No. 21-1446

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FRANCISCO SERNA,
Plaintiff-Appellant,

v.

DENVER POLICE DEPARTMENT, *et al.*
Defendants-Appellees.

On Appeal from the United States District Court for the District of Colorado (Civ. No. 21-CV-789, Hon. William J. Martinez)

BRIEF FOR APPELLANT

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REGULATIONS

STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals in this case.

STATEMENT OF JURISDICTION

Francisco Serna brought this action under the Agricultural Improvement Act of 2018 (the "2018 Farm Bill"), Pub. Law 115-334 § 10114(b), codified in relevant part at 7 U.S.C. § 1639o, for the Appellees' interference with his transportation of licensed industrial hemp across state lines. The district court had jurisdiction pursuant to 28 U.S.C. § 1331, and entered a final judgment on December 7, 2021. (Final Judgment, ROA at 137).[1] The notice of appeal was timely filed in the district court on December 29, 2021. (Notice of Appeal, ROA at 138). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1) Whether the 2018 Farm Bill, which declared that "no State or Indian Tribe shall prohibit" the interstate transportation of hemp, contains an implied private right of action to enforce that prohibition?
2) Whether the District Court abused its discretion by dismissing

[1] Citations to "ROA" are to the record on appeal, Appellate ECF No. 18.

Mr. Serna's complaint with prejudice without first offering him an opportunity to amend?

INTRODUCTION

Congress passed the 2018 Farm Bill to support America's struggling farmers. Among other things, the 2018 Farm Bill created a new cash crop to help farmers increase revenues: industrial hemp, used in everything from health products to home insulation. But state and tribal prohibitions could stymie farmers' efforts to get their crops into interstate commerce. So, in the 2018 Farm Bill, Congress attempted to solve the problem by prohibiting states and tribes from interfering with the interstate transportation of licensed industrial hemp.

Mr. Serna, a licensed industrial hemp grower, was traveling back to his farm in Texas with hemp cuttings from Colorado when he was stopped in the Denver International Airport and his cuttings seized by the Denver Police Department. Mr. Serna brought this suit, seeking to enforce the provision Congress included in the 2018 Farm Bill prohibiting states from interfering with the interstate transportation of licensed industrial hemp. The lower court dismissed Mr. Serna's complaint, finding that the 2018 Farm Bill did not contain an implied

private right of action to enforce that prohibition.

The lower court's decision is wrong for three reasons. First, the 2018 Farm Bill contains an implied private right of action to help farmers be free from state interference in transporting their hemp across state lines. Second, the legislative history of the 2018 Farm Bill supports this implied private right of action. Third, even if the 2018 Farm Bill did not provide the proper cause of action for Mr. Serna's claim, he should have been given an opportunity to amend his complaint before his case was dismissed with prejudice. Thus, the lower court's decision should be reversed.

STATEMENT OF THE CASE

A. The 2018 Farm Bill Was A Critical Tool To Support Agriculture In The United States.

In December 2018, Congress passed and President Trump signed the Agriculture Improvement Act of 2018, colloquially known as the 2018 Farm Bill. Pub. L. No. 115-334 (2018). Every five years, Congress must reauthorize the farm bill—a feature dating back to the original farm bill, which was passed in 1933 to help farmers struggling in the depths of the Great Depression. *See* Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31, Title I (1933).

The farm bill is a critically important, half-trillion-dollar omnibus bill. Keith Hall, Cong. Budget Off., Pub. 54880, Direct Spending and Revenue Effects for the Conference Agreement on H.R. 2, Agriculture Improvement Act of 2018 (Dec. 11, 2018), *available at* https://www.cbo.gov/publication/54880 (estimating spending under the Farm Bill at "$428 billion over the 2019-2023 period and $867 billion over the 2019-2028 period"). It is the primary mechanism by which the federal government controls agriculture and food policy. *See, e.g.*, Amy E. Mersol-Barg, Note, *Urban Agriculture & the Modern Farm Bill: Cultivating Prosperity in America's Rust Belt*, 24 DUKE ENVT'L L. & POL'Y F. 279, 295–300 (2013). The farm bill has significant impacts on what food is grown, how, and where, all of which impact local economies, public health, the environment, and food safety. *Id.*

In recent years, the reauthorization of the farm bill has become a divisive matter. Chad G. Marzen, *The 2018 Farm Bill: Legislative Compromise in the Trump Era*, 30 FORDHAM ENVT'L L. REV. 49, 55 (2019). During the most recent reauthorizations of the farm bill, in 2014 and 2018, legislators were divided over the federal crop insurance program and the Supplemental Nutritional Assistance Program

("SNAP"). *Id.* at 55-58. In 2014, Republicans wanted to cut $40 billion from the SNAP program. *Id.* at 56. Democrats' strong objections to the proposed cuts threatened the passage of the entire 2014 farm bill, but eventually, lawmakers compromised and cut $8 billion from SNAP. *Id.*

Similarly, the House and Senate versions of the 2018 Farm Bill were markedly different in their treatment of SNAP. *Id.* at 63. *Compare* H.R. 2, 115th Cong. § 2 Title IV, Subtitle A (House version, June 21, 2018) *with* H.R. 2, 115th Cong. § 2 Title IV, Subtitle A (Senate amendment, June 28, 2018). The House version of the 2018 Farm Bill, which would have reduced SNAP funding by $23 billion, passed by only two votes, 213-211. Marzen, 30 FORDHAM ENVT'L L. REV. at 65-67. The Senate version of the bill, on the other hand, "did not include any significant changes in the SNAP program" and passed by a large margin, 86-11. *Id.* at 68, 71.

Before the bill could be signed into law by President Trump, it needed to undergo reconciliation, made all the more difficult by the fact that it was a lame-duck session of Congress. *See id.*

The reconciliation process focused on the significant differences between the House and Senate's treatment of the SNAP program,

particularly with respect to work requirements for SNAP benefits. *See*, *e.g.*, H.R. Rep. No. 115-1072 (2018) (Conf. Rep.) at 614-19. Ultimately, the reconciliation process left the SNAP program largely intact after the "2018 elections placed pressure on Republican lawmakers to enact the legislation prior to the Democrats taking control of the House of Representatives in the 116th Congress in 2019." Marzen, 30 FORDHAM ENVT'L L. REV. at 75.

B. The Farm Bill Was Designed To Help American Farmers By Expanding The Crops They Can Grow And Sell Across State Lines.

The 2018 Farm Bill included funding for many significant programs, such as rural development, organic agriculture, and African-American land grant institutions of higher education, to help promote the growth and economic sustainability of American farming. *Id.* at 82-83. As another way to promote the economic health of America's farmers, the 2018 Farm Bill opened the door for farmers to grow a new kind of cash crop: industrial hemp. *See generally* Pub. L. No. 115-334 § 12619, Title X, Subtitle G (2018) (removing hemp from the Controlled Substances Act and creating federal and state structures to manage and promote industrial hemp growth). Industrial hemp is used in

thousands of products, including construction materials, cosmetics, and pharmaceuticals. RENÉE JOHNSON, CONG. RSCH. SERV., RL32725, HEMP AS AN AGRICULTURAL COMMODITY 2-3 (2018). *See also* 164 Cong. Rec. S108, 4459-60 (daily ed. Jun. 27, 2018) (statement of Sen. McConnell) (citing the use of hemp in a wide variety of industries).

Hemp would allow most farmers to diversify their crops, 164 Cong. Rec. S109, 4704 (daily ed. June 28, 2018) (statement of Sen. Leahy), because it would fit in most farmers' existing crop rotations across the country, 164 Cong. Rec. S108, 4480 (June 27, 2018) (statement of Sen. Tester).

The most vociferous support of the legalization of hemp in the Senate came from then-Senate majority leader Mitch McConnell. Senator McConnell cited a large demand for hemp among American consumers, but explained that "thanks to heavy-handed regulations" on hemp farming in the United States, consumers had no choice but to import hemp from foreign producers if they wished to have a sufficient quantity for their needs. 164 Cong. Rec. S108, 4459-60 (daily ed. June 27, 2018). Given the vast demand for hemp products, Senator McConnell expressed hope that hemp could serve as a cash crop which

could reinvigorate the struggling American farm economy. *Id.* The strong support for the legalization of hemp in the Senate, particularly from Senator McConnell, was a key factor in pushing the Farm Bill through Congress. Marzen, 30 FORDHAM ENVT'L L. REV. at 89-90.

The 2018 Farm Bill was not the first time Congress had addressed hemp; the 2014 farm bill included pilot programs for hemp cultivation to encourage research into the feasibility of hemp as an industrial crop. RENÉE JOHNSON, CONG. RSCH. SERV., R44742, DEFINING HEMP: A FACT SHEET 4 (2019), *available at* https://crsreports.congress.gov/product/pdf/R/R44742; John Hudak, *The Farm Bill, Hemp Legalization, and the status of CBD: An Explainer*, BROOKINGS INST., (Dec. 14, 2018), https://www.brookings.edu/blog/fixgov/2018/12/14/the-farm-bill-hemp-and-cbd-explainer/. But because hemp was still illegal in many states, it often could not be transported across state lines without running the risk of being seized and destroyed by state police. *Cf., e.g.*, *Big Sky Sci. LLC v. Idaho State Police*, 19-CV-00040, 2019 WL 2613882, at *1 (D. Idaho Feb. 19, 2019) (Idaho police seized 13,000 pounds of industrial hemp being transported across Idaho from Oregon to Colorado), *rev'd sub nom. Big Sky Sci. LLC v. Bennetts*, 776 F. App'x 541 (9th Cir. 2019).

To solve this problem and further promote hemp farming, Congress included Subtitle G of Title X of the 2018 Farm Bill, now codified as 7 U.S.C. §§ 1639o-1369s. That Subtitle did two things: First, it enabled farmers in every state to grow industrial hemp in a federally compliant manner. *See* 7 U.S.C. § 1639p(a)(1) (allowing states to create regulatory plans, subject to approval by the Secretary of Agriculture); 7 U.S.C. § 1639q(a)(1) (requiring the Secretary of Agriculture to create a regulatory scheme for states that do not submit their own for approval). Since the 2018 Farm Bill also removed hemp from the Controlled Substances Act, farmers may now process, market, and sell their hemp and hemp products across the country. JOHNSON, CONG. RSCH. SERV. R44742, at 5.

Congress recognized that just legalizing hemp was insufficient; it also had to ensure that state lawmakers with different priorities would not interfere with industrial hemp producers. So, the second thing Congress did was clarify that "no State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products . . . through the State or the Territory of the Indian Tribe," as long as the hemp in question was grown in compliance with the other provisions of Subtitle

G. Agriculture Improvement Act of 2018, Pub. L. No. 115-334 § 10114(b) (2018). Responding in 2019, the USDA issued legal guidance articulating that the provision was intended to preempt any state prohibitions on transportation of hemp. *See* Memorandum from Stephen Alexander Vaden, General Counsel, U.S.D.A. (May 28, 2019), *available at* https://www.ams.usda.gov/sites/default/files/HempExecSumandLegalOpinion.pdf.[2]

The 2018 Farm Bill also included industrial hemp as a crop for which farmers are able to receive federal assistance through the Federal Crop Insurance program. Pub. L. No. 115-334 § 11101. That meant that, like other crops, farmers could receive crop insurance, including individualized risk management solutions, for hemp. Marzen, 30 FORDHAM ENVT'L L. REV. at 61. Farmers can use such crop insurance to "improve their pre-harvesting marketing plans" and as collateral for loans, among other uses. *Id.*

Through all of the measures taken in the 2018 Farm Bill, it is

[2] The USDA also issued implementing regulations which reiterate that "No State or Indian Tribe may prohibit the transportation or shipment of hemp lawfully produced" pursuant to the Farm Bill's scheme. 7 C.F.R. § 990.63.

clear that Congress intended to promote hemp as a viable industrial crop. And Congress's plan worked—industrial hemp production in the United States exploded after 2018, growing to $824 million in 2021. U.S. DEP'T OF AGRIC. NAT'L AGRIC. STATISTICS SERV., NATIONAL HEMP REPORT 1 (Feb. 17, 2022), *available at* https://usda.library.cornell.edu/concern/publications/gf06h2430.

C. The Denver Police Department Interfered With Mr. Serna's Transportation Of Industrial Hemp Across State Lines.

Appellant Francisco Serna is a Texas farmer licensed to grow industrial hemp on his family farm. (Compl., ROA at 12.) While traveling home from Colorado through Denver International Airport, Mr. Serna was stopped because he was transporting thirty-two hemp plant clones or rooted clippings (a method of plant propagation). (*Id.* at 11.) Mr. Serna produced certificates of compliance for these plant clones which showed that they constituted industrial hemp under Subtitle G of the 2018 Farm Bill because they contained less than 0.3% THC by weight. (*Id.* at 12.)

Despite the certificates of compliance, Appellee Officer Anselmo Jaramillo, after consulting with another Denver Police Department

officer, confiscated the hemp on the basis that "they had a policy of confiscating any plants above zero percent THC." (Recommendation of United States Magistrate Judge ("Recommendation"), ROA at 92.)

Mr. Serna filed suit *pro se* against the Denver Police Department and Officer Jaramillo (together, "Appellees"), seeking to protect his right to be free from interference as created by § 10114(b) of the Farm Bill. (Compl., ROA at 12.) Appellees filed a motion to dismiss, arguing that the 2018 Farm Bill did not create a private right of action for Mr. Serna to enforce in federal court. (Mot. Dismiss, ROA at 61.)

Magistrate Judge Hegarty recommended dismissing Mr. Serna's complaint for failure to state a claim under the 2018 Farm Bill, finding that it did not create a private right of action. (Recommendation, ROA at 100.) Magistrate Judge Hegarty cited two reasons for granting the motion. First, the 2018 Farm Bill gave the Secretary of Agriculture enforcement power over hemp growers who ran afoul of the rules and regulations governing growing industrial hemp (but not states who interfered with interstate commerce). (*Id.* at 98.) Second, Magistrate Judge Hegarty relied on the fact that the House version of the Farm Bill had "proposed a private right of action to challenge state

regulation"—but not interference with—"interstate commerce," which was not adopted in the final version of the Farm Bill. (*Id.* at 99-100.)

The District Court adopted the Magistrate's recommendation "in its entirety," though the District Court appeared to rely on different legal reasons than Magistrate Judge Hegarty. (Order Adopting June 9, 2021 Recommendation of United States Magistrate Judge (hereinafter "Order"), ROA at 126.) The District Court followed the two-part inquiry of *Alexander v. Sandoval*, 532 U.S. 275 (2001), and looked to see whether the statute "displays an intent to create not just a private right, but also a private remedy." (Order, ROA at 131.)

As to the first part of the inquiry, the District Court agreed that "§ 10114 [of the Farm Bill] identifies hemp producers licensed under Subtitle G as a protected class" with a right to be free from state or tribal interference with the interstate transportation of their hemp. (*Id.* at 134.) Nevertheless, the District Court adopted the Magistrate Judge's recommendation that Mr. Serna's Complaint be dismissed, because it was unable to find "language in the statute that displays an intent to create a private remedy" to enforce that right. (*Id.*)

SUMMARY OF THE ARGUMENT

Congress declared in the 2018 Farm Bill that "no State . . . shall prohibit the transportation or shipment of hemp or hemp products . . . through the State." Yet the Appellees here did just that, seizing Mr. Serna's compliant hemp products and prohibiting him from transporting them back to Texas. As a result, Mr. Serna is entitled to relief under the 2018 Farm Bill.

The lower court's dismissal should be reversed for three reasons. First, the 2018 Farm Bill contains an implied private right of action. On its face, the 2018 Farm Bill demonstrates clear Congressional intent to create both private rights and private remedies. When Congress passes laws creating personal rights but which fail to provide meaningful enforcement mechanisms, courts interpret Congress as having intended to create a private right of action to enforce those personal rights. Congress did exactly that in the 2018 Farm Bill—it provided rights to industrial hemp farmers but failed to create adequate enforcement mechanisms outside of a private right of action. As such, Congress intended courts to read a private right of action into the 2018 Farm Bill for hemp farmers. *See* Part I.

Second, the legislative history of the 2018 Farm Bill supports a private right of action. It makes clear that Congress intended to protect hemp farmers from state or tribal interference with the interstate transportation of their licensed industrial hemp, and would not have wanted that right to be unenforceable. Nothing in the legislative history indicates that Congress did not want individuals to enforce their right to be free from governmental interference in transporting their hemp in interstate commerce. Beyond the language of the statute, the legislative history lays bare Congress's intent to provide farmers with a valuable cash crop and allow them to take the crop market; such intent can only be effectuated if farmers can protect themselves, in a court of law, from state or tribal interference as they transport their crops across state lines. *See* Part II.

Finally, even if the 2018 Farm Bill does not provide a cause of action—and it does—Mr. Serna, appearing *pro se*, should have been given an opportunity to amend his complaint to add a federally recognized cause of action supported by the factual allegations in his complaint before the District Court dismissed his complaint with prejudice. *See* Part III.

ARGUMENT

I. THE 2018 FARM BILL CONTAINS AN IMPLIED PRIVATE RIGHT OF ACTION TO ENFORCE THE RIGHT OF FARMERS TO BE FREE FROM STATE AND TRIBAL INTERFERENCE.

The Magistrate Judge and the District Court erred in finding that the 2018 Farm Bill did not contain an implied private right of action to enforce farmers' right to be free from state and triable interference in the interstate transportation of their licensed industrial hemp.[3]

Congress intended for the provision of the 2018 Farm Bill prohibiting states and tribes from interfering with the interstate transportation of industrial hemp to be enforceable by a private right of action. Courts imply private rights of action when statutes create important personal rights, but fail to provide sufficient enforcement mechanisms. *See*, *e.g.*, *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 141 S. Ct. 1951, 1958 (2021) (affirming that a private right of action exists to enforce SEC Rule 10b-5), *Morse v. Republican Party of Virginia*, 517 U.S. 186, 234-35 (1996) (holding that a private right of action exists to enforce Section 10 of the Voting Rights

[3] (Recommendation, ROA at 96-100; Order, ROA at 126, 131-34). This Court reviews legal conclusions *de novo*. *Fowler v. Incor*, 279 F. App'x 590, 592-93 (10th Cir. 2008).

Act), *BlackRock Allocation Target Shares: Series S. Portfolio v. Wells Fargo Bank*, 247 F. Supp. 3d 377, 403 (S.D.N.Y. 2017) (holding that a private right of action exists to enforce the Trust Indentured Act).

Here, as the District Court correctly found, the 2018 Farm Bill unambiguously creates an important, personal right for a protected class: the right for farmers to be free from state and tribal interference in the interstate transportation of their industrial hemp. *See* Part A. But the 2018 Farm Bill fails to provide sufficient enforcement mechanisms to protect that right, much like SEC Rule 10b-5, the Voting Rights Act, and the Trust Indenture Act. As the Supreme Court and other courts have recognized with respect to those regulations and statutes, courts must imply a private right of action to ensure that the unambiguously created right in the 2018 Farm Bill is meaningful and effective. *See* Part B.

A. The 2018 Farm Bill Created A Private Right To Be Free From State And Tribal Interference In Interstate Transportation.

The District Court correctly held that the 2018 Farm Bill creates a private right for licensed farmers to be free from state and tribal interference in the interstate transportation of their industrial hemp.

(Order, ROA at 134.) When a statute contains a provision enacted for the benefit of a group, it is said to create a private right for the members of that group (sometimes called a protected class). *See, e.g.*, *Sandoval*, 532 U.S. at 288-89 (recognizing that the language "[n]o person . . . shall . . . be subjected to discrimination" in 42 U.S.C. § 2000d creates a private right); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 689-94 (1979) (finding Title IX to "explicitly confer[] a benefit on persons discriminated against on the basis of sex," and thus create a private right); *Cort v. Ash*, 422 U.S. 66, 78 (1975) (noting that a "statute create[s] a federal right in favor of the plaintiff" when Congress passes a statute for the "especial benefit" of a particular "class" of individuals).

In *Cannon*, for example, the Supreme Court found that the language of Title IX—"[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program . . . receiving Federal financial assistance," 20 U.S.C. § 1681—conferred a benefit on a specified class of individuals, and thus created a private right. *Cannon*, 441 U.S. at 694. Likewise, the Supreme Court has recognized that the language "no person shall be denied the right to vote" in section 5 of the

Voting Rights Act created a private right. *Allen v. State Bd. of Elections*, 393 U.S. 544, 554–55 (1969).

As the District Court recognized, here, as in Title IX and the Voting Rights Act, the 2018 Farm Bill conferred a benefit on a specified class of individuals, and thus created a private right. (Order, ROA at 134 ("The Court agrees that § 10114 identifies hemp producers licensed under Subtitle G as a protected class.").) Section 10114(b) of the 2018 Farm Bill declares that "no State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products . . . through the State or the Territory of the Indian Tribe," as long as the hemp in question was grown in compliance with Subtitle G. Pub. L. No. 115-334 § 10114(b). This language clearly confers a benefit, freedom from State or Tribal interference, on a specified class of individuals, licensed hemp farmers. *Id.* Thus, like Title IX and the Voting Rights Act, this provision of the 2018 Farm Bill creates a private right. *See* (Order, ROA at 134), *Cannon*, 441 U.S. at 694; *Allen*, 393 U.S. at 554–55.

B. Courts Must Imply A Private Right Of Action To Enforce The Farm Bill's Private Right To Be Free From State And Tribal Interference.

This Court should imply a private right of action to enforce the

licensed hemp farmers' right to be free from state and tribal interference in the interstate transportation of their hemp because the 2018 Farm Bill does not provide any enforcement mechanism to give effect to that right. In a wide variety of contexts, both before and after the Supreme Court's decision in *Sandoval*, courts have implied private rights of action when statutes protect important personal rights, but fail to provide sufficient enforcement mechanisms to meaningfully secure those rights. *See* Part 1. Contrary to the District Court's conclusion, *Sandoval* does not change the result. Indeed, the 2018 Farm Bill contains clear Congressional intent to create both a private right and a private remedy, and thus meets *Sandoval*'s requirements. *See* Part 2.

1. An implied private right of action is necessary because Congress failed to provide any enforcement mechanisms in the 2018 Farm Bill.

An implied private right of action is necessary because Congress did not specify who could enforce farmers' right to be free from state and tribal interference in the interstate transportation of their industrial hemp. When Congress creates an important right in a statute benefitting a particularized group, but fails to provide an enforcement mechanism to effectuate that right, courts imply a private

right of action to give meaning to Congress's intent. *See*, *e.g.*, *BlackRock*, 247 F. Supp. 3d at 403; *Fixed Income Shares: Series M v. Citibank N.A.*, 130 F. Supp. 3d 842, 850 (S.D.N.Y. 2015).

For example, sections 315(b) and (c) of the Trust Indenture Act created rights to benefit investors by imposing certain fiduciary duties on trustees. *Fixed Income Shares*, 130 F. Supp. 3d at 850 ("Sections 315(b) and (c) impose specific duties that the trustee must perform to protect investors, and 'a statute that imposes fiduciary duties necessarily implies corresponding rights in the beneficiaries.'"). The Trust Indenture Act of 1939 required that a trustee be appointed for all bond issues so that the rights of bondholders could be protected. *See* 15 U.S.C. § 77ggg. Congress enacted the Trust Indenture Act to "increase the protection of investors who depend upon the security which an indenture trustee holds in their interest" and to do so on a nationwide scale. *Zeffiro v. First Pennsylvania Banking & Tr. Co.*, 623 F.2d 290, 297 (3d Cir. 1980) (citation omitted). *See also, e.g.*, 15 U.S.C. § 77bbb(a) (noting that previous abuses by indenture trustees impacted "the national public interest"); S. Rep. No. 76-248, at 3 (1939) (noting the importance of a national, uniform system to address these abuses).

But the Trust Indenture Act contained no explicit private right of action, and the SEC "has no power to enforce the terms of an indenture after it has been qualified under the Act," thus leaving the created right without an enforcement mechanism absent an implied private right of action. *Fixed Income Shares*, 130 F. Supp. 3d at 848–49. Because Congress would not have wanted the important private rights it had created left unenforceable, multiple courts after *Sandoval* have interpreted the Trust Indenture Act to contain an implied private right of action. *See, e.g.*, *BlackRock*, 247 F. Supp. 3d at 403 (finding an implied private right of action post-*Sandoval*); *Fixed Income Shares*, 130 F. Supp. 3d at 850 (finding same post-*Sandoval*); *Zeffiro*, 623 F.2d at 301 (finding same, pre-*Sandoval*).

Here, like the Trust Indenture Act, the 2018 Farm Bill created a clear private right, *see supra* Part I, that Congress intended to be enforced, *see infra* Part II. And like the Trust Indenture Act, there is no alternative mechanism in the 2018 Farm Bill to provide meaningful enforcement of the right for farmers to be free from state or tribal interference during the interstate transportation of industrial hemp. The 2018 Farm Bill is silent as to who may enforce its prohibition on

interference with interstate commerce.[4] Thus, like the Trust Indenture Act, courts must read into the 2018 Farm Bill an implied private right of action to enforce the farmers' right to be free from State or Tribal interference in their interstate transportation of industrial hemp. *See, e.g.*, *BlackRock*, 247 F. Supp. 3d at 403; *Fixed Income Shares*, 130 F. Supp. 3d at 850.

Even if Congress had given some enforcement authority to the Secretary of Agriculture—and it did not, *see supra* and n.4—courts still read private rights of action into statutes that only provide general enforcement authority over some provisions of a statute and not specific

[4] That the prohibition appears in a subsection of the bill that also gives some regulatory power to the Secretary of Agriculture does not imply, as the District Court and Magistrate Judge here seemed to rely on, that Congress intended the Secretary of Agriculture to enforce the farmers' right to be free from interference with the interstate transportation of their hemp. (*See, e.g.*, Order, ROA at 132-34.) As both the District Court and Magistrate Judge acknowledge, the 2018 Farm Bill only gives the Secretary of Agriculture responsibility over the regulation of hemp *production*—such as how it is grown; what licenses are required; and what tests must be performed on the plants, when, and by whom. *See, e.g.*, 7 U.S.C. § 1639p(a)(1) (requiring Secretary of Agriculture to review state hemp regulation plans); 7 U.S.C. § 1639q(a)(1) (requiring Secretary of Agriculture to create a regulatory scheme for states that do not submit their own for approval). It says nothing about enforcement of the provision giving farmers the right to be free from interference in the interstate transportation of their hemp.

authority to enforce a particular private right created by that statute. When a statute provides some general enforcement authority to a government entity, but that general enforcement authority would be insufficient to ensure the protection of a particular private right created by a statute, courts will read an implied private right of action into that statute. *See Morse*, 517 U.S. at 231.

For example, in *Morse* the Supreme Court found that Section 10 of the Voting Rights Act contained an implied private right of action despite also giving some enforcement authority to the Attorney General. *Id.*[5] Section 10 prohibited poll taxes. Pub. L. No. 89-110, 79 Stat. 437, § 10(a) (1965). Congress expressly "authorized and directed" the Attorney General of the United States to "institute forthwith . . . actions . . . for declaratory judgment or injunctive relief against the enforcement of any requirement of the payment of a poll tax as a

[5] Justice Stevens authored the majority opinion on this point, which Justice Ginsburg joined in full. Justices Breyer, O'Connor, and Souter concurred in the judgment, but specifically agreed with the majority's private right of action analysis in their concurrence. *See id.* at 240 (Breyer, O'Connor, and Souter, JJ., concurring) (agreeing with Justices Stevens and Ginsburg that "Congress must be taken to have intended to authorize a private right of action to enforce § 10 of the Act"). Thus, there were five votes on the private right of action portion of the majority opinion.

precondition to voting" to prevent racial discrimination. *Id.* § 10(b).

Notwithstanding this direct grant of enforcement authority, in *Morse*, the Supreme Court held that § 10 of the Voting Rights Act contains an implied private right of action. 517 U.S. at 231. Justice Stevens, in his opinion for the majority, recognized that the general enforcement authority granted to the Attorney General would be insufficient to protect voters' rights and that "achievement of the Act's laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." *Id.* (citation omitted).

Here, unlike the Voting Rights Act, the 2018 Farm Bill does not grant explicit enforcement authority as to the farmers' right to be free from state or tribal interference with the interstate transportation of their industrial hemp. It only gives the Secretary of Agriculture authority to sanction farmers who fail to comply with plans erected to grow industrial hemp. *See* Pub. L. No. 115-334, Title X, Subtitle G.

But even if Congress had delegated to the Secretary of Agriculture a general power to enforce the farmers' right to be free from interference, that would be insufficient to supplant an implied private

right of action under *Morse*. Like the Voting Rights Act, the Farm Bill is a massive piece of legislation impacting people across the nation. *See generally* Pub. L. No. 115-334 (2018). Attempting to enforce such laws without a private right of action would be certain to fail to vindicate the important rights that the laws in question seek to protect. *See Morse*, 517 U.S. at 231.

2. Sandoval *does not require a contrary result.*

Contrary to the belief of both the Magistrate Judge and the District Court, *Sandoval* does not dictate a different result. In *Sandoval*, the Supreme Court explained that its long line of implied private right of action cases could be distilled to require two showings in order for a court to read a private right of action into a statute: if Congress has "display[ed] an intent to create not just a private right but also a private remedy" in a statute, then it is for the courts to imply a private right of action to effectuate that intent. *Sandoval*, 532 U.S. at 286. "Statutory intent on this latter point is determinative." *Id.*

To illustrate the difference between where the Supreme Court believed Congress had indicated an intent to create a private right and remedy and where it had not, the Court compared sections 601 and 602

of Title VI of the Civil Rights Act of 1964. *Id.* at 278-89. Section 601 was intended to prohibit intentional discrimination and provided that "no person shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity covered by Title VI." *Id.* at 278 (quoting 42 U.S.C. § 2000d). The *Sandoval* Court recognized that it was "beyond dispute that private individuals may sue to enforce § 601," even though that section did not contain any language explicitly creating a private right of action within Title VI. *Id.* at 280 (citation omitted).

Section 602, on the other hand, delegated authority to federal agencies to regulate disparate-impact discrimination, a type of discrimination that manifests itself in conduct or activities that may be permissible under § 601's general prohibition. *Id.* at 281-82. Pursuant to § 602's delegation, Justice promulgated rules to clarify the scope of prohibition against activities that result in disparate impact on racial groups. *Id.* at 278.

The Court held that § 602 did *not* confer an implied private right of action. *Id.* at 288-89. This was because § 602's language lacked the

"independent force" necessary to create a private right of action.[6] *Id.* at 285-86. But the absence of explicit language alone cannot preclude a finding of an implied private right of action, as the Court's preceding § 601 analysis concluded. Instead, the Court relied on the fact that § 602's delegation of authority "focuse[d] . . . on the agencies that will do the regulating" against disparately impactful activities, which were not explicitly prohibited by section 601, *id.* at 289, while § 601 focused on providing a private right of action to those protected class members who are subject to unlawful intentional discrimination. *Id.* at 278.

Here, like § 601 in *Sandoval*, the 2018 Farm Bill contains rights-creating language. *See* part I.A, *supra*. Mr. Serna does not seek to enforce regulations delegated to the province of a federal agency. Instead, Mr. Serna seeks relief where Congress has provided for the protection of an important private right. *See Sandoval*, 532 U.S. at 280 (citing *Cannon*); *Cannon*, 441 U.S. at 690.

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[6] Section 602 authorized federal agencies "to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability." 42 U.S.C. § 2000d–1. Under this authority, the DOJ promulgated a regulation forbidding funding recipients to "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin." 28 C.F.R. § 42.104(b)(2).

As for the private remedy, Congressional intent is also clear. When Congress uses language in a statute that implies certain equitable remedies, courts have interpreted that language as clear evidence of Congressional intent to create a private right of action to seek those remedies. *See, e.g.*, *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979).[7] For example, in *Transamerica*, the Supreme Court looked to Congress's use of the word "void" in a statute to "conclude that the statutory language itself fairly implies a right to specific and limited relief in a federal court." *Id.* "By declaring certain contracts void, § 215 by its terms necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere." *Id.* The use of the word "void," the Supreme Court held, demonstrated that Congress "intended that the customary legal incidents of voidness would follow, including the availability of a suit for rescission or for an injunction against continued operation of the contract, and for restitution." *Id.* at 19.

[7] Although *Transamerica* predates *Sandoval*, it discerned Congress's intent solely from the text of the statute, and thus comports with *Sandoval*'s suggestion that courts "begin [the] search for Congress's intent with the text." *Sandoval*, 532 U.S. at 288.

Similarly, here Congress implied the availability of limited injunctive or declaratory relief when it banned states and tribes from prohibiting interstate transportation of licensed industrial hemp. When Congress prohibits an entity from acting in a certain manner, that necessarily implies the availability of limited injunctive relief to effectuate that prohibition. *Cf. Atl. Coast Line R. Co. v. Bhd. of Locomotive Engineers*, 398 U.S. 281, 295 (1970) (noting that two exceptions to statutory prohibition against federal court interference in state court proceedings imply that "some federal injunctive relief may be necessary" even though such relief was not expressly provided for in the statute).

Thus, like in *Transamerica*, the 2018 Farm Bill's directive that states and tribes not prohibit interstate transportation of licensed industrial hemp necessarily demonstrates Congress's intent to include a limited equitable injunctive remedy. And this intent is further confirmed by the legislative history. *See* part II.

Therefore, even under *Sandoval*, the 2018 Farm Bill creates a private right of action because it includes both a private right (to be free from state interference) and a private remedy (injunctive relief).

* * *

Congress clearly created a private right for licensed farmers to be free from State and Tribal interference with the interstate transportation of their industrial hemp. As demonstrated above, even post-*Sandoval*, courts have implied private rights of action to enforce such clearly-created rights. That is particularly so when, as demonstrated below, the legislative history makes clear that Congress created the right intending that it be enforceable.

II. THE LEGISLATIVE HISTORY SUPPORTS AN IMPLIED PRIVATE RIGHT OF ACTION FOR FARMERS.

The legislative history of the 2018 Farm Bill supports an implied private right of action in two ways: First, it makes clear that Congress thought it was important to protect farmers from state and tribal interference with the interstate transportation of hemp. *See* Part A. Second, nothing in the legislative history supports the conclusion that Congress intended to deprive farmers of the rights it explicitly granted. *See* Part B. As such, the Magistrate Judge and, ultimately, the District Court erred in finding that the legislative history of the 2018 Farm Bill did not support an implied private right of action. (Recommendation, ROA at 99-100, Order, ROA at 126.)

A. The Legislative History Makes Clear That Congress Wanted To Protect Farmers From State And Tribal Interference In Interstate Transportation Of Industrial Hemp.

Congress clearly intended to create a robust hemp farming program with the passage of the 2018 Farm Bill. Congress sought to clear the way for industrial scale production of a cash crop that could reinvigorate the struggling American farm economy. 164 Cong. Rec. S108 at 4459-60. Hemp would allow most farmers to diversify their crops because it fit into existing crop rotation patterns used throughout the country. *See id.* at 4480; 164 Cong. Rec. S109 at 4704; 164 Cong. Rec. S108 at 4480. So Congress removed industrial hemp from the Controlled Substances Act, invited States to create regulatory schemes to license and control hemp within their territories, and directed the Secretary of Agriculture to create a backstop regulatory scheme in the event that a State declined or failed to do so. *See, e.g.*, 7 U.S.C. § 1639p(a)(1) (inviting states to create regulatory plans); 7 U.S.C. § 1639q(a)(1) (Secretary of Agriculture to create a backup regulatory scheme).

But Congress could not achieve its goal of supporting farmers by creating a new profitable crop if states could seize hemp moving

through their borders. Thus, it was critical to the success of Congress's agricultural invigoration efforts that farmers be given protections from State and Tribal interference with the interstate transportation of their industrial hemp crops on their way to market. *Cf. Big Sky Sci.*, 2019 WL 2613882, at *1 (involving seizure by Idaho police of industrial hemp in interstate commerce between Oregon and Colorado, and criminal charges for the driver).

Congress could not have intended to leave a critical component of its agricultural reinvigoration efforts without any method by which it could be enforced. *See, e.g.*, *Zeffiro*, 623 F.2d at 299-300 (citing similar reasons in support of finding an implied private right of action).

B. Nothing In The Legislative History Indicates Congress Intended A Different Result.

Nothing in the legislative history suggests Congress would have intended that the free-from-interference right be unenforceable by private suit.

1. In finding that the legislative history indicated Congress would not have wanted an implied private right of action, the Magistrate Judge—subsequently repeated and adopted by the District Court (Order, ROA at 132-33)—relied heavily on the fact that other provisions

in Subtitle G of the 2018 Farm Bill give enforcement power to the Secretary of Agriculture, indicating Congress did not intend for private suits to enforce the interstate interference provision (Recommendation, ROA at 98). But while the 2018 Farm Bill grants the Secretary of Agriculture authority to enforce a federal plan for hemp farming against hemp producers who violate that plan, it does not grant the Secretary enforcement authority against states or tribes who interfere with compliant hemp producers' efforts to travel interstate. 7 U.S.C. § 1639q(c)(2). Those regulatory provisions are unconnected to the rights-creating provision at issue here. *See* Pub. L. No. 115-334 § 10114(b).[8]

That the Secretary of Agriculture does not have such enforcement authority is supported by the fact there is no published case of which Appellant is aware in which the Secretary of Agriculture has ever sought to enforce the interstate travel right created by the 2018 Farm

[8] And, as noted above, even if those provisions were connected, the fact that a general enforcement power is granted to the government does not prevent this Court from nevertheless reading in an implied private right of action to enforce personal, private rights such as these that would otherwise be significantly under-enforced if left solely to the governmental agency to enforce. *See supra* Part I.B.1.

Bill. The Secretary of Agriculture either does not understand himself to have enforcement authority pertaining to that right, or has failed to exercise his authority thus far. In either case, the District Court and Magistrate Judge were wrong to assert that the Secretary of Agriculture's enforcement power over hemp production in any way indicated a Congressional intent not to allow individuals to sue to enforce their private right to be free from interstate inference.

2. The Magistrate Judge also incorrectly believed that the reconciliation process between the House and Senate versions of the 2018 Farm Bill "puts any question of a right of action to rest." (Recommendation, ROA at 99.) The Magistrate Judge ascribed significant weight to the fact that "the House version of the bill proposed a private right of action to challenge state regulation of interstate commerce," that the Senate bill did not, and that the reconciled final bill did not adopt the House provision. (*Id.* (citing H.R. Conf. Rep. 115-1072, at 794).)

But the provision of the House version of the bill cited by the Magistrate Judge had nothing to do with a private right of action to enforce the farmers' right to be free from interference with interstate

transportation of industrial hemp. *See* H.R. 2, 115th Cong., § 11702(a) (2018). Instead, it proposed to create a private right of action to allow anyone impacted by any state's agricultural regulations to sue to block those regulations and obtain monetary damages:

> (a) Private Right of Action--A person . . . affected by a regulation of a State . . . which regulates any aspect of an agricultural product, including any aspect of the method of production, which is sold in interstate commerce, . . . may bring an action in the appropriate court to invalidate such a regulation and seek damages for economic loss resulting from such regulation.

Id. Not only is this provision not related to hemp specifically, it is not even related to state seizures of agricultural products generally—the focus of the private right at issue.[9]

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[9] Even if the private right of action had been related to the prohibition on interference with interstate transportation provision, its omission from the final bill is not indicative of Congressional intent. The reconciliation process between the House and Senate versions of the bill were focused on the differences in each bill's treatment of the SNAP program. *See* Statement of the Case, *supra*; *see*, *e.g.*, H.R. Rep. No. 115-1072 (2018) (Conf. Rep.) at 614-19, Marzen, 30 FORDHAM ENVT'L L. REV. at 75. While the House proposed $23 billion in budget cuts to SNAP, the Senate Amendment left the program largely intact. Marzen, 30 FORDHAM ENVT'L L. REV. at 65-67, 68, 71. The reconciliation process largely adopted the Senate version of the bill and left the SNAP program intact after the "2018 elections placed pressure on Republican lawmakers to enact the legislation prior to the Democrats taking control of the House of Representatives in the 116th Congress in 2019." *Id.* at 75.

Thus, the Magistrate Judge—and, to the extent that the Recommendation was adopted in its entirety, the District Court—erred in ascribing any meaning to Congress's decision not to adopt the explicit private right of action provision contained in the House version during the reconciliation process.

III. MR. SERNA SHOULD HAVE BEEN GIVEN AN OPPORTUNITY TO AMEND HIS COMPLAINT

Finally, in the alternative, Mr. Serna should have been given the opportunity to amend his complaint to change the cause of action to section 1983 or another federal claim. A lower court abuses its discretion when it fails to provide a *pro se* plaintiff an opportunity to amend a complaint that fails to state a claim but could plausibly state an alternative cause of action under the facts alleged if given the opportunity. *Roman-Nose v. New Mexico Dep't of Hum. Servs.*, 967 F.2d 435, 438 (10th Cir. 1992) (abuse of discretion to dismiss without opportunity to amend where pro se plaintiff's stated cause of action would likely be subject to dismissal under Rule 12(b)(6), but other causes of action may have been available).

As the Magistrate Judge correctly recognized, *pro se* plaintiffs should be freely given the opportunity to amend a complaint when it

fails to state a cause of action. (Recommendation, ROA at 100.) Indeed, a complaint should only be dismissed without giving a *pro se* plaintiff the opportunity to amend when the "*facts* he has alleged" make it "patently obvious that [the] plaintiff could not prevail." *Brown v. New Mexico Dist. Ct. Clerks*, 97-2044, 1998 WL 123064, at * 2-3 (10th Cir. 1998) (unpublished) (emphasis added) (vacating and remanding dismissal without leave to amend). But when the *pro se* plaintiff has alleged facts that could support a cause of action, and the plaintiff merely asserted the wrong one, leave should be freely granted. *See, e.g.*, *Trosper v. Utah*, 21-CV-00489, 2021 WL 4553222, at *2-3 (D. Utah Oct. 5, 2021) (offering *pro se* plaintiff leave to change cause of action when original claims were based on statutes that did not contain private rights of action); *Harrison-Khatana v. Washington Metro. Area Transit Auth.*, 11-3715, 2013 WL 4562508, at *2 (D. Md. Aug. 27, 2013) (granting previously *pro se* plaintiff leave to amend to change cause of action based on same factual allegations in original complaint, even after completion of discovery and summary judgment briefing).

Here, the facts Mr. Serna alleged in his complaint could support a cause of action under, e.g., section 1983. *See, e.g.*, First Amended

Complaint for Declaratory and Injunctive Relief Challenging the Constitutionality of State Statute, *C.Y. Wholesale, Inc. v. Holcomb*, 19-CV-2659, 2020 WL 7868070, at ¶ 9 (S.D. Ind. Nov. 17, 2020) (seeking injunctive relief using 42 U.S.C. § 1983 for violation of 2018 Farm Bill). *Cf. also Sandoval*, 532 U.S. at 298 (Stevens, J., dissenting) ("[T]o the extent that the majority denies relief to the respondents merely because they neglected to mention 42 U.S.C. § 1983 in framing their Title VI claim, this case is something of a sport. Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief.")

Thus, leave should have been granted before dismissal with prejudice. *See Mani v. United Bank*, 498 F. Supp. 2d 406, 415 (D. Mass. 2007) (granting leave to amend to add section 1983 claim before dismissal where the complaint's facts, in light of the plaintiff's *pro se* status, could be read to support such a claim). The District Court abused its discretion by not providing Mr. Serna that opportunity. *See Roman-Nose*, 967 F.2d at 438.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that

this Court reverse the lower court's decision, or remand with instructions that Mr. Serna be granted leave to file an amended complaint.

STATEMENT REGARDING ORAL ARGUMENT

Because of the importance of the issues presented in this appeal, counsel believes that the Court's decisional process will be significantly aided by oral argument.

Respectfully submitted,

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April 1, 2022

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Counsel for Appellant

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/s/ Matthew R. Cushing
Counsel for Appellant

April 1, 2022

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/s/ Matthew R. Cushing
Counsel for Appellant

April 1, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-cv-00789-WJM-MEH

FRANCISCO SERNA,

Plaintiff,

v.

DENVER POLICE DEPARTMENT, and
ANSELMO JARAMILLO,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Michael E. Hegarty, United States Magistrate Judge.

Plaintiff Francisco Serna asserts a claim against Defendants Denver Police Department[1] and Anselmo Jaramillo (together, "Defendants") pursuant to the Agriculture Improvement Act of 2018, Pub. L. 115-334, December 20, 2018, 132 Stat 4490 (hereafter, "2018 Farm Bill"), related to the seizure of Plaintiff's hemp plants at the Denver International Airport. Defendants have filed the present motion to dismiss ("Motion"), arguing that the 2018 Farm Bill does not provide a private right of action. Because the Court agrees that Plaintiff fails to state a claim upon which relief can be granted, the Court respectfully recommends **granting** the Motion.

[1] The Court notes that, in a footnote, Defendants assert that the Denver Police Department is not a separable suable entity. Mot. at 1 n.1 (citing *Stump v. Gates*, 777 F. Supp. 8080, 815 (D. Colo. 1991), *aff'd*, 986 F.2d 1429 (10th Cir. 1993)).

BACKGROUND

The following are factual allegations made by Plaintiff in the operative pleading, which are taken as true for analysis under Fed. R. Civ. P. 12(b)(6) pursuant to *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Plaintiff is a licensed hemp producer in Texas. Compl. § IV. On or about March 16, 2021, at approximately 2:00 p.m., Plaintiff went through security at Denver International Airport. *Id.* §§ III.A–B. He planned on travelling with thirty-two "plant clones or rooted clippings compliantly produced under Subtitle G of 2018 Farm Bill Act." *Id.* § III.C. He had a certificate of compliance for the plants stating that they contained less that 0.3 percent THC. *Id.* When Plaintiff reached a checkpoint, Officer Jaramillo spoke with another officer and decided to confiscate the plants. *Id.* Officer Jaramillo told Plaintiff that they had a policy of confiscating any plants above zero percent THC. *Id.*

Plaintiff alleges that he is making preparations for "the grow season," and, if his preparations are not completed in a timely manner, it will prevent a harvest this season. *Id.* § IV. He requests that the confiscated plants "be kept under permanent light and returned to [him] immediately so that [he] can grow these mother plants to produce the starts necessary for this season's harvest." *Id.* In seeking this injunctive relief, Plaintiff has brought this lawsuit pursuant to Section 10114 of the 2018 Farm Bill. *Id.* § V.

LEGAL STANDARDS

I. Fed. R. Civ. P. 12(b)(6)

The purpose of a motion to dismiss under Fed. R. Civ. P. 12(b)(6) is to test the sufficiency of the plaintiff's complaint. *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 2008). "To survive a motion to dismiss, a complaint must contain sufficient factual

matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff pled facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* *Twombly* requires a two-prong analysis. First, a court must identify "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusions, bare assertions, or merely conclusory. *Id.* at 679. Second, the Court must consider the factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id.* at 681. If the allegations state a plausible claim for relief, such claim survives the motion to dismiss. *Id.* at 680.

Plausibility refers "to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs have not nudged their claims across the line from conceivable to plausible." *S.E.C. v. Shields*, 744 F.3d 633, 640 (10th Cir. 2014) (quoting *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012)). "The nature and specificity of the allegations required to state a plausible claim will vary based on context." *Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 878 (10th Cir. 2017) (quoting *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011)). Thus, while the Rule 12(b)(6) standard does not require that a plaintiff establish a prima facie case in a complaint, the elements of each alleged cause of action may help to determine whether the plaintiff has set forth a plausible claim. *Khalik*, 671 F.3d at 1191.

However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. The complaint must provide "more than labels and conclusions" or merely "a formulaic recitation of the elements of a cause of action,"

so that "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint has made an allegation, "but it has not shown that the pleader is entitled to relief." *Id*. (quotation marks and citation omitted).

II. Treatment of a Pro Se Plaintiff's Complaint

A pro se plaintiff's "pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (quoting *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)). "Th[e] court, however, will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on plaintiff's behalf." *Smith v. United States*, 561 F.3d 1090, 1096 (10th Cir. 2009) (quoting *Whitney v. New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997)). The Tenth Circuit interpreted this rule to mean, if a court "can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, [it] should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." *Diversey v. Schmidly*, 738 F.3d 1196, 1199 (10th Cir. 2013) (quoting *Hall*, 935 F.2d at 1110). However, this interpretation is qualified in that it is not "the proper function of the district court to assume the role of advocate for the pro se litigant." *Garrett*, 425 F.3d at 840 (quoting *Hall*, 935 F.2d at 1110).

ANALYSIS

As mentioned earlier, Plaintiff's only claim is for injunctive relief under the 2018 Farm Bill.[2] Defendants contend that there is no private right of action under that legislation. Plaintiff's response is two-fold. First, he argues that Defendants' Motion was served beyond the time permitted under Fed. R. Civ. P. 5. Resp. at 3–4. Hence, the Court should deny the Motion as untimely. Second, the 2018 Farm Bill and its legislative history support the notion that a private right of action is provided. *Id.* at 4–10.

I. Timeliness

Plaintiff argues that "Defendants' motion must fail" because service of the Motion was completed three days past the due date. Resp. at 3–4. Defendants filed their Motion on the docket on April 23, 2021. ECF 20. In a Notice of Errata filed on April 27, 2021, Defendants asserted that, "[d]ue to an administrative error," the Motion was not emailed to Plaintiff until April 26, 2021. ECF 23. Citing Fed. R. Civ. P. 5 and D.C.Colo.LCivR 5.1(d), Plaintiff contends that service was untimely, and, as such, the Motion should be denied. Resp. 3–4.

Plaintiff's argument fails for three reasons. First, Defendants did not fail to meet the deadline to respond to the Complaint. Defendants timely filed the Motion on the docket on April 23, 2021. When a document "is filed in CM/ECF, it is served electronically under Fed. R. Civ. P. 5." D.C.Colo.LCivR 5.1(d). Plaintiff's desire to receive the Motion by email indicates he was willing to accept service electronically. Second, even though Plaintiff did not receive the Motion by email until three days later, Plaintiff has not demonstrated prejudice from this delay. Plaintiff

[2] In their Motion, Defendants indicate that they conferred with Plaintiff prior to filing, even though it was not required, to ensure that this was Plaintiff's only claim. Mot. at 1–2. Defendants "confirmed that [Plaintiff's] Complaint seeks relief under the 2018 Farm Bill." *Id.* Plaintiff's response confirms this.

did not seek an extension of time to respond, even though Defendants' counsel "told Mr. Serna that an extension of time would not be opposed." Reply at 2. Third, Plaintiff's response is itself technically untimely. The Court ordered Plaintiff to file his response on or before May 19, 2021. ECF 22. Plaintiff attempted to file his response on that date; however, he did so by emailing the document to Judge Martinez's chambers. Reply, Exh. A. Although Judge Martinez advised Plaintiff to contact the Clerk's Office about properly filing the response, Plaintiff did not actually file it until May 24, 2021 (five days later than the deadline). If the Court held Defendants liable for their administrative error, then the Court would also need to hold Plaintiff accountable for his. The simpler and just course of action is for the Court to accept both parties' filings and consider the merits of the arguments presented.

II. Private Right of Action

The Court begins with the notion that, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id.* "[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action." *CNSP, Inc. v. City of Santa Fe*, 755 F. App'x 845, 848 (10th Cir. 2019).

With that understanding, the Court will examine the two provisions of the 2018 Farm Bill cited by Plaintiff in his Complaint: Subtitle G and Section 10114. Subtitle G provides a framework by which the United States Department of Agriculture must create and administer a program regarding the production of hemp. It begins with a definition of "hemp" as "the plant Cannabis sativa L. and any part of that plant . . . with a delta-9 tetrahydrocannabinol [THC] concentration

of not more than 0.3 percent on a dry weight basis." 7 U.S.C. § 1639o(1). Any state or Indian tribe that wants "primary regulatory authority over the production of hemp in the State or territory of the Indian tribe," must provide to the Secretary of Agriculture ("Secretary") "a plan under which the State or Indian tribe monitors and regulates that production." 7 U.S.C. § 1639p(a)(1). The statute describes the requirements of such a plan. *Id.* § 1639p(a)(2). The Secretary has the authority to approve or disapprove any plan in consultation with the Attorney General of the United States. *Id.* § 1639p(b). Also, the Secretary has the authority to conduct an audit of any state or Indian tribe to determine compliance with an approved plan. *Id.* § 1639p(c). If the Secretary determines that a state or Indian tribe is not in compliance, the Secretary may either work with the non-complying state or Indian tribe to develop a corrective action plan (if it is the first instance of non-compliance) or revoke the prior approval of the plan. *Id.* § 1639p(c)(2). Any violation of an approved plan is "subject to enforcement solely in accordance with" subsection (e). *Id.* § 1639p(e)(1).

Depending on the type of violation, the statute bestows the authority on the Secretary to issue corrective action plans (for a non-repeating, negligent violation, *id.* § 1639p(e)(2)) and to report the state's department of agriculture or tribal government to the Attorney General and chief law enforcement officer of the state or Indian tribe (for violations with a culpable mental state greater than negligence, *id.* § 1639p(e)(3)(A)).

To the extent a state or tribal plan is not approved, the Secretary establishes a plan for the production of hemp in that state or territory. *Id.* § 1639q(a)(1). As part of this authority, the Secretary determines the procedures for the licensing of hemp producers. *Id.* § 1639q(b). The statute makes it unlawful to produce hemp "[i]n the case of a State or Indian tribe for which a State

or Tribal plan is not approved," and enforcement authority for violations of the plans is reserved to the Secretary. *Id.* § 1639q(c).

Finally, appended as a note to 7 U.S.C. § 1639o is Section 10114 concerning interstate commerce. That Section states:

> (a) RULE OF CONSTRUCTION.—Nothing in this title or an amendment made by this title prohibits the interstate commerce of hemp (as defined in section 297A of the Agricultural Marketing Act of 1946 (as added by section 10113)) or hemp products.
>
> (b) TRANSPORTATION OF HEMP AND HEMP PRODUCTS.—No State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with subtitle G of the Agricultural Marketing Act of 1946 (as added by section 10113) through the State or the territory of the Indian Tribe, as applicable.

Pub. L. 115-334, Title X, § 10114 (Dec. 20, 2018) (appended as a note to 7 U.S.C. § 1639o).

Nothing in the framework created by Subtitle G indicates any intent by Congress to create a private right of action. To the contrary, the provisions of Subtitle G describe the powers and methods reserved to the Secretary for enforcement and regulation of state, Indian, or Department of Agriculture plans for production of hemp. Such a delegation of authority is evidence that no private right of action was intended. *Freier v. Colorado*, 804 F. App'x 890, 891–92 (10th Cir. 2020) ("Those courts have reasoned that Congress, by delegating enforcement authority to the Secretary of Health and Human Services, did not intend for HIPAA to include or create a private remedy.") (citation omitted). Moreover, the Court does not perceive any "rights-creating language" in Subtitle G or Section 10114; that is, the statute does not contain language "which 'explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff' . . . and language identifying 'the class for whose *especial* benefit the statue was enacted.'" *Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263, 1267 (10th Cir. 2004) (internal citations omitted) (emphasis in original). Rather, these sections of the 2018 Farm Bill focus exclusively on the Department of

Agriculture and the states and Indian tribes it will regulate. The lack of focus on any individuals is more evidence that there is no congressional intent to create a private right of action. *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (finding that section of a statute that focused not "on the individuals protected[,] . . . but on the agencies that will do the regulating" did not create a private right of action).

Plaintiff cites heavily to *Gebser v. Lago Vista*, 524 U.S. 274 (1998) and *Landegger v. Cohen*, 5 F. Supp. 3d 1278 (D. Colo. 2013) as support for why there is an implied right of action. He cites these cases essentially for the notion that context, including Congressional purpose, matters for purposes of the implied rights analysis. *Gebser*, 524 U.S. at 284 ("[W]e have a measure of latitude to shape a sensible remedial scheme that best comports with the statute."); *Landegger*, 5 F. Supp. 3d at 1289 ("*Sandoval* permits a district court [to] look to the 'contemporary legal context' in which the statute was enacted.").

Even if the Court believed that the text and structure of the 2018 Farm Bill was inadequate to conclusively state that Congress did not intend for a private right of action, *see Landegger*, 5 F. Supp. 3d at 1289 ("[c]ontext may only buttress a 'conclusion independently supported by the text of the statute'"), the context cited by Plaintiff puts any question of a right of action to rest. Plaintiff cites to the bill's legislative history. Resp. at 9–10. The Conference Report for the legislation notes that the House version of the bill proposed a private right of action to challenge state regulation of interstate commerce. H.R. CONF. REP. 115-1072, at 794.[3] The Senate version did not contain that provision. *Id.* In resolving this difference, "[t]he Conference substitute *does not* adopt the House provision." *Id.* (emphasis added). As such, Congress specifically contemplated

[3] Available online at https://www.govinfo.gov/content/pkg/CRPT-115hrpt1072/pdf/CRPT-115hrpt1072.pdf.

a private right of action and rejected it. The Court cannot "supply by construction what Congress has clearly shown its intention to omit." *Carey v. Donohue*, 240 U.S. 430, 437 (1916).

For these reasons, the Court finds that Congress did not intend for the 2018 Farm Bill to provide a private right of action.[4] As such, Plaintiff's Complaint fails to state a claim upon which relief can be granted and must be dismissed. Ordinarily, especially in the case of a pro se plaintiff, the Court would consider whether to grant leave to amend the Complaint. *See Reynoldson v. Shillinger*, 907 F.2d 124, 126 (10th Cir. 1990). In this case, however, as Plaintiff's only claim is under the 2018 Farm Bill, allowing amendment would likely prove futile since, as a matter of law, no cause of action exists under that statute. Because amendment would be futile, dismissal of Plaintiff's Complaint should be with prejudice. *Fleming v. Coulter*, 573 F. App'x 765, 769 (10th Cir. 2014) (holding that "dismissal with prejudice is proper for failure to state a claim when 'it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him the opportunity to amend'") (quoting *Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803, 806 (10th Cir. 1999)).

CONCLUSION

Accordingly, Court respectfully recommends that Judge Martinez **grant** Defendants' Motion [filed April 23, 2021; ECF 20] and dismiss Plaintiff's Complaint with prejudice.[5]

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[4] Based on this Court's research, only one other court has weighed in on this issue. That court agreed with this Court's conclusion. *Garrison v. New Fashion Pork LLP*, 449 F. Supp. 3d 863, 868 (N.D. Iowa 2020) (noting that the "Federal Farm Bill did not create a private right of action").

[5] Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72. The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a *de novo* determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file

Respectfully submitted this 9th day of June, 2021, at Denver, Colorado.

BY THE COURT:

Michael E. Hegarty
United States Magistrate Judge

written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted or adopted by the District Court. *Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir. 2008) (quoting *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991)).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 21-cv-0789-WJM-MEH

FRANCISCO SERNA,

Plaintiff,

v.

DENVER POLICE DEPARTMENT, and
ANSELMO JARAMILLO,

Defendants.

ORDER ADOPTING JUNE 9, 2021 RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

This matter is before the Court on the June 9, 2021 Report and Recommendation of United States Magistrate Judge Michael E. Hegarty (the "Recommendation") (ECF No. 38) that the Court grant the City and County of Denver's and Anselmo Jaramillo's (jointly, "Defendants") Motion to Dismiss ("Motion") (ECF Nos. 20), and dismiss Plaintiff Francisco Serna's Complaint (ECF No. 1) with prejudice. The Recommendation is incorporated herein by reference. *See* 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b). For the following reasons, the Recommendation is adopted in its entirety.

I. BACKGROUND AND PROCEDURAL HISTORY

Serna is a licensed hemp producer from Texas. (ECF No. 1 at 5.) On March 16, 2021, Serna was stopped at the Transportation Security Administration ("TSA") security checkpoint while traveling through Denver International Airport. (*Id.* at 4.) Serna was traveling with 32 "plant clones or rooted clippings" and certificates of compliance

showing that the plants had a concentration of delta-9 tetrahydrocannabinol ("THC") of less than 0.3%, such that the plants are categorized as hemp under Subtitle G of the Agricultural Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (2018) (the "2018 Farm Bill"). (*Id.* at 5.) Although Serna informed Officer Jaramillo that his "paperwork demonstrated the plants were under 0.3% THC and therefore protected by the 2018 Farm Bill," Officer Jaramillo confiscated Serna's hemp plants. (*Id.*)

Serna filed this action on March 17, 2021, alleging that Defendants have violated Pub. L. 115-334, Title X, § 10114 ("§ 10114"). (ECF No. 1 at 3.) According to Serna,

> [a]s a licensed Texas hemp producer I am currently making preparations for the grow season that if not done in a timely manner will prevent a harvest this season. The clones confiscated by the Denver Police must be kept under permanent light and returned to me immediately so that I can grow these mother plants to produce the starts necessary for this season's harvest.

(*Id.* at 5.) He further states that "[t]he Denver Police must immediately enact interstate commerce policies consistent with the [2018 Farm Bill] which forbids states from prohibiting compliantly produced hemp plants from interstate commerce." (*Id.*)

On April 23, 2021, Defendants filed a Motion to Dismiss. (ECF Nos. 20). Serna responded on May 24, 2021, and Judge Hegarty issued his Recommendation on June 9, 2021. (ECF Nos. 33 & 38.) Judge Hegarty found that Serna failed to state a claim for relief and therefore recommended granting the Defendants' Motion and dismissing the Complaint with prejudice. (ECF No. 38 at 10.)

Serna filed his Objection on June 28, 2021. (ECF No. 41.) Defendants responded to the Objection on July 12, 2021. (ECF No. 42.) For reasons set for below, Serna's Objection is overruled, and the Recommendation is adopted in its entirety.

II. LEGAL STANDARD

A. Rule 72(b) Review of a Magistrate Judge's Recommendation

When a magistrate judge issues a recommendation on a dispositive matter, Federal Rule of Civil Procedure 72(b)(3) requires that the district judge "determine *de novo* any part of the magistrate judge's [recommendation] that has been properly objected to." Fed. R. Civ. P. 73(b)(3). An objection to a recommendation is properly made if it is both timely and specific. *United States v. 2121 E. 30th St.*, 73 F.3d 1057, 1059 (10th Cir. 1996). An objection is sufficiently specific if it "enables the district judge to focus attention on those issues—factual and legal—that are at the heart of the parties' dispute." *Id.* In conducting its review, "[t]he district court judge may accept, reject, or modify the recommendation; receive further evidence; or return the matter to the magistrate judge with instructions." *Id.*

In the absence of a timely and specific objection, "the district court may review a magistrate [judge's] report under any standard it deems appropriate." *Summers v. State of Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991) (citing *Thomas v. Arn*, 474 U.S. 140, 150 (1985)); *see also* Fed. R. Civ. P. 72 Advisory Committee's Note ("When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record.").

B. Rule 12(b)(6) Motion to Dismiss

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a claim in a complaint for "failure to state a claim upon which relief can be granted." The Rule 12(b)(6) standard requires the Court to "assume the truth of the plaintiff's well-pleaded factual allegations and view them in the light most favorable to the plaintiff."

Ridge at Red Hawk, 493 F.3d at 1177. In ruling on such a motion, the dispositive inquiry is "whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Granting a motion to dismiss "is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) (internal quotation marks omitted). "Thus, 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.'" *Id.* (quoting *Twombly*, 550 U.S. at 556).

Because Serna is proceeding *pro se*, the Court construes his filings liberally. *See Haines v. Kerner*, 404 U.S. 519, 520–21 (1972). The Court cannot, however, "supply additional factual allegations to round out a plaintiff's complaint," or "construct a legal theory on a plaintiff's behalf." *Whitney v. New Mexico*, 113 F.3d 1170, 1175 (10th Cir. 1997).

III. ANALYSIS

Judge Hegarty recommends granting Defendants' Motion because Serna fails to state a claim under the 2018 Farm Bill. (ECF No. 38 at 11.) In his Objection, Serna argues that Judge Hegarty's Recommendation erred in two ways. First, Serna argues Defendant's Motion to Dismiss should have been denied because service was untimely. (ECF No. 41 at 2–3.) Second, Serna argues that he has stated a claim under the 2018 Farm Bill. The Court considers both objections in turn. (*Id.* at 4–15.)

A. Timeliness

Judge Hegarty set an April 23, 2021 deadline for Defendants to respond to Serna's Complaint. (ECF No. 19.) Defendants filed their Motion on April 23, 2021, and served Serna by email three days later. Serna argues that the Motion should be denied as untimely because it was served on Defendants three days after the deadline for service. (ECF No. 41 at 2–3.)

Judge Hegarty found that Defendants' untimely service of the Motion had not prejudiced Serna and, therefore, did not require denial of the Motion. In his Objection, Serna argues that it is not his burden to demonstrate prejudice and that late service can only be cured on motion by the Defendants. (ECF No. 41 at 3 (citing Fed. R. Civ. Pro. 6(b)(1)(B)).) Serna fails to cite a single case supporting his argument. Moreover, Serna did not request an extension of time to respond; to the contrary, he admits that "he responded immediately on the merits." (ECF No. 41 at 3.)

The Court finds that Serna was not prejudiced by the brief delay of service. In these circumstances, the interests of justice are best served by considering the Motion on the merits. *Gustafson v. Bridger Coal Co.*, 834 F. Supp. 352, 358 (D. Wyo. 1993) (refusing to grant defendant's motion to dismiss on the grounds that the response was untimely "because the defendants were not prejudiced by the plaintiff's untimely filing").

Judge Hegarty also reasoned that if the Court were to hold Defendants accountable for their error, then the Court would also need to hold Serna accountable for his untimely filing of his response to the Motion, which was filed five days past the deadline. (ECF No. 38 at 6.) Judge Hegarty concluded that "[t]he simpler and just course of action is for the Court to accept both parties' filings and consider the merits of

the arguments presented." (*Id.*) Serna admits that he filed his response five days late, but he points out that he served his response on Defendants before the deadline for filing his response. The Court agrees with Judge Hegarty that both parties made clerical errors and finds that the interests of justice are best served by considering the Motion on the merits. Serna's objection to this portion of the Recommendation is overruled.

B. Private Right of Action

Serna brings this lawsuit pursuant to § 10114 of the 2018 Farm Bill. (ECF No. 1 at 3.) Judge Hegarty found that the 2018 Farm Bill does not provide a private right of action. (ECF No. 38 at 10.) Therefore, he concluded that Serna has failed to state a claim, and his Complaint should be dismissed. (*Id.*) Serna argues that the 2018 Farm Bill does provide a private right of action and that he has stated a claim. (ECF No. 41 at 4–15.)

1. Legal Standard

The Supreme Court's most recent treatment of the private right of action issue can be found in *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001). It is the most restrictive approach announced by the Court to date. In accordance with *Sandoval*, the judicial task is to "interpret the statute to determine whether it displays an intent to create not just a private right, but also a private remedy." *Id.* Such an intent must be drawn from the "text and structure" of the statute to determine whether "rights-creating language" exists. *Id.* at 288. And to determine whether such language exists, courts are to look to whether the statute: (1) grants "private rights to any identifiable class," and (2) "proscribes conduct as unlawful." *Touche Ross & Co. v. Redington*, 442 U.S. 560,

568 (1979). If the statute does not contain "rights-creating language," *Sandoval* makes clear that the interpretive process ends there. *Sandoval*, 532 U.S. at 288.

Additionally, and to clarify the language of the statute—so to discern Congressional intent—*Sandoval* permits a district court to look to the "contemporary legal context" in which the statute was enacted. *Id.* But this legal context may only be used to buttress a "conclusion independently supported by the text of the statute." *Id.* Courts may not rely upon legal context as the first tool in the interpretive toolbox. It is secondary indicia of Congressional intent.

2. Whether Section 10114 and Subtitle G of the 2018 Farm Bill Create a Private Right of Action

Judge Hegarty examined the provisions of the 2018 Farm Bill cited by Serna in his Complaint to determine whether they create a private right of action. (ECF No. 38 at 6–10.)

First, Judge Hegarty examined Subtitle G as a whole and found that it provides "a framework by which the United States Department of Agriculture must create and administer a program regarding the production of hemp." (*Id.* at 6.) He cited numerous provisions which support his conclusion that Subtitle G "describes the powers and methods reserved to the Secretary [of Agriculture] for enforcement and regulation of state, Indian, or Department of Agriculture plans for production of hemp." (*Id.* at 6–8.) He reasoned that Congress's explicit delegation of enforcement authority to the Secretary of Agriculture "is evidence that no private right of action was intended." (*Id.* at 8 (citing *Freier v. Colorado*, 804 F. App'x 890, 891–92 (10th Cir. 2020) ("Those courts have reasoned that Congress, by delegating enforcement authority to the Secretary of

Health and Human Services, did not intend for HIPAA to include or create a private remedy.")).)

Next, Judge Hegarty examined § 10114, which states:

> (a) RULE OF CONSTRUCTION.—Nothing in this title or an amendment made by this title prohibits the interstate commerce of hemp (as defined in section 297A of the Agricultural Marketing Act of 1946 (as added by section 10113)) or hemp products.
>
> (b) TRANSPORTATION OF HEMP AND HEMP PRODUCTS.—No State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with subtitle G of the Agricultural Marketing Act of 1946 (as added by section 10113) through the State or the territory of the Indian Tribe, as applicable.

Pub. L. 115-334, Title X, § 10114 (Dec. 20, 2018) (appended as a note to 7 U.S.C. § 1639o). Judge Hegarty explained that § 10114 is codified as a note to 7 U.S.C. § 1639o, which is within Subtitle G. (ECF No. 38 at 11.) He interpreted § 10114 in the context of Subtitle G and found no evidence that Congress intended to create a private right of action. (*Id.*) He noted that the statute focuses on regulatory agencies and that the statute's "lack of focus on any individuals is more evidence that there is no congressional intent to create a private right of action." (*Id.* at 8 (citing *Sandoval*, 532 U.S. at 289 (finding that section of a statute that focused not "on the individuals protected[,] . . . but on the agencies that will do the regulating" did not create a private right of action)).)

Serna argues in his Objection that § 10114 should not be read within the context of Subtitle G but rather as a "free standing provision." (ECF No. 41 at 7.) He offers no case law to support his position.[1] In fact, courts typically do look at the "statutory

[1] In his Objection, Serna cites a United States Department of Agriculture legal memorandum to support his position. However, Serna waived this argument because he failed to raise this

scheme of which [the statute] is a part" to determine whether a statute creates a private right of action. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571; *Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263, 1267 (10th Cir. 2004) ("We also consider the relation between the specific provision at issue and the related statutory scheme.").

Serna further argues that "[t]he rights inquiry should begin and end by identifying Subtitle G Hemp Licensees as the protected class and beneficiary of the 'hemp and hemp products' protections explicit in Section 10114 of the 2018 Farm Bill." (ECF No. 41 at 8.) Again, Serna does not cite case law to support his position. To the contrary, in accordance with *Sandoval*, the judicial task is to "interpret the statute to determine whether it displays an intent to create not just a private right, *but also a private remedy*." *Sandoval*, 532 U.S. at 289 (emphasis added); *see also id.* at 286–87 ("Without [Congressional intent to create a private remedy], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter or how compatible with the statute."). The Court agrees that § 10114 identifies hemp producers licensed under Subtitle G as a protected class. But the Court does not find any language in the statute that displays an intent to create a private remedy. Therefore, under *Sandoval*, the Court concludes that § 10114 does not provide a private right of action.

Finally, Serna attacks the precedential value of *Sandoval* and argues that *Sandoval* should not govern this analysis. (ECF No. 41 at 10.). He argues that Justice Sandra Day O'Connor should not have joined the majority opinion in *Sandoval* because

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argument in his response to Defendants' Motion to Dismiss. *See United States v. Garfinkle*, 261 F.3d 1030, 1031 (10th Cir. 2001) ("In this circuit, theories raised for the first time in objections to the magistrate judge's report are deemed waived.") (citing *Marshall v. Chater*, 75 F.3d 1421, 1426–27 (10th Cir. 1996)).

part of the majority's reasoning was inconsistent with her earlier dissent in *Guardians Association v. Civil Service Commission of the City of New York*, 463 U.S. 582 (1983). (*Id.* at 12.) As a result, Serna contends, "[f]or reasons of professional integrity her vote is nullified and *Sandoval*'s 5-4 ruling should have no precedential value." (*Id.* at 13.) However, Serna offers no case law to support his argument that a district court has the power to nullify the vote of a Supreme Court Justice. The Court rejects Serna's invitation to ignore binding Supreme Court precedent. *Hutto v. Davis*, 454 U.S. 370, 375 (1982) ("[A] precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.").

For the reasons set forth above, the Court finds that § 10114 of the 2018 Farm Bill does not provide a private right of action. Since Serna's only claim is under the 2018 Farm Bill, allowing amendment would likely prove futile because, as a matter of law, no right of action exists under that statute. Because amendment would be futile, the Court dismisses Sernas's Complaint with prejudice. *Fleming v. Coulter*, 573 F. App'x 765, 769 (10th Cir. 2014) ("dismissal with prejudice is proper for failure to state a claim when it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him the opportunity to amend") (citations omitted).

IV. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

1. Plaintiff's Objection (ECF No. 41) is OVERRULED;
2. The Report and Recommendation (ECF No. 38) is ADOPTED in its entirety;
3. Defendants' Motion to Dismiss (ECF No. 20) is GRANTED; and
4. The Complaint (ECF No. 1) is DISMISSED WITH PREJUDICE;

5. The Clerk shall enter Judgment in favor of Defendants and against Plaintiff and shall terminate this case;

6. Each party shall bear his or its own costs; and

7. The Clerk is DIRECTED to mail a copy of this Order to Plaintiff and file a certificate of service on the docket.

Dated this 6th day of December, 2021.

BY THE COURT:

William J. Martínez
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-cv-830-REB-SKC

FRANCISCO SERNA,

Plaintiff,

v.

DENVER POLICE DEPARTMENT, and
ANSELMO JARAMILLO,

Defendants.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order Dismissing Case [ECF 43] entered by United States District Judge William J. Martínez on December 6, 2021, it is

ORDERED that the Complaint [ECF 1] is dismissed with prejudice. It is

FURTHER ORDERED that judgment is entered in favor of Defendants, Denver Police Department and Anselmo Jaramillo, and against Plaintiff, Francisco Serna. It is

FURTHER ORDERED that each party shall bear his or its own costs.

This case will be closed.

DATED December 7, 2021, at Denver, Colorado.

FOR THE COURT:

Jeffrey P. Colwell, Clerk

By: s/L.Roberson
Deputy Clerk