injury within the meaning of § 1997e(e), *see* A.127-28, the district court made five errors. First, it appeared to impose an atextual requirement that "physical injury" means a "more-than-*de-minimis*" physical injury. Second, it disregarded entirely that another detainee had physically assaulted Rowe. Third, it ignored this Court's caselaw holding that pain (and, specifically, chest pain) is a physical injury. Fourth, it imposed an

atextual requirement that "physical injury" under § 1997e(e) does not include physical injuries that are symptoms of psychological conditions. Finally, it failed to recognize that PTSD is both a psychological *and* physical illness, causing tangible physical impacts to the brain and throughout the body.

A. Under basic principles of statutory interpretation, § 1997e(e) requires only a physical injury, not a *serious* physical injury.

As an initial matter, the district court appeared to believe that § 1997e(e) requires a physical injury that is more-than-*de-minimis*. *See* A.128. That was error. The text 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*."

Start with the text. Where Congress has left terms undefined, this Court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020); *see also Sebelius v. Cloer*, 569 U.S. 369, 376 (2013). The ordinary meaning of "physical injury" in 1996, when Congress passed the PLRA, 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.[13] Non-legal dictionaries are similarly inclusive. In one, for instance, "injury" is defined in relevant part as "an act that damages or hurts." *Injury*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 602 (10th ed. 1993).[14]

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." *Jama v. Imm. & Customs Enf't*, 543 U.S. 335, 341 (2005). When Congress wanted to require an injury of a particular degree of severity in the PLRA, it knew how to do so: in a separate portion of the PLRA, Congress required a showing of a "*serious* physical injury" to exempt a litigant from the PLRA's "three

[13] *See also Bodily Injuries*, BALLENTINE'S LAW DICTIONARY (William S. Anderson ed., 3d ed.) (encompasses "various degrees of harm").

[14] *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.").

strikes" rule. 28 U.S.C. § 1915(g) (emphasis added). The failure to do so in § 1997e(e) evinces "a deliberate congressional choice"—one that should be respected. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 184 (1994).[15]

To be sure, some other circuits have imposed a more-than-*de-minimis* requirement. But those out-of-circuit decisions were wrong at the time they were decided—most around two decades ago—and are doubly wrong now in light of intervening Supreme Court precedent. Consider the first published decision to graft a more-than-*de-minimis* requirement onto the statute: the Fifth Circuit's decision in *Siglar v. Hightower*, 112 F.3d 191 (5th Cir. 1997). *Siglar* announced that "Eighth Amendment standards guide our analysis," without looking at the text of § 1997e(e) or explaining why that made sense. 112 F.3d at 193. *Siglar*

[15] This reading of the PLRA is also consistent with the way the word "injury" is used in other settings. *See, e.g.*, Restatement (Second) of Torts § 7(1) & cmt. a ("injury" can occur without showing of "harm"); Model Penal Code § 210.0 (defining "bodily injury" as "physical pain, illness or any impairment of physical condition," without requiring any particular severity, and distinguishing between "bodily injury" and "serious bodily injury"); *see, also, e.g.*, 18 U.S.C. §§ 831(g)(5); 1365(h)(4); 1515(a)(5); 1864(d)(2) (distinguishing between "bodily injury" and "serious bodily injury," and defining the former to include such minor injuries as "a cut, abrasion, bruise" or "any other injury to the body, no matter how temporary").

then made a second inexplicable announcement: it declared that "Eighth Amendment standards" require an injury that is "more than *de minim[i]s*," *id.*, citing *Hudson v. McMillian*, 503 U.S. 1 (1992). But the Supreme Court in *Hudson* noted only that "*de minimis* uses of physical *force*" are not actionable, and made clear that "[t]he absence of serious injury is . . . relevant to the Eighth Amendment inquiry, but does not end it." 503 U.S. at 7, 10 (emphasis added).

So *Siglar* was untenable the day it was decided. And in the decades since, the Supreme Court has made clear *Siglar* was dead wrong. In *Wilkins v. Gaddy*, 559 U.S. 35 (2010), the Supreme Court described the court of appeals' imposition of a more-than-*de-minimis* requirement under the Eighth Amendment as "not defensible" and "strained." *Id.* at 39. Even the Fifth Circuit itself has recently acknowledged that *Wilkins* is incompatible with *Siglar*. *See Buchanan v. Harris*, No. 20-20408, 2021 WL 4514694, at *2 (5th Cir. Oct. 1, 2021).

Most other circuits to adopt a more-than-*de-minimis* requirement under § 1997e(e) largely adopted *Siglar*'s flawed reasoning wholesale. *See, e.g.*, *Harris v. Garner*, 190 F.3d 1279, 1286-87 (11th Cir. 1999), *vacated in part on other grounds*, 216 F.3d 970 (11th Cir. 2000) (en banc);

Corsetti v. Tessmer, 41 F. App'x 753, 755 (6th Cir. 2002). Those circuits that did not blindly follow *Siglar* nonetheless did little to tether their analysis to the text of the statute. In *Mitchell v. Horn*, 318 F.3d 523 (3d Cir. 2003), for instance, the Third Circuit acknowledged that the plain text of the statute could not support a "more-than-*de-minimis*" requirement. *Id.* at 535-36. But it held that the plain text should be ignored because taking the statute at its word would "produce an unintended (indeed absurd) result"—allowing emotional injury claims where a prisoner "received a paper cut, for example." *Id.* at 535. As a practical matter, though, a prisoner filing suit over a paper cut would be hard-pressed to state a claim under the Eighth Amendment or, indeed, any other constitutional or statutory provision. Substantive law, not § 1997e(e), should be the basis for dismissing the "paper cut" claims; indeed, were § 1997e(e) the basis for dismissing such claims, the plaintiff with a superficial flesh wound could still proceed with requests for injunctive relief, punitive damages, or nominal damages, none of which are affected by § 1997e(e). *Searles v. Van Bebber*, 251 F.3d 869, 878 (10th Cir. 2001). And even if the Third Circuit's concerns were founded, courts are not "free to pave over bumpy statutory texts in the name of more

expeditiously advancing a policy goal." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019). The Ninth Circuit made a similar mistake, immediately turning to legislative intent without ever grappling with the text of § 1997e(e). *See Oliver v. Keller*, 289 F.3d 623, 627-28 (9th Cir. 2002) (adopting a "more-than-*de-minimis*" injury requirement as consistent with legislative history and Congressional intent, with no discussion of ordinary meaning or other textual clues).

In sum, though some of this Court's sister circuits have added a "more-than-*de-minimis*" requirement to the plain text of § 1997e(e), they've done so without reference to the text of the statute, in reliance on now-overruled Eighth Amendment principles, and in contravention of the Supreme Court's exhortation that courts should first "exhaust all the textual and structural clues" bearing on the "ordinary meaning" of the statute's terms before turning to any other considerations, like legislative intent or policy concerns. *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021). This Court should not follow suit.

B. Rowe sustained a physical injury when he was assaulted by a fellow detainee.

The district court's second error in applying § 1997e(e) was to entirely ignore that Rowe had been physically assaulted by a fellow

detainee. Recall that on August 17, 2018, Cooks and Farmer subjected Rowe to four long hours of sexual harassment and threatened sexual abuse—including threatening to "fuck him in the ass" with a broom to "show him what a faggot he was"—while Farmer was being held in his cell and Rowe was in the dayroom. A.24-25. When Farmer was finally released from his cell, he and Cooks rushed to assault Rowe, pushing him toward an off-camera area so they could "fuck him in the ass." A.25. Farmer then "slapped [Rowe] across his face" before officers intervened. *Id.*

True, Farmer's assault on Rowe may not have been a *severe* physical injury. But again, as explained above, "physical injury" means just that: "physical injury," no particular severity required. The assault by Farmer would satisfy "the ordinary public meaning" of physical injury "at the time of its enactment," *Bostock*, 140 S. Ct. at 1738—as described, "physical injury" was defined simply as "bodily harm or hurt," BLACK'S LAW DICTIONARY 1147 (6th ed. 1990). "Injury," likewise, was understood as "an act that damages or hurts." *Injury*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 602 (10th ed. 1993). Being intentionally hit across the face, it's fair to say, is "an act that . . . hurts," and a form of

"bodily . . . hurt." And this Court, as well as district courts in this Circuit, have held that physical injuries of a similar severity satisfy § 1997e(e)'s physical injury requirement. For example, in *Sanders v. Yeager*, 57 F. App'x 381 (10th Cir. 2003), this Court found § 1997e(e) satisfied by a plaintiff's allegation that he was "physically injured when he slipped in a pool of water on the floor." *Id.* at 383. And in *Anderson v. Colo. Dep't of Corr.*, 848 F. Supp. 2d 1291 (D. Colo. 2012), the plaintiff's allegation that a lack of outdoor exercise "caused his muscles to grow weaker" created "a fact dispute that prevent[ed] summary disposition" under § 1997e(e). *Id.* at 1298. The district court thus erred in entirely ignoring the assault by Farmer, which was a qualifying "physical injury."

C. Rowe's recurrent chest pains satisfy § 1997e(e).

Among Rowe's "constant" PTSD symptoms was chest pain. *See* A.25-26. The district court made two errors in analyzing this injury. First, it ignored this Court's caselaw holding that pain is a physical, rather than mental or emotional, injury. Second, it imposed an atextual requirement that qualifying physical injuries cannot be manifestations of psychological illnesses.

1. Pain is a physical, not a mental or emotional, injury.

This Court has recognized that physical pain satisfies § 1997e(e) because it is a physical injury, not an emotional injury. *See Mata*, 427 F.3d at 754 n.4. In *Mata*, an incarcerated woman sued prison officials after suffering chest pains that culminated in a heart attack. *See id.* at 748-49. Defendants argued that Ms. Mata's experience of pain alone could not satisfy § 1997e(e) because pain was not a physical injury. *See id.* at 753. But this Court disagreed. It held instead that "there is no doubt on the record before us that Ms. Mata offered substantial evidence she suffered physical injury from her chest pains," explaining that "Ms. Mata is suing for the pain she endured, *not for emotional injury*." *Id.* at 754 n.4 (emphasis added). Two years later, this Court reaffirmed its stance in *Murray v. Edwards City Sheriff's Dep't*, 248 F. App'x 993 (10th Cir. 2007), where it assumed for purposes of the appeal that plaintiff's "headaches and tooth pain [were] 'physical injuries' sufficient to permit him to recover damages for mental or emotional injury under § 1997e(e)." *Id.* at 996-97.

This Court's classification of pain as physical injury is also consistent with principles of statutory interpretation. When the PLRA

was enacted in 1996, Black's Law Dictionary defined "physical injury" as bodily harm or injury, *Physical Injury*, BLACK'S LAW DICTIONARY 1147 (6th ed. 1990), which, in turn, was defined to include "[p]hysical *pain*." *Bodily Injury*, BLACK'S LAW DICTIONARY 786 (6th ed. 1990) (emphasis added). Similarly, throughout the U.S. Code, Congress has defined bodily injury to include physical pain. *See, e.g.*, 18 U.S.C. § 831(g)(5)(B) (defining bodily injury to mean "physical pain"); 42 U.S.C. § 1397j (defining "[s]erious bodily injury" as "an injury involving extreme physical pain").

For the same reasons, the district court erred in determining that § 1997e(e) blocked Rowe from recovering *all* compensatory damages. Nothing in § 1997e(e) bars recovery of compensatory damages for *physical* injury; rather, the statute only limits compensatory damages for "mental or emotional injury." And because pain is a physical injury, rather than a "mental or emotional injury" subject to the strictures of § 1997e(e), Rowe is eligible for compensatory damages for the physical pain he suffered, regardless of whether that pain is a qualifying "prior showing of physical injury" under § 1997e(e). *Mata*, 427 F.3d at 754 n.4.

In short, physical pain is a well-recognized type of physical injury. Under *Mata*, the chest pains that Rowe experienced as one of the recurrent physical symptoms of his PTSD constitute a "physical injury." A.25-26. This both enables him to seek compensatory damages specifically for that physical pain and satisfies § 1997e(e)'s physical injury requirement, enabling him to seek compensatory damages for mental or emotional injury.

2. Physical injuries stemming from psychological illnesses satisfy § 1997e(e).

The district court rejected the physical symptoms of Rowe's PTSD—including chest pains—as potential qualifying physical injuries under § 1997e(e) simply because they were "physical manifestations" of PTSD.[16]

[16] Rowe's original complaint contains additional details about his chest pains and other physical symptoms he experienced from his PTSD; he explained that his chest pain was so severe he "believed he was going to have a heart attack" and that he suffered from "heart palpitations," headaches, nausea, and "extreme hypertension," among other symptoms. *See, e.g.*, ECF 1 at 19, 21, 22, 24. Although Rowe's amended complaint did not include that level of detail about his symptoms (although he did specifically refer to his chest pains and generally to his physical PTSD symptoms), this Court can and should consider the original complaint's details about those symptoms in light of Rowe's *pro se* status. *See Webb v. United States Veterans Initiative*, 993 F.3d 970, 972-73 (D.C. Cir. 2021) (considering factual allegations included in original complaint even though not re-alleged in amended complaint in light of plaintiff's *pro se* status); *see generally Diversey*, 738 F.3d at 1199 (this Court liberally

A.127. It did so without citation to authority and without applying basic principles of statutory interpretation. That imposition of an atextual, unsupported limitation on what qualifies as a "physical injury" was error.

From a statutory interpretation standpoint, the district court's causal limitation is unsupported for many of the same reasons that a "more-than-*de-minimis*" limitation is unsupported. *See supra* at 45-47. In short, the text—the starting point for any statutory interpretation analysis, *see Cloer*, 569 U.S. at 376—is conspicuously void of any language demanding, or even suggesting, a causal limitation. Congress knows how to create causal exclusions when it wants to, and indeed often does. *See* 11 U.S.C. § 523(a)(9) (excluding debts for "personal injury caused by" drunk driving from bankruptcy protections); 46 U.S.C. § 57103(a)(4) (excluding "claims arising from the use of the vessel by the Government" from certain liability claims); 7 U.S.C. § 2025(a) (excluding

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construes *pro se* pleadings). Moreover, the *pro se* Rowe may have omitted these details in response to the district court's order requiring Rowe to file an amended complaint, which faulted Rowe for not complying with Rule 8's requirements for "short and plain statement[s]" and "concise" allegations. *See* ECF 7 at 10-11. And given that Rowe's case was dismissed at the screening stage prior to service on Defendants, Rowe could amend his complaint to re-include these details without any prejudice to Defendants if this Court remands his case.

value of funds "that arise from an error of a State agency" from reimbursement of certain costs). This demonstrates that Congress "knows how to impose such a requirement when it wishes to do so." *Whitfield v. United States*, 543 U.S. 209, 216-17 (2005); *see also Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003). But Congress did not do so here. Its omission of such causal language from the PLRA thus "indicates a deliberate congressional choice with which the courts should not interfere." *Cent. Bank of Denver, N.A.*, 511 U.S. at 184. This is especially so given that the Supreme Court has repeatedly admonished courts for imposing requirements upon plaintiffs exceeding those in the PLRA's plain text. *See Jones v. Bock*, 549 U.S. 199, 212 (2007); *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 167-68 (2007).

And the district court's causal limitation finds no more support in precedent than it does in principles of statutory interpretation. To the contrary, this Court has explicitly recognized the possibility that physical injuries caused by mental injury can satisfy § 1997e(e). In *Perkins v. Kansas Department of Corrections*, 165 F.3d 803 (10th Cir. 1999), an HIV-positive prisoner alleged that his "mental anguish" from being forced to

wear a face mask and from being denied outdoor exercise had caused "further weaken[ing] [of] his immune system" and "hastened his death." *Id.* at 806-07. This Court observed that although the "primary harm" the plaintiff alleged was "mental or emotional," he did "allege physical harm as well." *Id.* at 807. But because the district court had not addressed whether § 1997e(e) was satisfied by the weakening of plaintiff's immune system and deterioration of his physical condition caused by his "mental anguish," *Perkins* remanded for the district court to do so in the first instance. *Id.*

In sum, the district court's cramped interpretation of § 1997e(e) has no basis in statutory text or precedent. By its own terms, § 1997e(e) is satisfied by any physical injury suffered prior to the initiation of the action, whatever the cause.

D. PTSD, which is both a psychological and a physical injury, satisfies § 1997e(e).

The district court erred in holding PTSD does not satisfy § 1997e(e)'s physical injury requirement. A.127-28. Though laypeople may more commonly understand PTSD as a psychological disease, PTSD also inflicts myriad physical injuries, damaging various regions in the

brain, altering stress hormone levels and responses, and accelerating cellular aging. These injuries satisfy § 1997e(e).[17]

First, PTSD causes various regions of the brain to atrophy—that is, it causes neurons in those regions die. *See* Jonathan E. Sherin & Charles B. Nemeroff, *Post-Traumatic Stress Disorder: The Neurobiological Impact of Psychological Trauma*, 13 DIALOGUES CLINICAL NEUROSCIENCE 263, 271 (2011) (collecting studies finding that people with PTSD exhibit decreased volumes of the frontal cortex and that the loss of volume is caused by PTSD). [18] In addition to changing the

[17] In addition to the direct physical consequences of PTSD, detailed *infra*, PTSD is significantly associated with general medical issues, gastrointestinal health, cardio-respiratory health, and one's experience of pain. *See* Marcia L. Pacella et al., *The Physical Health Consequences of PTSD and PTSD Symptoms: A Meta-Analytic Review*, 27 J. ANXIETY DISORDERS 33, 41 (2013) (conducting a meta-analysis of 62 studies).

[18] This Court, the Supreme Court, and other circuits have repeatedly relied on academic and scientific literature. *See, e.g.*, *United States v. Poole*, 545 F.3d 916, 921 n.5 (10th Cir. 2008) (citing a law review article "collecting social science literature showing that juries often misunderstand their instructions"); *Williams v. Sec'y Penn. Dept. of Corr.*, 848 F.3d 549, 566 (3d Cir. 2017) (reviewing "body of scientific literature" on psychiatric harms of extended solitary confinement); *Brown v. Bd. of Ed.*, 347 U.S. 483, 494 n.11 (1954), *supplemented by* 349 U.S. 294 (1955) (citing articles detailing the harm that segregated schooling inflicts upon Black students); *Young v. Conway*, 698 F.3d 69, 78-79 (2d Cir. 2012) (favorably referencing scientific research on eyewitness identification provided in amicus brief).

brain's structure, PTSD alters stress hormone levels and responses. *See* Rachel Yehuda et al., *Post-traumatic Stress Disorder*, 1 NATURE REVS. 1, 4 (2015) (summarizing studies finding that individuals with PTSD display lower basal cortisol levels and elevated catecholamine levels, and that people with PTSD display exaggerated negative feedback sensitivity in the hypothalamic-pituitary-adrenal axis). Finally, PTSD alters DNA at the molecular level, accelerating cellular aging, which may lead to neurodegeneration and premature mortality. *See* Erika J. Wolf et al., *Accelerated DNA Methylation Age: Associations with PTSD and Neural Integrity*, 63 PSYCHONEUROENDOCRINOLOGY 155, 155, 159 (2016).[19] In sum, PTSD inflicts physical injuries by decreasing the volume of various brain regions via irreversible neuronal death, altering stress hormone levels, and accelerating cellular aging.[20]

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[19] Some of these changes may be permanent. *See* Seyma Katrinli et al., *Evaluating the Impact of Trauma and PTSD on Epigenetic Prediction of Lifespan and Neural Integrity*, 45 NEUROPSYCHOPHARMACOLOGY 1609, 1609, 1613 (2020) (finding that people who had recovered from PTSD still showed signs of accelerated cellular aging, which is in turn linked to a higher risk of neurocognitive decline and a shorter lifespan). Here, the mental health provider who diagnosed Rowe with PTSD told him that it would affect him for "the rest of his life." A.56.

[20] Although Rowe did not allege the precise physiological changes detailed above, he did explain that his PTSD was a "debilitating" and

Rowe's PTSD was so severe that he experienced "constant symptoms" in the weeks following the assault and harassment he suffered on August 17. A.26. These symptoms only "increas[ed] in strength" after he experienced additional sexual harassment and threats to rape or kill him on September 17. A.26, A.34. Although Rowe was finally diagnosed with PTSD on October 31, A.56, he had not received mental health treatment nor did he report a reduction in the severity of his PTSD symptoms by the time he filed his complaint. Moreover, Rowe was told by the mental health provider that his condition was expected to be permanent. A.56. Given the numerous physical injuries wrought by PTSD, there is no question that Rowe's affliction with this disorder satisfies § 1997e(e).

* * *

In short, Rowe pled multiple qualifying physical injuries under § 1997e(e). But even if this Court disagrees and holds that § 1997e(e) bars Rowe from seeking compensatory damages for mental or emotional

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"permanent" injury, A.42, A.70, and wrote his *pro se* complaint with no or very limited access to empirical scientific literature. If this case is remanded for further proceedings, Rowe can seek leave to amend to include references to this literature.

injury, § 1997e(e) still would not serve as a basis to dismiss his complaint. Rowe also sought punitive and nominal damages, A.73, which are unaffected by § 1997e(e)'s strictures, *Searles*, 251 F.3d at 878.

CONCLUSION

For these reasons, this Court should reverse the district court's order dismissing Rowe's complaint and remand for further proceedings.

Dated: March 2, 2022

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Rowe, through his *pro bono* appellate counsel, respectfully requests oral argument because this case implicates multiple unresolved questions of statutory interpretation—including whether 28 U.S.C. § 1997e(e) incorporates an atextual more-than-*de-minimis* physical injury requirement and whether the physical effects of post-traumatic stress disorder are physical injuries within the meaning of the statute—as well as serious constitutional questions.

CERTIFICATES OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(g)(1) because it contains 12,794 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 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 2016 in Century Schoolbook 14-point font.

Dated: March 2, 2022

/s/ Devi M. Rao
Devi M. Rao

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I certify that on March 2, 2022, I filed a true, correct, and complete copy of the foregoing Brief of Appellant with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF System.

Participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: March 2, 2022

/s/ Devi M. Rao
Devi M. Rao

Counsel for Plaintiff-Appellant

10th CIR. R. 28.2(A) ATTACHMENT TO BRIEF

Memorandum and Order Dismissing Case, Dkt. 23, filed Sept. 28, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

LOGAN EUGENE ROWE,

Plaintiff,

v. **CASE NO. 19-3024-SAC**

(FNU) CHURCH, et al.,

Defendants.

MEMORANDUM AND ORDER

This matter comes before the Court upon Plaintiff's response to the Court's Memorandum and Order to Show Cause (MOSC) issued July 28, 2021. For the reasons set forth below, the Court will dismiss the matter without prejudice for failure to state a claim upon which relief can be granted.

I. Nature of the Matter before the Court

Plaintiff commenced this action while housed in the Sumner County Detention Center (SCDC), in Wellington, Kansas, pending his extradition to Oklahoma. As Count I of his amended complaint, Plaintiff claims that Defendant Doe violated his constitutional rights by spreading an unfounded rumor at SCDC that Plaintiff is racist. *Id.* at 8-9. As Count II, Plaintiff asserts that Defendants Baucom and Yoder violated his constitutional rights by their deliberate indifference to the substantial risk of harm Plaintiff faced because of the rumor. *Id.* at 15. As Count III, Plaintiff asserts Defendant Yoder acted with deliberate indifference toward

a substantial risk of serious harm to Plaintiff when Defendant Yoder allowed Plaintiff and inmate Cooks to be placed in a hallway together despite knowing that SDCD administrators had "flagged" Plaintiff and Cooks with respect to each other. As Count IV, Plaintiff alleges that Defendants Church, Baucom, and Yoder demonstrated deliberate indifference to the risk of further injury to Plaintiff, as shown by their failure to comply with the Prison Rape Elimination Act (PREA).[1] *Id.* at 33-34.

As Count V, Plaintiff alleges that Defendants Yoder and Church unconstitutionally retaliated against him by taking "actions that were intended to deter the Plaintiff from engaging in a protected activity," presumably his pursuit of his complaints under the PREA. *Id.* at 49. As Count VI, Plaintiff alleges a claim of negligence under the Kansas Tort Claims Act (KTCA). *Id.* at 61. Plaintiff seeks declaratory and injunctive relief, money damages, attorney's fees, and any other relief the Court deems proper. *Id.* at 63-65.

Because Plaintiff was a prisoner at the time he filed his amended complaint, the Court was required by statute to screen his complaint and must dismiss the complaint or any portion thereof

[1] The petition left the basis for Count IV unclear, so the Court construed Count IV as alleging a claim based on violations of the PREA. (Doc. 19, p. 5.) Plaintiff clarifies Count IV in his response and asserts that "[h]is use of the language of the PREA was proof objectively and subjectively that the defendants were aware of in detail, specifically without mere abstract conclusions of the substantial risk for harm the numerous claims and multiple complicated events caused. The Plaintiff used the PREA language and reference to show further that the defendants knew they were liable and could not attempt to claim qualified immunity." (Doc. 20, p. 4.)

that is frivolous, fails to state a claim on which relief may be granted, or seeks relief from a defendant immune from such relief. *See* 28 U.S.C. § 1915A(a) and (b); 28 U.S.C. § 1915(e)(2)(B). After conducting the initial screening, the Court issued the MOSC directing Plaintiff to show cause, in writing, why this matter should not be dismissed without prejudice.[2] (Doc. 19.) Plaintiff timely filed a response. (Doc. 20.)

II. Discussion

As a preliminary matter, the Court will respond to Plaintiff's "object[ion to] this Court's use of the *Martinez* report to essentially respond with an order that appears to him to be essentially a Summary Judgment [order] written by the Court on behalf of the defendants." (Doc. 20, p. 2.) The Court agrees that if it had before it a motion to dismiss for failure to state a claim, the Court could not consider the *Martinez* report without converting the motion to dismiss into one for summary judgment. *See Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010). But at the current stage in the proceedings, the Court is screening the complaint as required by 28 U.S.C. § 1915A(a) and (b). The Tenth Circuit has repeatedly approved use of a *Martinez* report to aid in such screening. *See, e.g., Rachel v. Troutt*, 820 F.3d 390, 396 (10th

[2] Plaintiff has suggested that the MOSC was "written for another individual's Complaint" and that it "does not make sense" when applied to his submitted complaint. (Doc. 20, p. 102.) The Court assures Plaintiff that the MOSC is directed to the amended complaint in this case, which Plaintiff filed on October 15, 2019 and which is the controlling complaint in this action.

Cir. 2016); *Gee v. Estes*, 829 F.2d 1005, 1007 (10th Cir. 1987). The Court recognizes that it "may not make credibility determinations solely from conflicting affidavits." *Id.* The Court assures Plaintiff it did not improperly utilize the *Martinez* report in screening this case, nor did it resolve any factual conflicts in Defendants' favor. Any concern that the Court "has taken the statements of the defendants as true and the Plaintiff's as false" is unnecessary. (See Doc. 20, p. 2.)

A. PREA CLAIMS

In the MOSC, the Court noted that as a matter of law, Plaintiff cannot sue for violation of the PREA. *See Langston v. Friend*, No. 20-3213-SAC, 2021 WL 1694321, at *5 (D. Kan. April 29, 2021) (unpublished opinion). Plaintiff has now clarified for the Court that he did not intend to assert a claim under the PREA. (Doc. 20, p. 3-4.) Rather, he intended to assert "that his constitutional right to Due Process of Law and the Prohibition on Cruel and Unusual Punishment had been deprived and violated . . . ." *Id.* at 2. Since Plaintiff has clarified the amended complaint, the availability of PREA claims as a private cause of action is now irrelevant.

B. Kansas Tort Claims Act

The MOSC noted that Plaintiff's state-law-based claim of negligence in Count VI is not a claim that may be brought under § 1983. *See Davidson v. Cannon*, 474 U.S. 344, 347 (1986). In his response, Plaintiff has not provided any substantive argument why

his KTCA negligence claim should not be dismissed. Thus, the Court will dismiss Count VI.

C. Relief Sought

The precise nature of the relief Plaintiff seeks is difficult to discern from the amended complaint. In the portion of the complaint form for Plaintiff to identify the relief to which he believes he is entitled, he states, "See attachment D." (Doc. 8, p. 6.) Attachment D includes requests for declaratory relief, injunctive relief, money damages;,the removal of cameras at the SCDC, and the initiation of an investigation into allegations about noncompliance with PREA requirements, embezzlement, "staff-on-inmate Voyeurism and cross gender viewing," and the recording of inmates "performing bodily functions" or of nude inmates. (Doc. 8, p. 63-65.)

Injunctive and Declaratory Relief

As the MOSC noted, Plaintiff is suing the Defendants in their individual capacities only and, as such, may seek "only . . . money damages." *Brown v. Montoya*, 662 F.3d 1152, 1161 n.5 (2011) (citing *Hafer v. Melo*, 502 U.S. 21, 30, 27 (1991)). In his response, Plaintiff makes no substantive argument to the contrary. In addition, because Plaintiff is no longer incarcerated at SCDC, his claims for declaratory and injunctive relief against SCDC officials are moot. *See Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1311 (10th

Cir. 2010); *Marrie v. Nickels*, 70 F. Supp. 2d 1252, 1259 (D. Kan. 1999).[3]

Compensatory Damages

Plaintiff also seeks money damages. The MOSC noted that under the Prison Litigation Reform Act (PLRA), "[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 or the commission of a sexual act." 42 U.S.C. § 1997e(e). The Tenth Circuit has held that without "a prior showing of physical injury or the commission of a sexual act," a prisoner plaintiff may not obtain compensatory damages. *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001). In this context, "sexual act" requires genital contact or penetration. *See* 42 U.S.C. § 1997e(e); 18 U.S.C. § 2246(2). Plaintiff alleges that he was threatened with sexual acts, but he does not allege that a sexual act occurred; the only injuries Plaintiff alleges are PTSD and the physical manifestations thereof[4], which do not satisfy the "physical injury" requirement of the PLRA.

[3] The Court also notes that in the alternative, it would dismiss the requests for injunctive relief that are unrelated to the claims in the amended complaint, such as the request for orders related to cameras at SCDC and embezzlement. Although these requests for relief may have related to claims made in Plaintiff's original complaint, the Court has previously cautioned Plaintiff that "[a]n amended complaint is not an addendum or supplement to the original complaint but completely supersedes it. Therefore, any claims or allegations not presented in the amended complaint are no longer before the Court." (*See* Doc. 7, p. 15-16.)

[4] *See e.g.* Doc. 8, p. 34 (asserting that the actions/inaction underlying Count 4 "forc[ed Plaintiff] to internalize drastic and manic mental states and to experience emotional distress that was a result of the deprivations in count 1 and 2 and 3"); p. 38 (asserting that the alleged events "caused the Plaintiff to suffer the symptoms of P.T.S.D constantly").

In his response, Plaintiff asserts that in his original complaint and his amended complaint, he "cited 10th Circuit case law that ruled that For a Plaintiff to meet a Requirement of more than [de minimis] Physical injury, A diagnosis of PTSD arising out of the circumstances in the Complaint, are beyond [de minimis] and Permanent and Debilitating."[5] (Doc. 20, p. 5.) The Court has carefully reviewed the 65-page amended complaint and although Plaintiff repeatedly asserts therein that the Tenth Circuit "has ruled" that PTSD is more than a de minimis injury, the amended complaint contains no citation to legal authority that supports this assertion or ties it to the PLRA. Nor has the Court's independent research revealed any Tenth Circuit case that holds a diagnosis of PTSD is sufficient to meet the requirement that a prisoner plaintiff must show "physical injury or the commission of a sexual act" to obtain compensatory damages. Thus, Plaintiff's request for compensatory damages is barred by § 1997e(e).

D. Failure to State a Claim

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the

[5] In this portion of his response, the Plaintiff "asks this Court to address [a] Constitutional Question" regarding the constitutionality of 42 U.S.C. 1997e(e) and whether the United States Supreme Court should rule that PTSD is an injury for which prisoner plaintiffs may obtain compensatory damages. The constitutionality of § 1997e(e) is not squarely before this Court and the Court will decline to opine on future actions of the United States Supreme Court. *Cf. TransUnion LLC v. Ramirez*, 141 S. Ct. 290, 2203 (2021) ("Under Article III, federal courts do not adjudicate hypothetical or abstract disputes . . . [a]nd federal courts do not issue advisory opinions.").

United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48-49 (1988)(citations omitted). A court liberally construes a pro se complaint and applies "less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). But "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief," dismissal is appropriate. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007). Furthermore, "conclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). The court "will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on plaintiff's behalf." *Whitney v. New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997).

A. Deliberate Indifference (Counts I, II, III)

> "The constitution 'does not mandate comfortable prisons,' but neither does it permit inhumane ones, and it is now settled that 'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.' In its prohibition of 'cruel and unusual punishments,' the Eighth Amendment . . . imposes duties on [prison] officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'
>
> "In particular, . . . 'prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners." *Farmer v. Brennan*, 511 U.S. 825, 832-33 (1994)(citations omitted).

"To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety." *Id.* at 834. The "deliberate indifference" standard has both objective and subjective components. *Martinez v. Garden*, 430 F.3d 1302, 1304 (10th Cir. 2005). A prisoner satisfies the objective component by alleging facts showing he is "incarcerated under conditions posing a substantial risk of serious harm." *Farmer*, 511 U.S. at 834. A prisoner satisfies the subjective component by showing that the defendant acted with a "sufficiently culpable state of mind." *Id.* at 834. The prisoner must show that the defendant knew of and disregarded "an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exist, and he must also draw the inference." *Id.* at 837. It is not enough to assert that the official should have known of the risk of harm. *Id.*

1. Count I

In Count I, Plaintiff asserts that Defendant Doe was aware of the substantial risk of serious harm to Plaintiff if Defendant Doe told Cooks that Plaintiff was racist "[e]ither through training or through a generally understood public awareness." (Doc. 8, p. 8.) The MOSC concluded that it is insufficient to assert that Defendant Doe should have known of the risk of harm. Because the amended

complaint does not allege facts that plausibly show Defendant Doe was aware of facts from which he could draw the inference that his actions could place Plaintiff at substantial risk of serious harm and the amended complaint does not allege facts that plausibly show Defendant Doe drew that inference, the MOSC concluded that Count I should be dismissed. *See Farmer*, 511 U.S. at 837.

Plaintiff responds that "as a Jail professional," Defendant Doe was "responsible in their office for knowing the dynamics of prison and jail environments." (Doc. 20, p. 7.) Plaintiff also asserts that in the MOSC "the Court failed to acknowledge the Plaintiff's statement that discovery will show that the officers are specifically aware that race conflict is one of the top security threats. And is taught about this." *Id.* It appears that Plaintiff is referring to his assertion in the complaint that

> "Upon information and belief, the [SCDC's] training program, like similar facilities will show upon discover. That it educates new employees to the nature of confinement, risks to health and safety, how to deal with inmates, and how to handle potentially dangerous situations further between the PREA and the training of Sumner County Sherriff's office. It will be shown that the defendant was fully aware of the risk a rumor about the Plaintiff had the potential of creating." (Doc. 8, p. 10.)

Even taking this as sufficient to plead allegations that show a plausible claim that meets the objective prong of the deliberate indifference test, Plaintiff has failed to sufficiently plead facts that plausibly support the subjective prong of the test. *See Farmer*, 511 U.S. at 837. The amended complaint does not allege facts that

support a plausible conclusion that Defendant Doe actually drew the inference that informing another inmate that Plaintiff was racist could place Plaintiff at substantial risk of serious harm. Thus, Count I will be dismissed.

2. Count II

As to Count II, the MOSC concluded that even taking all the facts alleged in the complaint as true, Plaintiff has not stated a plausible claim that Defendants Baucom and Yoder were deliberately indifferent to an unconstitutional level. Plaintiff makes only conclusory allegations that Defendants Baucom and Yoder knew of the risk of harm to Plaintiff and chose to do nothing. Additionally, the facts alleged do not establish that Plaintiff endured conditions that "pos[ed] a substantial risk of serious harm" because of this choice. Finally, the complaint does not allege facts that plausibly establish that Cooks and Farmer's actions in the dayroom resulted from a belief that Plaintiff was racist. Although Cooks may have called Plaintiff a racist during the exchange, it appears that the disagreement was over the remote control.

In his response, Plaintiff states that in the amended complaint, he "made clear that the friendly relationship before Cooks was told by Doe he was Racist, he made clear the change and Sudden Violence and the sexual abuse and attempted assault." (Doc. 20, p. 8.) Plaintiff also asserts that the "Court, based upon the Martinez report, appears to be taking the position that the Conflict

was over a television remote. The Plaintiff's complaint stated it was factually over the tension created by the Spreading of the Rumor and the label As a Racist." *Id.*

The Court has reviewed the portion of the amended complaint dedicated to Count II. (Doc. 8, p. 15-22.) Therein, Plaintiff alleged that on August 2, 2018, Deputy Bebe informed Defendants Baucom and Yoder that Plaintiff was worried he was at substantial risk of harm because of Defendant Doe spreading the rumor that Plaintiff is racist, but Defendants Baucom and Yoder took no action to protect Plaintiff. *Id.* at 15. Plaintiff then alleges:

> "On 08/17/2018 the Plaintiff was assaulted and sexually abused by Terril Lee Cooks and Arrell Farmer. At 4:30 p.m. the Plaintiff was watching a movie in the day room. Terrill Cooks approached the Plaintiff demanding the remote to the T.V. The Plaintiff refused stating he was watching a movie. Terill Lee Cooks said 'Is that right' to the Plaintiff and walked to the POD door and picked up a broom." *Id.* at 16.

Cooks then allegedly threatened Plaintiff with the broom and, among other insults, called Plaintiff racist. *Id.*

Based on these allegations, Plaintiff's claim in Count II is, generally speaking, that (1) he warned the defendants of the risk he faced because of the rumor that he was racist, (2) the defendants did nothing, and (3) because of their inaction, Plaintiff was placed at substantial risk of serious harm, as seen when Cooks threatened to rape him. For this reasoning to succeed, however, the risk of harm—and the resulting harm Plaintiff allegedly suffered during the

dayroom confrontation with Cook—must be related to the risk of which the defendants were aware.

The Court concluded in the MOSC that Plaintiff failed to plead facts that support a plausible inference that the disagreement with Cook was related to the rumor, so the disagreement with Cooks was not a risk of harm that the defendants could have foreseen or disregarded. That conclusion resulted from the allegations in the amended complaint as detailed above, not from information in the *Martinez* report. Having again reviewed the amended complaint and carefully considered the Plaintiff's response, the Court is not persuaded otherwise. Accordingly, Count II will be dismissed.

3. Count III

With respect to Count III, the MOSC concluded that even taking all the allegations in the complaint as true, Plaintiff has not alleged a plausible constitutional claim for deliberate indifference based on the hallway incident. Although the allegations show that Defendant Yoder was aware of the flag, a flag by itself does not appear to meet the objective prong of the deliberate indifference test: that Plaintiff, by being alone in a hallway with Cooks, would face "conditions posing a substantial risk of serious harm." *See Farmer*, 511 U.S. at 834. The MOSC also concluded that Plaintiff's allegations that Defendant Yoder disregarded "an excessive risk to [Plaintiff's] health or safety," are merely conclusory and therefore did not state a claim upon which

relief can be granted. Finally, Cooks threatening Plaintiff for approximately 90 seconds did not constitute serious harm.

In his response, Plaintiff correctly points out that a prisoner need not actually suffer substantial harm to assert his or her constitutional right to be protected from an excessive risk to his or her health or safety. *See Farmer*, 511 U.S. at 845 ("'[O]ne does not have to await the consummation of threatened injury to obtain preventive relief.'"). But the remedy for unsafe conditions that have not yet caused harm is "injunctive relief to prevent a substantial risk of serious injury from ripening into actual harm." *See id.* And for the reasons already set forth above, injunctive relief is not available to Plaintiff in this action.

Plaintiff's response also asserts that the Court erred by finding his allegations that Defendant Yoder knew of and disregarded a serious risk of substantial harm Plaintiff would face by being placed in a hallway with Cooks. (oc. 20, p. 9.) The facts alleged in the amended complaint, however, show that Defendant Yoder told Plaintiff that pulling him at the same time as Cooks "was a simple mistake" and that Defendant Yoder had "overlooked" the flag. (Doc. 8, 32.) Although Plaintiff does not believe Defendant Yoder, he has alleged no facts to support this belief. The Court has again reviewed the portions of the amended complaint dedicated to Count II and finds that Plaintiff has failed to plead facts, even if taken

as true, that allege a plausible claim of deliberate indifference in Count II.

B. Denial of Access to Mental Health Care (Count IV)

The MOSC liberally construed Count IV as asserting a claim that Defendants Church, Baucom, and Yoder denied Plaintiff access to mental health services, but held that the facts alleged in support of this count do not allege specific dates and times that each specific defendant denied Plaintiff's requests for mental health services. Because the generalization makes it impossible to ascertain what unconstitutional act each defendant is alleged to have committed, the MOSC concluded that Plaintiff did not allege a plausible claim in Count IV.

In his response, Plaintiff reiterates that he "did not attempt to state a claim for a violation of Federal Law. He stated a claim for Deprivation of Federal Rights." (Doc. 20, p. 10.) Plaintiff again relies on his reasoning that if the SCDC, as an accredited facility, improperly denied him access to a "trained professional" as guaranteed by the PREA. *Id.* at 10-11. For the reasons already explained, however, Plaintiff is not entitled to sue for violations of the PREA, even when they are couched in terms of due process. Therefore, Count IV will be dismissed.

C. Retaliation (Count V)

In the MOSC, the Court noted that an "inmate claiming retaliation must allege *specific facts* showing retaliation because

of the exercise of the prisoner's constitutional rights." *Fogle v. Pierson*, 435 F.3d 1252, 1264 (10th Cir. 2006)(quotations and citations omitted). A prisoner must show that the challenged actions would not have occurred "but for" a retaliatory motive. *Baughman v. Saffle*, 24 Fed. Appx. 845, 848 (10th Cir.2001)(citations omitted). The Court concluded that the complaint does not allege specific facts that demonstrate more than Plaintiff's personal belief that Defendants would not have taken the actions but for a retaliatory motive. Thus, he has failed to allege a plausible claim for unconstitutional retaliation.

In his response, Plaintiff contends that the facts supporting his claim are sufficient and plain. (Doc. 20, p. 6.) He points to his right to certain treatment and to use resources ensured by the PREA, which he asserts is protected by the Fourteenth Amendment's due process clause. *Id.* The Court has again reviewed the amended complaint and concludes that although Plaintiff repeatedly asserts that certain actions were taken in retaliation for his attempts to utilize PREA-guaranteed resources, Plaintiff has not alleged specific facts that demonstrate more than his personal belief in the alleged retaliatory motive.

Plaintiff was placed in administrative segregation after filing a PREA grievance, for example, but temporal proximity alone is not sufficient to plausibly allege retaliatory motive. Even taking all the facts alleged in the amended complaint as true and

considering them in the light most favorable to Plaintiff, he has failed to state a claim for unconstitutional retaliation. Thus, the Court will dismiss Count V.

IV. Conclusion

In summary, the Court has considered Plaintiff's response and carefully reviewed the amended complaint in light of the arguments made therein. The Court concludes that Plaintiff may not seek injunctive, declaratory, or compensatory relief in this action. In addition, he has failed to state a claim upon which such relief could be granted. Accordingly, the Court will dismiss this action without prejudice.

IT IS THEREFORE ORDERED that this action is dismissed without prejudice for failure to state a claim upon which relief could be granted.

IT IS SO ORDERED.

DATED: This 28th day of September, 2021, at Topeka, Kansas.

S/ Sam A. Crow

SAM A. CROW
U.S. Senior District Judge