Case No. 20-2884

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

Wilbert Glover

*Appellant*,

v.

Matt Bostrom, et al.

*Appellees*.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
District Court Civil No. 18-CV-285-NEB
District Court Judge Nancy E. Brasel

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# REPLY BRIEF OF APPELLANT

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## INTRODUCTION

When Wilbert Glover came to court seeking relief for the relentless racial harassment and discrimination he experienced while detained at the Ramsey County Adult Detention Center, he did so without the benefit of a lawyer's help. He remained *pro se* throughout the proceedings before the District Court, including through multiple rounds of dispositive motion practice. At each stage, Glover did his best to contend with the arguments raised by the Defendants, submitting and resubmitting the documents he had to support his case, including grievance forms, declarations from other detainees, and sworn statements in which he outlined the testimony he would give at trial about the harassment and discrimination he endured.

As a party opposing summary judgment, Glover is entitled to the benefit of all reasonable inferences that can be drawn in his favor from the evidence that he submitted. *Watson v. Jones*, 980 F.2d 1165, 1166 (8th Cir. 1992). And as a *pro se* litigant, Glover's submissions—including his affidavits—must be construed liberally. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). In granting summary judgment in favor of Defendants Richard Rodriguez ("Rodriguez") and Joseph Paget ("Paget") on Glover's Equal Protection claim, the District Court did neither. Because Glover offered sufficient admissible evidence to



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make out genuine disputes of material fact on his Equal Protection claim, the District Court's summary judgment order should be reversed and the claim remanded for trial.

Separately, Defendants have now conceded that the District Court erred when it dismissed Glover's claims of retaliation and violations of the Minnesota Human Rights Act at the Rule 12 stage. The parties accordingly agree that this Court should reverse the dismissal of those claims and remand them for further proceedings before the District Court.

## ARGUMENT

### I. The District Court erred in granting summary judgment on Glover's Equal Protection claim.

Wilbert Glover came to court seeking redress for the fact that, while detained at the Adult Detention Center, he was called "the N-word three (3) or four (4) times a day and otherwise harassed."[1] The grievances he submitted to Defendants Rodriguez and Paget (among other Ramsey County officials) about this harassment fell on deaf ears: in a sworn statement, Glover reported that "[n]o matter how many times I complain about racially offensive language, nothing is done."[2] The District Court appropriately recognized at the Rule 12 stage that Glover's assertions give rise to a cognizable Equal Protection claim.[3] But at the Rule 56 stage, the District Court improperly dismissed Glover's Equal Protection claim. In so doing, the District Court committed several distinct errors. *First*, the District Court failed to consider whether Defendants Rodriguez and Paget have supervisory liability for the violations of Glover's constitutional rights. *Second*, the District Court

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[1] APPX.013, *available at* ECF No. 1-1 at 7.

[2] APPX.013, *available at* ECF No. 1-1 at 7.

[3] ADD.7, *available at* ECF No. 35 at 7.

overlooked admissible evidence in the form of sworn statements that were part of the summary judgment record and that create issues for trial on the question of whether Rodriguez and Paget personally violated Glover's rights. *Finally*, the District Court erroneously concluded that Glover was barred from pursuing any form of money damages by the Prison Litigation Reform Act's ("PLRA") physical-injury requirement. Taken together these errors compel reversal of the District Court's summary judgment order and a remand for trial on Glover's Equal Protection claim.

### A. The District Court erroneously failed to address Defendants Rodriguez's and Paget's supervisory liability.

Supervisors may be liable under Section 1983 if their "failure to properly supervise and train [an] offending employee caused the constitutional violation at issue." *Jackson v. Nixon*, 747 F.3d 537, 543 (8th Cir. 2014) (internal quotation marks omitted). This Court has previously explained that "a supervisor incurs liability for a [constitutional] violation when the supervisor is personally involved in the violation *or* when the supervisor's corrective inaction constitutes deliberate indifference toward the violation." *Boyd v. Knox*, 47 F.3d 966, 968 (8th Cir. 1995) (emphasis added). In other words, "[t]he supervisor must know about the conduct and facilitate it, approve it,



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condone it, or turn a blind eye for fear of what [he or she] might see." *Id.* (quoting *Ripson v. Alles*, 21 F.3d 805, 809 (8th Cir. 1994)).

Genuine disputes of material fact should have precluded summary judgment on Glover's supervisory liability claims against Rodriguez and Paget. As a preliminary matter, Glover submitted numerous sworn statements attesting that he experienced severe and pervasive racial harassment and discrimination while detained at the Adult Detention Center.[4] For example, Glover's Minnesota Department of Human Rights ("MDHR") Charge of Discrimination, which he submitted to the District Court numerous times, averred that Adult Detention Center officers "used the N-word three (3) or four (4) times a day and otherwise harassed [Glover]," and that "[n]o matter how many times [he] complain[ed] about racially offensive language, nothing is done."[5] These assertions state a cognizable claim that Glover's constitutional

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[4] *See, e.g.*, APPX.013-14, *available at* ECF No. 1-1 at 7 (MDHR Charge of Discrimination); APPX.102, *available at* ECF No. 30 (Glover MDHR Affidavit); APPX.148-49, *available at* ECF No. 37-1 (notarized letter to Huffman); APPX.164-65, *available at* ECF No. 53 (notarized letter to Croucher); APPX.235-36, *available at* ECF No. 87 (Glover Aff. responding to Rodriguez Aff.); APPX.240-41, *available at* ECF No. 101 (Glover Aff. responding to Paget Aff.).

[5] APPX.013, *available at* ECF No. 1-1 at 7. In addition to submitting the MDHR Charge of Discrimination with his Complaint, Glover re-submitted the

rights were violated. *See, e.g.*, *Lewis v. Jacks*, 486 F.3d 1025, 1028 (8th Cir. 2007) (pervasive use of racially derogatory language can amount to unconstitutional race discrimination); *see also* Section I.B.3 *infra*.

Moreover, record evidence creates triable issues on whether Rodriguez and Paget are liable as supervisors for these violations of Glover's constitutional rights. Rodriguez's and Paget's *own affidavits* establish (1) that they were supervisors at the Adult Detention Center, who (2) received many grievances from Glover about the severe, race-based harassment and discrimination he experienced.[6] In other words, Rodriguez and Paget acknowledge that they had actual knowledge of Glover's complaints about the racially harassing environment he encountered at the Adult Detention Center and could have done something about it. Rodriguez and Paget go on to attest that they investigated Glover's claims and found them to be uncorroborated, and that Glover's race "never played any part in [their] evaluation or decisions

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Charge of Discrimination as part of his opposition to Defendants' summary-judgment motion. *See* ECF No. 86 at 5-6. The same is true of Glover's notarized letter to County Commissioner Blake Huffman. *Compare* APPX.148-9, *available at* ECF No. 37-1, *with* ECF No. 91 at 13-14.

[6] *See* APPX.227-28, *available at* ECF No. 79 at 1-2 (Paget Aff.); APPX.229-30, *available at* ECF No. 80 at 1-2 (Rodriguez Aff.).

regarding his grievances."[7] But in sworn statements, Glover disagrees. Responding directly to Rodriguez's affidavit, Glover swears that his grievances received "no answer – nothing was address cause we was all Afro American."[8] Similarly, in responding directly to Paget's affidavit, Glover avers that Paget "received my grievances and rejected them" and that Glover's "race played a major part in regarding his grievances and kites."[9] Glover also contests Paget's assertion that he met with Glover "approximately twenty-one times to discuss his claims,"[10] attesting that Paget "never came to see me twenty one times."[11] Glover's sworn statements are sufficient to create issues for trial on the question of whether Rodriguez and Paget, acting in their roles as Adult Detention Center supervisors, facilitated, condoned, or "turn[ed] a blind eye" to violations of Glover's constitutional rights. *Boyd*, 47 F.3d at 968 (quotation marks omitted).

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[7] APPX.228, *available at* ECF No. 79 at 2 (Paget Aff.); *see also* APPX.230, *available at* ECF No. 80 at 2 (Rodriguez Aff.).

[8] APPX.236, *available at* ECF No. 87 at 2.

[9] APPX.241, *available at* ECF No. 101 at 2.

[10] APPX.228, *available at* ECF No. 79 at 2.

[11] APPX.241, *available at* ECF No. 101 at 2.



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Defendants' sole response to Glover's supervisory liability argument is to contend that it has been waived: that "it was not raised to the district court and cannot be considered for the first time on appeal."[12] But Defendants are incorrect that this issue was not raised before the District Court. In fact, in their own summary judgment briefing, Defendants spent nearly four pages arguing that Glover's "theory of supervisory liability against the individually-named Defendants . . . fails as a matter of law."[13] Defendants specifically addressed claims for supervisory liability directed against Rodriguez and Paget, reflecting their understanding that Glover was asserting such claims.[14] And Glover's *pro se* briefing and affidavits in response to Defendants' summary judgment motion make clear that he is in fact pressing claims related to Rodriguez's and Paget's actual knowledge of and failure to rectify the racial discrimination and harassment he experienced at the Adult Detention Center.[15] Glover might not have used the words "supervisory

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[12] Br. of Defs.-Appellees at 29.

[13] APPX.218-221, *available at* ECF No. 76 at 13-16.

[14] APPX.220-21, *available at* ECF No. 76 at 15-16.

[15] *See, e.g.*, APPX.231-33, *available at* ECF No. 85 (discussing lack of action on grievances and noting "Richard Rodriguez has signed and processed and nothing was done"); APPX.241, *available at* ECF No. 101 (discussing lack



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liability" to describe these claims, but as a *pro se* litigant his filings are "to be liberally construed." *Erickson*, 551 U.S. at 94 (quotation marks omitted). When given a liberal construction, Glover's filings sufficiently establish that he is pursuing supervisory liability claims against Rodriguez and Paget. The fact that the District Court did not address Glover's supervisory liability theory when it entered summary judgment in Defendants' favor is accordingly error warranting reversal, not waiver by Glover.

### B. There are genuine disputes of fact about whether Rodriguez and Paget personally violated Glover's constitutional rights.

The record also reflects triable issues on whether Rodriguez and Paget themselves engaged in direct, race-based harassment and discrimination against Glover. Defendants raise three arguments in response to Glover's assertion that Rodriguez and Paget called Glover the N-word and failed to act on Glover's grievances, thereby personally violating Glover's constitutional rights: (1) that Glover's assertions are not supported by admissible evidence; (2) that Glover has failed to establish that similarly situated detainees were treated differently; and (3) that Glover's right to be free from an environment

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of action on grievances and noting "Joseph Paget . . . never came to see me twenty one times he signed received my grievances and rejected them").

in which he was constantly called despicable racial slurs has not been clearly established. All of these arguments should be rejected.

### 1. Glover's Equal Protection claims against Rodriguez and Paget are supported by admissible evidence.

Glover has identified admissible evidence sufficient to create genuine disputes of fact about whether Rodriguez and Paget personally engaged in race-based harassment and discrimination. As noted above, after Rodriguez and Paget submitted affidavits asserting that Glover "was never discriminated against,"[16] Glover submitted his own affidavits contesting specific assertions made by Rodriguez and Paget, averring that Rodriguez and Paget are not being truthful, and stating that Rodriguez and Paget harassed and discriminated against him because of his race.[17] Glover also submitted as part of his opposition to Defendants' summary judgment motion additional sworn statements in the form of a Charge of Discrimination filed with the MDHR and a notarized letter sent to former Ramsey County Commissioner Blake Huffman outlining in detail the environment of severe racial discrimination

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[16] APPX.230, *available at* ECF No. 80.

[17] APPX.235-36, *available at* ECF No. 87; APPX.240-41, *available at* ECF No. 101.

and harassment that Glover was experiencing.[18] In his letter to Mr. Huffman, Glover identified Rodriguez and Paget by name as people to whom he had sent grievances and "received no, none answer! Or investigation."[19]

The District Court construed Glover's affidavits and other filings—including affidavits responding to the affidavits of Rodriguez and Paget, the MDHR Charge of Discrimination, and the Huffman letter—to be Glover's response to the Defendants' summary-judgment motion.[20] But although the District Court recognized that these sworn statements were part of Glover's response to the Defendants' motion for summary judgment, it only mentioned Glover's responsive affidavits in passing and did not discuss the MDHR Charge of Discrimination or Glover's notarized letter to Commissioner Huffman at

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[18] *See* ECF No. 86 at 5-6 (MDHR Charge of Discrimination); ECF No. 91 at 13-14 (Glover letter to Huffman). *See also supra* n. 5 (explaining that these documents were submitted as both exhibits to the Initial Complaint and in response to Defendants' summary judgment motion).

[19] ECF No. 91 at 13 (Glover letter to Huffman).

[20] *See* ADD.023, *available at* ECF No. 104 at 3 (construing Doc. Nos. 82, 83, 85, 86, 87, 88, 89, 91, 92, 93, 95, 96, 97, 98, 100, 101 and 103 as Glover's opposition to Defendants' summary-judgment motion); APPX.235-36, *available at* ECF No. 87 (Glover Aff. responding to Rodriguez Aff.); APPX.240-41, *available at* ECF No. 101 (Glover Aff. responding to Paget Aff.); ECF No. 86 at 5-6 (MDHR Charge of Discrimination); ECF No. 91 at 13 (Glover letter to Huffman).

all. Instead, the District Court focused on grievance forms that Glover had also submitted, which the Court concluded "are inadmissible hearsay."[21] The Court reasoned that without the grievance forms, Glover's claims "rest[] entirely on Plaintiff's unsupported allegations."[22] In so holding, the District Court erred. Because Glover supported his allegations that Defendants Rodriguez and Paget personally violated his constitutional rights with admissible evidence in the form of his own sworn statements, Glover should be permitted to proceed to trial on these claims.

Defendants make several counterarguments that boil down to two basic contentions: (1) that Glover cannot rely on unsworn statements to defeat summary judgment, and (2) that Glover's sworn statements do not contain sufficient detail about the ways in which Rodriguez and Paget are personally responsible for the violations of Glover's Equal Protection rights. With respect to the former point, Glover has already acknowledged that his unsworn statements and allegations standing alone will not defeat a motion for

[21] ADD.034, *available at* ECF No. 104 at 14.

[22] ADD.034, *available at* ECF No. 104 at 14; *see also* ADD.035, *available at* ECF No. 104 at 15.

summary judgment.[23] And with respect to the latter point, Defendants seek to impose a heavier burden on Glover than the law requires. As a party opposing summary judgment, Glover is entitled to all reasonable inferences that can be drawn in his favor. *See, e.g.*, *Watson*, 980 F.2d at 1166. And as a *pro se* litigant, Glover's submissions are entitled to liberal construction. *See Erickson*, 551 U.S. at 94; *see also Haymes v. Montanye*, 547 F.2d 188, 190 (2d Cir. 1976) (noting *pro se* affidavits are entitled to liberal construction). Liberally construed, Glover's sworn statements submitted in response to the Defendants' summary judgment briefing and the reasonable inferences that can be drawn from them are sufficient to create issues for trial on whether Rodriguez and Paget personally violated Glover's rights.

*Watson v. Jones* is analogous and instructive. In that case, two *pro se* inmates alleged that a female corrections officer "performed almost daily routine pat-down searches" for a two-month period "that consisted of tickling and a deliberate examination of the genital, anus, lower stomach and thigh areas." 980 F.2d at 1165 (quotation marks omitted). The corrections officer moved for summary judgment and submitted an affidavit denying that she

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[23] Br. of Appellant at 39-40.



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had engaged in the behavior alleged by the inmates. *See id.* at 1166. The district court granted the officer summary judgment, "finding that the inmates had made only broad, conclusory allegations of sexual harassment, while Jones, in her affidavit, swore that she had not conducted any improper pat searches." *Id.* On appeal, this Court reversed, noting that it is "required to view all evidence in the light most favorable to the nonmoving party and to give that party the benefit of all reasonable inferences to be drawn from the underlying facts." *Id.* This Court went on to note that although the plaintiffs' averments "admittedly lack[ed] detail," they were sufficient to survive summary judgment. *Id.*

So too here. Although Glover's sworn statements may not be intricately detailed, as in *Watson*, when read liberally and with the benefit of reasonable inferences, they are sufficient to create triable issues on whether Rodriguez and Paget personally violated Glover's constitutional rights. The District Court failed to give Glover's sworn statements proper weight (indeed, the Court failed to mention two of those sworn statements at all). As a result, the District Court's grant of summary judgment to Rodriguez and Paget on the grounds that Glover's Equal Protection claim is unsupported by admissible evidence should be reversed.

### 2. Glover did not need to identify similarly-situated detainees who were treated differently.

Defendants' argument that summary judgment was appropriately granted because Glover "failed to introduce any evidence that similarly-situated inmates were treated differently than he was"[24] also fails. As the cases on which Defendants rely themselves make clear, the identification of similarly-situated inmates who were treated more favorably is necessary only when "direct evidence of racial animus" is lacking. *See, e.g.*, *Seenyur v. Coolidge*, Civ. No. 14-4250, 2016 WL 7971295, at *10 (D. Minn. July 21, 2016), *report & recommendation adopted by* 2016 WL 4467887 (D. Minn. Aug. 22, 2016), *aff'd sub nom. Johnson v. Coolidge*, 692 F. App'x 320 (8th Cir. 2017); *see also, e.g.*, *U.S. v. Frazier*, 408 F.3d 1102, 1108 (8th Cir. 2005) ("[W]e recognize that encounters with officers may violate the Equal Protection Clause when initiated solely based on racial considerations."). It is hard to imagine clearer evidence of racial animus than the repeated use of the N-word that Glover has attested to in this case. Glover accordingly had no obligation to plead additional facts about the Defendants' differential

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[24] Br. of Defs.-Appellees at 28.

treatment of similarly-situated inmates in order to make out a cognizable Equal Protection claim.

### 3. The constitutional rights Defendants violated were clearly established.

Finally, this Court should dismiss out of hand Defendants' suggestion that the Equal Protection rights at issue in this case were not clearly established at the time of the Defendants' actions. Assessing "whether the right at issue was clearly established at the time of [a] defendant's alleged misconduct" is "the second step of the qualified immunity analysis." *Z.J. by & through Jones v. Kansas City Bd. of Police Comm.*, 931 F.3d 672, 683 (8th Cir. 2019) (internal quotation marks omitted). To determine whether a given right is clearly established, "the focus is on whether the officer had fair notice that her conduct was unlawful." *Id.* (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018)). "It is not required that there be 'a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.'" *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). At the end of the day, the clearly established inquiry ensures that "[o]fficials are not liable for bad guesses in gray areas," but "*are* liable for transgressing bright lines." *Id.* (emphasis added) (quotation marks omitted).



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Glover's assertions in this case reflect the Defendants' transgression of bright lines, not bad guesses in gray areas. Glover has sworn that the Defendants and those they supervised called him and other Black detainees the most heinous slurs imaginable multiple times a day throughout his time at the Adult Detention Center.[25] For several decades, this Court has acknowledged that the use of "reprehensible racially derogatory language" could be an Equal Protection violation if "it is pervasive or severe enough to amount to racial harassment." *Lewis*, 486 F.3d at 1028 (internal quotation marks omitted); *see also Habhab v. Hon*, 536 F.3d 963, 967 (8th Cir. 2008); *Blades v. Schuetzle*, 302 F.3d 801, 805 (8th Cir. 2002). It is hard to imagine circumstances more "pervasive or severe" than those alleged in this case. Similarly, Glover's claim that Rodriguez and Paget failed to address his grievances because he is Black is one that this Court (and others) have recognized may be cognizable under the Fourteenth Amendment. *See, e.g.*, *Williams v. Davis*, 200 F.3d 538, 539 (8th Cir. 2000) (per curiam); *McIntosh v. Lindsey*, No. 16-cv-00927, 2017 WL 1132642, at *3 (S.D. Ill. Mar. 27, 2017).

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[25] *See, e.g.*, APPX.013-14, *available at* ECF No. 1-1 at 7-8.

The purpose of the "clearly established" component of qualified immunity is to "provide[] officers with ample room for honest mistakes." *Z.J.*, 931 F.3d at 683. But Glover's claims in this case are not about potential mistakes, or even the kinds of circumstances that could give rise to them. Glover's claims that the Defendants relentlessly used racial slurs to refer to him and other detainees, failed to appropriately supervise other officers who also engaged in this racial harassment, and refused to address his grievances because he is Black, are well within the bounds of clearly-established violations of the Equal Protection Clause.

### C. The PLRA's physical-injury-damages bar does not warrant dismissal of Glover's equal protection claim.

Defendants' final argument is that the Court's summary judgment order should be affirmed based on the PLRA's damages limitation. In making this argument, Defendants do not take issue with Glover's suggestion that compensatory damages should be available under the PLRA for *constitutional, non-physical injuries*.[26] Nor do Defendants dispute that Glover may recover

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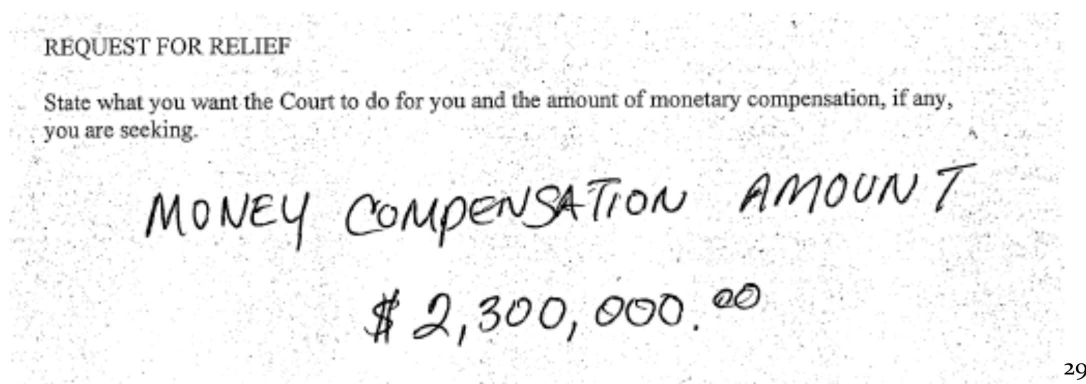
[26] *See* Br. of Appellant at 47–50 (discussing growing circuit split on this issue and reasons to revisit this Court's holding in *Royal v. Kautzky*, 375 F.3d 720 (8th Cir. 2004)).

*nominal and/or punitive damages* under the PLRA for non-physical injuries. Defendants instead make two technical and unpersuasive arguments: (1) Glover solely sought compensatory damages to the exclusion of other forms of damages; and (2) Glover waived his nominal and punitive damages argument. Neither argument can be reconciled with the record below.

To start, Glover did not seek compensatory damages to the exclusion of other forms of damages. Glover filed his Initial Complaint on a district court *pro se* complaint form.[27] In the request for relief, Glover sought "money compensation" amounting to $2.3 million.[28] The Initial Complaint's reference to "money compensation" *precisely* mirrored the request-for-relief language in the *pro se* complaint form utilized by Glover.


REQUEST FOR RELIEF

State what you want the Court to do for you and the amount of monetary compensation, if any, you are seeking.

MONEY COMPENSATION AMOUNT

$2,300,000.00

[29]

[27] *See* APPX.001, *available at* ECF No. 1 at 1.

[28] APPX.005, *available* at ECF No. 1 at 5.

[29] APPX.005, *available at* ECF No. 1 at 5.

Given this context, Glover's request for "compensation" should be read to include all forms of monetary damages, rather than as a reference to the narrower and more technical phrase of "compensatory damages." Such a reading is most consistent with the *pro se* complaint form as a whole, since that form does not request specification of whether the money compensation is nominal, compensatory, or punitive.

Reading the Initial Complaint to request all forms of damages—nominal, compensatory, and punitive—is also most consistent with the plain meaning of the word "compensation," which is broader than the phrase "compensatory damages." Black's Law Dictionary defines "compensation" as "[p]ayment of damages." Compensation, Black's Law Dictionary (11th ed. 2019). "Damages," in turn, are defined as "[m]oney claimed by . . . a person as compensation for loss or injury." Damages, Black's Law Dictionary (11th ed. 2019). "Compensatory damages," by contrast, are defined as "[d]amages sufficient in amount to *indemnify* the injured person for the loss suffered." Damages, Black's Law Dictionary (11th ed. 2019) (emphasis added). In other words, compensatory damages are by definition narrower and different than money compensation.

A plain reading of the Initial Complaint's reference to "money compensation" thus encompasses nominal, compensatory, and punitive damages, all of which are types of damages that an individual may obtain as compensation for an injury. *Wilcox v. Brown*, 877 F.3d 161 (4th Cir. 2017), is thus directly on point and supports reversal. As in *Wilcox*, Glover's *pro se* request for damages "encompasses a request for nominal damages." *Id.* at 169. *Munn v. Toney*, 433 F.3d 1087 (8th Cir. 2006), also supports reversal, since in that case this Court made two alternative holdings: (1) there was a physical injury; *or* (2) "at a minimum," even if there was no physical injury, the plaintiff "could recover nominal damages." *Id.* at 1089. Defendants mistakenly focus on the former holding to the exclusion of the latter.[30]. The District Court accordingly erred by concluding that Glover solely sought compensatory

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[30] The Defendants are also incorrect that Glover is asserting that "punitive and nominal damages must *always* be considered whenever the PLRA is applicable to a claim for damages." Br. of Defs.-Appellees at 35 (emphasis added). What Glover is asserting is that his request for general damages, as in *Wilcox* and *Munn*, should have been construed as encompassing a request for non-compensatory damages.

damages and granting summary judgment on Glover's Equal Protection claim on that basis.[31]

The Defendants are also wrong that Glover has waived any argument that he should recover nominal and punitive damages. Notably, of the seven cases cited by Defendants in support of their waiver argument, only *one* (distinguishable) case appears to have involved a *pro se* party.[32] It is well established that the pleadings of *pro se* plaintiffs are held "to less stringent standards than formal pleadings drafted by lawyers." *Jackson v. Nixon*, 747 F.3d 541 (quoting *Erickson*, 551 U.S. at 94). Moreover, Defendants are impermissibly faulting Glover for failing to respond to an argument that they

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[31] *See* ADD.029 (assuming without analysis that "Plaintiff requests compensatory damages in the amount of $2,300,000"); *see also* ADD.036 (similar).

[32] *See* Br. of Defs.-Appellees at 34–35 (collecting cases). That one case—an unpublished decision from the Ninth Circuit—is readily distinguishable. The plaintiff in that case violated multiple court orders and had its answer stricken as a discovery sanction. *O'Connell v. Fernandez-Pol*, 542 Fed. Appx. 546, 548 (9th Cir. 2013) (Mem.).



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simply did not make at summary judgment.[33] The Defendants argued at summary judgment that

> Plaintiff does not allege any physical injury in his complaint, and he has produced no evidence of any alleged physical injury. His claim *for damages* therefore fails as a matter of law and the case should be dismissed.[34]

Defendants did *not* argue that Glover's Initial Complaint should be construed to seek solely *compensatory* damages to the exclusion of nominal and punitive damages—rather, Defendants' brief phrased the issue as one of *all damages*. Glover should not be faulted for failing to respond to an argument that was not made below, since he "could not anticipate" that the District Court's order would adopt a position not made in Defendants' briefing. *Nassar v. Jackson*, 779 F.3d 547, 553–54 (8th Cir. 2015) (quotation omitted) (explaining that parties could not have waived issued "introduced in [district court's] order").

The remainder of the cases invoked by Defendants are readily distinguishable. Glover is not arguing that the District Court should have advised him to explicitly list nominal and punitive damages in his complaint.

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[33] Waiver is only applicable for "a failure to *oppose a basis* for summary judgment." *See, e.g.*, *Satcher v. Univ. of Ark. at Pine Bluff Bd. of Trustee*, 558 F.3d 731, 735 (8th Cir. 2009) (emphasis added).

[34] APPX.224, *available at* ECF No. 76 at 19 (emphasis added).

If he were, then perhaps *Pliler v. Ford*, 542 U.S. 225 (2004), and the unpublished opinions invoked by Defendants may have been apposite, and supported affirmance.[35] Instead, Glover is arguing that the Initial Complaint *already* had a request for all forms of damages. The District Court's conclusion otherwise—not any failure by the District Court to provide Glover legal advice—was error.

For these reasons, the District Court erred by granting Defendants summary judgment based on the PLRA's non-physical-injury damages limitation.

## II. This Court should reverse the District Court's dismissal of Glover's retaliation and MHRA claims.

In addition to reversing the grant of summary judgment on Glover's Equal Protection Claim, this Court should reverse the dismissal of Glover's claims of retaliation and violations of the Minnesota Human Rights Act and remand these claims for discovery. In his opening brief, Glover argued that the District Court erred by failing to address these claims in its Rule 12 dismissal order.[36] In its opposition brief, Defendants agree and concede that

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[35] Br. of Defs.-Appellees at 36–37 (discussing cases).

[36] Br. of Appellant at 27-33.



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"[t]he proper remedy is therefore for this Court to remand those claims to the district court so that the claims can be addressed by the district court in the first instance."[37]

## CONCLUSION

For the foregoing reasons, Glover respectfully asks that this Court (1) reverse the District Court's order granting summary judgment to defendants Paget and Rodriguez on Glover's Equal Protection claim, (2) reverse the dismissal of Glover's claims for unlawful retaliation and violation of the Minnesota Human Rights Act, and (3) remand this case for discovery and further proceedings.

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[37] Br. of Defs.-Appellees at 9-10.

Respectfully submitted,

Dated: September 24, 2021

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned certifies that this document complies with the type-volume requirements of Fed. R. App. P. 32(a)(7). This brief was prepared using Microsoft Word in Office 365, which reports that the brief contains 4,764 words, excluding items listed in Fed. R. App. P. 32(f). This document also complies with the typeface and the type-style requirements of Fed. R. App. P. 32(a), because this document has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in Constantia 14-point font.

The brief and addendum have been scanned for viruses and are virus free. *See* 8th Cir. Local Rule 28A(h)(2).

s/ Virginia R. McCalmont

**CERTIFICATE OF SERVICE**

I hereby certify that on September 24, 2021 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Virginia R. McCalmont



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