

In the  
Supreme Court of the United States

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DEBBIE FLOWERS, AS THE PERSONAL  
REPRESENTATIVE OF TOBY KRISTOPHER PAYNE,

*Petitioner,*

v.

JAMES SUTTERFIELD, MENTAL HEALTH MANAGER;  
JASON M. HARDEGREE, MAJOR;  
DAMON B. ANDREWS, ASST. WARDEN;  
DARREL K. NASH, ASST. WARDEN;  
KEVIN S. FOLEY, SR. WARDEN,

*Respondents.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Fifth Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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SAMUEL WEISS  
*COUNSEL OF RECORD*  
RIGHTS BEHIND BARS  
416 FLORIDA AVENUE, NW  
#26152  
WASHINGTON, DC 20001  
(202) 455-4399  
SAM@RIGHTSBEHINDBARS.ORG

## QUESTION PRESENTED

Toby Payne filed a complaint alleging that the Texas Department of Corrections kept him in a unit for the Chronically Mentally Ill (CMI) that provided virtually no mental health treatment and horrible conditions in violation of the Constitution and disability law. When the court did not act for years, he also moved for multiple temporary restraining orders. The district court denied his request for preliminary relief on the basis that he had not demonstrated a disability or that his need for accommodations were obvious, both despite the prison itself placing him in the CMI unit. Then, without any separate analysis, the court dismissed his complaint under a pre-service screening order. Payne appealed to the Fifth Circuit. After briefing but before a ruling, Payne succumbed to his mental illness and committed suicide. The Fifth Circuit affirmed the district court's ruling, holding that his estate's equitable claims were moot because he had killed himself but that his damages claims were frivolous because he did "not appear to have alleged a physical injury," which is required to obtain compensatory damages. The Court did not consider whether Payne's complaint was frivolous if his estate was still plausibly entitled to nominal and punitive damages nor the number of physical injuries that Payne actually listed in documents attached to his complaint. Nor did the Circuit Court remand with an order granting Payne's estate leave to amend the *pro se* complaint to include additional physical injury such as, for example, his death. The question is:

1. Does the courts' abdication of several procedural and substantive legal principles merit summary reversal?

## **PARTIES TO THE PROCEEDINGS**

### **Petitioner**

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- Debbie Flowers as Personal Representative of Toby K. Payne
- Toby K. Payne, Original Plaintiff (deceased)

### **Respondents**

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- James Sutterfield, Mental Health Manager
- Jason M. Hardegree, Major
- Damon B. Andrews, Asst. Warden
- Darrell K. Nash, Asst. Warden
- Kevin D. Foley, Sr. Warden

## **LIST OF PROCEEDINGS**

U.S. Court of Appeals for the Fifth Circuit  
No. 20-10988

Debbie Flowers, as the Personal Representative of  
Appellant Toby Kristopher Payne, for Substitution in  
the Place and Stead of the Appellant Toby Kristopher  
Payne, *Plaintiff-Appellant*, v. James Sutterfield, Mental  
Health Manager; Jason M. Hardegree, Major; Damon  
B. Andrews, Asst. Warden; Darrell K. Nash, Asst.  
Warden; Kevin D. Foley, Sr. Warden, *Defendants-*  
*Appellees*

Date of Final Opinion: July 20, 2022

Date of Rehearing Denial: July 26, 2022

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U.S. District Court, Northern District of Texas

No. 2:17-CV-211-Z-BR

Toby Kristopher Payne, *Plaintiff*, v.  
James Sutterfield, et al., *Defendants*

Date of Final Order: Sept. 2, 2020

**TABLE OF CONTENTS**

	Page
QUESTION PRESENTED .....	i
PARTIES TO THE PROCEEDINGS .....	ii
LIST OF PROCEEDINGS .....	iii
TABLE OF AUTHORITIES .....	vi
INTRODUCTION .....	1
OPINIONS BELOW .....	2
JURISDICTION .....	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	3
STATEMENT OF THE CASE .....	4
REASONS FOR GRANTING THE PETITION .....	10
I. THE LOWER COURTS' ABDICATION OF THE APPROPRIATE SUBSTANTIVE AND PROCEDURAL STANDARDS MERITS SUMMARY REVERSAL .....	10
CONCLUSION .....	18

**TABLE OF CONTENTS – Continued**

Page

**APPENDIX TABLE OF CONTENTS****OPINIONS AND ORDERS**

Revised Opinion of the United States Court of Appeals for the Fifth Circuit (July 20, 2022) .....	1a
Opinion of the United States Court of Appeals for the Fifth Circuit (June 22, 2022) .....	7a
Memorandum Opinion of the United States District Court for the Northern District of Texas (September 2, 2020) .....	12a

**REHEARING ORDER**

Order of the United States Court of Appeals for the Fifth Circuit Denying Petition for Rehearing and Rehearing En Banc (July 26, 2022) .....	30a
---	-----

**OTHER DOCUMENTS**

Fifth Circuit Docket Case No: 20-10988.....	32a
Complaint, Relevant Excerpts and Selected Exhibits .....	41a
Plaintiff Declaration and Motion for TRO and/or PI (December 8, 2019).....	106a
Plaintiff's Motion for TRO and/or Preliminary Injunction with Inmate Declaration in Support (September 5, 2020).....	113a

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Allah v. Al-Hafeez</i> , 226 F.3d 247 (3d Cir. 2000) .....	11
<i>Booker v. Koonce</i> , 2 F.3d 114 (5th Cir. 1993) .....	6
<i>Bryan v. MacPherson</i> , 630 F.3d 805 (9th Cir. 2010) .....	12
<i>Calhoun v. DeTella</i> , 319 F.3d 936 (7th Cir. 2003) .....	11
<i>Chatman v. City of Pittsburgh</i> , 437 F. App'x 115 (3d Cir. 2011) .....	10
<i>Chavis v. Chappius</i> , 618 F.3d 162 (2d Cir. 2010) .....	10
<i>Estelle v. Gamble</i> , 429 U.S. 97 (1976) .....	17
<i>Hughes v. Lott</i> , 350 F.3d 1157 (11th Cir. 2003) .....	11
<i>Iko v. Shreve</i> , 535 F.3d 225 (4th Cir. 2008) .....	12
<i>Lopez v. Smith</i> , 203 F.3d 1122 (9th Cir. 2000) .....	10
<i>Munn v. Toney</i> , 433 F.3d 1087 (8th Cir. 2006) .....	12
<i>Neitzke v. Williams</i> , 490 U.S. 319 (1989) .....	13
<i>Oliver v. Keller</i> , 289 F.3d 623 (9th Cir. 2002) .....	11

**TABLE OF AUTHORITIES – Continued**

	Page
<i>Peterson v. Burris,</i> No. 17-1291, 2017 WL 8289655, (6th Cir. Dec. 8, 2017) .....	12
<i>Robinson v. Hunt Cnty.,</i> 921 F.3d 440 (5th Cir. 2019) .....	6
<i>Tate v. SCR Med. Transp.,</i> 809 F.3d 343 (7th Cir. 2015) .....	10
<i>Thomas v. Bryant,</i> 614 F.3d 1288 (11th Cir. 2010) .....	12
<i>Thompson v. Carter,</i> 284 F.3d 411 (2d Cir. 2002).....	11
<i>Turner v. Safley,</i> 482 U.S. 78 (1987).....	12
<i>Wilcox v. Brown,</i> 877 F.3d 161 (4th Cir. 2017) .....	11
<i>Williams v. Rickman,</i> 759 F. App’x 849 (11th Cir. 2019) .....	12
<i>Winter v. Nat. Res. Def. Council, Inc.,</i> 555 U.S. 7 (2008).....	13
<i>Wooden v. Armenteros,</i> 756 F. App’x 951 (11th Cir. 2018) .....	10

**CONSTITUTIONAL PROVISIONS**

U.S. Const. amend. VIII .....	4, 5, 7, 8
-------------------------------	------------

**TABLE OF AUTHORITIES – Continued**

Page

**STATUTES**

28 U.S.C. § 1254(1) .....	3
28 U.S.C. § 1915A .....	6
29 U.S.C. § 701 et seq., Rehabilitation Act of 1973.....	5
42 U.S.C. § 12101 et seq., Americans with Disabilities Act .....	3
42 U.S.C. § 12102(1)(A) .....	6, 13
42 U.S.C. § 12102(3)(A) .....	14
42 U.S.C. § 12132 .....	3
42 U.S.C. § 1983.....	4, 16
42 U.S.C. § 1997e(e), Prison Litigation Reform Act.....	8, 12

**JUDICIAL RULES**

Fed. R. Civ. P. 10(c).....	16
----------------------------	----

**REGULATIONS**

29 C.F.R. § 1630.2(j)(1)(i) .....	13
29 C.F.R. § 1630.2(j)(1)(ii) .....	13
29 C.F.R. § 1630.2(k) .....	14



## INTRODUCTION

Toby Payne died by suicide inside the Texas Department of Criminal Justice's (TDCJ) Chronic Mentally Ill (CMI) program—a unit for people with severe mental impairments. His death came in the midst of litigation against TDCJ officials over the conditions that Mr. Payne was subjected to in the CMI program and over TDCJ's failure to accommodate the disabilities that placed him in the CMI program in the first place. Mr. Payne's *pro se* complaint and attached documents explained that he suffered from schizoaffective disorder; the unconstitutional conditions he was subjected to in TDCJ custody; and the services and programs he alleged the TDCJ denied him and other mentally ill inmates.

Despite these allegations, and despite the liberal pleading standard afforded *pro se* litigants, the District Court, after years of delay and numerous motions for preliminary relief, denied Payne preliminary relief because he had not demonstrated his disability or that his need for an accommodation was obvious, and dismissed Payne's complaint as frivolous under a pre-service screening order without leave to amend. Payne appealed. But the Fifth Circuit affirmed the District Court by holding that his damages claims were frivolous because he did “not appear to have alleged a physical injury,” and that, following Payne's death, his estate's equitable claims were moot because of his suicide. In short, the district told Payne that he had not thoroughly pleaded facts concerning the disability that killed him and the Fifth Circuit affirmed by finding that Payne had no physical injury (a requirement for

compensatory damages under § 1997e(e)) without ordering that Payne’s estate be allowed to amend to include his death as an injury. Even though it was not enough of physical injury to sustain his claim or warrant amendment, Payne’s death did count for one thing in the eyes of the Fifth Circuit: it mooted his equitable relief.

In making its ruling the Fifth Circuit departed from precedent in other circuits in significant ways, including: by holding that a *pro se* litigant who requests damages should have his complaint dismissed for frivolity where compensatory damages (but not nominal or punitive damages) may be statutorily barred; by holding that a *pro se* Plaintiff, whose complaint was dismissed for frivolity, should not have the opportunity to amend, despite significant intervening facts; and by holding that high blood pressure and respiratory distress resulting from pepper spray are not physical injuries as defined by the Prison Litigation Reform Act. These holdings are rife with legal error and create important and unnecessary conflict among the circuits. The ruling of the court below should be summarily reversed.



## OPINIONS BELOW

The revised opinion of the Court of Appeals is unreported but available at 2022 WL 2821953 and is reproduced at App.1a-6a. The original opinion of the Court of Appeals is reproduced at App.7a-11a. The order of the district court dismissing Payne’s complaint for frivolity is unreported but may be found at 2020

WL 5237747 and is reproduced at App.12a-30a. The unpublished order of the Court of Appeals denying the petition for panel rehearing and rehearing *en banc* is reproduced at App.31a-32a.



## **JURISDICTION**

The Fifth Circuit entered its judgment on July 20, 2022. App.1a. A timely petition for panel rehearing and rehearing *en banc* was denied on July 26, 2022. App.31a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).



## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

**In 42 U.S.C. § 12132, the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., provides as follows:**

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

**The Eighth Amendment to the U.S. Constitution provides:**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**42 U.S.C. § 1983 provides in relevant part:**

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....



**STATEMENT OF THE CASE**

After pleading guilty to murdering his son during a bout of psychosis, Toby Payne was incarcerated in Texas Department of Criminal Justice (TDCJ) prisons from 2011 until his death by suicide in 2021. App.2a. Because Payne suffered from schizoaffective disorder, TDCJ placed Payne at the Williams P. Clements Unit. *Id.* The conditions there prompted this suit.

Because of Mr. Payne's severe mental illness, TDCJ officials placed him in the Chronically Mentally Ill (CMI) program. *Id.* Mr. Payne alleged that while in

the CMI program, he was “kept in solitary confinement virtually twenty-four hours per day.” *Id.* He was “offered limited recreation, communication, entertainment, and hygiene opportunities,” and denied access to any religious services. *Id.* He was given inadequate mental health services, including “limited group therapy” and no “individual therapy.” App.3a. And TDCJ did not train its staff on how to safely and appropriately interact with people with psychiatric disorders. App.2a-3a.

In October 2017, Mr. Payne, proceeding *pro se*, filed suit in the Northern District of Texas alleging that the conditions in Clements Unit violated the Eighth Amendment, the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973 (RA). App.2a. In December 2019, Mr. Payne filed for a temporary restraining order (TRO) and preliminary injunction because the district court had yet to act on his complaint. App.105a. In the TRO motion, Mr. Payne explained that he “has tried everything within [his] power to get the mental health help [he] need[s]” and that “solitary confinement has a sneaky way of adversely affecting a person in a way that they cannot sense.” App.108a. He made clear that “[a]ll of the issues” that he “complained about in this action [were] still occurring.” *Id.* Mr. Payne also informed the court that he was fighting off thoughts of self-harm and was worried that, given the conditions he faced and the lack of mental health treatment, he might “succumb to suicide.” *Id.*

Payne filed a second motion for a TRO in September 2020. App.113a. With the motion, Mr. Payne filed a declaration stating that in 2020, while in the CMI program and because of its conditions, he twice

attempted suicide—once by hanging and the other by chewing through the veins in his left wrist. App.115a. Payne still had the scars from his suicide attempts. *Id.*

Three years after Payne filed his complaint, the district court denied Mr. Payne’s Motion for a TRO and then dismissed his claims as frivolous under 28 U.S.C. § 1915A. App.29a-30a. In its opinion, the district court set forth the standard for frivolous claims, noting that a frivolous claim is one that “lacks an arguable basis in law or in fact.” App.16a n.4 (citing *Booker v. Konsense*, 2 F.3d 114, 115 (5th Cir. 1993)). The district court then discussed the standard for a TRO or preliminary injunction, explaining, in part, that “[t]o obtain a preliminary injunction, a movant must prove. ‘a substantial likelihood of success on the merits.’” App.21a (quoting *Robinson v. Hunt Cnty.*, 921 F.3d 440, 451 (5th Cir. 2019)).

Applying the TRO standard to Mr. Payne’s ADA claims, the district court held that he was “not substantially likely to prevail on the merits.” App.26a. The district court held that Mr. Payne was not likely to be found “disabled” under the ADA because his mental illness did not substantially limit his major life activities, one manner of being qualified as disabled under the ADA. *Id.* (citing 42 U.S.C. § 12102(1)(A)). It found the “very success [Mr. Payne] asserts he had after the onset of his mental illness … suggests no limitation exists.” *Id.* It did not consider whether Mr. Payne had a “record of” such a limitation or whether the TDCJ “regarded him as” having an impairment substantially limiting major life activities, the other two ways to qualify as disabled under the ADA. *Id.* The district court also held that Mr. Payne’s was not substantially likely to succeed on his claim because “he had [not]

requested an accommodation” under the statute. App. 23a. The district court did not conduct a disparate treatment analysis. *Id.*

In evaluating Mr. Payne’s Eighth Amendment claim, the district court again applied the TRO standard. App.16a-30a. Analyzing each condition individually, the court held there was not a substantial likelihood Mr. Payne would prevail in demonstrating either an “extreme deprivation or deliberate indifference.” App.18a.

The district court ultimately concluded that Mr. Payne “failed to prove he is substantially likely to prevail on any of his statutory or constitutional claims.” App.29a. Then, and without a word of separate analysis, the district court denied his motion for a preliminary injunction *and* dismissed his complaint as frivolous. *Id.*

On appeal, Payne argued that the district abused its discretion in dismissing his Eighth Amendment and ADA/RA claims as frivolous. While the appeal was pending and over six months after briefing was complete, Mr. Payne finally succumbed to his mental illness and committed suicide. App.3a. Counsel notified the Fifth Circuit of Payne’s death and moved to have Payne’s mother, Debbie Flowers, substituted as Payne’s next of kin. *Id.* The Fifth Circuit granted this motion. *Id.*

Over six months after that occurred, the Fifth Circuit Court of Appeals asked counsel to file a brief on whether Mr. Payne’s claims were mooted by his death within three days. App.36a. Counsel filed a letter brief explaining why Payne’s damages claims

under neither the ADA/RA nor the Eighth Amendment were mooted by his death. App.39a.

The panel affirmed the district court’s dismissal of Payne’s complaint with one sentence of analysis. The panel did not affirm the district court’s dismissal on the ground that Mr. Payne’s claims were frivolous on the merits, as the district court appears to have held. App.11a. And the panel did not affirm the district court’s dismissal because Mr. Payne’s damages claims were moot, the issue on which it requested supplementary briefing. *Id.* Instead, the panel dismissed Payne’s complaint on a basis never briefed or mentioned, holding that Payne’s equitable claims were moot because of his death and that because his “complaint does not appear to allege any physical injury,” dismissal of his damages claims was required under the physical injury requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(e). *Id.* The provision “requires a prisoner to show physical injury before he can recover compensatory damages for any psychological injury.” 42 U.S.C. § 1997e(e). The panel did not distinguish between Payne’s Eighth Amendment and ADA/RA claims in holding that dismissal was required under § 1997e(e).

The Appellant—now Payne’s mother and next of kin, Debbie Flowers—filed a Petition for Rehearing and Rehearing En Banc, making three primary arguments. First, Flowers argued that the Fifth Circuit erred in dismissing her claims in their entirety under § 1997e(e) because the provision only applies to compensatory damages and not nominal or punitive damages, which are also available in suits under 42 U.S.C. § 1983. Second, Payne included a number of documents in his *pro se* complaint, several of which actually did allege physical injuries, ranging from involuntary muscle

contractions and high blood pressure from medications to respiratory irritation from gas when staff pepper sprayed him. Third, it is well-settled law that plaintiffs, especially when *pro se*, be given a chance to amend their complaints when there is any chance that they could allege facts that would entitle them to relief. Here, Flowers could unquestionably do so, as while Payne’s complaint concerning his psychiatric disability was pending, he had filed a motion with the court stating that he had attempted suicide twice include by chewing through the veins in his left wrist, *see* App. 115a, and then, while the appeal was pending, actually killed himself.

On July 20, 2022, the Fifth Circuit reissued the opinion under the docket entry “TECHNICAL REVIEW MADE TO OPINION.” App.41a. This opinion added a footnote to its one sentence of analysis. It stated that while “prisoners may recover punitive or nominal damages for a Constitutional violation even in the absence of physical injury,” Payne “did not request punitive or nominal damages in his complaint.” Payne’s complaint did not request compensatory damages either—it simply asked the court to evaluate his claims and “award damages accordingly.” App.43a. Six days later, the Fifth Circuit denied Flowers’s Petition for Rehearing and Rehearing En Banc. This Petition followed.



## REASONS FOR GRANTING THE PETITION

### I. THE LOWER COURTS’ ABDICATION OF THE APPROPRIATE SUBSTANTIVE AND PROCEDURAL STANDARDS MERITS SUMMARY REVERSAL.

Read on its face, the Fifth Circuit’s ruling and its lone sentence of analysis would create several different circuit splits worthy of this Court’s review. These include:

1. When a pleading defect in a *pro se* complaint can obviously be cured because of intervening events, is dismissal for frivolity appropriate, as the court held here, or is leave to amend appropriate, as held by the Second, Third, Seventh, Ninth, and Eleventh Circuits. *Chavis v. Chappius*, 618 F.3d 162, 171 (2d Cir. 2010) (district court abused its discretion denying *pro se* motion for leave to amend where additional facts could have been included); *Chatman v. City of Pittsburgh*, 437 F. App’x 115, 116 (3d Cir. 2011) (holding that “prior to dismissing a *pro se* complaint under § 1915(e), a district court must give the plaintiff an opportunity to amend his pleading to cure the defect unless such an amendment would be futile or pre-judicial.”); *Tate v. SCR Med. Transp.*, 809 F.3d 343, 346 (7th Cir. 2015) (same); *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (reversal for not allowing *pro se* plaintiff to file second amended complaint even where request for amendment did not identify how defects in prior complaints would be cured); *Wooden v. Armenteros*, 756 F. App’x 951, 952 (11th Cir. 2018) (holding that a *pro se* plaintiff must be given at least one chance to amend, even without request, and given opportunity

to amend liberally where amendment would not be futile).

2. When a *pro se* complaint makes a request for “damages,” but compensatory damages are barred, is dismissal for frivolity appropriate because the complainant did not specifically request nominal damages or punitive damages, as held here, or does a general request for damages reach beyond compensatory damages as held by the Second, Third, Fourth, Seventh, Ninth, and Eleventh Circuits. *Thompson v. Carter*, 284 F.3d 411, 419 (2d Cir. 2002) (ordering the district court on remand to allow *pro se* plaintiff to amend his complaint where he made no claim for any damages but presented facts that might have amounted to claims for compensatory, nominal, or punitive damages); *Allah v. Al-Hafeez*, 226 F.3d 247, 251 (3d Cir. 2000) (holding a *pro se* prisoner’s complaint to include a request for nominal damages despite no explicit request plaintiff’s complaint); *Wilcox v. Brown*, 877 F.3d 161, 169 (4th Cir. 2017) (holding that a *pro se* prison litigant pleading damages generally without specifying any particular type encompasses a request for nominal damages); *Calhoun v. DeTella*, 319 F.3d 936, 943 (7th Cir. 2003) (same); *Oliver v. Keller*, 289 F.3d 623, 630 (9th Cir. 2002) (same); *Hughes v. Lott*, 350 F.3d 1157, 1162 (11th Cir. 2003) (instructing district court to read *pro se* prisoner’s complaint liberally on remand to determine whether a claim for nominal damages exists despite no specific request for such).

3. Are physical maladies that require medical treatment like high blood pressure and respiratory irritation from pepper spray “physical injur[ies],” as held by the Fourth, Sixth, Eighth, Ninth, and Eleventh Circuits, or are they not, as held here. *Iko v. Shreve*,

535 F.3d 225, 239 (4th Cir. 2008) (pepper spray causing respiratory distress that led to asphyxiation is a physical injury); *Peterson v. Burris*, No. 17-1291, 2017 WL 8289655, at \*2 (6th Cir. Dec. 8, 2017) (assuming without deciding that elevated blood pressure from stress is sufficient to allege a physical injury under 1997e(e)); *Munn v. Toney*, 433 F.3d 1087, 1089 (8th Cir. 2006) (inmate suffering the effects of high blood pressure after being denied high blood pressure medication meets the 1997e(e) physical injury requirements); *Bryan v. MacPherson*, 630 F.3d 805, 825 (9th Cir. 2010) (pepper spray results in physical injury); *Thomas v. Bryant*, 614 F.3d 1288, 1316 (11th Cir. 2010) (holding that being pepper sprayed causes physical injury and reserving for a jury the question of whether that injury is *de minimus*); *Williams v. Rickman*, 759 F. App’x 849, 853 (11th Cir. 2019) (high blood pressure and headaches resulting from pepper spray and other uses of force were physical injuries).

Flowers’s case, however, is likely better read not as a break from the law of every other circuit but instead as a breakdown of the fair application of the relevant legal standards to his case. In recognizing the challenges of prison administration, both this Court and Congress have enacted challenging standards for prisoners to obtain relief on claims related to prison conditions, and prisoners must meet those onerous standards to win relief. But when they do so, they are entitled to as much despite their disfavored social status. *See Turner v. Safley*, 482 U.S. 78, 84 (1987) (“Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.”). That is not what happened to Toby Payne or his estate.

The blatant errors, both procedural and substantive, began in the district court. Procedurally, the district court discussed Payne’s claims under the preliminary injunction standard for several pages before *also* dismissing his complaint for frivolity without leave to amend or a word of separate analysis. App.29a. The result was a conflation of two standards that could not be more different—while a “preliminary injunction is an extraordinary remedy,” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008), pre-service frivolity review under the Prison Litigation Reform Act merely asks whether the complaint lacks any arguable basis to state a claim, *see Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

The district court also erred substantively in its discussion of the merits of his claim. The district court held first that Payne had failed to demonstrate that he had a disability under the ADA. App.23a. But even though the district court only considered the first of the three, Payne met all of the possible definitions of disabled under the ADA: he had “a physical or mental impairment that substantially limits one or more major life activities of such individual”; “a record of such an impairment”; and was “regarded as having such an impairment.” § 12102(1).

Under the first definition, an impairment qualifies as a disability if it “substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.” 29 C.F.R. § 1630.2(j)(1)(ii). This requirement “is not meant to be a demanding standard.” 29 C.F.R. § 1630.2 (j)(1)(i).

Payne’s schizoaffective disorder plainly met this definition. Per the complaint, it clouded his brain

functions and his ability to think and process his emotions. Payne's illness made him "mentally instabl[e]" and "susceptible to extreme degrees of emotion." App.97a. It frequently triggered "depressive cycles," App.56a, and pushed him "into a downward spiral mentally." App.67a He could "barely keep [his] head above water mentally speaking." App.115a-116a. As illustrated by the killing of his son, Payne's schizoaffective disorder also triggered severe psychotic breaks. App.90a. And perhaps most pertinently, his mental illness caused suicidal ideations. App.115a.

Payne also had a "record of" a substantial impairment. "An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k). His schizoaffective disorder both initially caused his imprisonment within the TDCJ —forensic investigators attributed his son's death to a deep psychotic break caused by his schizoaffective disorder—and then disabled him to the point where the TDCJ assigned him to the Chronic Mentally Ill program.

Finally, Payne was "regarded as" having an impairment, meaning that an entity "subjected [him] to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." § 12102(3)(A). By restricting Payne to facilities and services on the grounds that he was "Chronically Mentally Ill," the TDCJ regarded Payne as substantially limited in his ability to perform major life activities. For instance, the TDCJ restricted Clements Unit "Chronically Mentally Ill" inmates' recreational and hygienic opportunities, seeking to reduce

the amount of time outside of their cells, and restrained their telephone access to ten minutes every ninety days. App.54a; App.73a.

The district court erred again by only addressing his claim as alleging a failure to accommodate when Payne also stated a claim for disparate treatment under the ADA. Payne alleged his schizoaffective disorder caused the TDCJ to assign him to the CMI Unit, which resulted in the TDCJ “stripp[ing] [him] of practically all privileges” and services. App.54a. Payne alleged that the TDCJ disproportionately restricted CMI inmates to solitary confinement for “virtually 24 hours a day” and limited their access to shower facilities and recreational opportunities. App.43a; App.54a-56a. Furthermore, non-CMI inmates had greater telephone access than CMI inmates and were afforded a level of privacy unknown to CMI inmates when using the phone. App. 47a. The TDCJ even denied CMI inmates the work opportunities afforded to non-CMI inmates. App.100a.

The district court made another strange error in holding that Payne’s disability was not obvious and that he had not requested an accommodation. Both are wrong. His need for an accommodation was so plainly obvious that TDCJ itself assigned him to the CMI program and imposed increased restrictions to prevent future harm to himself and others. App.54a. And Clements Unit doctors prescribed Mr. Payne various medications for this disability and the limitations it imposed. App.70a. Payne’s complaint was also replete with grievance forms notifying the TDCJ of his schizoaffective disorder, its limitations on his major life activities, and requests for the TDCJ to accommodate his disabilities by rectifying those issues. *See, e.g.*, App.49a; App.51a; App.64a; App.75a; App.102a.

The Fifth Circuit opinion affirming the district court was no better, on either procedural or substantive grounds. It did not defend the holding of the district court or, as to Flowers's damages claims, mention the claim survival issue for which it had requested a supplemental letter brief. Instead, it held correctly that Payne's death mooted his equitable claims and, in a single sentence of analysis, that the Prison Litigation Reform Act's physical injury requirement barred his damages claims because "Payne's complaint does not appear to allege any physical injury." App.11a.

This holding had three fundamental problems. First, 42 U.S.C. § 1983 permits not only compensatory damages but also nominal and punitive damages, the claims of which the PLRA's physical injury requirement could not extinguish. Second, Payne *did* allege several physical injuries in the documents attached to his complaint, which are a part of the complaint "for all purposes." Fed. R. Civ. P. 10(c). These included muscle tremors, App.70a; respiratory irritation from pepper gas, App.15a; and high blood pressure from medication, App.79a. Finally, just as the district court did not, the Fifth Circuit did not give Flowers a chance to amend to cure this defect, even though he not only filed a request for a TRO that referenced multiple suicide attempts—including one by chewing through his the veins in his left arm—but also actually killed himself while the case was pending.

On July 20, 2022, the Fifth Circuit made a "Technical Revision" to its opinion. App.41a. It consisted of adding a footnote to its one sentence of analysis stating that, although Payne would have been entitled to nominal and punitive damages, "Payne did not request punitive or nominal damages in his complaint."

App.5a. This attempted to solve one of the above problems (although only one). But it created another. Payne had pleaded for the court to evaluate his claims and “award damages accordingly.” App.43a. The Fifth Circuit’s interpretation of his complaint was therefore that Payne implicitly had only sought compensatory damages, to which he was not entitled, while implicitly disclaiming nominal and punitive damages, to which he was. This parsing is the opposite of the approach courts must take at the pre-service screening stage, where allegations must be read liberally. And this Court has held that *pro se* complaints like Payne’s must be read particularly liberally and held to less stringent standards. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

\* \* \*

Defendants have not been served. They will have, and deserve, every opportunity to disprove the claims in Payne’s complaint and raise defenses to their liability. But Payne’s complaint was obviously not frivolous, and the conclusion to the contrary only occurred through a litany of legal errors made before any defendant even appeared in the case and in a posture where Payne did not have the opportunity to respond. These errors culminated in the Orwellian conclusion that although his alleged discrimination was so severe that it culminated in his suicide—the same fear that animated filing his complaint in the first place—Payne’s claim was frivolous and should be dismissed without leave to amend because he did not, and could not, plead a physical injury. This conclusion merits summary reversal.



## CONCLUSION

The petition for a writ of certiorari should be granted, and the lower court opinion should be summarily reversed.

Respectfully submitted,

SAMUEL WEISS  
*COUNSEL OF RECORD*  
RIGHTS BEHIND BARS  
416 FLORIDA AVENUE, NW  
#26152  
WASHINGTON, DC 20001  
(202) 455-4399  
[SAM@RIGHTSBEHINDBARS.ORG](mailto:SAM@RIGHTSBEHINDBARS.ORG)

*COUNSEL FOR PETITIONER*

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