CASE NO. 21-1446

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FRANCISCO SERNA,

Plaintiff-Appellant,

v.

DENVER POLICE DEPARTMENT and ANSELMO JARAMILLO,

Defendants–Appellees,

On Appeal from the United States District Court for the District of Colorado
The Honorable William J. Martinez
District Court No. 21-cv-0789-WJM-MEH

ANSWER BRIEF

CONOR D. FARLEY, Assistant City Attorney
JENNIFER JOHNSON, Assistant City Attorney
Denver City Attorney's Office
201 W. Colfax Ave., Dept. 1108
Denver, Colorado 80202-5332
Telephone: (720) 913-3100

ORAL ARGUMENT IS REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF RELATED CASES

Defendants-Appellees the City and County of Denver (improperly designated as "Denver Police Department) and Anselmo Jaramillo are not aware of any prior or related appeals under 10th Cir. R. 28.2(C)(3).

I. JURISDICTIONAL STATEMENT

In Case Number 21-cv-0789-WJM-MEH, Plaintiff-Appellant Francisco Serna ("Mr. Serna") brought one claim in the United States District Court for the District of Colorado against Defendants-Appellees the City and County of Denver (improperly designated as, "Denver Police Department") and Denver Police Officer Anselmo Jaramillo ("Officer Jaramillo") (collectively, "Defendants"). Mr. Serna's sole claim against the Denver Defendants asserted a violation of Section 10114 of the 2018 Farm Bill (the "Farm Bill" or the "Act"). The district court had jurisdiction over this claim pursuant to 28 U.S.C. § 1331. The district court's final judgment is appealable under 28 U.S.C. § 1291. *See Haberman v. Hartford Ins. Grp.*, 443 F.3d 1257, 1264 (10th Cir. 2006). Accordingly, this Court has jurisdiction over the issues raised on appeal.

II. ISSUES PRESENTED

1. Whether the 2018 Farm Bill contains an implied private right of action under Subtitle G[1] or § 10114[2] to allow licensed hemp producers

[1] 7 U.S.C. § 1639o-s. ("Subtitle G").
[2] Pub. L. 115-334, Title X, § 10114 (Dec. 20, 2018) (appended as a note to 7 U.S.C. § 1639o) ("§ 10114").

to enforce its provisions by civil lawsuit against local municipalities and local municipal law enforcement personnel related to transportation of hemp plants across state borders.

2. Whether the legislative history of the 2018 Farm Bill supports such an implied private right of action for hemp farmers.

3. Whether the district court erred by denying Mr. Serna the opportunity to amend his complaint instead of dismissing the lawsuit with prejudice.

III. STATEMENT OF THE CASE

A. Statement of the Facts

On March 16, 2021, Plaintiff Francisco Serna tried to clear security at Denver International Airport carrying a box of what looked like young marijuana plants. ROA at 11-12.[3] TSA agents stopped him and alerted Denver Police Officer Anselmo Jaramillo. ROA at 12. Mr. Serna produced paperwork that (he alleges) proved the plants were "clones or rooted clippings compliantly produced under Subtitle G of 2018 Farm Bill Act." ROA at 12. But after investigation and consultation with a DPD

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

detective, Officer Jaramillo continued to suspect the plants were marijuana. ROA at 12, 33-34. He confiscated the plants for further testing, and Mr. Serna was allowed to board his plane to his destination. ROA at 34.

B. Procedural History

Mr. Serna filed his *pro se* "Complaint and Request for Injunction" on March 17, 2021, asserting that Defendants violated Section 10114 of the 2018 Farm Bill when Officer Jaramillo confiscated his plants. ROA at 8-13. Defendants moved to dismiss Mr. Serna's Complaint on the basis that the 2018 Farm Bill does not create a private right of action. ROA at 16-38.

Magistrate Judge Michael E. Hegarty recommended that Mr. Serna's complaint be dismissed for failure to state a claim, agreeing with Defendants that the 2018 Farm Bill does not provide a private right of action. ROA at 91-101. Mr. Serna filed a timely objection to this Recommendation and, for the first time, requested leave to amend his Complaint to add claims under "42 U.S.C. § 1983 and other constitutional and common law theories." ROA at 116. Defendants filed a timely

response to Mr. Serna's objections, noting that Mr. Serna's request to amend was not appropriately made in an objection to the Magistrate Judge's Recommendation and that his request failed to comply with the Federal Rules of Civil Procedure and the local rules of the district court. ROA at 124.

The District Court adopted the Magistrate Judge's recommendation and dismissed Mr. Serna's Complaint with prejudice, finding that the 2018 Farm Bill does not provide for a private right of action and, therefore, that amendment would be futile. ROA at 126-136. The District Court then entered final judgment. ROA at 137. This appeal followed.

IV. SUMMARY OF THE ARGUMENT

Subtitle G and § 10114 of the 2018 Farm Bill created only a right for states and Indian tribes to regulate the production of hemp under a specific framework outlined and administered by the United State Department of Agriculture. While this national agricultural policy also prohibited state and Tribal interference in the interstate transport of complying hemp products, it did not create a protected class of all hemp

farmers or an individualized right of Mr. Serna as the beneficiary of Subtitle G or § 10114 for which a private right of action could be found.

Further, because the language of the 2018 Farm Bill does not provide for a private right of action – and expressly reserves the right of the Department of Agriculture to enforce Subtitle G and § 10114 – there is no basis for the Court to imply a private right of action for Mr. Serna to enforce against a local government that has seized his allegedly compliant hemp plants and/or products.

The Farm Bill's legislative history does not support any implied private right of action because the Senate explicitly rejected the House's version, and a private right of action was excluded from the final version. Further, there is absolutely no evidence that Congress intended the Farm Bill to cover the situation at issue here—a police officer's reasonable, but mistaken, belief that industrial hemp was marijuana.

Finally, the District Court did not err in failing to, *sua sponte*, allow Mr. Serna to amend his complaint. The District Court correctly found that any amendment of Mr. Serna's sole claim under the Farm Bill would be futile. Further, Mr. Serna was put on notice of the deficiency of his

claim via Defendants' motion to dismiss, the Recommendation, and the District Court's order, but did not utilize any of the procedural tools available at any stage of the District Court proceedings to amend his complaint. Instead, he doubled down on his claim under the Farm Bill.

V. ARGUMENT

A. 2018 Farm Bill Created a Right for States and Indian Tribes to Regulate the Production of Hemp and Prohibited State and Tribal Interference in Interstate Transportation Only

Mr. Serna notes that the District Court found the 2018 Farm Bill identifies licensed hemp producers as a protected class. [Op. Brief at 17-18.] Specifically, the District Court included a single line without analysis stating it "agrees that § 10114 identifies hemp producers licensed under Subtitle G as a protected class." ROA at 134. But the 2018 Farm Bill appears only to establish the right to State and Tribal regulatory authority over hemp production and – at most – the right to be free from State or Tribal regulations that would prohibit interstate transport of hemp and hemp products that comply with federal hemp regulations contained within the Act. *See* § 10114(b). Assuming the intent of Congress was to facilitate the interstate transportation of hemp,

it does not follow that the Act created a "protected class" of private hemp producers like Mr. Serna.

1. Mr. Serna is Not A Specific Beneficiary of Subtitle G or § 10114

There is no rights-creating language in Subtitle G or § 10114 that identifies hemp producers as a protected class – and the Act does not "explicitly confer a right directly on a class of persons that include[s] the plaintiff' . . . [nor does it contain] 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 quotations and citations omitted). Rather, under Subtitle G, the Act is expressly for the benefit of any "State or Indian tribe desiring to have primary regulatory authority over the production of hemp." 7 U.S.C § 1639p(a)(1). Should a State or Indian tribe enact such a regulatory scheme, a plan must be submitted for approval to the Secretary of Agriculture, with the Act outlining the minimum requirements necessary on issues ranging from record-keeping to product testing methods, procedures for disposal of non-conforming plants and products, necessary enforcement procedures, and other obligations. *Id.* at § 1639p(a)(2)(A)(i)-(vii).

The Act also creates a procedure in which the Secretary of Agriculture may audit a State or Indian tribe with an approved plan and has the authority to order corrective action and revocation of approval should the audit reveal noncompliance with the approved plan. *Id.* at § 1639p(c)(1)-(2). Additionally, § 10114 provides that "[n]o State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with subtitle G."

This framework simply does not create an individual right for Mr. Serna. *See Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) ("Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons'" (*quoting California v. Sierra Club*, 451 U.S. 287, 294 (1981))). Rather, Subtitle G and § 10114 are expressly directed at States and Indian tribes, who act for the benefit of the public at large rather than the narrow class of regulated hemp producers.

Mr. Serna argues that "[w]hen 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)." [Op.

Brief at 18-19.] While this general proposition may often be true, the conclusion that Mr. Serna suggests from this proposition—that "licensed hemp farmers" like himself are the intended beneficiary group of a private right—is supported by neither the text of the 2018 Farm Bill nor the cases he relies upon. *Id.* at 18-19.

Mr. Serna cites *Cort v. Ash*, 422 U.S. 66 (1975) for the limited proposition 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." [Op. Brief at 18.] More precisely, courts "examine the statute for 'rights-creating language' that 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 statute was enacted.'" *Boswell*, 361 F.3d at 1267 (emphasis in original) (internal citations omitted). None of these elements are met here. There is no rights-creating language in the text of the Act related to hemp producers, let alone language that explicitly confers a right that especially benefits hemp producers. As noted above, Subtitle G and § 10114 are expressly directed at States and Indian tribes without mention of hemp producers

at all. And to the extent the prohibitory language in Section 10114 ("[n]o State or Indian tribe shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with Subtitle G") may have an indirect benefit to hemp producers, the intent is clearly to grant individual States and Indian tribes primary regulatory authority over the production of hemp within the bounds of a national policy.

Similarly, Mr. Serna points to *Cannon v. Univ. of Chicago*, 441 U.S. 677, 689-94 (1979) and its finding that Title IX was enacted for the benefit of a special class of which the plaintiff is a member and, therefore, created a private right to benefit persons discriminated against on the basis of sex. [Op. Brief at 18.] However, *Cannon* was clear that the determination of "whether the statute was enacted for the benefit of a special class of which the plaintiff is a member…is answered by looking to the language of the statute itself." 441 U.S. at 689. The court also explained that "[t]he language in [statutes where a private right has been found]—which expressly identifies the class Congress intended to benefit—contrasts sharply with statutory language customarily found in criminal statutes…and other laws enacted for the protection of the

general public. There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices." *Id.* at 690-93.

This highlights the problem with Mr. Serna's claim that hemp producers – and not the States and Indian tribes whom the Act expressly identifies as the parties "desiring to have primary regulatory authority over the production of hemp" – are the beneficiary of the Act. 7 U.S.C § 1639p(a)(1). Under the framework created by the Act, the Secretary of Agriculture reserves the right to audit, order corrective action, and revoke approval—not of individual producers—but the approved State and Tribal plans. *Id.* at § 1639p(c)(1)-(2). These delegations of enforcement authority track the examples *Cannon* provided for when an individual, private right is <u>not</u> found in a statute.

Mr. Serna also relies on *Sandoval*, 532 U.S. at 288-89, as an example of a statute creating a protected class by reference to a broadly

defined group [Op. Brief at 18 (citing *Sandoval*'s recognition "that the language '[n]o person . . . shall . . . be subjected to discrimination' in 42 U.S.C. § 2000d creates a private right.").] While that may have been true for § 601 of Title VI of the Civil Rights Act, the analysis in *Sandoval* regarding § 602 is significantly more applicable to the issues on appeal here. 532 U.S. at 288.

Because § 602 authorized and directed governmental departments and agencies to effectuate the provisions of § 601, the Supreme Court found that, "far from displaying congressional intent to create new rights, § 602 limits agencies to "'effectuat[ing]' rights already created by § 601" and "[s]tatutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Id.* at 288-89 (quotations and citations omitted). Critically, "Section 602 is yet a step further removed: It focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating." *Id.* at 289. In short, the Court held "[i]t is immediately clear that the 'rights-creating' language so critical to the Court's analysis in *Cannon* of §

601….is completely absent from § 602."

Finally, Mr. Serna's reliance on *Allen v. State Bd. of Elections*, 393 U.S. 544, 556 (1969), is also misplaced because the liberal interpretation to determine a private right based upon the court's belief that "achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General" is both critical to the court's finding of an individual right and no longer how this analysis is undertaken. *See* Section B.1, *infra.*

Accordingly, the record demonstrates that Subtitle G and § 10114 of the 2018 Farm Bill benefit states and Indian tribes who wish to have primary regulatory authority over the production of hemp in the State or territory of the Indian tribe – and that hemp producers who are not the beneficiary of any corollary private right under these sections of the Act.

B. The Court Cannot Imply a Private Right of Action to Enforce the Farm Bill's Right to be Free from State and Tribal Interference in Interstate Transportation

1. A Private Right of Action is not Necessary

Even when a private right exists, it does not necessarily follow that a private right of action is created. Rather, it is fundamental that, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Sandoval*, 532 U.S. at 286. "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.* Accordingly, there must be clear statutory intent to create a private right of action because "[w]ithout it, 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." *Id.*

There is no argument to be made that the 2018 Farm Bill included any language explicitly creating a right of private enforcement. Mr. Serna concedes that fact and argues instead that "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" an implied private right of action must be created by the Court. [Op. Brief at 20-21.] In support, Mr. Serna points to cases from the United States District Court for the Southern District of New York and United States Court of Appeals for the Third Circuit finding an implied private right of action under the Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa-77bbbb (the "TIA"). *Id.* at 21-23. But Mr. Serna cannot carry his burden to clearly demonstrate Congress's intent to create a private right of action in the 2018 Farm Bill by citing out-of-circuit cases interpreting a different statute.

For instance, in *Fixed Income Shares: Series M v. Citibank N.A.*, 130 F. Supp. 3d 842, 848-49 (S.D.N.Y. 2015), a district court found a private right of action under the TIA because, in part, "the Securities and Exchange Commission ('SEC') has no power to enforce the terms of an indenture after it has been qualified under the Act, leaving private lawsuits as the only possible enforcement mechanism." (citing *Zeffiro v. First Pennsylvania Banking & Tr. Co.*, 623 F.2d 290, 296-301 (3d Cir. 1980)). The court "emphasized that the SEC is not entitled to enforce the terms of indentures covered by the TIA." *Id.* at 849-50. It also found "text

and legislative history [to] support the inference that Congress intended to permit debenture holders to sue in federal court" and a lack of evidence supporting a contrary interpretation. *Id.* Under these circumstances, the *Fixed Income Shares* court did not "depart from the longstanding view that a private right of action exists to enforce" the TIA. *Id.* at 850.

None of these factors are present in the 2018 Farm Bill allowing hemp producers to sue municipalities and police officers. There is no longstanding interpretation of a private right of action, the legislative history does not indicate any intention to create a private right of action, and the governmental authority creating the regulatory framework retained enforcement power. *See* Section B.2., *infra.*

For the same reasons, the decision in *BlackRock Allocation Target Shares: Series S. Portfolio v. Wells Fargo Bank*, 247 F. Supp. 3d 377 (S.D.N.Y. 2017) is entirely distinguishable. There, the Court expressly relied on the fact that the TIA "do[es] not allow potentially preclusive SEC enforcement" and found that "the TIA 'unambiguously confer[s] a private right of action." *Id.* at 403.

Mr. Serna argues that there is a void in the enforcement power related to the right created by Subtitle G of the 2018 Farm Bill. [Op. Brief at 23-26.] Specifically, in a footnote, Mr. Serna dismisses the "regulatory power" given to the Secretary of Agriculture as controlling the production of hemp rather than interstate transportation of hemp. This is incorrect. The comprehensive scheme that the law established for the licensing of hemp producers and testing of plants for appropriate levels of THC also permits the Secretary of Agriculture to audit States or Indian Tribes to ensure compliance with a Department-approved plan and enforce compliance through corrective action plans and even revocation of a State or Tribal plan. 7 U.S.C. § 1639p(c). It allows States and Tribes to enforce hemp licensees' violations of State or Tribal plans, but specifically reserves enforcement of violations of Department plans to the Secretary of Agriculture. *See* 7 U.S.C. §§ 1639p(e), 1639q(c)(2). In short, Mr. Serna's argument that the Farm Bill's enforcement provisions are "insufficient" simply does not comport with the statutory text. If a State or Tribe creates regulations that prohibit the transportation of compliant hemp,

the Secretary of Agriculture has statutory authority to revoke that State's regulatory plan.

Mr. Serna also relies on *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996) to argue that there is room for concurrent enforcement authority – one expressly delegated in the statute to a governmental agency and another one implied for private citizens that the Court must create. [Op. Brief at 23-26.] But 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). Further, the relevant analysis of *Morse* builds on the outdated and superseded analysis of *Allen,* 393 U.S. 544, that held private parties may enforce a section of the Voting Rights Act of 1965. 517 U.S. at 231-235. The decision in *Morse* also "attached significance to the fact that the Attorney General had urged [the Court] to find that private litigants may enforce the Act," and that "[t]he United States takes the same position in this case." 517 U.S. at 231–32. This factor is missing here. As with the TIA cases discussed above, a pre-existing, "longstanding view that a private right of action exists to

enforce" the Voting Rights Act distinguishes *Morse* and *Allen* from this case.

More importantly, *Morse* and *Allen* were part of the "*ancien regime*" that the Supreme Court explicitly rejected in *Sandoval*. "In the mid–20th century," the Supreme Court more recently explained, "the Court followed a different approach to recognizing implied causes of action than it follows now." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017). But "[l]ater, the arguments for recognizing implied causes of action for damages began to lose their force." *Id.* By the time *Sandoval* was decided (five years after *Morse*), "the Court clarified in a series of cases that, when deciding whether to recognize an implied cause of action, the 'determinative' question is one of statutory intent." *Id.* at 1855-56; *see also Boswell*, 361 F.3d at 1267.

Under the law as it now exists, "[i]f the statute itself does not 'displa[y] an intent' to create 'a private remedy,' then '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.'" *Ziglar*, 137 S. Ct. at 1856 (quoting *Sandoval*, 532 U.S. at 286–

87 and citing *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 15–16, 23–24, (1979); *Karahalios v. Federal Employees,* 489 U.S. 527, 536–537 (1989)). "[T]he judicial task [is] instead 'limited solely to determining whether Congress intended to create the private right of action asserted.'" *Id.* (quoting *Touche Ross & Co. v. Redington,* 442 U.S. 560, 568 (1979)). Therefore, if the statute does not itself so provide, a private cause of action will not be created through judicial mandate. *Id.*

Morse expressly relied (as Mr. Serna does here) on the reasoning 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." 393 U.S., at 556. This is the approach that *Sandoval* expressly disclaims. 532 U.S. at 286–87.

2. The Sandoval Analysis Precludes an Implied Right of Action

Recognizing the hurdle *Sandoval* creates, Mr. Serna argues the Magistrate Judge and District Court both misapplied its teachings. He claims that "[a]s for the private remedy, Congressional intent is… clear" because "Congress implied the availability of limited injunctive or declaratory relief when it banned States and Tribes from prohibiting

interstate transportation of licensed industrial hemp." [Op. Brief at 29-30.] But it is undisputed that the text of the 2018 Farm Bill contains no private right of action. Thus, Mr. Serna must ask this Court to infer Congressional intent via a complex analogy between the Farm Bill and other cases where the Court found such implicit rights. There is no reason for the Court to engage in this.

Mr. Serna first compares this case with the implied right found in *Transamerica Mortg. Advisors, Inc.,* 444 U.S. 11 to conclude that "[w]hen Congress prohibits an entity from acting in a certain manner, that necessarily implies the availability of limited injunctive relief to effectuate that prohibition." [Op. Brief at 29-30.] But this immediately falls flat, because Mr. Serna primarily seeks monetary damages[4] here. Instead, the dispositive question here is whether Congress intended to grant private citizens the ability to enforce the right through civil lawsuits for money damages against individual local police officers or

[4] The District Court denied Mr. Serna's request for an injunction finding that he failed to meet his burden to establish irreparable harm and failed to demonstrate that he will suffer certain, actual, and imminent harm unless the Court entered the injunction sought. ROA 52-55. Mr. Serna has not argued that decision was made in error on appeal.

municipalities. No such right is found in the 2018 Farm Bill either expressly or implicitly.

Further, contrary to Mr. Serna's contention, individuals are not left without any recourse for a violation of the Bill's prohibition against State or Tribal laws and regulations impacting interstate commerce. In *C.Y. Wholesale Inc. v. Holcomb*, 965 F.3d 541 (7th Cir. 2020), a group of hemp sellers and wholesalers filed a complaint seeking declaratory relief pursuant to Fed. R. Civ. P. 57 and 28 U.S.C. §§ 2201 & 2202 and damages under 42 U.S.C. § 1983 regarding a State criminal prohibition on the manufacture, delivery, or possession of smokable hemp. The hemp sellers successfully sought and obtained a preliminary injunction on the basis that the State law was preempted by the 2018 Farm Bill's interstate commerce provision. *Id.* (reversing district court's preliminary injunction as too broad, but recognizing States cannot enact laws criminalizing the possession and delivery of industrial hemp and remanding to the district court with instructions to consider a more narrowly tailored preliminary injunction).

Additionally, in *Big Sky Scientific LLC v. Idaho State Police*, No.

1:19-cv-0040-REB, 2019 WL 2613882 (D. Idaho Feb. 19, 2019), the plaintiff, who owned a large load of industrial hemp that was seized by the state police pursuant to a state law that included hemp as a controlled substance, filed a lawsuit seeking, in part, a declaratory ruling, pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57 as to the plaintiff's rights under the 2018 Farm Bill, including that its hemp was improperly seized. *Id.* at *6-7, rev'd on other grounds by *Big Sky Scientific v. Bennetts*, 776 F. App'x 541 (9th Cir. 2019) (reversing district court's decision not to apply *Younger* abstention). The plaintiff also sought injunctive relief pursuant to Fed. R. Civ. P. 65 & 66. *Id.* at *7. The plaintiff's request for injunctive relief was denied because the district court determined that the plaintiff failed to show a likelihood of success on the merits—not because the district court did not believe he could seek declaratory or injunctive relief to stop a potentially ongoing violation of the interstate commerce provision. *Id.* at *11-15.

The more applicable portion of the *Transamerica Mortgage* decision is its interpretation of § 206 of the Investment Advisors Act of 1940. The Court found that § 206 (as opposed to § 215, where a private right of

action was implied) "simply proscribes certain conduct, and does not in terms create or alter any civil liabilities" and, "[i]f monetary liability to a private plaintiff is to be found it must be read into the Act." *Transamerica Mortg. Advisors, Inc.,* 444 U.S. at 19-20. Reviewing the other express provisions under the relevant section, the Court declined to read such a right into the Act and found that "[i]n view of these express provisions for enforcing the duties imposed by § 206, it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.'" *Id.* at 20 (quoting *Cannon*, 441 U.S. at 689-94 (1979) (Powell, J., dissenting)).

Here, the relevant language of Section 10114 does not proscribe or render unlawful any conduct – at least, not any conduct by Denver or its police officers – but rather, only prevents a "State or Indian Tribe" from establishing regulations that forbid interstate shipments of hemp products. *See* 7 U.S.C. 1639o (defining "State" and "Indian Tribe"). Had Congress intended for private citizens to be able to bring an action against local police officers and municipalities (for damages or injunctive relief) under the framework it established for hemp production and

transportation in the 2018 Farm Bill, it certainly could have expressly included such an enforcement provision in the language of the Act. Under *Transamerica Mortgage*, the absence of such language is dispositive. Congress did not absentmindedly forget to provide for a private cause of action for individual farmers while it specifically provided for the Secretary's enforcement of federal farm policy against States and Tribes. This conclusion is strongly reinforced by a consideration of the Farm Bill's legislative history as expressed by the Magistrate Judge's Recommendation and adopted by the District Court. ROA at 99-100, 127; *see also* Section C, *infra.*

C. The Legislative History Demonstrates That Congress Consciously Chose Not To Allow For Private Enforcement Actions

Mr. Serna fails to identify any legislative history suggesting that Congress intended to include a private right of action for violations of the interstate commerce provision of the 2018 Farm Bill. On the contrary, as the District Court noted, Congress considered and rejected a provision allowing for such private right of action. Mr. Serna attempts to downplay the significance of this crucial fact by claiming the deleted provision "had

nothing to do with a private right of action to enforce the farmer's right to be free from interference with interstate transportation of hemp." [Op. Brief at pp. 35-36.] The plain language of the Bill and rejected provision, however, directly contradict his claim.

> The interstate commerce provision of Subtitle G provides:
>
> > No State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with subtitle G . . . 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). The proposed and rejected private right of action provided, in relevant part:

> > A person . . . which is affected by a regulation of a State or unit of local government which regulates any aspect of an agricultural product, including . . . *any means or instrumentality through which such an agriculture product is sold in interstate commerce*,[5] may bring an action in the appropriate court to invalidate such a regulation and seek damages for economic loss resulting from such regulation.

House Report 115-61, Title XI, Subtitle G, § 11702 (May 3, 2018) (emphasis added). The House Bill defined "agricultural product" as

[5] Mr. Serna omitted the italicized portion of the provision from the recitation in his brief. [*See* Op. Brief at p. 36.]

having "the meaning given such term in section 207 of the Agricultural Marketing Act of 1946 (7 U.S.C. § 1626)." House Report 115-61, Title XI, Subtitle G, § 11701(b) (May 3, 2018). The Agricultural Marketing Act's definition of "Agricultural Product" includes "agricultural, horticultural . . . and any products thereof, including processed and manufactured products, and any and all products raised or produced on farms and any processed or manufactured product thereof . . .." 7 U.S.C. § 1626.

From the text of these provisions, it cannot be disputed that hemp qualifies as an "agricultural product" under the relevant definitions. Further, the parties agree that the effect of the interstate commerce provision is to prohibit State and Tribal interference with the interstate transport of hemp through the adoption of regulations, laws, or other rules. Finally, as reproduced above, the rejected private right of action provision allowed an impacted individual to bring a lawsuit pertaining to regulations affecting "any means or instrumentality" through which an agricultural product, *i.e.*, hemp, "is sold in interstate commerce." House Report 115-61, Title XI, Subtitle G, § 11702 (May 3, 2018). The transport of hemp across state lines would certainly qualify as a "means or

instrumentality" of selling hemp in interstate commerce. Thus, the plain statutory language establishes that Congress expressly rejected a provision allowing a private right of action to seek damages for a violation of the interstate commerce provision—precisely what Mr. Serna seeks to do through this lawsuit.

The Supreme Court views Congressional rejection of a proposed amendment as strong evidence of legislative intent. *See Burlington Northern R. Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 439-440 (1987) (the fact that the House refused an amendment that would exempt railroads from the Norris-LaGuardia Act "leaves no doubt that Congress intended the [ ] Act to cover the railroads."). In fact, numerous circuit courts have found that "the most persuasive indication of legislative intent is Congress's decision to delete a proposed private right of action provision from the final version of the Act." *Wagner v. PennWest Farm Credit, ACA*, 109 F.3d 909, 912 (3d Cir. 1997) (applying factors set forth in *Cort*, 422 U.S. 66; *Local 3-689, Oil, Chemical & Atomic Intern. Union v. Martin Marietta Energy System, Inc.*, 77 F.3d 131, 136 (6th Cir. 1996) (noting that the fact that Congress considered and

rejected a version of a bill that would have allowed a private action for damages undermines an argument for an implied private right of action); *Harper v. Fed. Land Bank of Spokane*, 878 F.2d 1172, 1176 (9th Cir. 1989) (declining to allocate much weight to the fact that both houses of Congress proposed a private right of action, but deleted in the final conference version "[b]ecause the conference report represents the final statement of the terms agreed to by both houses, next to the statute itself it is the most persuasive evidence of congressional intent.") (quotation marks and citation omitted); *Saltzman v. Farm Credit Services of Mid-America, ACA*, 950 F.2d 466, 468 (7th Cir. 1991) ("Most telling, Congress chose to delete a proposed private right of action provision from the final version of the Act"); *Zajac v. Federal Land Bank of St. Paul*, 909 F.2d 1181, 1182 (8th Cir. 1990) (adopting and quoting *Harper*); *see also Griffin v. Federal Land Bank of Wichita*, 902 F.2d 22, 23-24 (10th Cir. 1990) (adopting, without discussion, *Harper's* reasoning to find that no private right of action is available to enforce the Agricultural Act of 1987). Thus, based on the deletion of the provision providing for a private right of action, the legislative intent does not support Mr. Serna's position.

Importantly, as demonstrated by the plain language of the Bill, the interstate commerce provision of Subtitle G is concerned with the enactment of regulations, laws, or other rules prohibiting interstate transport of hemp by a State or Tribe. Here, Mr. Serna's alleged hemp was not seized due to a regulation, law, or other rule barring the interstate transport of qualifying hemp in Colorado or Denver. His hemp was seized because Officer Jaramillo believed it to be marijuana, which cannot be transported across state lines. ROA at 20. The Congressional Record for the 2018 Farm Bill is devoid of any discussion of cases of mistaken identification of industrial hemp for marijuana by local law enforcement authorities.

Mr. Serna fails to identify any legislative history indicating that Congress intended to give individuals a private right of action to seek damages for a violation of the interstate commerce provision of the 2018 Farm Bill—let alone that such provision could apply to circumstances involving local law enforcement mistaking hemp for marijuana. For these reasons, the District Court did not err in dismissing Mr. Serna's complaint for failure to state a claim, and its decision should be affirmed.

D. The District Court Did Not Abuse Its Discretion in Failing to Grant Mr. Serna an Opportunity to Amend His Complaint

Finally, Mr. Serna argues that the District Court abused its discretion in denying him the opportunity to amend his complaint to plead a claim under 42 U.S.C. § 1983 before dismissing his case with prejudice. The District Court was well within its discretion to dismiss the case with prejudice, both because of the legal infirmities of Mr. Serna's claim and his violation of procedural rules. "[T]he district court may dismiss without granting leave to amend when it would be futile to allow the plaintiff an opportunity to amend his complaint." *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006) (citation omitted). Here the District Court conducted such analysis and determined that any attempt by Mr. Serna to amend his complaint to state a claim under the Farm Bill, which was the only claim alleged in his complaint and addressed in response to Defendants' motion to dismiss, would be futile. ROA at 135.

The Tenth Circuit cases Mr. Serna cites in support of his contention that the District Court should have, *sua sponte*, granted him leave to amend arose from procedural postures very distinct from those in this

case. In both *Brown v. New Mexico Dist. Ct. Clerks*, 141 F.3d 1184 (10th Cir. 1998) (table decision) and *Roman-Nose v. New Mexico Dist. Ct. Clerks*, 967 F.2d 435, 437 (10th Cir. 1992), the dismissal of the *pro se* complaints was *sua sponte* after initial judicial review. Here, however, Mr. Serna's complaint was dismissed after fully briefing a motion to dismiss brought pursuant to Rule 12(b)(6) and the issuance of the Magistrate Judge's Recommendation, both of which put him on notice of the legal deficiencies of his claim. ROA at 127.

The Supreme Court, in addressing the distinction between dismissal under Rule 12(b)(6) pursuant to a motion and *sua sponte* dismissal under 28 U.S.C. § 1915(d), reasoned:

> Under Rule 12(b)(6), a plaintiff with an arguable claim is ordinarily accorded notice of a pending motion to dismiss for failure to state a claim and an opportunity to amend the complaint before the motion is ruled upon. These procedures alert him to the legal theory underlying the defendant's challenge and enable him meaningfully to respond by opposing the motion to dismiss on legal grounds or by clarifying his factual allegations so as to conform to the requirements of a valid legal cause of action.

Neitzke v. Williams, 490 U.S. 319, 329-30 (1989). Here, Defendants filed a motion to dismiss that put Mr. Serna on notice of the perceived

deficiencies in his complaint; yet Mr. Serna did not file an amended complaint as permitted by Fed. R. Civ. P. 15(a)(1)(B). He, instead, chose to stand on his initial pleading.

Thus, unlike *pro se* plaintiffs whose complaints are dismissed with prejudice *sua sponte* by the Court, Mr. Serna had notice and an opportunity to amend his complaint before the District Court acted on Defendants' motion to dismiss. *See Neitzke*, 490 U.S. at 329-30.; *McKinney v. Oklahoma*, 925 F.2d 363, 365 (10th Cir. 1991) ("[T]he preferred practice is to accord plaintiff notice and an opportunity to amend his complaint before acting upon a motion to dismiss for failure to state a claim[.]"); *see also Ostler v. Buhler*, 30 F.3d 142, *2 (10th Cir. 1994) (table decision) ("The filing of a motion to dismiss gives the plaintiff notice that his complaint is potentially deficient and the opportunity to amend his complaint to cure the alleged deficiencies.") (citing *Hall v. Bellmon*, 935 F.2d 1106, 1109-1110 (10th Cir. 1991)). Mr. Serna's decision to stand on his initial pleading when faced with a motion to dismiss that put him on notice of the deficiencies of his complaint does not support a

finding that the District Court abused its discretion in failing to afford him leave to amend his complaint.

Although Mr. Serna does not raise this issue in his Opening Brief, he mentions leave to amend his complaint in the final paragraph of his objection to the Magistrate Judge's Recommendation, stating:

> If leave will be granted under Rule 15(a), Plaintiff will request that leave under guidance from D.C.COLO.LCivR 15.1. He requests leave to amend his petition with a Section 1983 claim as well as constitutional and common law theories under which Plaintiff may be made whole in addition to seeking equitable relief.

ROA at 116. A proper request for leave to amend "must give adequate notice to the district court and the opposing party of the basis of the proposed amendment before the court is required to recognize that a motion to leave to amend is before it." *Calderon v. Kansas Dep't of Soc. & Rehab. Servs.*, 181 F.3d 1180, 1186-87 (10th Cir. 1999). Mr. Serna's vague allusions to a "Section 1983 claim" and "constitutional and common law theories" does not provide such notice and, therefore, cannot constitute a motion for leave to amend. *See id.* at 1187 ("single sentence, lacking a statement for the grounds for amendment and dangling at the end of [plaintiff's] memorandum, did not rise to the level of a motion for leave to

amend."); *Wright v. Petty*, 759 F. App'x 732, 735 (10th Cir. 2019) (unpublished). Thus, the District Court did not err in declining to consider and address such request.

Further, Mr. Serna offered nothing in his opposition to Defendants' motion to dismiss or in his objection to the Recommendation to indicate the manner in which Defendants allegedly violated his constitutional rights, thereby "plac[ing] the district court in the untenable position of making [his] case for [him]." *McNamara v. Pre-Paid Legal Servs., Inc.*, 189 F. App'x 702, 719 (10th Cir. 2006) (unpublished); *see also Calderon*, 181 F.3d at 1187 ("Our requirement of notice merely assures that we do not require district courts to engage in independent research or read the minds of litigants to determine if information justifying an amendment exists") (quotation marks and citations omitted). The District Court did not err by not affording Mr. Serna the opportunity to amend his complaint when Mr. Serna failed to even suggest the basis for any amendment.

Finally, even after the District Court entered its Order dismissing the case, Mr. Serna could have moved under Fed. R. Civ. P. 59(e) or 60(b)

to reopen the case and then filed a motion for leave to amend his complaint pursuant to Fed. R. Civ. P. 15. *See Calderon*, 181 F.3d at 1185; *Switzer v. Coan*, 261 F.3d 985, 989-90 (10th Cir. 2001) (even if *pro se* plaintiff were to contend at appellate level "that he should have been allowed to amend his complaint to correct its deficiencies, such a contention would be properly rejected because it was incumbent upon him to seek leave from the District Court to make the attempt after dismissal of his action below. By not doing so, he has elected to appeal the case as it stood.") (quotation marks, alterations, and citation omitted). Mr. Serna did not do this and, instead, filed a notice of appeal.

In sum, Mr. Serna failed to avail himself of numerous options to raise his unasserted claims at the District Court level: (1) he did not seek leave to amend after Defendants filed their motion to dismiss, instead doubling down on his claim under the Farm Bill; (2) he did not file a separate motion to amend in compliance with Fed. R. Civ. P. 15(a)(2) and D.C.COLO.LCivR 15.1 after the Magistrate Judge entered the Recommendation that his complaint be dismissed with prejudice; and (3) he failed to seek relief through Rule 59 or 60 after the District Court

dismissed his complaint with prejudice. *See Weldon v. Ramstand-Hvass*, 512 F. App'x 783, 797-98 (10th Cir. 2013) (unpublished) (finding district court did not abuse its discretion in not giving pro se plaintiff leave to amend where plaintiff did not avail himself of opportunity to amend his complaint in response to defendants' motion to dismiss or, after the district court dismissed the complaint, by filing a motion pursuant to Rules 59(e) or 60(b)).

As stated by this Court, "[t]he courts of appeals are not second-chance forums where litigants, whose appellate arguments are deemed unavailing, are given the opportunity to relitigate their cases in ways previously available to them." *Pyle v. Woods*, 874 F.3d 1257, 1267 (10th Cir. 2017). Under the circumstances of this case, the District Court was not required to *sua sponte* grant Mr. Serna leave to amend his complaint and, therefore, did not abuse its discretion in dismissing Mr. Serna's complaint with prejudice.

VI. CONCLUSION

For all these reasons, the District Court's order dismissing Mr. Serna's complaint with prejudice should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellees request oral argument because this case involves the important issue of the availability of a private right of action under the 2018 Farm Bill and oral argument will assist this Court in its review of the issue and argument raised by this appeal.

DATED this 24th day of June 2022.

Respectfully submitted,

s/Conor D. Farley
Conor D. Farley, Assistant City Attorney
Jennifer Johnson, Assistant City Attorney
Denver City Attorney's Office
Civil Litigation Section
201 W. Colfax Avenue, Dept. 1108
Denver, CO 80202-5332
Telephone: (720) 913-3100
Facsimile: (720) 913-3131
Email: conor.farley@denvergov.org
jennifer.johnson2@denvergov.org
Attorneys for Defendants-Appellees

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 7,444 words.

2. This document complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word for 365 in 14-point Century Schoolbook font.

Date: June 24, 2022

s/Conor D. Farley
Denver City Attorney's Office
Attorney for Defendants-Appellees

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hardcopies, that the ECF submission is an exact copy of those documents; and

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, CrowdStrike Falcon Sensor, and according to the program are free of viruses.

Dated: June 24, 2022

s/Conor D. Farley
Denver City Attorney's Office
Attorney for Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2022, I electronically filed a copy of the foregoing **ANSWER BRIEF** with the Clerk of the United States Court of Appeals for the Tenth Circuit using the Court's appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users who will be served by the appellate CM/ECF system.

Dated this 24th day of June 2022

s/Conor D. Farley
Denver City Attorney's Office