No. 18-

IN THE

Supreme Court of the United States

STEVEN LEON BANKS,

Petitioner,

v.

VINCENT MYRON GORE, Head-Physician; A. SMITH, Nurse; NURSE KEYS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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DECEMBER 21, 2018

QUESTIONS PRESENTED

Petitioner Steven Banks was incarcerated in a prison where defendant Gore was the head physician and defendant Smith was the nurse manager. Mr. Banks is a diabetic in need of regular dialysis. In addition, while in prison, Mr. Banks suffered a severe concussion and needed medical treatment. The prison, and defendants specifically, did little to treat Mr. Banks' concussion and regularly cancelled or shortened his dialysis, causing him great physical distress and suffering.

Mr. Banks sued. The district court rejected his first two complaints because of their form. Mr. Banks then filed a second amended complaint, but Mr. Banks—who was still suffering severe neurological symptoms, who is not well educated, and whose repeated requests for appointed counsel were denied—did not appreciate that his second amended complaint would replace rather than supplement the earlier ones, so he did not replead the issues raised in his earlier complaints or reattach the evidence he had previously provided.

The district court entered summary judgment, and the Fourth Circuit affirmed. The court of appeals "declined to consider" the allegations that were not repled in the Second Amended complaint. On the merits, the panel found that defendants could not be liable because, while they knew about and oversaw Mr. Banks' care, they contracted out much of it, which meant that they were not, in the Fourth Circuit's view, sufficiently "personally involved." This case presents two important questions that have split the lower courts.

The questions presented are:

1. Can supervisors be liable for the constitutional violations of their subordinates even if the supervisor is not directly "personally involved"?

2. When courts construe a *pro se* plaintiff's amended complaint, are they required to consider all the plaintiff's filings together or can they look at only the most recently filed complaint?

PARTIES TO THE PROCEEDING

All parties appear on the caption to the case found on the cover page. Petitioner Steven Leon Banks was the Appellant below. Dr. Vincent Myron Gore, Nurse Shearyl Kee, and Nurse Angela Smith were the Appellees.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTIONAL AND STATUTORY AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

PETITION FOR A WRIT OF CERTIORARI

Petitioner Steven Leon Banks respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the court of appeals (App. 1a-15a) is reported at 738 F. App'x 766 (4th Cir. 2018). The decision of the district court (App. 16a-26a) is reported at 2016 WL 8732422 (E.D. Va. June 3, 2016).

JURISDICTION

The court of appeals entered judgment on June 13, 2018, and denied Mr. Banks' petition for rehearing *en banc* on July 24, 2018 (App. 27a-28a). On October 17, 2018, Chief Justice Roberts extended the time for filing this petition for certiorari to December 21, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

> injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

INTRODUCTION

This case presents two important issues that occur all too frequently with *pro se* prisoners. *First*, the prison system as an institution severely mistreated and the defendants as individuals were deliberately indifferent to a prisoner's significant medical needs. These circumstances present the question whether each member of the system can pass the buck or whether the supervisors, who know of the mistreatment and yet, through deliberate indifference do nothing, should be held accountable. *Second*, this case involved the common scenario where the facts and allegations relevant to a *pro se* plaintiff's claim were spread across a few complaints. The district court and Fourth Circuit insisted on looking only at the last-filed complaint, and they entirely refused to consider the allegations and claims raised in the earlier complaints. Although some courts are similarly restrictive in dealing with *pro se* complainants, the majority of circuits are more liberal and consider all of the *pro se* complainant's arguments. Both questions have deeply divided the lower courts and are very important and recurring. Accordingly, both questions

independently and together warrant this Court's review.

STATEMENT OF THE CASE

A. Defendants' Treatment Of Mr. Banks' Medical Needs.

Mr. Banks was imprisoned in the Greensville Correctional Center (the "Prison"), where defendant Dr. Vincent M. Gore was the head physician and defendant Nurse Angela Smith was the nurse manager. At issue in this case are the defendants' responses to two separate medical needs of Mr. Banks: his concussion and his dialysis. Mr. Banks explained in his first amended complaint that, ultimately, responsibility lies with Dr. Gore. "Doctor Gore is the head physician that makes the final decisions over the other doctors that are under Doctor Gore," and "Doctor Gore has the authority to take control of the medical care that I'm entitled to." App. 56a-57a (capitalization and internal quotation marks omitted).

1. Mr. Banks Received Little Treatment For His Concussion.

Supported by multiple affidavits, Mr. Banks' first amended complaint explains that he fell on the hard metal edge of a Prison bench and suffered a serious concussion. App. 39a, 42a, 60a. He requested medical attention, but the Prison, under Dr. Gore and Nurse Smith's supervision, largely ignored his medical needs. App. 39a-59a.

For the first weeks after Mr. Banks' fall, the Prison staff did little to treat his concussion. Initially, Mr. Banks bled profusely from his ear, but the medical staff gave him only Q-tips and bacterial ointment, and then, for some time, they just ignored him. App. 40a.

It was not until five days after his fall that Mr. Banks was taken to the hospital where he was diagnosed with a concussion so severe that it was characterized as a traumatic brain injury. App. 40a-42a. A doctor informed Mr. Banks that he needed rest. App. 42a. Yet, the Prison staff refused to write Mr. Banks a bed pass—which would have allowed him to remain in bed and rest; they initially would not prescribe him any medication; and, even when they ultimately did prescribe him Tylenol, the staff gave him insufficient amounts of and expired medication. App. 42a-43a.

Mr. Banks' symptoms have continued for years. He continues experiencing pain, shortness of breath, numbness, and nausea—sometimes even vomiting blood—due to his concussion and its continuing neurological consequences, but the Prison, under defendants' supervision, failed to attend to him. App. 43a-59a. On at least one occasion, Dr. Gore personally refused to prescribe Mr. Banks the necessary medication. App. 47a. Dr. Gore made these decisions without adhering to any Prison concussive-injury policies or procedures. App. 39a-43a.

Mr. Banks' second amended complaint explains that Dr. Gore also repeatedly rejected other doctors' recommendations that Mr. Banks be referred to a neurologist for his concussion. App. 65a-67a.

2. The Prison Repeatedly Cancelled Or Cut Short Mr. Banks' Dialysis Sessions.

Mr. Banks' first amended complaint also explains that he is a diabetic with kidney failure who needs regular dialysis to live. App. 44a, 56a. Yet the Prison staff improperly cut his dialysis short numerous times.

Sometimes, Mr. Banks had severe headaches related to his concussion and illnesses that interfered with his dialysis. App. 44a-45a. Rather than treat the underlying symptoms, Mr. Banks was taken off dialysis. App. 44a-45a. Other times, Mr. Banks was concurrently scheduled for dialysis and other medical appointments. App. 47a; A127-129[1]; A235-236. The Prison made no effort to accommodate his schedule, instead forcing him to choose between the Scylla of missing dialysis or the Charybdis of not seeing his other doctors. App. 47a; A127-129; A235-236. And on yet other occasions, the Prison stopped dialysis because it was unable to maintain a steady water supply. App. 7a, 49a ("water problems[] that happens on a regular basi[s]") (capitalization altered), 50a; A133-135; A138; A142. Mr. Banks filed numerous grievances about these issues, but the Prison—and the supervisors, Dr. Gore and Nurse Smith, specifically—did nothing to assist him. App. 49a-51a; A132-A135; A138-A140. Nurse Smith knew about the shortened dialyses and their associated medical consequences, such as illness, kidney failure, and early death; yet she did not provide Mr. Banks with additional or alternative dialysis appointments. A132-A135; A138; A142-A143. Dr. Gore also knew about Mr. Banks' multifaceted medical conditions and associated complex treatment; however, he did not provide any medical personnel under his supervision with any Prison policy or procedure on proper medical care for complex medical treatment, concussions, or dialysis. App. 39a-55a. Dr. Gore and Nurse Smith provided this

[1] The "A__" pages refer to the pages in the appendix filed in *Banks v. Gore*, No. 16-7512, ECF No. 44 (4th Cir., Dec. 6, 2017).

inadequate medical treatment even as Mr. Banks and others repeatedly complained. App. 49a, 58a.

B. The District Court Repeatedly Rejected Mr. Banks' Complaints, Leaving Mr. Banks Confused About What To Include In His Second Amended Complaint.

On February 26, 2014, Mr. Banks filed a complaint against Dr. Gore, but the district court rejected it as insufficiently "particularize[d]." A001; A003. Mr. Banks then filed an amended complaint with affidavits and, later, a proposed further-amended complaint. A003; A005; App. 37a-60a; A025-027. These complaints pled in detail how Dr. Gore and Nurse Smith had been deliberately indifferent to his concussions and his need for regular dialysis. App. 37a-60a. As part of these complaints, Mr. Banks included numerous affidavits and grievance forms. App. 60a; A025-027; A039–A044; A046–A048; A052–A054; A057–A058; A060; A065; A077; A080–A081; A090–A095; A097–A099; A102–A103; A106–A127; A129. Despite his best efforts, Mr. Banks recognized that he was out of his depth and requested the appointment of counsel. A147.

Despite refusing to appoint counsel, App. 35a, the district court continued to reject Mr. Banks' complaints. App. 3a, 31a. The district court stated that the problem was that this medically weakened *pro se* "plaintiff's claims are set out in three separate partial complaints," and this "piecemeal expression" was unacceptable. App. 31a. The district court made it clear that it was losing its patience: It ordered Mr. Banks to file a second amended complaint but suggested that this would be his last chance. App. 31a

(Mr. Banks is allowed "one additional opportunity to amend his complaint"). If Mr. Banks "fail[ed] to comply with" the various "instructions"—up to and including such details as how paragraphs were to be numbered—it "will result in dismissal of the action." App. 31a-32a. The district court told Mr. Banks, unfortunately using uncommon language for a layperson, that the second amended complaint "will supplant all previous complaints and will serve as the sole operative complaint in this action." App. 31a (emphases omitted).

Mr. Banks filed a second amended complaint. App. 3a, 61a. Unfortunately, without counsel and suffering from his insufficiently treated ailments, Mr. Banks did not understand what the district court meant when it said that the new complaint would "supplant" his earlier complaints and would become the "sole operative" complaint. As a result, he did not replead any of the facts from his previous complaints, he did not reattach any of the previous affidavits or grievances, and he only added new and condensed details. Where the first amended complaint had twenty-one pages of facts, the second amended complaint had only six. *Compare* App. 39a-59a, *with* App. 65a-70a.

The second amended complaint pled only one issue relating to his concussion: Dr. Gore was deliberately indifferent in "refus[ing] to approve all three (3) requests for a neurologist consult" that other doctors had requested. App. 67a. As to his dialysis, he complained that Nurse Smith, who "is responsible for making all decisions at the nursing level regarding medical procedures in the infirmary," failed to "provide him dialysis treatment." App. 69a-70a.

C. The District Court Concluded That Mr. Banks Did Not Exhaust His Administrative Remedies, With Only One Conclusory Sentence About The Merits Of Mr. Banks' Claims.

The defendants moved for summary judgment. *See Banks v. Gore*, No. 1:14-cv-205, ECF No. 56 (E.D. Va. Jan. 13, 2016). Mr. Banks responded by asking again for counsel, explaining that he "has limited[] access to the law-library and limited knowledge of the law," but he did not file a substantive response to defendants' motion. A170; App. 16a. The district court refused to appoint counsel. A173.

The case therefore proceeded solely on Mr. Banks' complaints, and, in fact, the district court only considered the second amended complaint. *See, e.g.*, App. 18a. The district court granted the defendants' motion for summary judgment. App. 16a. Virtually all of the district court's analysis went to the procedural question of exhaustion and is included in a section titled "*A. Plaintiff Failed to Exhaust His Administrative Remedies*." App. 23a-25a. However, the district court did include a one-sentence section titled "*B. Defendant Did Not Violate Plaintiff's Eighth Amendment Rights*," which stated:

> Even if plaintiff's claims had been properly exhausted prior to filing this lawsuit, summary judgment in favor of Dr. Gore, Nurse Smith, and Nurse Kee is appropriate because the pleadings, affidavits, and exhibits on file demonstrate that the named defendants did not violate plaintiff's Eighth Amendment rights and plaintiff has not produced any evidence to the contrary.

App. 26a. That single conclusory sentence was the district court's entire analysis of the merits of Mr. Banks' claims.

D. The Fourth Circuit Rejected Mr. Banks' Claims On The Merits.

Mr. Banks appealed, and, finally, he was appointed counsel. *See Banks v. Gore*, Assignment of Counsel, No. 16-7512, ECF No. 25 (4th Cir. Sept. 12, 2017). Mr. Banks first explained that he had exhausted his administrative remedies. Panel Op. Br.[2] 19-33. On the merits, Mr. Banks showed that defendants violated his constitutional rights by failing to ensure that he was receiving proper treatment. *Id.* at 34-57. In response, the defendants did not deny that Mr. Banks' treatment was unacceptable. Instead, they argued that the mistakes could not be pinned on the defendants specifically. Panel Resp. Br. 28-35. [3] Naturally, they acknowledged that Dr. Gore was the "medical director" and Nurse Smith was the "infirmary nurse manager." *Id.* at 9, 11. But they believed that that was not enough because they concluded that Dr. Gore and Nurse Smith were not directly "personally involved." *Id.* at 31, 34, 35. Without "[p]ersonal involvement," they argued, there could be no liability. *Id.* at 31 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009); *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 692 (1978)). In his reply, Mr. Banks explained that Dr. Gore and Nurse Smith could be liable because (1) they had actual or constructive knowledge of the medical staff's conduct; (2) their lack of response demonstrated deliberate

[2] *Id.* ECF No. 35 (4th Cir., Nov. 20, 2017).

[3] *Id.* ECF No. 47 (4th Cir., Jan. 5, 2018).

indifference; and (3) there was an "affirmative causal link" between the indifference of the medical staff's directors and Mr. Banks' harm. Panel Reply Br.[4] at 19-23.

Notwithstanding that the district court devoted only one sentence to the merits of Mr. Banks' claim of an Eighth Amendment violation, the panel "affirm[ed] on the merits of Banks's Eighth Amendment claims without deciding if Banks properly exhausted his administrative remedies." App. 2a.

Regarding Dr. Gore, the court of appeals recognized that Mr. Banks "filed a number of grievances about improper medical treatment of his concussion symptoms throughout the summer of 2012," but it "decline[d] to consider" these issues on the grounds that "they were not before the district court"—referring to the fact that they were not repled in the second amended complaint. App. 4a, 6a[5]; *see supra* at pp. 6-7. The court of appeals only considered Dr. Gore's failure to refer Mr. Banks to an outside neurologist. App. 9a.

As to Nurse Smith, the court of appeals held that, "[a]bsent record evidence that Smith was personally involved in the alleged deprivation of a constitutional right, she is entitled to summary judgment." App. 10a. The court of appeals thus affirmed the district court's dismissal with prejudice of Mr. Banks' Eighth

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[4] *Id.* ECF No. 52 (4th Cir., Jan. 31, 2018).

[5] The panel's only reference to the first amended complaint was to rule against Mr. Banks—affirming the denial of his requests for counsel—rather than to support his claims. App. 12a.

Amendment claims.[6] The Fourth Circuit denied Mr. Banks' petition for rehearing. App. 27a-28a.

REASONS FOR GRANTING THE PETITION

The decision below raises two questions, each of which merits the Court's review. *First*, this case presents a clean issue of law that is the subject of an irreconcilable circuit split requiring this Court's review: When can supervisors be liable for the actions and inactions of their subordinates or contractors? The decision below follows the wrong end of an important, multiway circuit split that involves almost every regional circuit court.

Additionally, this case presents a second important and recurring issue regarding the question of how to deal with *pro se* complaints. A number of courts, including some district courts in the Second Circuit and the Fourth Circuit, read *pro se* papers very narrowly. Thus, for example, they will only look at the last-filed complaint, and they will ignore allegations in earlier complaints. The majority of courts, however, treat *pro se* litigants more generously—which includes considering all of a *pro se* litigant's complaints together. This Court's intervention is necessary to resolve this split and to ensure that courts give *pro se* papers the liberal reading they deserve.

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[6] The court of appeals remanded the disposition of state-law medical-malpractice claims to the district court for further clarification. App. 2a. On remand, the district court dismissed them without prejudice. *See Banks v. Gore*, No. 1:14-cv-205, ECF No. 107 (E.D. Va. Aug. 17, 2018).

I. THE FOURTH CIRCUIT'S EVISCERATION OF SUPERVISORY LIABILITY IS THE WRONG APPROACH IN AN IMPORTANT AND RECURRING CIRCUIT COURT SPLIT.

The question of when and if a supervisor can be liable under Section 1983 for torts committed by his or her subordinates depends on the proper reading of this Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In that case, Iqbal was arrested, and he sued John Ashcroft and Robert Mueller in their official capacities—as the Attorney General and head of the FBI, respectively—for violating his constitutional rights. *See id.* at 666. Ashcroft and Mueller moved to dismiss, arguing that Iqbal's pleadings were insufficient. *See id.* The district court denied their motion, the Second Circuit affirmed, but this Court reversed. *See id.*

This Court began by emphasizing that "[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." *Id.* at 676. Iqbal, however, believed that Ashcroft and Mueller could still be liable under a theory of "supervisory liability" based on their "knowledge [of] and acquiescence" to their subordinates' actions. *Id.* at 677. This Court rejected that argument, concluding that "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct," and mere "knowledge" of what the subordinates are doing is insufficient. *Id.* Justice Souter dissented, characterizing the majority as "eliminating . . . supervisory liability entirely." *Id.* at 693 (Souter, J., dissenting).

A. The Fourth Circuit's Narrow Understanding Of Supervisory Liability Is Part Of An Important And Recurring Multiway Circuit Split.

The prime difficulty in extrapolating from *Iqbal* is that Iqbal asserted invidious discrimination, which required him to prove that the defendants acted with "discriminatory purpose." *Id.* at 676 (majority); *see id.* at 677 (requiring sufficient factual pleadings to show that defendants "purpose[fully] discriminat[ed] on account of race, religion, or national origin"). For cases with lower *mens rea* requirements, the only point of common ground is that there is little agreement on how to construe supervisory liability. One scholar describes *Iqbal* as leaving "a sea of uncertainty, confusion, and disagreement among the lower courts as to when, if ever, supervisory liability may attach for claims based on inaction, rather than affirmative acts." Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 921 (2015). "Despite the amount of ink invested, the area remains a mess." *Id.* at 922. The Third Circuit notes that "[n]umerous courts, including this one, have expressed uncertainty as to the viability and scope of supervisory liability after *Iqbal*." *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 n.8 (3d Cir. 2010) (citations omitted). "[C]onsensus as to its meaning remains elusive." *Dodds v. Richardson*, 614 F.3d 1185, 1198 (10th Cir. 2010).

Scholars and courts both acknowledge the circuit split on the meaning of *Iqbal*. *See* Zuniga, 56 ARIZ. L.

REV. at 609[7]; *Peatross v. City of Memphis*, 818 F.3d 233, 242 n.3 (6th Cir. 2016). William N. Evans argues that there are now "[f]ive unique interpretations" of *Iqbal*. Evans, 65 SYRACUSE L. REV. at 130.[8] How, precisely, the various circuits align is the subject of debate. *Compare* Evans, 65 SYRACUSE L. REV. at 130-78; Zuniga, 56(2) ARIZ. L. REV. at 609; *and* Smith, 38 AM. J. TRIAL ADVOC. at 415-22.[9]

There is a multiway split. The Ninth Circuit holds that a supervisor can be liable for knowing failure to act even if the subordinates' behavior is unauthorized. The Eighth, Tenth, Eleventh, and D.C. Circuits are somewhat stricter, and they will hold supervisors liable only where the supervisors have the necessary *mens rea* for the underlying tort. The First Circuit (and some panels of the Ninth Circuit) are slightly stricter still. They require that a plaintiff shows that the supervisor's deliberate indifference bears a "strong causal connection" to the harm. The approach taken by the Second, Third, and now Fourth Circuits is the second strictest. Supervisors can be liable only if they are "direct participant[s]" or are directly "personally involved" in the constitutional tort. The strictest

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[7] Jacob A. Zuniga, *Supervisory Liability Under 42 U.S.C. § 1983 in the Wake of Iqbal and Connick: It May Be Misconceived, but It's Not A Misnomer*, 56 ARIZ. L. REV. 601 (2014) ("Zuniga").

[8] *Supervisory Liability in the Fallout of Iqbal*, 65 SYRACUSE L. REV. 103 (2014) ("Evans").

[9] S. Autumn Smith, *Barrett v. Board of Education of Johnston County: The Federal Circuit Split over the State-of-Mind Requirement for Municipal and Supervisory Liability in "Failure to Act" Cases*, 38 Am. J. Trial Advoc. 407 (2014) ("Smith").

approach is that of the Fifth and Seventh Circuits that hold that supervisory liability is no longer viable at all.

In *al-Kidd v. Ashcroft*, a Ninth Circuit panel allowed a plaintiff to sue the same Attorney General Ashcroft named in *Iqbal*, based on his "*knowing failure* to act in the light of even unauthorized abuses." 580 F.3d 949, 976 (9th Cir. 2009), *rev'd on other grounds*, 563 U.S. 731 (2011). At the other extreme, the Fifth and Seventh Circuits believe that supervisory liability is no longer an independently viable theory. In the Fifth Circuit, unless a plaintiff can show that "a supervisor . . . implement[ed] an unconstitutional policy," the supervisor cannot be liable. *Carnaby v. City of Houston*, 636 F.3d 183, 189 (5th Cir. 2011).[10] Likewise in the Seventh Circuit, supervisors are not responsible for the acts "of subordinates, or for failing to ensure that subordinates carry out their tasks correctly." *Horshaw v. Casper*, No. 16-3789, 2018 WL 6583432, at *2 (7th Cir. Dec. 14, 2018).

Most circuits fall somewhere in the middle. Some hold that supervisors can be liable whenever they have the same *mens rea* that is required by the underlying claim. For example, the Eighth Circuit has allowed a prisoner to sue an "indifferent" medical administrator who knew that the contracted medical workers were not doing an "adequate" job. *Langford v. Norris*, 614 F.3d 445, 460-61 (8th Cir. 2010). Likewise, the Tenth Circuit holds supervisors liable if they "acted with the

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[10] *See Barkes v. First Corr. Med., Inc.*, 766 F.3d 307, 318 (3d Cir. 2014), *rev'd on other grounds sub nom.* 135 S. Ct. 2042 (2015) (the Third Circuit explaining that the Fifth Circuit's decision in *Carnaby* "impliedly confirmed" that the Fifth Circuit reads *Iqbal* as "abolishing supervisory liability in its entirety").

requisite state of mind" in situations where they have "supervisory responsibility." *Cox v. Glanz*, 800 F.3d 1231, 1240, 1249 (10th Cir. 2015) (citations omitted). The Eleventh Circuit, too, makes supervisors liable if their conduct demonstrates "deliberate indifference." *Franklin v. Curry*, 738 F.3d 1246, 1252 n.7 (11th Cir. 2013). Courts within the D.C. circuit continue to allow plaintiffs to bring "failure to supervise" claims under Section 1983 in some contexts. *E.g.*, *Smith v. D.C.*, 306 F. Supp. 3d 223, 259 (D.D.C. 2018). However, as Evans notes, where the underlying tort requires intent, the D.C. Circuit requires that the supervisor "'purposefully direct[]'" the tort. Evans, 65 SYRACUSE L. REV. at 171-74 (quoting *Johnson v. Gov't of D.C.*, 734 F.3d 1194, 1205 (D.C. Cir. 2013)).

Other circuits, however, have held that, after *Iqbal*, plaintiffs must show stronger causation. The First Circuit will only allow a suit if the plaintiff shows that (1) the supervisor was on "notice," (2) the supervisor showed "deliberate indifference," and (3) there was a "strong causal connection" between the failed supervision and the constitutional violation. *Ramirez-Lluveras v. Rivera-Merced*, 759 F.3d 10, 19-20 (1st Cir. 2014). A Ninth Circuit panel[11] has similarly held that a plaintiff must show "a sufficient causal connection." *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011).

The Second and Third Circuits require even more. In the Second Circuit, supervisors can only be liable if they were "direct participant[s]" in the constitutional violation. *Terebesi v. Torreso*, 764 F.3d 217, 234 (2d Cir. 2014). The Third Circuit requires that the

[11] As Evans notes, the Ninth Circuit is "deeply divided" on the issue of supervisory liability. Evans, 65 SYRACUSE L. REV. at 164.

supervisor be directly "personally involved." *Phillips v. Northampton Co., P.A.*, 687 F. App'x 129, 131 (3d Cir. 2017); *Sims v. Wexford Health Sources*, 635 F. App'x 16, 19 (3d Cir. 2015). The Fourth Circuit has now taken that approach as well. Nurse Smith, who was the infirmary nurse manager, could not be liable in the Fourth Circuit's view because she was not "personally involved." App. 10a.

"The effects of this circuit split cannot be understated." Zuniga, 56(2) ARIZ. L. REV. at 610. As Evans notes, depending on how *Iqbal* is read, it may signify "sweeping changes." 65 SYRACUSE L. REV. at 185. Naturally, then, defendants are relying on narrow readings of *Iqbal* to argue that "supervisors are free to turn a blind eye to their subordinates' constitutionally tortious conduct." Zuniga, 56 ARIZ. L. REV. at 610. This Court should grant certiorari to resolve this deep division of the circuits and clarify the scope of *Iqbal*.

B. The Decision Below Is An Excellent Vehicle For Clarifying *Iqbal*.

The issue of supervisory liability is squarely presented in this case. Mr. Banks' second amended complaint claims that defendants were deliberately indifferent to his medical needs when they treated his dialysis. App.69a-70a. As the prison itself admitted, at least for one of Mr. Banks' dialysis-based complaints, "[a]ll administrative remedies have been exhausted." A235. The only question, then, is whether the defendants, as supervisors, could be liable.

Mr. Banks alleged all the necessary facts for the First, Sixth, Eighth, Ninth, and Eleventh Circuits' application of *Iqbal*. Defendants' conduct is actionable

under the First Circuit's test because Dr. Gore and Nurse Smith were on "notice" that Mr. Banks' dialysis was regularly being cancelled or terminated; they could not be troubled to reschedule his other appointments so they did not interfere with his dialysis or to assign him additional dialysis sessions when the water was not working (in other words, they were "deliberately indifferent" to his need); and there is a "strong causal connection" between, on the one hand, Mr. Banks' conflicting appointments and defendants' refusal to reschedule his appointments and the failure to maintain the necessary water supply for dialysis and, on the other hand, the fact that Mr. Banks missed the dialysis he needed. *See Ramirez-Lluveras*, 759 F.3d at 19-20; *Starr*, 652 F.3d at 1207. It is actionable under Sixth Circuit's test because defendants "acted with the requisite state of mind," i.e., deliberate indifference, in a situation where they have "supervisory responsibility." *Cox*, 800 F.3d at 1240, 1249 (citations omitted). It is actionable under the Eighth Circuit's test because defendants Smith "knew that [plaintiff]'s serious medical needs were not being adequately treated yet remained indifferent." *Langford*, 614 F.3d at 460-61. It is actionable under the Ninth Circuit's test because Dr. Gore and Nurse Smith "knowing[ly] fail[ed] to act in the light of even unauthorized abuses." *See al-Kidd*, 580 F.3d at 976. And it is actionable under the Eleventh Circuit's test because, as explained above, Dr. Gore and Nurse Smith were "deliberately indifferent" to Mr. Banks' needs. *See Franklin*, 738 F.3d at 1252 & n.7.

However, Nurse Smith (and Dr. Gore) were not directly "personally involved." App. 10a. Thus, under the test espoused by the Second, Third, and now

Fourth Circuits, they will not be liable for the Prison's failure to provide essential dialysis. And, certainly, under the Fifth and Seventh Circuits' approach, which does not recognize any form of supervisory liability, defendants are not liable.

C. Dr. Gore And Nurse Smith Cannot Hide Behind Their Decision To Contract Out Mr. Banks' Dialysis.

The panel notes that nurses "employed by a different company[] managed patients' dialysis treatments." App. 10a. Aside from the issue of supervisory liability, discussed above, this does not present any additional basis for absolving Dr. Gore and Nurse Smith from liability. As this Court has made clear, "[c]ontracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights." *West v. Atkins*, 487 U.S. 42, 56 (1988). Thus, "the mere contracting of services with an independent contractor does not immunize the State from liability for damages in failing to provide a prisoner with the opportunity for such treatment." *Langford*, 614 F.3d at 460 (citations omitted). "[P]rison supervisors" can still be liable for "corrective inaction." *Id.*

Beyond that, several of Mr. Banks' complaints are not about the way dialysis was administered but concern the circumstances surrounding the dialysis. The Prison scheduled his other medical appointments at the same time as his dialysis, the Prison refused to treat his concussion-related illnesses that required him to stop his dialysis early, and the prison controlled

its own water supply. Those are problems of the prison's making—independent of the contractors.

D. The Fourth Circuit Misread *Iqbal*.

The Fourth Circuit never mentions *Iqbal* or supervisory liability. It just assumes that direct "personal involvement" is required. It is not.

As Evans notes, the normal rule is that "a causally attenuated actor who is responsible for an injury can be held accountable": In torts, this is called "proximate cause"; in criminal law, "accomplice liability"; and, in agency law, it is "vicarious liability." 65 SYRACUSE L. REV. at 180. If *Iqbal* stands for the proposition that supervisors can only be liable if they were directly personally involved, as the Fourth Circuit believes, "*Iqbal* represents an unprecedented reversion from established principles of attenuated causation." *Id.* at 182. Instead, the better approach is to hold that supervisors can be liable if they are deliberately indifferent to the patient's needs and there is sufficiently strong causation. *Id.* at 182-83. That was certainly the law before *Iqbal*. *Id.* at 183-85.

Indeed, as the Third Circuit has explained, the better reading of *Iqbal* is that supervisors can still be liable where the supervisor's "*own* deliberate indifference to *known* deficiencies in a government policy or procedure, has allowed to develop an environment in which there is an unreasonable risk that a constitutional injury will occur, and that such an injury *does* occur." *Barkes*, 766 F.3d at 320. That kind of liability is "based on the supervisor's own misconduct, because to exhibit deliberate indifference to such a situation is a culpable mental state under the Eighth Amendment." *Id.*

Moreover, *Iqbal* affirmatively suggests this is the better reading. This Court in *Iqbal* went out of its way to note that the tort at issue there, "invidious discrimination in contravention of the First and Fifth Amendments," requires "discriminatory purpose." 556 U.S. at 676. Indeed, *Iqbal*'s "holding is expressly limited to situations involving discrimination." *Womack v. Smith*, No. CIV. A. 1:06-cv-2348, 2009 WL 5214966, at *5 (M.D. Pa. Dec. 29, 2009). This Court "specifically stated that 'in the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability for *unconstitutional discrimination*.'" *Id.* (quoting *Iqbal*, 556 U.S. at 677) (emphasis in original; citations omitted). If supervisory liability were never available, then this Court had no reason to mention the *mens rea* requirements. *See id.* Rather, the ability to raise supervisory liability should depend on the *mens rea* requirement of the underlying tort. Unlike invidious discrimination claims, Eighth Amendment claims do not require "purpose" as the requisite *mens rea* for the underlying tort, so the supervisor can be liable without that *mens rea*.

This case is a perfect example of the need for supervisory liability. Defendants were charged with taking care of Mr. Banks. Of course, they were entitled to ask others to do the day-to-day work. But it was their responsibility to ensure that this work was done right—at least when they were aware of grievous deficiencies in medical care. And if they knew a patient like Mr. Banks was not receiving the treatment he needed, they did nothing about it, and Mr. Banks was harmed as a result, they should be held accountable.

II. THERE IS A DEEP AND RECURRING SPLIT REGARDING WHETHER *PRO SE* FILINGS ARE LIBERALLY CONSTRUED

Mr. Banks' first amended complaint contained detailed factual allegations concerning defendants' mistreatment of his concussion and their regular failure to provide full-length dialysis. The district court, however, insisted that he file a second amended complaint. Not understanding that this new complaint would replace his earlier ones, Mr. Banks alleged only new facts and largely new issues—for the most part, he did not replead the Prison's failures to treat his concussions or to provide him adequate dialysis. Notwithstanding his obvious intent to rely on all of his complaints, the courts below "decline[d] to consider" anything that was not included in the second amended complaint. App. 4a.

A. There Is A Deep And Well-Developed Circuit Conflict Over How To Treat *Pro Se* Complaints.

Papers filed by *pro se* plaintiffs "must be held to less stringent standards than formal pleadings drafted by lawyers." *E.g.*, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Hughes v. Rowe*, 449 U.S. 5, 10 (1980); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (all quoting other cases). Although the principle is easy to formulate, courts are deeply divided on how broadly it applies. The Third, Seventh, Eighth, Ninth, Tenth, Eleventh, and some courts within the Second Circuit in certain contexts take a generous approach to *pro se* complaints. The Fourth Circuit and some courts within the Second Circuit in other contexts are much more restrictive.

1. The Circuits Are Generally Split On How To Treat *Pro Se* Litigants.

a. The Tenth Circuit's unanimous decision in *Nasious v. Two Unknown B.I.C.E. Agents, at Arapahoe County Justice Center*, 492 F.3d 1158, 1161 (10th Cir. 2007) (per Gorsuch, J.) represents the more generous treatment of *pro se* papers applied by some circuits. John Nasious was an inmate who brought a Section 1983 action against a number of prison officials raising Fifth and Eighth Amendment claims. *Id.* at 1160, 1161. The magistrate judge dismissed the complaint without prejudice and told Nasious to refile a complaint that was clearer and that demonstrated that he had exhausted his administrative remedies. *Id.* at 1160-61. He did. The new complaint was "arguably worse than its predecessor in some respects," but it "represented an improvement in others." *Id.* at 1161. The district court dismissed this complaint, seemingly with prejudice, because the complaint was insufficiently "clear and concise." *Id.* at 1161, 1162.

Nasious appealed, and the Tenth Circuit, in an opinion by then-Judge Gorsuch, reversed. The Tenth Circuit acknowledged that "wordy and unwieldy" complaints prejudice defendants and make district courts' jobs more difficult. *Id.* at 1162-63. However, the Tenth Circuit faulted the district court (1) for dismissing a case where the *pro se* litigant could not fairly be held culpable for not understanding how the complaint should be crafted and (2) for not "consider[ing] the practicability of alternatives to dismissing Mr. Nasious's cause with prejudice." *Id.* at 1163. It therefore reversed. *Id.* at 1163-64.

In the same vein, in *Olivier v. Scribner* the Ninth Circuit reviewed a case where "[t]he operative complaint referenced but did not independently include certain documents that were filed with earlier, superseded pleadings." 598 F. App'x 504, 506 n.1 (9th Cir. 2015). Recognizing the plaintiff's pro se status, the Ninth Circuit agreed to "consider these documents as incorporated into the operative complaint." *Id.*

The Seventh Circuit's decision in *Donald v. Cook County Sheriff's Department*, 95 F.3d 548 (7th Cir. 1996), is similar. Where it was likely that an inmate could state a "colorable claim against *some* County officials," the Seventh Circuit found that the district court should have "assist[ed]" the inmate in putting together a proper complaint. *Id.* at 555.

Other circuits apply a similar approach at least in theory. *See, e.g.*, *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983) (courts have "an obligation . . . to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training"); *Ricks v. Shover*, 891 F.3d 468, 479 (3d Cir. 2018) (finding that the complaint as-filed was insufficient but allowing an amended complaint); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988) (*pro se* appeals should not be dismissed for failure to comply with formal requirements).

Likewise, circuits differ in how they treat *pro se* notices of appeal. The Second Circuit will "read a pro se appellant's appeal from an order closing the case as constituting an appeal from all prior orders." *Elliott v. City of Hartford*, 823 F.3d 170, 171 (2d Cir. 2016). The Eighth and Eleventh Circuits will as well. *See, e.g.*,

Greer v. St. Louis Reg'l Med. Ctr., 258 F.3d 843, 846 (8th Cir. 2001) (holding that the rules about the contents of notices of appeal should not be applied strictly against a *pro se* plaintiff); *Pippen v. Georgia-Pac. Gypsum, LLC*, 408 F. App'x 299, 301-02 (11th Cir. 2011) (not limiting a *pro se* notice of appeal even though it "failed to expressly designate the judgment . . . being appealed" (internal citations omitted)).

Moreover, many courts are lenient when considering a *pro se* plaintiff's later-amended complaints. *See, e.g.*, *Beal v. Beller*, 847 F.3d 897 (7th Cir. 2017); *Hartsfield v. Colburn*, 371 F.3d 454 (8th Cir. 2004); *Fellows v. Vermont*, No. 5:17-cv-187, 2018 WL 1157788, at *3 (D. Vt. Mar. 2, 2018), *adopted* 2018 WL 1951156 (D. Vt. Apr. 25, 2018); *Mackay v. Ford Motor Co.*, No. CV 14-14097, 2016 WL 8243167 (E.D. Mich. Jan. 25, 2016), *adopted*, No. 14-14097, 2016 WL 1237663 (E.D. Mich. Mar. 30, 2016); *Hillware v. Snyder*, 151 F. Supp. 3d 154 (D.D.C. 2015); *Louis v. Seaboard Marine, Ltd.*, No. 10-22719-CIV, 2012 WL 13071863 (S.D. Fla. Feb. 27, 2012); *Steele v. Turner Broad. Sys.*, 607 F. Supp. 2d 258 (D. Mass. 2009).

b. On the other hand, the Fourth Circuit is much more restrictive. With respect to notices of appeal, it will only consider arguments relating to the specific case listed in a notice of appeal. Thus, in *Jackson v. Lightsey*, the Fourth Circuit would not consider the *pro se* plaintiff's arguments relating to a 2012 order where the notice of appeal only listed the 2013 order. 775 F.3d 170, 176-77 (4th Cir. 2014). Furthermore, it is extremely restrictive with later-amended complaints, as shown below. *See also Williams v. U.S. Information Sys.*, No. 11 CIV. 7471 ER, 2013 WL 214318, at *4 (S.D.N.Y. Jan. 17, 2013) (citing

numerous cases for the proposition that courts "may not consider" allegations that are not found in the *pro se* complaint).

2. The Circuits Are Further Split As To How To Treat Amended Complaints Filed By *Pro Se* Litigants.

As noted above, the broader circuit split on how liberally to construe *pro se* papers is reflected in the way courts treat a *pro se* plaintiff who has been required to file multiple complaints. Most courts relax the normal rule that the last-filed complaint is the operative complaint for *pro se* plaintiffs. They will consider all the filed complaints together. With the decision below, the Fourth Circuit joins a number of courts in the Second Circuit that will only consider the last-filed complaint.

a. The Seventh Circuit's decision in *Beal* is representative of the more generous view. Beal filed an initial Section 1983 complaint that included detailed and relevant factual allegations, and he then filed a more cursory amended complaint. *See* 847 F.3d at 900-01. The defendants argued that the original complaint was irrelevant, citing the general rule that "facts or admissions from an earlier complaint that are not included in a later complaint cannot be considered on a motion to dismiss." *Id.* at 901 (citations omitted). The Seventh Circuit ruled that this would be inappropriately harsh given plaintiff's *pro se* status. *Id.* at 902. As the Seventh Circuit noted, it was not breaking new ground. "In a case similar to ours, where a *pro se* litigant filed verified original and amended complaints, the Eighth Circuit considered both versions in a decision reversing summary judgment

for the defendants." *Id.* (citing *Hartsfield*, 371 F.3d at 455-57).

Hartsfield is not a one-off case in the Eighth Circuit. In *Cooper v. Schriro*, for example, the court agreed to consider multiple complaints together, where it was "clear" that a plaintiff "intended to have the two complaints read together." 189 F.3d 781, 783 (8th Cir. 1999). This approach has even been codified in the District of Nebraska's Local Civil Rule 15.1(b):

> **Pro Se Cases.** In considering pro se litigants' amended pleadings, the court may consider the amended pleading as supplemental to, rather than as superseding, the original pleading, unless the pleading states that it supersedes the prior pleading.

The more-forgiving approach espoused by the Seventh and Eighth Circuits is applied by many district courts as well. In *Steele*, the *pro se* complainant filed an initial complaint that named a limited number of defendants and asserted copyright and Lanham Act violations. *See* 607 F. Supp. 2d at 261. The plaintiff then filed an amended complaint that added defendants but that omitted the Lanham Act charge and certain attachments. *See id.* The court recognized that, "ordinarily," an amended complaint "renders the original complaint inoperative," but, given complainant's *pro se* status, the court agreed to read the "original and amended complaints together." *Id.* at 262. Effectively identical fact patterns have come up repeatedly in other circuits, and courts generally follow *Steele*'s approach. *See, e.g.*, *Phillip v. Atl. City Med. Ctr.*, 861 F. Supp. 2d 459, 462 n.9 (D.N.J. 2012) ("Given Plaintiff's *pro se* status, the

Court liberally construes both the original complaint and the amended complaint and considers these documents together."); *Mackay*, 2016 WL 8243167, at *1 (similar); *Williams v. Aldridge*, No. 6:13-cv-6004, 2014 WL 504874, at *2 (W.D. Ark. Feb 7, 2014) (similar).

Other courts will also consider earlier complaints where those complaints were more detailed and contained causes of actions that were not repeated in the last complaint. *See Louis*, 2012 WL 13071863, at *1 n.2 ("Because Plaintiff is pro se, and since the Amended Complaint actually contained fewer factual allegations than the original pleading," the court "consider[ed] the original and amended pleadings together."); *Bradley v. Smith*, 235 F.R.D. 125, 127 (D.D.C. 2006) (similar); *Hillware*, 151 F. Supp. 3d at 157 (similar).

Some district courts within the Second Circuit have also taken a more lenient approach. Representative of this approach is *Moore v. Samuel S. Stratten Veterans Administration Hospital*, No. 1:16-CV-475, 2016 WL 6311233 (N.D.N.Y. Aug. 10, 2016), *adopted* 2016 WL 6304738 (N.D.N.Y. Oct. 27, 2016). The *pro se* plaintiff's amended complaint was incomplete because it "fail[ed] to contain the full version of events and claims that were set forth in the original complaint." *Id.* at *3. Normally, the court would order the complainant to file a new complaint that contained all the relevant allegations. *See id.* However, the court recognized that this was not appropriate for a *pro se* complainant. *See id.* "[A]s plaintiff is proceeding *pro se*, and the undersigned finds it is unlikely that a direction from this Court will result in a submission of a full and proper amended complaint containing all of the

relevant factual assertions" and "claims," the court determined it would be better to treat the amended complaint as a "supplement to the original complaint." *Id.*

Likewise, in *Rodriguez v. Rodriguez*, the court rejected defendant's argument "that the Court must consider statements from only the current, operative complaint" even for a pro se plaintiff. No. 10 Civ. 00891, 2013 WL 4779639, at *1 (S.D.N.Y. July 8, 2013). Instead, it explained that for a *pro se* plaintiff it should "consider[] statements" from numerous filings, including "Plaintiffs' Second Amended Complaint [and] First Amended Complaint." *Id.* Other district courts in the Second Circuit have come to the same conclusion. *See, e.g.*, *Fellows*, 2018 WL 1157788, at *3; *Calizaire v. Mortg. Elec. Registration Sys., Inc.*, No. 14-CV-1542, 2017 WL 895741, at *1 n.2 (E.D.N.Y. Mar. 6, 2017).

b. On the other hand, the Fourth Circuit in this case and several courts within the Second Circuit have taken a much less generous approach. In this case, the district court only looked at the allegations found in the second amended complaint. App. 17a-18a. It even dismissed the claims against defendant Kee because "[t]he Second Amended Complaint is the operative complaint in this case," and it did not include any allegations against Nurse Kee. App. 18a. The court of appeals followed suit, and it "decline[d] to consider" the arguments on appeal that derived from the first amended complaint—even though Mr. Banks, now represented by counsel, showed that this was all pled in the initial complaints. App. 4a.

The panel's decision leaves Mr. Banks with no Eighth Amendment recourse for six years of a mistreated severe concussion and numerous occasions of missed or shortened dialysis treatments. The potential long-term effects of the Prison's failure to provide proper dialysis include "anemia and bone disease"; "cardiac complications," such as "cardiac arrhythmia, cardiac arrest and death"; "cerebrovascular complications," namely "stroke"; and "shorten[ed] life expectancy." The Renal Network, Inc., *Missing Dialysis*, http://www.therenalnetwork.org/Resources/resources/missingdialysis1.pdf (accessed Dec. 20, 2018) (capitalization altered); *accord* Life Options Rehab. Program, Kidney Q&A, https://lifeoptions.org/assets/pdfs/pic2_07.pdf (accessed Dec. 20, 2018). The mistreatment of Mr. Banks' concussion increases his risks of post-concussive syndrome and related symptoms. *See* Naomi J. Brown *et al.*, *Effect of Cognitive Activity Level on Duration of Post-Concussion Symptoms*, (2014), https://www.ncbi.nlm.nih.gov/pubmed/24394679.

Similarly, some district courts within the Second Circuit will only look at the last-amended complaint. Thus, for example, the *Williams* district court concluded that it "may not consider" allegations that are not found in the pro se litigant's last-filed complaint, and it cited a number of earlier cases in support. *See* 2013 WL 214318, at *4 n.4 (citing *Tomlins v. Vill. of Wappinger Falls Zoning Bd. of Appeals*, 812 F. Supp. 2d 357, 363 n.9 (S.D.N.Y. 2011); *Scott v. City of New York Dep't of Correction*, 641 F. Supp. 2d 211, 229 (S.D.N.Y. 2009)). *Scott*, for example, refused to consider a *pro se* complainant's claims that

were pleaded in an opposition to summary judgment but that were not included in the complaint. *See* 641 F. Supp. 2d at 229.

The circuit split on how restrictive to be in reading *pro se* papers merits this Court's review.

B. Liberally Construing *Pro Se* Complaints Is More Important Now Than It Has Ever Been.

"The Founders believed that self-representation was a basic right of a free people." *Faretta v. California*, 422 U.S. 806, 830 n.39 (1975). Already in 1789, Congress "guaranteed in the federal courts the right of all parties to 'plead and manage their own causes personally.'" *Id.* at 831 (quoting 1 Stat. 92). And that right remains to this day. *See* 28 U.S.C. § 1654. "Implicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training." *Traguth*, 710 F.2d at 95.

The need for a meaningful right to self-representation is more important now than ever before. In 2017, about 20% of all civil district court cases were filed by *pro se* prisoners.[12] As this Court has noted, those prisoners are likely to be "totally or functionally illiterate," have only "slight" "educational attainments," and have "limited" intelligence. *Johnson v. Avery*, 393 U.S. 483, 487 (1969). Indeed, a

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[12] U.S. Courts Statistics and Reports, *Table C-13, U.S. District Courts–Civil Pro Se and Non-Pro Se Filings, by District, During the 12-Month Period Ending September 30, 2017*, http://www.uscourts.gov/sites/default/files/data_tables/jb_c13_0930.2017.pdf.

2003 study shows that prisoners are more than twice as likely to have little or no education than the general population. Caroline W. Harlow, *Educational and Correctional Populations*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT at 1 (Apr. 15, 2013), *available at* https://www.bjs.gov/content/pub/pdf/ecp.pdf.

Yet those prisoners are tasked with traversing the complicated legal system with little to no guidance. Not only are they so often forced to litigate *pro se*, they also have "restricted access to libraries, legal materials, computers, the Internet, and even items that the non-incarcerated take for granted—such as paper, pens, and telephones." Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 273 (2010).

Given these circumstances, it is critical that courts do their part to ensure that legitimate complaints are not being dismissed on technicalities—technicalities that it is unfair to expect *pro se* litigants to navigate. As the numerous cases cited above show, what happened to Mr. Banks—alleging the right thing in the wrong place—is commonplace.

C. Courts Should Not Be Dismissing *Pro Se* Complaints For Picayune Mistakes.

This Court has repeatedly emphasized that the complaint of a *pro se* plaintiff "must be held to less stringent standards than formal pleadings drafted by lawyers." *E.g.*, *Erickson*, 551 U.S. at 94; *Hughes*, 449 U.S. at 10; *Estelle*, 429 U.S. at 106 (all quoting other cases). Courts are therefore "required to interpret the *pro se* complaint liberally." *Sause v. Bauer*, 138 S. Ct.

2561, 2563 (2018); *see, e.g.*, *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 402 (2008).

This Court's decision in *Hughes* is informative. Hughes brought a Section 1983 action *pro se* complaining that he had been improperly put into solitary confinement. 449 U.S. at 8. Because Hughes was *pro se*, this Court looked to all the filings to understand the complaint. *See id.* at 9-10. This Court was liberal in its reading of the complaint: It concluded that Hughes' complaint "can be construed" as raising a due-process violation, relying on "his response to the defendants' motion to dismiss the amended complaint." *Id.* at 10.

Unlike this Court's *Hughes* decision, which used Hughes' Response to a Motion to Dismiss to decide what was being alleged in the complaint, the Fourth Circuit here strictly limited itself to the arguments Mr. Banks raised in the second amended complaint itself. Mr. Banks' first amended complaint properly pled the mistreatment of his concussion.

The first amended complaint should have been considered as well, especially given that (1) before Mr. Banks filed a second amended complaint he asked, unsuccessfully, for the appointment of counsel, App. 35a; and (2) in ordering him to file another complaint, the court ordered Mr. Banks to keep his discussion of the facts "short" and threatened to "dismiss[] the action" if Mr. Banks did not follow the instructions. App. 32a. The district court did warn Mr. Banks that the second amended complaint "will supplant all previous complaints and will serve as the sole operative complaint in this action," App. 31a (emphasis omitted), it did so using multiple

uncommon, SAT-level words.[13] That Mr. Banks, a *pro se*, poorly educated, sick man failed to comprehend the import of this sentence is more than understandable. Consequently, Mr. Banks did not understand that the district court's order required him to replead his already elaborated claims, as evidenced by the fact that he did not replead any of them or attach any of his previously adduced affidavits and grievance forms. App. 61a-71a. *Moore* predicted just this scenario: it explained that for a *pro se* plaintiff, the proper approach is to consider all the complaints because "it is unlikely that a direction from th[e] Court will result in a submission of a full and proper amended complaint containing all of the relevant factual assertions." 2016 WL 6311233, at *3.

Despite Mr. Banks' clear intention to incorporate the allegations from his earlier complaints, the courts below refused to consider them. *See* App. 4a. By ignoring Mr. Banks' complaints that relate to the Prison's strikingly deficient treatment of Mr. Banks' traumatic brain injury and the prison's repeated failure to provide a full dialysis, the courts below eviscerated the heart of Mr. Banks' complaint. The decision below only addresses the narrow allegations that he did not plead in his initial or first amended complaint. And, by issuing summary judgment on the merits, Mr. Banks may well end up being prevented from repleading these claims in a subsequent proceeding.

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[13] *See* Vocabulary.com, *Vocabulary Lists: SAT 5000*, *available at* https://www.vocabulary.com/lists/65391 (listing "operative" and "supplant").

Courts should not be so quick to permanently destroy a *pro se* plaintiff's right to seek redress. As then-Judge Gorsuch made clear in *Nasious*, when courts give instructions to a *pro se* plaintiff, they should provide an "explanation[] aimed at a layperson," and they should "consider[] the practicability of alternatives to dismissing [the complainant's] cause with prejudice, such as dismissal without prejudice," especially when dealing with a *pro se* plaintiff. 492 F.3d at 1163. Here, the instructions given to Mr. Banks were not aimed at a layperson, and there was no analysis suggesting that the issues pled in his first amended complaint merited dismissal with prejudice. The claims should not have been dismissed.

D. This Case Presents An Excellent Vehicle To Address The Split Among Courts.

Both the district court and Fourth Circuit are clear that their rejection of most of Mr. Banks' concussion- and dialysis-based claims was because they were insufficiently pled in the second amended complaint. App. 4a, 18a. As Mr. Banks' brief to the panel noted, he clearly exhausted at least one concussion-related grievance where the Prison said its decision was "final," and there was one dialysis-related grievance where the Prison said "[a]ll administrative remedies have been exhausted." Panel Op. Br. at 20-21 (quoting A035, A235).

On the merits, Dr. Gore and Nurse Smith were plainly deliberately indifferent to Mr. Banks' serious medical needs. As described above at pp. 3-5, the Prison's treatment for Mr. Banks' traumatic brain injury was first to give him Q-tips and bacterial

ointment; then to ignore him; then to deny him a bed pass—even after he had been diagnosed with traumatic brain injury; then not to prescribe him any medication; and then to give him expired and insufficient amounts of Tylenol. Regarding his dialysis, the Prison regularly cancelled his dialysis when he was ill—rather than treat his underlying sickness; it regularly scheduled doctor appointments at the same time as dialysis; and it used a defective water system. Doctor Gore and Nurse Smith's refusal to address these issues are paradigmatic examples of deliberate indifference that should survive summary judgment. This case so starkly presents the problems of failing to liberally construe a *pro se* complainant's papers that it provides an excellent opportunity for the Court to provide guidance on the proper construction of a *pro se* complainant's pleadings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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