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)

REPLY BRIEF FOR APPELLANT

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ARGUMENT

In his opening brief, Mr. Serna established that the District Court should be reversed. Congress gave industrial hemp farmers the right to be free from interference with the interstate transportation of their hemp, but left farmers without any way to enforce that right absent an implied private right of action. *See* Br. at 17–19.[1] When that occurs, courts interpret Congress as intending that a private right of action be read into the statute. *Id.* at 19–31. The legislative history of the 2018 Farm Bill makes clear that Congress intended to promote hemp farming as a way of supporting America's farmers, and to do so needed to protect those farmers from state or tribal interference. Congress would not have wanted those farmers to be unable to enforce their right to transport licensed, industrial hemp to market. *Id.* at 31–37. Mr. Serna also established in his opening brief that even if the 2018 Farm Bill did not provide a private right of action, he should have been given an opportunity to amend his complaint to add a § 1983 claim before the District Court dismissed his complaint with prejudice. *Id.* at 37–39.

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[1] Citations to "Br." are to Mr. Serna's opening Brief, filed April 1, 2022, located at Appellate ECF No. 19.

In response, the Appellees argue four points. Each will be addressed in turn.

I. THE DISTRICT COURT WAS CORRECT TO FIND THAT SECTION 10114 CREATED A PRIVATE RIGHT.

As Mr. Serna established in his opening brief, the District Court correctly held that § 10114 of the 2018 Farm Bill creates a private right for farmers to be free from state and tribal interference in the interstate transportation of their licensed industrial hemp. *See* Br. at 17–19. In response, Appellees argue that the District Court erred in so holding, for two reasons. First, Appellees argue that § 10114 does not provide a specific benefit to an identified class, and thus does not create a private right. Answer Br. at 7–14.[2] But § 10114's language bestows a right upon hemp farmers to be free from interference when transporting their goods interstate, and that right was especially created for their benefit. It thus creates a private right. *See* part A.

Second, Appellees argue that "at most" the 2018 Farm Bill "establish[es] . . . the right to be free from State or Tribal *regulations* that would prohibit interstate transport of hemp." Answer Br. at 7

[2] Citations to "Answer Br." are to the Appellees' Answer Brief, filed June 24, 2022, located at Appellate ECF No. 24.

(emphasis added). But that interpretation must be rejected because it requires this Court to add words to the statute. *See* part B.

A. Section 10114 Creates A Private Right.

In his opening brief, Mr. Serna established that the District Court was correct to find that § 10114 creates a private right for hemp farmers: to be free from interference in the interstate transportation of their products to market. *See* Br. at 17–19. In response, Appellees make two arguments why they believe the statute does not create a private right:

First, Appellees focus not on the language of § 10114 but on the hemp regulatory scheme as a whole, to argue that the focus of the scheme is on the State or Tribe being regulated and not on the individual benefitting from the Act's prohibitions. *See* Answer Br. at 8–12 (citing, e.g., 7 U.S.C. § 1639p, which deals with hemp regulations, not § 1639o where § 10114 was codified). But that is the wrong lens for the inquiry. The analysis of whether a subsection of a statute creates a private right must start with the subsection first, and not the statute as a whole, because it is common for one subsection of a statute to create a private right while another does not. *See, e.g.*, *Alexander v. Sandoval*,

532 U.S. 275, 280–89 (2001) (noting that it was "beyond dispute" that § 601 of Title VI of the Civil Rights Act contained a private right, but finding that there was no private right created by § 602).[3]

Here, there is no dispute that the hemp regulatory provisions of the Agricultural Improvement Act cited by Appellees, such as 7 U.S.C. § 1639p, are focused on State and Tribe licensing schemes overseen by the Department of Agriculture. *See generally* 7 U.S.C. § 1639p (2022) (establishing a process by which States and Tribes develop and submit regulatory licensing schemes for review and approval by the Secretary of Agriculture). But those sections tell us nothing about whether § 10114 (codified at 7 U.S.C. § 1639o) by itself creates a private right, because "Section 10114 (7 U.S.C. § 1639o note) is a freestanding provision." Memorandum from Stephen Alexander Vaden, General Counsel, U.S.D.A. at 3 (May 28, 2019), *available at* https://www.ams.usda.gov/sites/default/files/HempExecSumandLegalOpinion.pdf (hereafter "U.S.D.A. Memorandum").

[3] While other subsections of the statute can be useful context if it is unclear from the particular subsection at issue whether Congress intended to create a private right of action, here it is clear just from § 10114 that Congress intended to create a private right.

And § 10114 does create a private right. Statutes that identify a targeted group, even obliquely, and contain direct prohibitions benefitting those individuals create a private right. *See* Br. at 17–19 (citing cases). *Cf. also, e.g.*, *Wyandotte Trans. Co. v. United States*, 389 U.S. 191, 200–02 (1967) (holding that 33 U.S.C. § 409, which stated only that "[i]t shall not be lawful [to obstruct navigable waterways]" created a right enforceable by the United States); *United States v. Republic Steel Corp.*, 362 U.S. 482, 492 (1960) (same). Here, § 10114 prohibits States and Tribes from interfering with "the transportation or shipment of hemp or hemp products produced in accordance with subtitle G . . . through the State or the territory." Agriculture Improvement Act of 2018, Pub. L. No. 115-334 § 10114 (2018). By the plain language of the statute, those who create "hemp or hemp products . . . in accordance with subtitle G"—including, among others, industrial hemp farmers like Mr. Serna—are the specified beneficiaries of § 10114's protection from interference. *Cf. Wyandotte*, 389 U.S. at 200–02. And when a statute specifies a group of persons for whose benefit the law's protections were enacted, that is a private right for purposes of the private right of action analysis, as the District Court found here. (Order Adopting June 9,

2021 Recommendation of United States Magistrate Judge (hereinafter "Order"), ROA at 134.)[4]

Second, Appellees analogize § 10114's prohibition to § 602 of the Civil Rights Act, which does not create a private right. *See* Answer Br. at 13–14 ("[T]he analysis in Sandoval regarding § 602 is significantly more applicable to the issues on appeal here."). But in fact, § 10114 is more analogous to § 601 of the Civil Rights Act, also discussed in *Sandoval*, which Appellees concede creates a private right. *See id.*

Section 601 "provides 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." *Sandoval*, 532 U.S. at 278. Like § 10114,

[4] Appellees downplay the District Court's holding, describing it as "a single line without analysis." Answer Br. at 7. But the District Court's brevity was likely because Appellees suggested in their briefing below that it should not be the District Court's focus: "Defendants do not dispute that the 2018 Farm Bill created a legal right for hemp producers like Mr. Serna to transport hemp across state lines, so long as federal and state or tribal regulatory requirements are met. The dispositive question is whether Congress intended to grant private citizens the ability to enforce that right through civil suits against individual police officers or municipalities. Magistrate Judge Hegarty correctly determined that it did not." (Defs.' Resp. Pl.'s "Surreply M.J. Hegarty's Rec.," ROA at 120.)

it thus provides an identified protection (freedom from discrimination) to a specified group of people (those who would be discriminated against on the basis of race, color, or national origin). *Compare* 42 U.S.C. § 2000d (2022) (protecting individuals from discrimination), *with* Pub. L. No. 115-334 § 10114 (protecting licensed hemp producers from interference).

By contrast, § 602 "authorizes federal agencies 'to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability.'" *Sandoval*, 532 U.S. at 278 (citing 42 U.S.C. § 2000d–1). Section 602's language authorizing federal agencies to create rules and regulations does not contain specific protections afforded to identifiable groups, unlike § 601. *Compare* 42 U.S.C. § 2000d–1 (2022) (§ 602), *with* 42 U.S.C. § 2000d (§ 601). *See also Sandoval*, 532 U.S. at 289 (noting that "[s]ection 602 is yet a step further removed" from the individuals protected or the parties being regulated, "but on the agencies that will do the regulating"). And it was that distance from direct benefits to individuals that the Supreme Court relied on in finding that § 602 did not create a private right. *Sandoval*, 532 U.S. at 289.

Section 602 looks nothing like § 10114's directive providing licensed hemp producers with protection from State and Tribal interference with the transportation of their goods to market. Section 601 is the better analogy, and it is "beyond dispute" that § 601 created a private right. *Id.* at 280. So too here.

B. Section 10114 Is Not Limited To Regulatory Interference.

Appellees next argue that, "at most" the 2018 Farm Bill "establish[es] . . . the right to be free from State or Tribal *regulations* that would prohibit interstate transport of hemp." Answer Br. at 7 (emphasis added). That reading must be rejected because it asks this Court to add the word "regulations" into the statute where it does not appear. Statutory interpretation arguments that would require a court to add a word to a statute must be rejected. *See, e.g.*, *Marchetti v. United States*, 390 U.S. 39, 60 n.18 (1968) ("We would be required not merely to strike out words, but to insert words that are not now in the statute. . . . 'This would, to some extent, substitute the judicial for the legislative department of the government. . . . This is no part of duty.'" (citation omitted)); *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951) ("Congress expresses its

purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort.”). *Cf. Lewis, Roca, Scoville & Beauchamp v. Inland Empire Ins. Co.*, 259 F.2d 318, 323 (10th Cir. 1958) (“Courts cannot supply omissions in a statute.”).

Section 10114 says, without qualification, that “[n]o State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products . . . through the State.” Pub. L. No. 115-334 § 10114. To limit that section’s prohibition to only regulatory interference would be to add words to the statute that Congress chose not to include. Appellees’ suggestion must therefore be rejected. *See Marchetti*, 390 U.S. at 60 n.18; *62 Cases*, 340 U.S. at 596.

II. SECTION 10114 DOES NOT CONTAIN AN ALTERNATIVE ENFORCEMENT MECHANISM.

As for whether Mr. Serna can enforce the private right created by § 10114 through the courts, Appellees argue three points:

First, Appellees argue that § 10114 cannot be read to contain an implied private right of action because licensing provisions contained in the 2018 Farm Bill are enforced by the Secretary of Agriculture, and private rights of action are not implied when Congress expressly gives an agency enforcement authority. *See* Answer Br. at 15–26. But the

licensing provisions which the Secretary of Agriculture has oversight over have nothing to do with § 10114's prohibition against interference with interstate transportation, and thus say nothing about Congress's intent concerning private rights of action. *Compare, e.g.*, 7 U.S.C. § 1639p(a)(1) (requiring Secretary of Agriculture to review state hemp regulation plans) *and* 7 U.S.C. § 1639q(a)(1) (2022) (requiring Secretary of Agriculture to create a regulatory scheme for states that do not submit their own for approval), *with* Pub. L. No. 115-334 § 10114 (giving licensed hemp producers right to be free from interference with interstate transportation). *See also* part III, *infra*. Even the Department of Agriculture believes that § 10114 is distinct from the regulatory licensing scheme set forth in the other sections, *see* U.S.D.A. Memorandum, *supra*, at 3 ("Section 10114 (7 U.S.C. § 1639o note) is a freestanding provision."), which is why, as Mr. Serna noted in his opening brief and Appellees do not dispute, the Department has never brought an enforcement action under that section of the statute, *see* Br. at 34–35.

Next, Appellees argue that "[t]here is no reason for the Court" to look to other cases where courts have found implied private rights of

action, such as *Transamerica Mortgage Advisors*. Answer Br. at 22. Appellees concede that the Supreme Court found an implied right in *Transamerica, see id.*, where, like here, Congress had prohibited an entity from acting in a certain manner and the Supreme Court held that implied the availability of injunctive relief, *see Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979) (interpreting Congress's inclusion of the word "void" to "conclude that the statutory language itself fairly implies a right to," among others, injunctive "relief in a federal court"). *See also Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 295 (1970) (reading in availability of "some federal injunctive relief" to two exceptions to statutory prohibition against federal court interference in state court proceedings, even though such relief was not expressly provided for in the statute). But Appellees argue that this Court should ignore those cases "because Mr. Serna primarily seeks monetary damages here." Answer Br. at 22.

Not so. Mr. Serna has only sought equitable or injunctive relief in this action. Mr. Serna's initial pleading was titled a "Complaint and Request for Injunction." (Compl., ROA at 8.) In the Relief section of the *pro se* pleading form, Mr. Serna sought only an order requiring that

"[t]he Denver Police must immediately enact interstate commerce policies consistent with the Farm Bill Act." (*Id.* at 12.) The Magistrate Judge understood that Mr. Serna's "only claim is for injunctive relief," not damages. (Recommendation of United States Magistrate Judge ("Recommendation"), ROA at 95.) Indeed, Mr. Serna attempted to amend his pleadings to add a request for monetary damages, but that request was denied. (Order Denying Pl.'s Construed Mot. Preliminary Inj., Denying as Moot Pl.'s Mot. Expedited Discovery, and Striking Pl.'s Rule 15(a) Pleading Amendment, ROA at 55.) In any event, the question here—whether the 2018 Farm Bill contains an implied private right of action—precedes, and is independent of, whether Mr. Serna can ultimately obtain the relief he seeks.

Aside from this objection, Appellees make no effort to distinguish *Transamerica* and, in fact, concede that it supports an implied private right of action. *See* Answer Br. at 22. Thus, at a minimum, § 10114 contains an implied private right of action to seek injunctive relief. *See* *Transamerica*, 444 U.S. at 18; *Atl. Coast Line*, 398 U.S. at 295.

Finally, Appellees suggest that Mr. Serna had alternative causes of action available to him such as a declaratory judgment action under

28 U.S.C. § 2201 or a damages action under 42 U.S.C. § 1983. *See* Answer Br. at 23 (citing *C.Y. Wholesale Inc. v. Holcomb*, 965 F.3d 541 (7th Cir. 2020)). But that is not relevant to whether § 10114 can be enforced through a private right of action.[5] For one, it is not clear that Mr. Serna could have brought a declaratory judgment action, since he had no reason to know that Appellees would interfere with his right to transport licensed hemp across state lines. As for a damages action under § 1983, that would not give Mr. Serna the injunctive relief he sought in his complaint. (*See* Compl., ROA at 12.) In any event, even the theoretical availability of alternative causes of action says nothing about whether § 10114 can be enforced through a private right of action. If it did, no private rights of action would have been inferred since 1871 when § 1983 was created. *But see, e.g.*, *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 66 (1992) (finding implied right of action for damages under Title IX); *Ray Charles Found. v. Robinson*, 795 F.3d

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[5] It does, however, support Mr. Serna's contention that he should have been given an opportunity to amend his complaint before the District Court dismissed with prejudice. *See* Br. at 37–39. If there are at least two other statutory causes of action available to support his suit, as the Answer Brief suggests, *see* Answer Br. at 23–24, then amendment would not have been futile and should have been permitted. *See infra* part IV.

1109, 1122 (9th Cir. 2015) (finding implied private right of action under the termination provisions of the Copyright Act).

III. THE LEGISLATIVE HISTORY SUPPORTS A PRIVATE RIGHT OF ACTION.

In his opening brief, Mr. Serna established how important legalizing and promoting hemp was to Congress as a way to support American farmers. *See* Br. at 6–11. Congress knew hemp could enter into farmers' crop rotations and provide an additional source of income. And Congress wanted farmers to take advantage of this new crop by, among other things, making it eligible for crop insurance. But if farmers could not transport their hemp across state lines to new markets, then all of Congress's efforts would be for naught. So, Congress made sure that farmers would be protected from state and tribal interference in the interstate transportation of their hemp in § 10114. *See id.* *See also id.* at 31–33.

In their brief, Appellees do not dispute any of this. Instead, Appellees argue only that the legislative history of the 2018 Farm Bill indicates that Congress did not intend for courts to create an implied private right of action. Specifically, Appellees point to the reconciliation process that led to the final 2018 Farm Bill. *See* Answer Br. at 26–31.

During that process, a private right of action in the House version of the bill permitting challenges to agricultural regulations was not adopted and incorporated into the final bill:

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

H.R. 2, 115th Cong., § 11702(a) (2018).[6] This, Appellees argue, is proof that Congress did not intend to allow a private right of action to enforce § 10114.

Appellees read too much into this history. That a private right of action to challenge agricultural *regulations* was not adopted does not tell us anything about Congress's intent with respect to the private right of action Mr. Serna seeks here. As the cases cited in Appellees' brief demonstrate, courts only consider as indicative of Congressional

[6] It is no wonder that this proposed private right of action was rejected: it is so broad that it would bury the courts in lawsuits over every conceivable agricultural regulation spanning thousands of sections of the Code of Federal Regulations, from organic labeling requirements, 7 C.F.R. § 205.300 *et seq.* (2022), to the regulations governing agricultural research grants, 7 C.F.R. § 3415 *et seq.* (2022), and everything in between.

intent a rejection of the specific private right of action a party seeks to have a court imply in a particular case. *See* Answer Br. at 29–30. For example, Appellees cite *Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees*, which involved, in part, a question of whether railroads were subject to the Norris-LaGuardia Act. *See* 481 U.S. 429, 439–40 (1987). The Supreme Court found there was "no doubt" that they were, because the House had rejected an explicit amendment designed solely to exempt railroads from the Act. *Id.* (citing 75 Cong. Rec. 5471–80, 5501–12 (1932)).

Likewise, in *Local 3-689, Oil, Chemical & Atomic International Union v. Martin Marietta Energy Systems, Inc.*, the plaintiff union alleged that the Energy Policy Act of 1992 contained an implied private right of action to obtain monetary damages. 77 F.3d 131, 136 (6th Cir. 1996). The Sixth Circuit found it did not, because the union had conceded that Congress had rejected a version of the Act that had expressly included a private right of action for monetary damages. *See id.* (citing H.R. Rep. No. 102–474(I), 102d Cong., 2d Sess. 203–04 (1992), reprinted in 1992 U.S.C.C.A.N. at 2027).

And in *Saltzman v. Farm Credit Services of Mid-America, ACA*,

the Seventh Circuit rejected the plaintiffs' argument that the Agricultural Credit Act of 1987 contained an implied private right of action to supplement the Act's provided-for administrative remedies. 950 F.2d 466, 468 (7th Cir. 1991). But during reconciliation, Congress had chosen to delete out a provision in the House version of the Act which would have provided "borrowers the right to sue any FCS institution for violation of any duty, standard, or limitation prescribed under the Act"—the exact private right of action the plaintiffs were seeking. H.R. 3030, 100th Cong., 1st Sess. 178, 133 Cong. Rec. 11820 (Dec. 18, 1987).

Here, by contrast, the reconciliation process rejected a private right of action to sue to overturn agricultural regulations and obtain damages resulting therefrom. H.R. 2, 115th Cong., § 11702(a) (providing a private right of action to any "person . . . affected by a regulation of a State . . . to invalidate such a regulation and seek damages for economic loss resulting from such regulation"). That has nothing to do with the implied private right of action Mr. Serna seeks: to enforce his right to be free from interference with the interstate transportation of his hemp.

Appellees make much of the fact that the proposed private right of action permitted a person to sue over "a regulation . . . which regulates any aspect of an agricultural product, including . . . any means or instrumentality through which such an agricultural product is sold in interstate commerce." *See* Answer Br. at 27 (quoting H.R. 2, 115th Cong., § 11702(a)). But that misses the point. The proposed private right of action only permitted suits to "invalidate such a regulation and seek damages for economic loss resulting from such regulation." H.R. 2, 115th Cong., § 11702(a). It said nothing about other forms of interference (like police seizures) with the transportation of hemp across state lines, protected by § 10114. Thus, to the extent this Court was to give any preclusive effect to the House Bill's proposed-but-rejected private right of action, it would be limited to precluding an implied private right of action to "invalidate" or "seek damages for economic loss resulting from" a regulation, not other forms of interference (like police seizures) with the interstate transportation of hemp. But no such agricultural regulations are involved in this case, and Mr. Serna does not seek an implied private right of action to invalidate or obtain damages resulting from any regulations here.

IV. THE DISTRICT COURT SHOULD HAVE GIVEN MR. SERNA AN OPPORTUNITY TO AMEND BEFORE DISMISSING WITH PREJUDICE.

Finally, Appellees appear to concede that Mr. Serna could have brought a claim for damages under § 1983. *See* Answer Br. at 23 (citing *C.Y. Wholesale Inc. v. Holcomb*, 965 F.3d 541 (7th Cir. 2020)). Nevertheless, they contend that the District Court did not err in dismissing Mr. Serna's complaint with prejudice, based on two arguments: First, that Mr. Serna, acting *pro se*, should have known that he could have amended his complaint before opposing their motion to dismiss, *id.* at 34, and second, that he should have made a more specific request for leave to amend than what he included in his objection to the Magistrate Judge's Recommendation, *id.* at 35.

As to Appellees' first argument, *pro se* plaintiffs are given extra latitude with the rules of procedure that often confound even the most educated non-lawyer. That is why, for example, the Federal Rules provide that a "court should freely give leave [to amend] when justice so requires," Fed. R. Civ. P. 15(a)(2), especially when the opposing party would face no prejudice, *see, e.g.*, *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). There is no question that Appellees would have faced no prejudice from an amendment to the complaint that would have added a cause of action under, e.g., § 1983.

And indeed, the record indicates that Mr. Serna made at least two attempts to amend his complaint to add a cause of action under § 1983, albeit unsuccessfully, in a Rule 15 pleading amendment and in his objections to the Magistrate's Recommendation.[7] (*See* Order Denying Pl.'s Construed Mot. Preliminary Inj., Denying as Moot Pl.'s Mot. Expedited Discovery, and Striking Pl.'s Rule 15(a) Pleading Amendment, ROA at 55; Surreply to Magistrate Hegarty's Recommendation, ROA at 116.) As to the latter, Appellees claim that

[7] Mr. Serna's efforts to amend under Federal Rule 15 thus distinguish this case from those cited by Appellees where the plaintiff made no efforts to amend their complaints. *See Weldon v. Ramstand-Hvass*, 512 F. App'x 783, 797–98 (10th Cir. 2013) (finding district court did not err in dismissing without opportunity to amend, because plaintiff did not seek leave to amend at any point, and his failure to do so "indicates that he 'elected to appeal the case as it stood'"); *Switzer v. Coan*, 261 F.3d 985, 990 (10th Cir. 2001) (same).

Mr. Serna did not give enough notice for the basis of the amendment, Answer Br. at 35, but the context in which Mr. Serna made his request puts that argument to rest. Mr. Serna included his request to amend within his objections to the Magistrate's Recommendation, which had recommended that his complaint be dismissed because it lacked a cause of action under which he could recover. (*See* Recommendation, ROA at 100 ("For these reasons, the Court finds that Congress did not intend for the 2018 Farm Bill to provide a private right of action. As such, Plaintiff's Complaint fails to state a claim upon which relief can be granted and must be dismissed.") (footnote omitted).) In response to the Magistrate's recommendation that his complaint be dismissed because his "only claim is under the 2018 Farm Bill" and "no cause of action exists under that statute" (Recommendation, ROA at 100), Mr. Serna requested "leave to amend his petition with a Section 1983 claim," which would provide a cause of action to support his complaint, (Surreply to Magistrate Hegarty's Recommendation, ROA at 116). That provides sufficient notice for the basis of his amendment: to provide a cause of action to support the factual allegations in his complaint. *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.").

Although Appellees do not specifically argue it would be, a claim under § 1983 would not have been futile. Appellees are subject to § 1983 liability, and § 1983 is routinely used to litigate the potential issues suggested by Mr. Serna's Complaint (Compl., ROA at 12), such as an unlawful seizure of property under the Fourth Amendment or an uncompensated taking under the Fifth Amendment, pursuant to a municipal policy, *see generally City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) (uncompensated taking); *Monell v. Dep't Soc. Servs.*, 436 U.S. 658, 692 (1978) (municipal liability for

policies); *Stanley v. Gallegos*, 852 F.3d 1210 (10th Cir. 2017) (unlawful seizure of property); *Kan. Motorcycle Works USA, LLC v. McCloud*, 20-CV-01180, 2021 WL 5039019 (D. Kan. Oct. 27, 2021) (unlawful seizure of property and municipal policy). Appellees would not be entitled to qualified immunity for such claims because, e.g., they seized Mr. Serna's property without a warrant. *See Kan. Motorcycle Works*, 2021 WL 5039019, at *8 (denying qualified immunity where officer seized property without a warrant because law was clearly established at the time).

Thus, leave should have been granted before dismissal with prejudice.

CONCLUSION

For the foregoing reasons and those set forth in his opening brief, Mr. Serna 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.

Respectfully submitted,

/s/ Matthew R. Cushing

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July 8, 2022

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