No. 20-3101

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LUTHER JOHNSON,

***Appellant*,**

v.

LISA PETERSON; OSCAR CATALDI, JR.;
ROBERT YOCHUM,

***Appellees*.**

On Appeal from the United States District Court for the Northern District of Ohio,
No. 3-18-cv-331, Hon. Jeffrey J. Helmick

BRIEF OF APPELLANT JOHNSON URGING REVERSAL

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Corporate Disclosure Statement

Appellant Luther Johnson is an individual, and is not a corporation. He offers no stock; there are no parent corporations or publicly owned corporations that own 10 percent or more of stock.

/s/ James Davy

James Davy

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff-Appellant Luther Johnson requests oral argument pursuant to Federal Rule of Appellate Procedure 34(a) and Sixth Circuit R. 34. Appellant requests 30 minutes total for oral argument.

Oral argument would assist this Court in considering the issues and duties of the Ohio Department of Rehabilitation & Corrections regarding its compliance with the United States Constitution in treating prisoners in its care who have long-term diagnoses of Hepatitis C. Especially in light of recent decisions by this Court on this subject, including one involving the Ohio Department of Rehabilitation and Corrections that did not resolve questions relevant to this appeal, exploration of these issues at oral argument would complement the facts and legal arguments presented in the briefs and the record, and significantly aid the Court's decisional process.

Counsel for both parties—*pro bono* counsel with specific experience in prison issues, and counsel for the State with similar experience—are especially likely to assist the Court. Having counsel on both sides of an issue often litigated *pro se* by prisoners presents an additional benefit of oral argument in this case.

STATEMENT OF JURISDICTION

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291, as Plaintiff-Appellant Luther Johnson appeals from a final judgment of the United States District Court for the Northern District of Ohio. The trial court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331, as Mr. Johnson's complaint alleged claims pursuant to 42 U.S.C. § 1983. Complaint, R. 1, Page ID #1-2. A final order was entered on January 7, 2020 that disposed of all claims. Judgment, R. 31, Page ID #205. The Notice of Appeal was timely filed on January 24, 2020. Notice of Appeal, R. 35, Page ID #222.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the District Court erred in finding that failure to treat Plaintiff-Appellant's Hepatitis C for two decades, which has caused ongoing and progressive liver damage, cannot state a claim under the Eighth Amendment?

Proposed answer: YES

II. Whether the District Court erred in finding that denial of treatment pursuant to a statewide prioritization protocol could immunize State correctional defendants from individual claims of inadequate medical treatment in all circumstances?

Proposed answer: YES

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

In the year 2000, Luther Johnson was diagnosed with Hepatitis C. Opinion, R. 30, Page ID #200; Complaint, R. 1, Page ID #3. Since then, while Mr. Johnson has been in the sole custody of the Ohio Department of Rehabilitation & Corrections, he has not received any treatment for his Hepatitis C. Opinion, R. 30, Page ID #200; Complaint, R. 1, Page ID #3. Because he has not any received treatment for Hepatitis C, despite seeking it repeatedly, his liver has undergone increasing and extensive scarring that continues to this day. Opinion, R. 30, Page ID #2, Complaint, R. 1, Page ID #3. As Mr. Johnson has alleged, Defendant-Appellees have not treated him because his Hepatitis C has not yet reached the fourth level of scarring on a five level scale, and Defendant-Appellees concededly apply the state's State prioritization protocol to categorically decline to treat people with Mr. Johnson's supposed level of Hepatitis C or lower. Motion for Judgment on the Pleadings, R. 21, Page ID #100; *see also* Complaint, R. 1, Page ID #6-8. As Mr. Johnson has alleged, that categorical exclusion stems solely from the cost of the treatment. Complaint, R. 1, Page ID #6-8; Opposition to Motion for Judgment on the Pleadings, R. 23-2, Page ID #164.

During the course of his non-treatment, available Hepatitis C treatment has improved drastically. At the time Mr. Johnson was first diagnosed with Hepatitis C,

there was no reliably effective treatment for it. Prior to 2011, the best available treatments involved interferon—which only worked for a subset of all the people with Hepatitis C and often involved dangerous side effects even when it did work. *E.g.*, *Atkins v. Parker*, No. 19-6243, --- F.3d --- (6th Cir. Aug. 24, 2020) (slip op at 2). In 2011, however, the FDC approved a new class of drugs that "for almost all patients who take them . . . halt the progress of Hepatitis C and eventually cause the virus to disappear completely." *Id.*, slip op. at 2. As a result, in 2015, the American Association for the Study of Liver Diseases ("AASLD") and the Infectious Diseases Society of America jointly published guidelines recommending treatment with direct acting antiviral ("DAA" or "antiviral") medicine for anyone with Hepatitis C of any level of liver scarring (or fibrosis). Opinion, R. 30, Page ID #203 n.1. DAAs work for virtually all patients, with virtually no side effects. The availability of those medicines changed the standard of care for Hepatitis C, and they are now uniformly recognized by medical authorities as the standard of care for people with Hepatitis C at any level of progression. *E.g.* Complaint, R. 1, Page ID #6. Their cost has declined since their release, and they currently cost between $13,000 and $32,000 per patient to fully eliminate the virus. *Atkins*, slip op. at 2.

These treatment advances have ensured that anyone who is not incarcerated can access medicine that cures Hepatitis C, regardless of the level of their disease

progression. *See* Complaint, R. 1, Page ID #6. Those people, treated earlier, generally avoid any irreversible long-term scarring and functional declines suffered by people whose treatment comes too late to forestall damage, even as it successfully rids them of the virus going forward. (In fact, delays in accessing or providing new treatments may decrease the benefits of that treatment.) They also avoid risks of untreated Hepatitis C in the meantime, including, among other things, liver cancer and death. *E.g.*, Complaint, R. 1, Page ID #6-7. Even if the State eventually treats Mr. Johnson, the scarring that he has suffered and will continue to suffer until the State treats him will not be reversible. He may suffer impaired liver function, and other negative health consequences, for the rest of his life.

As Mr. Johnson alleged, he was diagnosed with Hepatitis C in 2000. Since then, the State has twice biopsied his liver—once in 2007, and once in 2016. Complaint, R. 1, Page ID #2-3; Answer, R. 13, Page ID #76. In 2007, the biopsy revealed that his liver fibrosis had progressed to stage one, or F_1. Complaint, R. 1, Page ID #3. In 2016, the biopsy revealed that his liver fibrosis had progressed to stage two, or F_2.[1] A biopsy measures the effects of Hepatitis C; it does not treat the disease. The State has used the results of the biopsies to decline to treat Mr. Johnson because he

[1] For purposes of assessing progressive liver fibrosis and scarring in this context, doctors use a five-level scale that runs from F_0 to F_4, with F_0 representing the least scarring and F_4 the most.

has not yet progressed to the level of scarring delineated as F_3 or F_4. Complaint, R. 1, Page ID #6-8.

Defendant-Appellees are medical and administrative professionals with the Ohio Department of Rehabilitation and Correction ("ODRC") or the Allen Oakwood Correctional Institute ("AOCI"), where Mr. Johnson is incarcerated. Lisa Peterson is the Health Care Administrator at AOCI, who has responsibility for decisions regarding Mr. Johnson's medical treatment, and to whom Mr. Johnson has directly addressed requests for Hepatitis C treatment. Opinion, R. 30, Page ID #200; Complaint, R. 1, Page ID #2, 4, 7. Oscar Cataldi, Jr., is the lead doctor at AOCI, who is personally involved in Mr. Johnson's care. Complaint, R. 1, Page ID #2, 4, 7. Carlos Perez is the former lead doctor at AOCI, who was personally involved in Mr. Johnson's care for a portion of the time covered by Mr. Johnson's claims, and to whom Mr. Johnson complained of advancing symptoms.[2] Complaint, R. 1, Page ID #2, 4-5, 7. Robert Yochum is a registered nurse who has likewise participated in Mr. Johnson's care while at AOCI, including denying him treatment. Complaint, R. 1, Page ID #2, 4, 7; Opinion, R. 30, Page ID #200. As Mr. Johnson has alleged, each is

[2] The Court dismissed Dr. Perez because of its conclusion that Mr. Johnson had not stated a claim upon which relief could be granted. Opinion, R. 30, Page ID #205. Because Mr. Johnson filed *in forma pauperis*, and the Court dismissed the claim on that basis, Dr. Perez was never served by the Marshals Service. *Id*. In the event that this Court reverses the dismissal as a matter of law and remands to the District Court, the claim should be reinstated against Dr. Perez, and the Court should undertake to assist Mr. Johnson, as an IFP filer, with service.

responsible for the application of the ORDC policy that bars him from receiving any Hepatitis C treatment—including particularly antiviral drugs that are the unambiguous standard of care according to medical professionals—solely because of the price of that treatment. Complaint, R.1, Page ID #7-8. They have declined this treatment despite knowing—both because of their medical and correctional background, and because Mr. Johnson has told them—the substantial risks he faces from non-treatment, and the symptoms he experiences from untreated Hepatitis C. Complaint, R. 1, Page ID #6-7.

Defendant-Appellees decline to provide the antiviral medication to prisoners with Hepatitis C, including Mr. Johnson, until the virus has scarred and damaged their livers so substantially that the scarring cannot be fully reversed. Complaint, R. 5, Page ID #5. They do this despite having knowledge of the standard of medical care for patients with Hepatitis C, and despite knowing the results of declining to provide treatment under the state protocol. Complaint, R. 5, Page ID #5-8.

II. PROCEDURAL HISTORY

Mr. Johnson filed a *pro se* complaint on February 12, 2018. Complaint, R. 1, Page ID #1-10. In that complaint, Mr. Johnson sought injunctive relief, in the form of treatment for his Hepatitis C, and compensatory damages, for violations of his Eighth Amendment rights. Complaint, R. 1, Page ID #8. Defendant-Appellees Peterson, Cataldi, Jr., and Yochum filed an answer, Answer, R. 13, and a motion for

judgment on the pleadings, Motion for Judgment on the Pleadings, R. 21, which the District Court granted, albeit with misgivings—specifically observing that "the Eighth Amendment draws its meaning from evolving standards of decency . . . [and] it is possible for medical treatment to be so woefully inadequate as to amount to no treatment at all." Opinion, R. 30, Page ID #203 (quoting *Roper v. Simmons*, 543 U.S. 551, 594 (2005) and *Alspaugh v. McConnell*, 643 F.3d 162, 169 (6th Cir. 2011)). The District Court granted Defendant-Appellees' motion for judgment on the pleadings at the same time that it denied as moot three pending motions by Mr. Johnson to take discovery that might have helped develop and prove his claims, and a motion by Mr. Johnson for appointment of counsel. Opinion, R. 30, Page ID #199; Judgment, R. 31, Page ID #205.

STANDARD OF REVIEW

This Court reviews a District Court's grant of a motion for judgment on the pleadings dismiss *de novo*. *E.g. Ziegler v. IBP Hog Mkt., Inc.*, 249 F.3d 509, 511-12 (6th Cir. 2001); *see also Barrett v. Harrington*, 130 F.3d 246, 251 (6th Cir. 1997) (applying the same standard of review to motions to dismiss).[3] Generally, courts accept well-pleaded factual allegations as true, and construe those allegations in the light most favorable to non-moving plaintiff. *Daily Servs., LLC v. Valentino*, 756

[3] District Court grants of judgment on the pleadings are subject to the same standard as a motion to dismiss under Rule 12(b)(6). *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007).

F.3d 893, 896 (6th Cir. 2014). In the context of *pro se* plaintiffs like Mr. Johnson, however, courts apply "less stringent standards" to their complaints than to "the formal pleadings drafted by lawyers, and may not . . . dismiss[] such a pleading simply because it finds the plaintiff's allegations unlikely." *Thomas v. Eby*, 481 F.3d 434, 437 (6th Cir. 2007). District Courts should undertake particular scrutiny when dismissing *pro se* civil rights complaints, and this Court "scrutinize[s] with special care" trial courts' decisions to dismiss such complaints. *Moore v. City of Harriman*, 272 F.3d 769, 771 (6th Cir. 2001) (en banc).

SUMMARY OF ARGUMENT

Defendant-Appellees have denied Mr. Johnson any medical treatment for Hepatitis C solely on the basis of cost. That ongoing denial has caused him to suffer serious liver damage and scarring, which even later treatment will not reverse. The denial contravenes the standard of medical care, which is that Mr. Johnson should receive treatment immediately. The allegations that he has been denied such treatment solely for cost reasons make out a paradigmatic Eighth Amendment claim for denial of adequate medical care.

As the District Court recognized—and as Defendant-Appellees conceded below—untreated Hepatitis C is an objectively serious medical problem. Because Mr. Johnson has alleged that Defendant-Appellee medical professionals have denied him that treatment based solely on cost, despite knowing of the substantial risk of harm

posed by untreated Hepatitis C, he has at least plausibly alleged the subjective knowledge required for deliberate indifference under this Court's precedent. As Mr. Johnson alleged, that denial depended not on what the standard of care is for someone with his degree of Hepatitis C progression, but rather, the cost of his treatment and the arbitrary threshold that Defendant-Appellees and the ODRC have imposed to categorically exclude people from treatment on that basis.

Second, to the extent that the District Court relied on Defendant-Appellees' application of the ODRC protocol to Mr. Johnson to hold that even the most generous reading of Mr. Johnson's allegations of non-treatment could not make out a plausible claim of deliberate indifference, the District Court erred in two distinct ways. First, it erroneously regarded monitoring and evaluation as constitutionally acceptable medical treatment. Second, even if this Court believes that the Ohio non-treatment policy that runs counter to the medical standard of care absolves Defendant-Appellee correctional defendants of deliberate indifference across the system as a whole, courts that have accepted state rationing systems—albeit systems far more

generous than Ohio's—have nevertheless held that individuals who have been denied needed care under those systems may still have individual claims for irreversible liver damage and scarring that occurs in the meantime.

ARGUMENT

The District Court erroneously dismissed Mr. Johnson's *pro se* complaint because Mr. Johnson's pleadings, construed liberally and with facts and inferences susceptible to proof through discovery, would make out paradigmatic Eighth Amendment claims. District Courts may not dismiss a complaint except when "the plaintiff can prove no set of facts consistent with the allegations that would entitle him to relief." *Flanory v. Bonn*, 604 F.3d 249, 252-53 (6th Cir. 2010). At the pleadings stage, the District Court needed to accept Mr. Johnson's factual allegations as true for the purposes of its inquiry, and construe them in his favor. *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976). And because Mr. Johnson filed a civil rights case as a *pro se* prisoner, the District Court needed to apply even "less stringent standards" to pleadings that it should have "liberally construed when determining whether they fail to state a claim." *Martin v. Overton*, 391 F.3d 710, 712 (6th Cir. 2004).

This Court should reinstate Mr. Johnson's complaint because the District Court failed to do those things. Mr. Johnson alleged that he has suffered from Hepatitis C since 2000. Everyone acknowledges that Hepatitis C is a serious medical condition. Mr. Johnson alleged not only that Defendant-Appellees knew that, but

that they nevertheless denied him any treatment at all solely because of cost, pursuant to their implementation of policy. As a result of that denial, he suffers ongoing liver scarring and increasing damage to his liver function, damage that any treatment he belatedly receives likely will not reverse. That denial flies in the face of the medical standard of care, which prescribes immediate treatment for people with far less serious cases of Hepatitis C than Mr. Johnson. These allegations on their own make out a plausible Eighth Amendment deliberate indifference claim.

The District Court's acknowledgement that medical advances have changed the legal landscape and that "caselaw prior to medical developments in Hepatitis C treatment appears to be out of date," Opinion, R. 30, Page ID #203 n.1, only heightens the error. Even Courts that have recently held state corrections systems' Hepatitis C treatment prioritization protocols to be constitutional have nevertheless also held that people who suffer physical damages while de-prioritized for treatment may have individual claims available under the Eighth Amendment. Under any reading of shifting precedent, Mr. Johnson's damages claim plausibly alleged a violation. But in light of recent changes to the medical standard of care, Mr. Johnson's factual

allegations that he has received only evaluation—never treatment—of his Hepatitis C also plausibly set out a claim for injunctive relief.

I. Mr. Johnson Plausibly Alleged Subjective Knowledge of an Objectively Serious Medical Condition that Could Prove an Eighth Amendment Deliberate Indifference Claim.

Under the facts alleged, Defendant-Appellees violated Mr. Johnson's Eighth Amendment rights through their deliberate indifference to a serious medical need. Deliberate indifference occurs in the correctional context when a prisoner's "medical need at issue is sufficiently serious" as an objective matter, *Alspaugh v. McConnell*, 643 F.3d 162, 169 (6th Cir. 2011), and prison medical defendants "have a sufficiently culpable state of mind in denying medical care" as a subjective matter. *Id*. As the District Court noted, Defendants conceded the seriousness of Hepatitis C. Opinion, R. 30, Page ID #201 ("Defendants . . . implicitly conced[e] for the purposes of this motion that Johnson's Hepatitis C diagnosis is an objectively-serious medical need.").[4] For the purposes of the deliberate indifference analysis here, then, this Court need only recognize that Mr. Johnson's allegations that Defendant-Appellees

[4] This Court, like others across the country, has long held as a matter of law that Hepatitis C is a serious medical need. *See Atkins*, slip op. at 4 ("everyone agrees that Hepatitis C is an objectively serious medical condition"); *Owens v. Hutchinson*, 79 F. App'x 159, 161 (6th Cir. 2003) (describing plausible allegations concerning "an objectively serious medical condition—hepatitis C virus"); *Hix v. Tennessee Dep't of Corr.*, 196 F. App'x 350, 356 (6th Cir. 2006) (same, in litigation involving prior consideration of Hepatitis C in prison prior to the advent of effective anti-viral treatments); *see also, e.g.*, *Orr v. Schicker*, 953 F.3d 490 (7th Cir. 2020) ("Hepatitis C is a serious medical condition.").

denied him *any* treatment of his Hepatitis C based solely on the cost of that treatment plausibly alleged the requisite subjective state of mind to allow his case to proceed.

a. Refusing to treat an objectively serious condition amounts to subjective knowledge for a plausible claim of deliberate indifference.

Mr. Johnson's allegations pertaining to the subjective prong of the deliberate indifference analysis plausibly state a violation. Defendant-Appellees, medical professionals all, recognize the objective seriousness of untreated Hepatitis C. Mr. Johnson has repeatedly drawn their attention to his own personal condition, and Defendant-Appellees' own evaluations have confirmed progressing Hepatitis C in his body. Despite knowing the objective seriousness of Hepatitis C and of Mr. Johnson's own case, in particular, Defendant-Appellees have not treated him at all. And as alleged in the complaint, they have denied him any treatment solely on the basis of cost, based on a protocol that forsakes the medical standard of care for a non-individualized prioritization that provides care solely to those with the very worst cases.

Prisoner-plaintiffs may demonstrate deliberate indifference by plausibly alleging that correctional defendants "subjectively perceived facts from which to infer substantial risk to the prisoner . . . , did in fact draw the inference, and . . . then disregarded that risk by failing to take reasonable measures to abate it." *Rhinehart v. Scutt*, 894 F.3d 721, 738 (6th Cir. 2018) (internal quotation omitted). Knowledge may be inferred when "a risk is well-documented and circumstances suggest that the

official has been exposed to the information so that he must have known of the risk." *Id.* at 738. And even on a far less favorable posture than at judgment on the pleadings, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Rouster v. City of Saginaw*, 749 F.3d 437, 447 (6th Cir. 2014) (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)).

Particularly in light of the liberal construction owed to *pro se* prisoner pleadings and the enhanced scrutiny required before dismissing a civil rights claim, Mr. Johnson more than plausibly alleged awareness of a substantial risk and ensuing disregard. As the District Court opinion implied, Defendant-Appellees' evaluations of Mr. Johnson evinced knowledge of the substantial risk of harm to a prisoner posed by failing to treat his long-term chronic Hepatitis C. Opinion, R. 30, Page ID #203-204. Mr. Johnson specifically alleged facts concerning Defendant-Appellees' monitoring of his personal condition, including biopsies in 2007 and 2016. *See* Complaint, R. 1, Page ID #2-3. Even without the liberal construction that might have considered medical defendants' familiarity with a disease that prisoners suffer distressingly commonly,[5] the Court should have presumed that the very fact of Mr. Johnson's ongoing evaluations reflected Defendant-Appellees' knowledge of the substantial risk of harm occasioned by untreated Hepatitis C. Moreover, Mr. Johnson

[5] *See Gordon v. Schilling*, 937 F.3d 348, 360 (4th Cir. 2019) (describing "the Chief Physician for a state prison system" who "by virtue of that role" the Court thought reasonable to presume "is familiar with the risks presented by untreated HCV").

also alleged that he had made repeated complaints to Defendant-Appellees about the nature of his physical symptoms and progressing disease, which the District Court ought have construed in his favor on this point, as well. Complaint, R. 1, Page ID #2, Opinion, R. 30, Page ID #200 (describing Mr. Johnson's pursuit of treatment from Defendant-Appellees "through the grievance system").

Defendant-Appellees also well know that the medical standard of care for Hepatitis C requires providing direct-acting anti-viral medicine immediately, regardless of the stage of liver scarring. Courts across the country have recognized this common medical knowledge. *E.g. Atkins*, slip op. at 2; *Stafford v. Carter*, No. 1:17-cv-289, 2018 WL 4361639, at *13 (S.D. Ind. Sept. 13, 2018) ("It is undisputed that treatment with DAA medication represents the medical standard of care for treatment of chronic HCV, regardless of the level of fibrosis or APRI score."). The relevant medical authority, the AASLD, provides guidance that advises treatment even in correctional contexts for people at any stage of progression. *Id*. at *9; *see also* Opinion, R. 30, Page ID #203 n.1. Construing the facts in favor of Mr. Johnson, as the Court must in this posture, Defendant-Appellees at least plausibly know this information as medical professionals in a correctional setting. *See Rhinehart*, 894 F.3d at 738.

Defendant-Appellees subsequently disregarded that substantial risk by declining to provide Mr. Johnson with treatment for Hepatitis C. For one thing, Defendant-

Appellees certainly did not provide anti-viral treatment according to the medical standard of care, the only treatment that could abate Mr. Johnson's risk. *See Atkins*, slip op. at 2-3. The unambiguous standard of care for Hepatitis C is immediate treatment with the new generation of anti-viral drugs, regardless of how far that person's Hepatitis C has progressed. *See, e.g.*, *id*., *see also Hoffer v. Sec'y Fla. Dep't of Corr.*, No. 19-11921, --- F.3d --- (11th Cir. Aug. 31, 2020). Mr. Johnson alleged in his complaint that Defendant-Appellees did not provide that care. If proven, that would amount to disregard of a substantial risk.

b. Evaluation and monitoring is not treatment, and the consequent denial of any treatment sets out a paradigmatic Eighth Amendment claim.

Mr. Johnson alleged in his complaint that Defendant-Appellees did not treat his Hepatitis C *at all*. They did not treat him with older, far less effective treatments for Hepatitis C, or indeed, any other medicine. They evaluated him, but evaluation is not treatment, and evaluation under a protocol cannot forestall a finding of deliberate indifference—much less support dismissal of such an allegation as completely implausible. While correctional defendants may consider cost, they may not decline treatment solely on that basis, and Mr. Johnson's allegations that Defendant-Appellees did so state a plausible claim. This is particularly true when, as here, a prisoner plaintiff alleges that cost serves as the sole basis for a treatment denial to the exclusion of individual medical assessment.

Evaluation and monitoring is not treatment, and cannot excuse the absence of real treatment for serious medical conditions. Of course courts routinely reject prisoner claims where the prisoner has a difference of opinion about the particular treatment he or she receives, *see Alspaugh*, 643 F.3d at 169; *Westlake*, 537 F.2d at 860 n.5, but those cases involved at least some treatment. By contrast, categorical denial of *any* treatment for a serious condition amounts to disregard of a substantial risk of serious harm. *See, e.g.*, *Boretti v. Wiscomb*, 930 F.2d 1150, 1154 (6th Cir. 1991) (holding that alleged refusal to provide needed treatment adequately stated a deliberate indifference claim). This principle applies specifically in the context of Hepatitis C, as well. *E.g. Allah v. Thomas*, 679 F. App'x 216, 219 (3d Cir. 2017) (per curiam) ("Allah alleged that he did not receive any treatment for his Hepatitis C . . . we conclude that Allah plausibly alleged an Eighth Amendment violation); *see also Lovelace v. Clarke*, No. 2:19-cv-75, 2019 WL 3728265, at *4 (E.D. Va. Aug. 7, 2019) (collecting cases, and allowing a plaintiff's Eighth Amendment claim to proceed when he had been "monitored" but "received no treatment" per the standard of care); *Postawko v. Missouri Dep't of Corr.*, No. 2:16-cv-4219, 2017 WL 1968317, at *7 (W.D. Mo. May 11, 2017) (observing that "adopting a monitoring policy instead of treatment and waiting to see just how much the inmate's health may deteriorate is not permissible"). Put simply, in the Hepatitis C context, where liver biopsies

do nothing to rid someone of the virus, the evaluation process precedes treatment, it does not serve as treatment itself.[6]

Mr. Johnson alleged in his complaint that he had not actually received any treatment, because he has only ever received biopsies and blood monitoring. Neither of those things treated his Hepatitis C in any fashion—they did not eradicate the virus from his body, arrest or reverse liver scarring, or improve liver function. They are not "treatment" in any meaningful respect. The District Court's error here owes in no small part to its fundamental misunderstanding of the purposes and effects of such diagnostic testing. The District Court acknowledged that "Johnson repeatedly alleges the defendants have consistently refused to treat Hepatitis C infection," but nevertheless found that clear allegation to have been "contradicted by Johnson's

[6] One other important reason to reverse the dismissal of the claim in this case is that even assuming Defendant-Appellees' theory about evaluation being sufficient is correct, the allegations in the complaint plausibly give rise to the inference that they have not even properly monitored Mr. Johnson. Mr. Johnson has received two liver biopsies, nearly a decade apart. Complaint, R.1, Page ID #2-3. Assuming any sort of progression timeline for Mr. Johnson on the basis of those two data points flies in the face of general knowledge about Hepatitis C progressing at different rates for different patients. *See Atkins*, slip op at 2. Moreover, the state's own evaluation protocol, involving APRI scores, *see* Complaint, R. 1, Page ID #5 (discussing Mr. Johnson's APRI value in explaining denial of treatment), may not even effectively or accurately measure the progression of the disease. *See, e.g.*, *Stafford*, 2018 WL 4361639, at *17 (discussing "undisputed medical evidence" that APRI "is not a good predictor [of progression] at earlier stages of infection"); *Chimenti v. Wetzel*, No. 15-cv-3333, 2018 WL 3388305, at *12 (E.D. Pa. July 12, 2018) (describing the Pa. Department of Corrections' use of APRI as "reliance on an inaccurate method of testing for fibrosis" which "could result in the DOC's failing to treat many individuals who suffer from advanced fibrosis and cirrhosis").

other allegations, which indicate he has received liver biopsies and periodic bloodwork." Opinion, R. 30, Page ID #202 (citing Complaint, R. 1, Page ID #8; 2-3). Construing biopsies and bloodwork as "treatment" for Hepatitis C, even though they do not treat the condition at all, is both incorrect and amounts to impermissible construing of his own allegations against Mr. Johnson at the pleadings stage. At the very least, on the relevant posture, the District Court failed to construe Johnson's allegations in the light most favorable to him. That failure demands reversal.

II. Defendant-Appellees' Application of the State's Prioritization Protocol Cannot Forestall an Individual Claim for Denial of Treatment or Delay in Treatment.

The District Court also erred by holding that Defendant-Appellees' application of the state prioritization protocol precluded any possible finding of deliberate indifference under any version of facts that might emerge during litigation. First, to the extent that the state's protocol prescribes monitoring and evaluation without *any* treatment whatsoever, for many prisoners it leads to a complete denial of care and a paradigmatic Eighth Amendment Claim. Mr. Johnson plausibly alleged just such a denial on the part of Defendant-Appellees in his own case. Second, to the extent that Defendant-Appellees' application of the protocol amounts to a delay in treatment that they will ultimately provide because of his condition, that delay itself sets out a plausible Eighth Amendment claim. Third, even if this Court believes that the Defendant-Appellees' application of the state's prioritization protocol insulates them

from any equitable relief, even Courts that have upheld prioritization protocols—including those that treat more prisoners with less-progressed Hepatitis C than ODRC's protocol does—have allowed individual damages claims for people not treated as a result of that protocol.

a. A state prioritization protocol cannot immunize correctional defendants who use the protocol to categorically deny treatment.

Defendant-Appellees' channeling their lack of treatment through a system of evaluations and monitoring cannot forestall a finding of subjective disregard for deliberate indifference, much less render allegations of such indifference implausible on the pleadings. The District Court erred in part by crediting Defendant-Appellees' prioritization system, without acknowledging the distinction between evaluation and treatment. *See* section I.b., *supra*; *see also, e.g.*, *Postawko*, 2017 WL 1968317, at *7. Appellate courts have specifically rejected "compliance with [state] Department of corrections protocol" as defeating "any allegation of deliberate indifference to an inmate's serious medical needs," *Allah*, 679 F. App'x at 218, when following the protocol leads to complete denial of treatment. *Id*. at 219. Compliance-with-protocol defenses are especially inappropriate at the pleadings stage, when courts "are bound by the allegations in the complaint and leave the factual basis for the denial of treatment to be developed on remand," *Abu-Jamal v. Kerestes*, 779 F. App'x 893, 900 n.9 (3d Cir. 2019), such as by Defendant-Appellees' showing "at a future stage of

the litigation . . . that there were medical reasons for adherence to the protocol, e.g., that prioritization was necessary given a limited supply of the anti-viral drugs." *Id*.

i. Cost alone cannot justify a non-treatment decision.

Dismissal of complaints on the basis of adherence with a state protocol is especially inappropriate when the plaintiff pleads non-treatment under the protocol on the basis of cost. Denial of treatment under a state protocol may amount to deliberate indifference when cost considerations "are considered to the *exclusion of reasonable medical judgement about inmate health*." *Roe v. Elyea*, 631 F.3d 843, 863 (7th Cir. 2011) (emphasis in original). Even if "cost may be, in appropriate circumstances, [a] permissible factor[]," *id*., it cannot serve as the sole basis for denial of the medical standard of treatment. *Allah*, 679 F. App'x at 220;[7] *see also Abu-Jamal*, 779 F. App'x at 900 n.8 ("our analysis here need not be tethered to the propriety of the Hepatitis C policy because Abu-Jamal's claim is predicated on the allegation that he was denied treatment for nonmedical reasons"). Notably, cost considerations are exactly those that should wait for summary judgment rather than supporting a motion to dismiss, because "[a]t that stage, a court can consider facts such as the costs of the

[7] "Here, Allah alleged that he did not receive *any* treatment for his Hepatitis C condition, that he was not placed on a newly developed Hepatitis C treatment regimen *solely* because it was cost-prohibitive, and that he was suffering medical complications as a result. Accepting these allegations as true, we conclude that Allah plausibly alleged an Eighth Amendment violation." (emphasis in original).

drugs covered under the protocol versus those which the inmate sought, the nature of the medical treatment or monitoring that the inmate is receiving, and the time necessary for treatment." *Allah*, 679 F. App'x at 220 n.2; *see also Orr*, 953 F.3d at 508 ("the fact that a disease may progress slowly does not mean that IDOC may refuse to treat it").[8]

This Court itself has rejected cost as a basis for denying medical care without violating the constitution. *See, e.g.*, *Darrah v. Krisher*, 865 F.3d 361, 372-73 (6th Cir. 2017). *Darrah* upheld a jury verdict that found deliberate indifference based on correctional defendants' reliance on cost to provide *less effective* medical care, not even a situation where, as here, prison officials provide no care at all. *Id*. The key fact there was that the less effective treatment had no medical justification, but rather, was simply less expensive. *Id*. at 372. Moreover, as in cases like *Allah* and *Orr*, *Darrah* involved claims that had already proceeded to discovery, and that were ultimately resolved in more informed postures than dismissal at the pleadings stage.

This Court recently considered the propriety of a state's Hepatitis C protocol after receiving the benefit of factual development at a trial. In *Atkins*, this Court deferred to the District Court's fact-finding about the scope of the state's financial

[8] Even courts like the *Orr* Court that reject preliminary injunctive relief for prisoners based on the high standard to show irreparable harm acknowledge that "a substantial risk 'could' arise," even if "evidence presented during the preliminary injunction hearings was likewise equivocal," *Orr*, 953 F.3d at 502, which reflects the error of resolving such a question at the pleadings stage.

resources and the adequacy of efforts made to obtain more funding, noting in particular that the correctional medical defendants "repeatedly sought more money to buy direct-acting antivirals for inmates with Hepatitis C." *Atkins*, slip op. at 4. The *Atkins* Court also relied on (and deferred to) District Court fact-finding about diagnostic equipment, "extensive monitoring and continuous care for every infected inmate," an advisory committee, and "individualized decisions regarding treatment." *Id.* None of those facts could have been weighed solely on the pleadings, and indeed, it would have been inappropriate to dismiss the complaint prior to the factual development of (for example, as in that case) a four-day bench trial. *Id*., slip op. at 1.

Here, with none of that information allowed development during discovery, dismissal was inappropriate. Indeed, what information Mr. Johnson did plead in the complaint suggests key differences that distinguish his situation from *Atkins*, especially construing his allegations in the light most favorable to him. Two biopsies in a decade may not amount to "extensive monitoring," for example. A straightforward threshold that categorically excludes Mr. Johnson and others at the F_2 level or below from treatment may not amount to "individualized decisions regarding treatment." *See* section II.a.ii., *infra*. Defendants-Appellees may have applied the protocol solely on the basis of cost, in violation of precedent and differently from the fact-finding to which this Court deferred in *Atkins*. But even if none of these things turn out to be true, those factual questions cannot be resolved based on the pleadings alone.

ii. A prioritization protocol that denies treatment based on a threshold may violate the Eighth Amendment because it rejects individual medical considerations.

Courts should also decline to dismiss complaints that allege non-treatment on the basis of cost, because a generous construction of such claims acknowledges that such denial necessarily lacks individualized medical consideration. Regardless of how courts feel about the protocol itself, "with respect to an individual case, however, prison officials still must make a determination that application of the protocols result in adequate medical care." *Roe*, 631 F.3d at 860 (quoting *Johnson v. Wright*, 412 F.3d 398, 406 (2d Cir. 2005) (holding that a prisoner could defeat even summary judgment by showing that prison officials were "reflexively relying on the medical soundness of a policy when they had been put on notice that the medically appropriate decision could be, instead, to depart from that policy")); *see also French v. Daviess Cnty., Ky.*, 376 F. App'x 519, 523 (6th Cir. 2010) (acknowledging a possible constitutional violation if a prison implemented a blanked policy instead of making decisions "based on a reasoned, individualized medical determination"). Courts have invalidated categorical exclusions from treatment on the basis of sentence length, *Roe*, 631 F.3d at 860-63; purported racial distinctions in treatment effectiveness, *Mitchell v. Washington*, 818 F.3d 436 (9th Cir. 2016); and cost, *see, e.g.*, *Abu-Jamal*, 779 F. App'x at 896, among other things.

Allegations of categorical exclusion from treatment without individual medical consideration make out just such a plausible claim of an Eighth Amendment violation. Denying treatment "based solely on the [p]olicy rather than medical judgment concerning [plaintiff's] specific circumstances" defeats a motion to dismiss. *De'Lonta v. Angelone*, 330 F.3d 630, 635 (4th Cir. 2003). Indeed, such claims of categorical denial of medically-indicated care pursuant to a policy "is the paradigm of deliberate indifference." *Colwell v. Bannister*, 763 F.3d 1060, 1063 (9th Cir. 2014). Even in *Atkins*, this Court held that the Tennessee protocol did not violate the Constitution in part because the department issued updated guidance that "guaranteed that every infected inmate, regardless of the extent of the inmate's liver scarring, was eligible for . . . antiviral treatment." *Atkins*, slip op. at 4.

* * *

Here, Mr. Johnson alleged sufficient facts to make out a plausible Eighth Amendment claim on several bases. He alleged that he did not receive any treatment at all. *See* Complaint, R. 1, Page ID #7-8, *see also* section I.b., *supra*. He alleged that Defendants-Appellees' refused to treat him because he had not reached the against-medical-standard threshold of F_3, and that they had drawn this arbitrary line solely on the basis of the cost of treatment under their application of ODRC's protocol. *See id*. Implicit in Mr. Johnson's allegations that Defendant-Appellees denied him treat-

ment solely on the basis of cost, Mr. Johnson's pleadings also set out plausible allegations that the denial stemmed from non-individualized consideration that did not account for his personal medical circumstances. *See id*. Taking all of his allegations and the inferences drawn therefrom together, Mr. Johnson has more than set out a plausible civil rights claim in his *pro se* pleadings.

b. Delay in treatment, when the medical standard of care is immediate treatment, supports a plausible Eighth Amendment claim.

Even if this Court believes the District Court did not err by regarding Defendant-Appellees' periodic evaluations of Mr. Johnson as coextensive with a longer-term treatment process, the delay in treatment pursuant to the protocol itself plausibly sets out an Eighth Amendment violation. As the District Court itself acknowledged, delay sets out a claim when it causes a detrimental effect. Opinion, R. 30, Page ID #202. Nevertheless, the District Court discounted the detrimental effects caused by delays in treating Hepatitis C.

Failing to provide treatment until a condition worsens sets out an Eighth Amendment violation. *Gordon*, 937 F.3d at 359; *see also Blackmore v. Kalamazoo Cnty.*, 390 F.3d 890, 899 (6th Cir. 2004) (describing constitutional violation when "prison officials are aware of a prisoner's obvious and serious need for treatment and delay medical treatment of that condition for non-medical reasons"). The Su-

preme Court has long held this in other medical contexts, holding that denial of medical care claims can accrue in advance of suffering the harm occasioned by the delay in treatment. *See Helling v. McKinney*, 509 U.S. 25, 33 (1993) (clarifying that the Eighth Amendment protects against risk of future harm, based on actions of correctional defendants). And courts across the country have held that the delay in treating Hepatitis C specifically, where the medical standard calls for immediate treatment, states exactly such a claim based upon delay. *E.g. Abu-Jamal*, 779 F. App'x at 900 ("a prison official has acted deliberately indifferent if he delays necessary medical treatment for non-medical reasons") (internal citation omitted); *see also McFadden v. Noeth*, No. 19-585-pr, --- F. App'x --- (2d Cir. Sept. 10, 2020) (summary order) (slip op. at 4) (describing an alleged delay in Hepatitis C treatment and reinstating a dismissed claim because "whether this timeline is correct is to be determined at a later stage, but for now [plaintiff] provides enough detail regarding the timeline that he should be permitted to proceed").

Delayed treatment matters particularly in the context of Hepatitis C. Because prisoner plaintiffs may suffer progressive damage and decline in liver function as their Hepatitis C goes untreated, they allege plausible Eighth Amendment violations when they allege delay of antiviral treatment until a pre-determined point that does not reflect medical standards. *E.g. Postawko*, 2017 WL 1968317, at *7. This is because "a delay in treatment with DAA drugs increases the risks of HCV progression

as well as decreases the benefits of DAA treatment." *Id*. at *6. That is, correctional defendants who delay treating prisoners' Hepatitis C not only indifferently suborn damages to liver function before they ultimately provide treatment, but also ensure that the damage may linger even after treatment because the delay renders the treatment less effective.

Even courts that have rejected delay-based claims have relied on factual distinctions that do not exist here based even on the least generous reading of Mr. Johnson's allegations. The Tenth Circuit, for example, specifically noted that a District Court had incorrectly described "further testing and evaluation" under a state protocol as treatment—which it was not—but nevertheless held that the prisoner had not shown that the delay caused him any harm. *Dawson v. Archambeau*, 763 F. App'x 667, 672 (10th Cir. 2019). Even then, the court reversed and remanded claims as to claims involving the non-treatment of the prisoner plaintiff's acute symptoms of Hepatitis C. *Id*. at 674. Where the delay itself causes harm, the prisoner has a claim.

Here, Mr. Johnson's allegations clearly state that the delay in treating his Hepatitis C have caused him physical damages in the form of a scarred liver with reduced function, as well as mental and emotional damages. The District Court's aforementioned confusion of evaluation and treatment drives its erroneous dismissal here, too. Even still, the District Court opinion implicitly acknowledges that Mr. Johnson has

not been treated, observing that "staff at AOCI have continued to provide the response that his condition has not yet risen to the level established in the ODRC guidelines for treatment." Opinion, R. 30, Page ID #202. Such an observation, even if true, *and* even if enough to eventually doom Mr. Johnson's claim for injunctive relief because Defendant-Appellees treat him and moot his claim, *see* section II.c., *infra*, cannot wave away the complaint's allegations that "the testing he has received shows his infection is progressing and is beginning to cause damage to his liver." Opinion, R. 30, Page ID #202. Those damages are not "merely the potential for detrimental effects," Opinion, R. 30, Page ID #202—they are ongoing damages that exist today. And they amount to a constitutional injury, the scope of which should be explored in discovery after reversal and remand.

c. Even if Defendant-Appellees applied a facially-valid state prioritization protocol, an individual who suffers damages while not receiving treatment pursuant to that protocol has an individual claim.

Even if the Defendant-Appellees' denied Mr. Johnson treatment pursuant to a facially-valid protocol,[9] Mr. Johnson has a plausible as-applied individual claim for

[9] This Court has recently declined to review the question of whether ODRC's protocol complies with the Eighth Amendment. *See Mann v. Ohio Dep't of Rehab. & Corr.*, No. 19-4060, --- F. App'x --- (6th Cir. Aug. 3, 2020) (per curiam). Notably, however, the ODRC protocol, which (as alleged in the complaint) only prescribes treatments for prisoners at the F_3 or F_4 levels, Complaint, R. 1, Page ID #7, while other state protocols that courts—including this one—have held constitutional for the purposes of class litigation allow or guarantee treatment much earlier in the Hepatitis C progression. *See Atkins*, slip op. at 3 (describing the Tennessee Department's

physical harm he suffers as a result of that denial. Other courts that have allowed states to adopt prioritization protocols have nevertheless subsequently confirmed individual claims for prisoners who correctional defendants deprioritized as a result. Such an individual claim may exist for injunctive relief in the form of treatment or for compensatory damages following physical injury.

Just weeks ago, the Eleventh Circuit illustrated the relevant distinction by rejecting class-wide injunctive relief against a state prioritization policy, but allowing for individual damages claims by prisoners who suffered damages after not being treated pursuant to *that same policy*. In *Hoffer*, the Court reversed a District Court which had enjoined the state of Florida's Hepatitis C treatment protocol, holding that the protocol to deprioritize some prisoners—even though "in the best of all possible worlds" all prisoners should receive anti-viral treatment—did not violate the Constitution. *Hoffer*, slip op. at 14. Despite that, two weeks later, the same Court held that even an individual whose claim injunctive relief was moot because he had been treated nevertheless still stated a possible individual damages claim—"including damages for mental or emotional injury during the time of delay that was wrongful."

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treatment protocol as "guarantee[ing] that every infected inmate, regardless of the extent of the inmate's liver scarring, was eligible for . . . antiviral treatment"), *and Hoffer v. Sec'y Fla. Dep't of Corr.*, No. 19-11921, --- F.3d. --- (11th Cir. Aug. 31, 2020) (slip op. at 2) (upholding the Florida Department's treatment protocol for anyone at the level of F_2 or beyond). To the extent that Ohio's protocol categorically declines to treat anyone at the F_2 level or lower, such as Mr. Johnson, allegations that it does not pass constitutional muster are at least plausible.

Furman v. Warden, 19-14134, --- F. App'x ---, (11th Cir. Sept. 11, 2020) (per curiam) (slip op. at 16). And even though one possible effect of *Hoffer* is that a prisoner might have to wait for treatment as his liver function declined, "[i]f Furman's liver is less good after the virus is cured than it would have been with constitutionally timely treatment, he is entitled to compensation for that harm, too." *Id*., slip op. 16; *see also* section II.b., *supra*.

This Court's own recent decision in *Mann*, following shortly after its decision in *Atkins*, reflects exactly that distinction. While the *Mann* Court noted that correctional defendants had mooted the injunctive relief by treating the plaintiffs, it acknowledged the ongoing vitality of those same plaintiffs' damages claims and remanded for consideration of qualified immunity by the district court in the first instance. *Mann*, slip op. at 2.[10] This Court should at least heed this Court's decisions in *Mann* and *Atkins*, and reinstate Mr. Johnson's damages claim.

[10] The District Court here did not address qualified immunity, even as an alternative basis for its judgment, *see* Opinion, R. 30, Page ID #199-205, and this Court should not address it in the first instance or in this posture. *See Wesley v. Campbell*, 779 F.3d 421, 433 (6th Cir. 2015) ("Although . . . entitle[ment] to qualified immunity is a threshold question to be resolved at the earlier possible point, that point is usually summary judgment and not dismissal under Rule 12.") (internal quotation omitted); *see also Stoudemire v. Mich. Dep't of Corr.*, 705 F.3d 560, 571 (6th Cir. 2013) ("we therefore vacate and remand to the district court for the purpose of properly evaluating Davis's qualified immunity defense").

CONCLUSION

For the reasons provided above, Mr. Johnson urges this Court to construe his allegations in his favor, with the generosity appropriate for a *pro se*-filed civil rights complaint, and reverse the District Court's dismissal of his plausible allegations of an Eighth Amendment violation. At a minimum, even if this Court believes that the Defendant-Appellees having potentially acted pursuant to state protocol may eventually foreclose relief, Mr. Johnson requests that the Court recognize that such a determination is inappropriate at the pleadings stage. Similarly, even if this Court believes that the Hepatitis C protocol writ large complies with the Constitution, Mr. Johnson asks that the Court recognize the vitality of an individual claim for the physical, mental, and emotion harms he suffers as a result of Defendant-Appellees' ongoing decision not to treat his Hepatitis C.

Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP

I, Jim Davy, certify pursuant to Local Rule 46.1 that I am a member in good standing of the bar of the United States Court of Appeals for the Sixth Circuit Court of Appeals.

Dated: October 9, 2020

/s/ James Davy

James Davy, Esq.

CERTIFICATE OF COMPLIANCE

I, Jim Davy, hereby certify as follows:

(1) the Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because the brief has been prepared in proportionally spaced typeface using Microsoft Word 14-point Times New Roman font;

(2) the Brief for Appellant Johnson complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,956 words, excluding those parts of the brief excluded by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1), as calculated using the word count function on Microsoft Word software;

(3) the electronic copy of the Brief for Appellant Johnson was scanned for electronic viruses on October 9, 2020, before transmission to this Court, and no viruses were detected.

Dated: October 9, 2020

/s/ James Davy

James Davy, Esq.

CERTIFICATE OF SERVICE

I, Jim Davy, certify that on October 9, 2020, I caused a copy of this Brief for Appellant Johnson to be filed with the Clerk of Court and served on all counsel of record using the *CM/ECF* system.

Dated: October 9, 2020

/s/ James Davy

James Davy, Esq.

ADDENDUM

Plaintiff-Appellant Johnson designates the following District Court documents as relevant to this matter:

Record Entry	Description of Document	Page ID #
1	*Pro se* Complaint	1-10
13	Answer of Defendants Lisa Peterson, Oscar Cataldi, Jr., and Robert Yochum	75-80
21	Defendants' Motion for Judgment on the Pleadings	99-107
26-3 & 26-4	*Pro se* Corrected Opposition to Motion for Judgment on the Pleadings, with Exhibits	161-193
30	Opinion of the District Court	199-204
31	Judgment	205
35	Plaintiff's *pro se* Notice of Appeal	222