No. _____

IN THE
Supreme Court of the United States

CONRAAD HOEVER,

Petitioner,

v.

P. BELLEIS, CHIEF OF SECURITY COLONEL, J HALL, DEPUTY CHIEF OF SECURITY MAJOR, K. HAMPTON, GROUP SUPERVISOR SERGEANT, J KELLEY, GROUP SUPERVISOR, T. KRISS, CORRECTION OFFICER, W MESSER, OFFICER IN CHARGE CAPTAIN, J SERRATO, CORRECTION OFFICER,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. For many faiths, certain observances are important but not mandatory. In a free exercise case, a plaintiff must establish that the government imposed a substantial burden on the exercise of her faith. The court of appeals created a circuit split by holding that only a burden on a practice mandated by a prisoner's faith can constitute a substantial burden.

The first question presented is:

Does the First Amendment extend to a prisoner's non-mandatory religious exercise?

2. Section 42 U.S.C. 1997e(e), a provision of the Prison Litigation Reform Act, states that a prisoner may not bring a claim "for mental or emotional injury" unless the prisoner makes "a prior showing of physical injury or the commission of a sexual act." In six circuits, this provision permits prisoners to recover compensatory damages for First Amendment violations unaccompanied by a physical injury or sexual act. In five other circuits, the opposite is true: compensatory damages are prohibited.

The second question presented is:

Does 42 U.S.C. § 1997e(e) permit a prisoner to recover compensatory damages against prison officials who violate the First Amendment?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption.

TABLE OF CONTENTS

Questions Presented..... i
Petition for a Writ of Certiorari 1
Opinions Below..... 1
Jurisdiction..... 1
Relevant Consitutional and Statutory Provisions
Introduction..... 1
Statement 3
Reasons for Granting the Writ..... 7
I. The Court should decide whether the First Amendment protects only religious exercise mandated by a prisoner's faith..... 8
A. The decision below is an outlier on this question and creates a split with five other circuits..... 8
B. The question is important because religious liberty should extend to non-mandatory exercises of faith 12
C. This case is an ideal vehicle to consider the question..... 14
II. The Court should decide whether prisoners who suffer a First Amendment violation, but not a physical injury, can recover compensatory damages..... 15
A. The circuits are split six to five on this question..... 16
B. The question is important 20
C. The holdings of five circuits contradict the plain language and the intent of the statute 22
III. The Court should also consider summary reversal on the free exercise claim..... 24
Conclusion 28

Appendices

Appendix A, Opinion of the United States Court of Appeals for the Eleventh Circuit, dated August 10, 2017..... 1a

Appendix B, Order of the United States District Court for the Northern District of Florida, dated March 29, 2016 ..... 9a
Appendix C, Second Report and Recommendation, United States District Court for the Northern District of Florida, dated February 24, 2016 ..... 10a
Appendix D, Order of the United States District Court for the Northern District of Florida, dated October 23, 2014 ..... 22a
Appendix E, Report and Recommendation, United States District Court for the Northern District of Florida, dated September 4, 2014 ..... 24a
Appendix F, Affidavit of Conraad Hoever, dated September 30, 2015 ..... 44a
Appendix G, Amended Complaint, dated December 16, 2014 (excerpt) 48a

TABLE OF AUTHORITIES

Cases

Aref v. Lynch, 833 F.3d 242 (D.C. Cir. 2016) 16, 21
Al-Amin v. Smith, 637 F.3d 1192 (11th Cir. 2011) 15, 18
Allah v. Al-Hafeez, 226 F.3d 247(3d Cir. 2000) 19
Ben-Levi v. Brown, 136 S. Ct. 930 (2016) 27
Burwell v. Hobby Lobby Stores 134 S. Ct. 2751 (2014) 24
Butts v. Martin, 877 F.3d 571 (5th Cir. 2017) 11
Canell v. Lightner, 143 F.3d 1210 (9th Cir. 1998) 18
Carlson v. Green, 446 U.S. 14 (1980) 20
Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. (1993) 6, 24
Cruz v. Beto 405 U.S. 319 (1972) 24
Cutter v. Wilkinson, 544 U.S. 709 (2005) 20
Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872 (1990) 12
Ford v. McGinnis 352 F.3d 582 (2d Cir. 2003) 9, 10, 13, 28
Freeman v. Arpaio, 125 F.3d 732 (9th Cir.1997) 10
Geiger v. Jowers, 404 F.3d 371 (5th Cir. 2005) 19
Hernandez v. C.I.R., 490 U.S. 680 (1989) 12
Holt v. Hobbs, 135 S. Ct. (2015) 20, 26
Jones v. Bock, 549 U.S. 199 (2007) 21
Kay v. Bemis 500 F.3d 1214 (10th Cir. 2007) 10, 13
King v. Zamiara, 788 F.3d 207 (6th Cir. 2015) 17, 21
Levitan v. Ashcroft, 281 F.3d 1313 (D.C. Cir. 2002) 9, 13
Midrash Sephardi, Inc. v. Town of Surfside 366 F.3d 1214 (11th Cir. 2003) 6
O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) 14

Owen v. City of Independence, 445 U.S. 622 (1980) 20
Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969) 12
Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 22
Robinson v. Page, 170 F.3d 747 (7th Cir. 1999) 23
Rowe v. Shake, 196 F.3d 778 (7th Cir. 1999) 18
Royal v. Kautzky, 375 F.3d 720 (8th Cir. 2004) 19, 23-24
Searles v. Van Bebber, 251 F.3d 869 (10th Cir. 2001) 19
Shakur v. Schriro 514 F.3d at 884 (9th Cir. 2008) 11, 13
Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981) 26
Toliver v. City of New York, 530 Fed. Appx. 90 (2d Cir. 2013) 17-18
Turner v. Safley, 482 U.S. 78 (1987) 11, 14
Wilcox v. Brown, 877 F.3d 161 (4th Cir. 2017) 17, 21
Woodford v. Ngo, 548 U.S. 81 (2006) 23

Statutes

42 U.S.C. § 1997e(e) ..... *passsim*
42 U.S.C. § 2000cc 20
Va. Code Ann. § 57-1 (2011) 23
Virginia Statute for Religious Freedom (1786) 23

Other Authorities

Protecting Religious Freedom after Boerne v. Flores: *Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1997) (prepared statement of Donald W. Brooks, Reverend, Diocese of Tulsa, Oklahoma) 21

Joseph Shapiro, *From Solitary to the Streets*: *Released Inmate Gets Little Help*, NAT'L PUB. RADIO, June 11, 2015 13
Peter Wagner and Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2017*, PRISON POLICY INITIATIVE 20
Richard Tewksbury, Introduction to Corrections (2015) 12
Sarah J. Young, *Introduction*, to Fyodor Dostoevsky, Crime and Punishment vii (Sarah J. Young ed., Oxford Univ. Press 2017) 12

PETITION FOR A WRIT OF CERTIORARI

Petitioner Conraad Hoever respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a) is reported in the Federal Appendix at 703 F' Appx. 908. The order of the district court (Pet. App. 22a-23a) adopting the magistrate judge's recommendation (Pet. App. 24a-43a) to grant a motion to dismiss in part is not reported. The order of the district court (Pet. App. 9a) adopting the magistrate judge's recommendation (Pet. App. 10a-21a) to grant summary judgment is not published but is available at 2016 WL 1241500.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on August 10, 2017. Pet. App. 1a. Petitioner filed a timely petition for rehearing, which the court of appeals denied on October 24, 2017. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

42 U.S.C. § 1997e(e) provides:

LIMITATION ON RECOVERY

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18).

INTRODUCTION

Petitioner Conraad Hoever believes that he is called by Jesus Christ to study the Bible every day. Pet. App. 16a, 46a. When prison officials dispatched petitioner to solitary confinement for 26 days, Officer Kriss refused him all religious materials, except for a Spanish translation of the Bible. *Id.* 11a, 15a, 20a, 45a, 49a. Petitioner does not know enough Spanish to read the Bible. *Id.*

When the Eleventh Circuit rejected petitioner's free exercise claim, it created a split with five other circuits. The court of appeals held that petitioner could not show a substantial burden on a religious practice because he "established that engaging in daily [Bible] studies was beneficial, not mandatory." *Id.* 8a.

The court of appeals also held that even if petitioner had established a substantial burden, he could not recover compensatory damages. *Id.* 6a-7a. The court reasoned that 42 U.S.C. § 1997e(e) bars compensatory damages for First Amendment violations that do not involve a physical injury. *Id.* Four other circuits follow this rule. Six reject it.

STATEMENT

1. *Factual Background.* Conraad Hoever studies the Bible every day. Pet. App. 15a-16a, 46a. He considers Bible study and daily devotionals to be the "spiritual food" that prevents him from "falling from the grace and mercy" of Jesus Christ. *Id.* 16a, 46a. In Luke 9:23, Jesus commands his disciples to "take up their cross daily," and to petitioner, these words are a call to daily Bible study. *Id.* 46a. Petitioner keeps three Bibles in his cell, in addition to daily devotionals. *Id.* 16a, 34a, 45a, 49a.

When prison officials threw petitioner into solitary confinement for a disciplinary violation, Officer Kriss decided what petitioner could take with him to the new cell. *Id.* 28a, 44a-45a. Despite petitioner's requests, Kriss refused to give him any of his three Bibles, or any other English translation of the Bible. *Id.* 11a, 45a. She also refused petitioner's requests to take his devotionals with him. *Id.* 11a, 45a. Instead, Kriss gave petitioner a Bible written in Spanish. *Id.* Petitioner does not know enough Spanish to read the Bible. *Id.* 11a, 45a, 49a.

Without his devotionals or a Bible written in a language he could understand, petitioner could only pray and recite Biblical verses he knew by heart. Pet. App. 7a-8a; R. 68-3 at 4. In petitioner's words, being separated from the Bible made him a "p[a]riah of the Christian faith" and constituted a "starvation of the soul." Pet. App. 8a.

2. *District court proceedings*. After exhausting the administrative remedies available at the prison, petitioner brought suit pro se in the United States Dis-

trict Court for the Northern District of Florida under 42 U.S.C. § 1983, alleging various claims. Pet. App. 2a. The court had jurisdiction under 28 U.S.C. § 1331. Only petitioner's free exercise claim is relevant now.

Respondents moved to dismiss the complaint. *Id.* 30a. Adopting a magistrate judge's report and recommendation, the district court dismissed some of petitioner's claims but allowed others, including the free exercise claim, to proceed. *Id.* 22a–23a, 33a. The court found that petitioner "presented a plausible First Amendment claim for the denial of his religious materials." *Id.* 33a.

In the same order, the court also held that petitioner could not recover compensatory and punitive damages for the free exercise claim because 42 U.S.C. § 1997e(e) precludes such damages, except in cases of physical injury. *Id.* 40a–41a. The court opined: "[I]f there is no physical injury to [petitioner] as a result of the alleged First Amendment violation, [petitioner's] request for monetary damages must necessarily be limited to nominal damages as required by 42 U.S.C. § 1997e(e)." *Id.* 40a. The court therefore partially dismissed the surviving claims to the extent petitioner sought relief other than nominal damages. *Id.* 22a–23a, 40a–41a. The court allowed petitioner to restate the surviving claims in an amended complaint. *Id.* 23a.

In his verified amended complaint, petitioner narrowed the case to the claim that the respondents violated his free exercise rights by denying him access to his devotionals and to a Bible that he could read. *Id.* 49a–50a. Petitioner stated that he told Kriss that he

could not read the Spanish Bible and needed one of his three English Bibles. *Id.* 49a. He spent 26 days in solitary confinement without these materials, leaving him "unable to practice his religion." *Id.*

The case proceeded to written and oral discovery. *Id.* 10a–11a. At the conclusion of discovery, respondents moved for summary judgment on the free exercise claim. *Id.* They argued that petitioner did not suffer a substantial burden on the exercise of his faith because he could pray and recite some verses he knew from memory while deprived of a Bible that he could understand. *Id.* 17a.

Petitioner responded with an affidavit stating that he was "obligated" by his faith to read the Bible and his devotionals each day. *Id.* 46a. Petitioner explained his belief that this daily obligation flows from the commands of Jesus Christ recorded in the Book of Luke. *Id.* Petitioner also stated that separation from the Bible and the devotionals for 26 days imposed a substantial burden on his religious exercise. *Id.*

The magistrate judge recommended granting the summary judgment motion and found no substantial burden as a matter of law. *Id.* 20a–21a. The district court adopted the recommendation and entered judgment for the respondents. *Id.* 9a.

3. *Court of appeals proceedings*. Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit, where he continued to prosecute his case pro se. *Id.* 2a.

The court of appeals affirmed. *Id.* Two of its holdings are relevant to this petition. First, the court of

appeals held that 42 U.S.C. § 1997e(e) limited petitioner to pursuing nominal damages for his free exercise claim because he did not suffer a physical injury. *Id.* 6a–7a. The court therefore affirmed the dismissal of the compensatory and punitive damages component of the free exercise claim. *Id.* 6a–7a.

Second, the court of appeals affirmed the grant of summary judgment on the nominal damages component of the free exercise claim. *Id.* 7a–8a. The court of appeals opined that petitioner could not show a substantial burden on his religious exercise because reading the Bible each day is not a "mandatory" part of his faith. *Id.* 8a. The court relied on *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2003), for the proposition that "a substantial burden occurs if the conduct complained of 'completely prevents the individual from engaging in religiously mandated activity, or . . . requires participation in an activity prohibited by religion' and, at a minimum, must have 'something more than an incidental effect on religious exercise.'" *Id.* 7a (quoting *Midrash*, 366 F.3d at 1227). The court concluded that petitioner could not show a substantial burden because he "established that engaging in daily [Bible] studies was beneficial, not mandatory." *Id.* 8a.[1]

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[1] In its substantial burden analysis, the court of appeals cited Justice Souter's concurrence in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), as the opinion of the Court. Pet. App. 7a. The court of appeals also stated that petitioner remained in solitary confinement without his religious materials for 20 days. *Id.* 3a. In fact, it was 26 days, as petitioner repeatedly stated and the district court repeatedly found. *Id.* 11a, 15a, 17a, 20a, 46a, 49a.

Petitioner filed a timely petition for rehearing, which the court of appeals denied on October 24, 2017.

REASONS FOR GRANTING THE WRIT

The circuits are divided on both questions presented, and the Court should grant the petition to resolve them.

A religious observance may lie at the core of a prisoner's faith (or anyone's faith) even if it is not mandatory. In this case, the court of appeals concluded that preventing petitioner from studying the Bible could not—as a matter of law—constitute a substantial burden because Bible study is not a mandatory component of petitioner's faith. *Id.* 7a-8a.

This holding created a split with at least five other circuits. No other circuit limits the substantial burden inquiry to religious practices mandated by a faith. The Court should grant certiorari to resolve the split and establish that the First Amendment is not limited to religious practices mandated by a prisoner's faith.

The court of appeals also held that even if petitioner could establish a substantial burden and a free exercise violation, he could recover only nominal damages under 42 U.S.C. § 1997e(e). *Id.* 6a-7a. That holding constitutes a position on a separate six-to-five circuit split, and presents a second question that also warrants this Court's review. The availability of compensatory damages in free exercise cases provides an important deterrent against affronts to religious liberty.

If the Court does not grant plenary review to consider the questions presented, the Court should

summarily reverse the lower court's substantial burden holding, which resulted in the rejection of petitioner's free exercise claim. Based on his interpretation of a verse from the Book of Luke, petitioner averred that his faith "obligated" him to study the Bible. *Id.* 46a. The court of appeals found that this religious obligation was not actually an obligation. *Id.* 7a-8a. It was not for the court to overrule petitioner's understanding of his own faith.

I. The Court should decide whether the First Amendment protects only religious exercise mandated by a prisoner's faith.

The lower court's holding that petitioner failed as a matter of law to show a substantial burden on his religious exercise because he "established that engaging in daily studies was beneficial, not mandatory," Pet. App. 8a, warrants this Court's review. In five other circuits, none of which require a substantial burden on a mandatory religious observance, the outcome of petitioner's free exercise claim would have been different—and rightly so. The richness of faith is not limited to mandates. Nor is religious freedom.

A. The decision below is an outlier on this question and creates a split with five other circuits.

The Eleventh Circuit stands alone in holding that the substantial burden element of a free exercise claim requires the prisoner to show that the burdened practice is mandated by her faith. In contrast to the Eleventh Circuit, four other circuits hold that

substantial burdens on a prisoner's religious observances are not limited to burdens on mandatory religious practices.

The Fifth Circuit follows a completely different rule. It holds that a prisoner prosecuting a free exercise claim need not establish a substantial burden at all.

1. Four circuits hold that burdens on a prisoner's non-mandatory religious practices can qualify as substantial burdens.

D.C. Circuit: In *Levitan v. Ashcroft*, the district court concluded that a prison policy banning sacramental wine at communion did not impose a substantial burden because consuming the wine is not a mandatory practice for Catholics. 281 F.3d 1313, 1315 (D.C. Cir. 2002). The court of appeals reversed and stated, "[a] requirement that a religious practice be mandatory to warrant First Amendment protection finds no support in the cases of the Supreme Court or of this court." *Id.* at 1319. It is enough that "[t]he litigant's beliefs [are] sincere and the practices at issue [are] of a religious nature." *Id.* at 1320.

Second Circuit: In *Ford v. McGinnis*, the district court, in holding that a Muslim prisoner's exclusion from the Eid ul Fitr feast did not constitute a substantial burden, "implied that in order for a burden to be substantial the burdened practice must be mandated by an adherent's religion." 352 F.3d 582, 593 (2d Cir. 2003). The Second Circuit rejected such a requirement, and reversed. *Id.* Then-Judge Sotomayor wrote: "Neither the Supreme Court nor we . . . have ever held that a burdened practice must be mandated

in order to sustain a prisoner's free exercise claim. Nor do we believe that substantial burden can or should be so narrowly defined." *Id.*

Ninth Circuit: In *Shakur v. Schriro*, the district court held that a Muslim prisoner failed to show a substantial burden because he conceded that consuming halal meat was not "conduct mandated by his faith." 514 F.3d at 884 (9th Cir. 2008). The Ninth Circuit reversed, finding that the district court "impermissibly focused on whether 'consuming Halal meat is required of Muslims as a central tenet of Islam,' rather than on whether [plaintiff] sincerely believes eating kosher meat is consistent with his faith." *Id.* at 885.

Tenth Circuit: In *Kay v. Bemis*, the district court had dismissed a complaint because a prisoner-plaintiff did not show that "tarot cards, incense, and religious books are necessary to the practice of his religion." 500 F.3d 1214, 1219 (10th Cir. 2007). The Tenth Circuit reversed, finding that a religious practice need not be mandatory or central in order to be substantially burdened: "We acknowledge that other circuits require that a prison regulation must interfere with a tenet or belief that is 'central' or mandated by religious doctrine before a prisoner may state a claim under § 1983. The Tenth Circuit does not follow such a rule." *Id.* at 1220 (citing *Freeman v. Arpaio*, 125 F.3d 732, 737 (9th Cir.1997)).[2] Instead, the court

[2] While the Tenth Circuit suggested that other circuits required a mandatory belief, it cited only the Ninth Circuit's holding in *Freeman*. The Ninth Circuit subsequently overruled the relevant portion of *Freeman*, aligning itself with the other circuits in holding that restrictions on non-mandatory practices can satisfy

held that "a prisoner's belief in religious dietary practices is constitutionally protected if the belief is 'genuine and sincere[.]'" *Id*.

2. The Fifth Circuit applies a completely different rule. It holds that a prisoner alleging a free exercise claim need not establish a substantial burden at all. *Butts v. Martin*, 877 F.3d 571, 585–86 (5th Cir. 2017). Rather, such a claim is governed by the legitimate penological interest test of *Turner v. Safley*, 482 U.S. 78 (1987). *Id.* Under the *Turner* test, a court determines whether there is a "valid, rational connection between [a] prison regulation and [a] legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 89. In *Butts*, the Fifth Circuit underscored its longstanding rule that no showing of a substantial burden is required in a free exercise case brought by a prisoner. 877 F.3d at 585–86.

The outcome of petitioner's free exercise claim was determined by the happenstance of his incarceration within the Eleventh Circuit. Had he been imprisoned in the Second, Fifth, Ninth, Tenth, or D.C. Circuits—none of which limit the substantial burden inquiry to mandatory religious practices—the result would have been different. The Court should grant the petition to resolve the division of authority.

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the substantial burden requirement. *See Shakur*, 514 F.3d at 884–85.

B. The question is important because religious liberty should extend to non-mandatory exercises of faith.

The decision below undermines religious freedom by excluding non-mandatory religious practices from constitutional protection. It is not the province of courts to decide whether religious doctrine makes an observance mandatory or non-mandatory. "Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion . . . ." *Employment Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872, 887 (1990).[3] In this case, the court of appeals presumed to do just that by deciding that petitioner could not show a substantial burden because daily Bible study was "beneficial, not mandatory" for the exercise of his faith. Pet. App. 8a.

Religiously mandated or not, reading and studying the Bible is the cornerstone of religious exercise for many prisoners. The Walnut Street Jail, which stood next to Independence Hall, offered Bible study beginning in the Eighteenth Century. RICHARD TEWKSBURY, INTRODUCTION TO CORRECTIONS 228

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[3] *See also Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969) ("[This] requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role.").

(2015). Since 1815, the New York Bible Society (later renamed Biblica) has been providing Bibles to prisoners.[4] When Fyodor Dostoevsky was dispatched to a Siberian prison camp in 1849, a Bible "became [one] of his most treasured possessions."[5] More recently, a former Illinois prisoner named Brian Nelson spent 12 years in solitary confinement. He copied the Bible word for word with a ballpoint pen.[6]

Petitioner's case illustrates a broader, and crucial, principle of religious liberty. Innumerable forms of religious exercise, mandatory or not, are important to practicing one's faith. The practices at issue in the cases cited in the previous section underscore the point: many forms of religious exercise—from studying books and partaking of feasts, to drinking sacramental wine and consuming certain foods—may not be mandatory, but they are nonetheless significant. *See Shakur*, 514 F.3d at 885; *Kay*, 500 F.3d at 1220; *Ford*, 352 F.3d at 593–94; *Levitan*, 281 F.3d at 1319–20.

If the Free Exercise Clause protected only mandatory religious observances, as the court of appeals

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[4] Biblica, Our History, https://www.biblica.com/about/history/ (last visited Jan. 19, 2008).

[5] Sarah J. Young, *Introduction*, to FYODOR DOSTOEVSKY, CRIME AND PUNISHMENT vii, xxiii (Sarah J. Young ed., Oxford Univ. Press 2017) (1866).

[6] Joseph Shapiro, *From Solitary to the Streets*: *Released Inmate Gets Little Help*, NAT'L PUB. RADIO, June 11, 2015, https://www.npr.org/2015/06/11/413208055/from-solitary-to-the-streets-released-inmates-get-little-help.

concluded, the government could prohibit everything else. Little would remain of religious freedom. The court of appeals' cramped view of religious liberty should not stand.

C. This case is an ideal vehicle to consider the question.

This case offers an excellent opportunity to consider whether a burden on a non-mandatory religious practice can constitute a substantial burden. But for the lower court's holding that petitioner could not establish a substantial burden, he would have been entitled to a trial on his free exercise claim.

That is not true in most cases. A prisoner who demonstrates a substantial burden must also show that the burden is not justified by a legitimate penological interest. *Turner*, 482 U.S. at 89-90; *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987).

In this case, respondents cannot show any legitimate penological interest for purposes of summary judgment. In opposing summary judgment, they disputed whether they imposed a substantial burden on petitioner's religious exercise, but they did not assert a penological justification for the burden. R. 68 at 5-11.

Nor could they have. Kriss gave petitioner a Bible. Pet. App. 28a. Giving petitioner one he could not read instead of one he could did not advance any legitimate purpose. *Id.* As the district court stated, the prison's polices allowed petitioner to take a Bible with him to solitary confinement. Pet. App. 34a. Petitioner's free exercise claim boils down to the substantial burden inquiry, the issue this Court should grant certiorari to resolve.

II. The Court should decide whether prisoners who suffer a First Amendment violation, but not a physical injury, can recover compensatory damages.

The Prison Litigation Reform Act ("PLRA") provides that a prisoner may not bring a claim "for mental or emotional injury" unless the prisoner makes "a prior showing of physical injury or the commission of a sexual act." 42 U.S.C. § 1997e(e).

The courts of appeals are intractably divided on whether a First Amendment injury is merely a "mental or emotional injury" under the statute. If a First Amendment injury is a "mental or emotional injury," a prisoner cannot obtain compensatory damages, unless the First Amendment injury also involves a physical injury. On the other hand, if a First Amendment injury is not a "mental or emotional injury," a prisoner can obtain compensatory damages, even without an accompanying physical injury.

The Eleventh Circuit holds that violations of a prisoner's First Amendment rights are mental or emotional injuries. *Al-Amin v. Smith*, 637 F.3d 1192, 1196 (11th Cir. 2011). Therefore, prisoners cannot recover compensatory damages for First Amendment violations, absent a showing of physical injury. *Id.* In this case, the court of appeals applied that rule against petitioner. Even if petitioner established a substantial burden and a free exercise violation, the court held, he could only recover nominal damages. Pet. App. 6a.

If this Court grants the petition to consider whether the Free Exercise Clause extends to non-

mandatory religious observances, it should also grant certiorari to consider whether § 1997e(e) prohibits compensatory damages for First Amendment violations. If compensatory damages are available for such violations, petitioner's claim for compensatory damages should be reinstated.

The circuits are split six to five on whether § 1997e(e) prohibits compensatory damages for First Amendment violations. This is an important issue worthy of the Court's consideration because the availability of damages deters unlawful deprivations of religious freedom.

A. The circuits are split six to five on this question.

There is a deep and mature split on whether the physical injury requirement applies when a prisoner is deprived of First Amendment liberty. Of the twelve circuits that hear prisoners' rights cases, only the First Circuit has not decided the question.

1. Six circuits reject the rule that the court of appeals applied in this case. These circuits hold that prisoners may obtain compensatory damages when prison officials violate the First Amendment. Physical injury is not part of the equation.

D.C. Circuit: The D.C. Circuit has stated that "there exists a universe of [non-physical] injuries that are neither mental nor emotional and for which plaintiffs can recover compensatory damages under the PLRA." *Aref v. Lynch*, 833 F.3d 242, 265 (D.C. Cir. 2016). Accordingly, the court has held that prisoners who bring constitutional claims—including

First Amendment claims—but do not allege physical injury "are eligible to seek compensatory, punitive, and nominal damages under Section 1997e(e)." *Id.* at 267; *see also id.* at 265 (stating that the court can hardly imagine that Congress "intended to afford virtual immunity to prison officials even when they commit blatant constitutional violations, as long as no physical blow is dealt. It is especially difficult to see how violations of inmates' First Amendment rights could ever be vindicated, given the unlikelihood of physical harm in that context.").

Fourth Circuit: The Fourth Circuit has held that injuries to First Amendment interests are not mental or emotional injuries within the meaning of § 1997e(e). *Wilcox v. Brown*, 877 F.3d 161, 170 (4th Cir. 2017). Accordingly, in the Fourth Circuit, prisoners' First Amendment claims are not subject to the physical injury requirement, and "§ 1997e(e) does not foreclose the possibility that [a prisoner bringing a Free Exercise claim] may prove entitlement to compensatory damages" even without showing a physical injury. *Id.*

Sixth Circuit: The Sixth Circuit has held that an injury to a First Amendment interest is not a mental or emotional injury, and that § 1997e(e) does not limit recovery in prisoners' First Amendment cases. *King v. Zamiara*, 788 F.3d 207, 213 (6th Cir. 2015).

Second Circuit: The Second Circuit has stated that § 1997e(e) does not prevent a prisoner from recovering damages for First Amendment violations even when those violations cannot be linked to a physical injury. *Toliver v. City of New York*, 530 F. App'x 90,

93 n.2 (2d Cir. 2013) (equating First Amendment injuries with "actual injuries" and distinguishing actual injuries from mental or emotional injuries under § 1997e(e)).

Seventh Circuit: The Seventh Circuit has squarely rejected the application of § 1997e(e) to prisoners' First Amendment claims, separating injuries to First Amendment interests from mental or emotional injuries. *Rowe v. Shake*, 196 F.3d 778, 781–82 (7th Cir. 1999) ("A prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained.")

Ninth Circuit: The Ninth Circuit holds that the physical injury requirement does not extend to First Amendment claims. *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998) ("The deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred. Therefore, § 1997e(e) does not apply to First Amendment claims regardless of the form of relief sought.").

2. Five other circuits reject the view of the six circuits discussed above and hold that § 1997e(e) prohibits compensatory damages for First Amendment claims not accompanied by physical injury.

Eleventh Circuit: The Eleventh Circuit holds that the physical injury requirement bars recovery of compensatory damages when the prisoner does not allege a physical injury. *Al-Amin*, 637 F.3d at 1196; Pet. App. 6a-7a.

Fifth Circuit: The Fifth Circuit holds that the text of § 1997e(e) makes the physical injury requirement "appli[cable] to all federal civil actions in which a prisoner alleges a constitutional violation"; therefore, in the Fifth Circuit, a prisoner cannot recover compensatory damages for a First Amendment violation absent an allegation of physical injury. *Geiger v. Jowers*, 404 F.3d 371, 374–75 (5th Cir. 2005).

Eighth Circuit: The Eighth Circuit holds that § 1997e(e)'s "clear language" limits recovery in all federal claims brought by prisoners, including First Amendment claims. *Royal v. Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004) (compensatory damages not available in prisoner's First Amendment claim because "we read section 1997e(e) as limiting recovery for mental or emotional injury in all federal actions brought by prisoners").

Tenth Circuit: The Tenth Circuit equates injuries to First Amendment interests with mental or emotional injuries, concluding that § 1997e(e)'s physical-injury requirement limits recovery for First Amendment violations. *Searles v. Van Bebber*, 251 F.3d 869, 875–76 (10th Cir. 2001).

Third Circuit: The Third Circuit holds that § 1997e(e) bars recovery of compensatory damages for First Amendment violations. *Allah v. Al-Hafeez*, 226 F.3d 247, 250–51 (3d Cir. 2000).

In the present case, the Eleventh Circuit applied § 1997e(e)'s physical injury requirement to petitioner's First Amendment claim, holding that because petitioner "did not allege he suffered a physical injury," his "recovery was necessarily limited to nominal

damages." Pet. App. 6a. The court's holding plainly falls on one side of a well-defined split implicating the vast majority of the federal circuits.

B. The question is important.

The availability of compensatory damages in First Amendment cases is a question of national importance. The threat of damages can deter prison officials from violating a prisoner's religious liberty. It is "almost axiomatic" that damages serve as a deterrent to unconstitutional acts by government employees and policymakers. *Carlson v. Green*, 446 U.S. 14, 21 (1980). "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees . . . ." *Owen v. City of Independence*, 445 U.S. 622, 651 (1980). The deterrent value of damages helps to secure the religious liberty of the 2.3 million people incarcerated in American prisons and jails. Peter Wagner and Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2017*, PRISON POLICY INITIATIVE, https://www.prisonpolicy.org/re ports/pie2017.html.

Congress has also recognized the protection of prisoners' religious liberty as an important national interest. The Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc et seq., exists "to provide very broad protection for religious liberty." *Holt v. Hobbs*, 135 S. Ct. at 859 (internal punctuation and citation omitted). Prior to enacting that statute, Congress held hearings to document the violations of religious freedom pervasive in prisons and jails. *Cutter v. Wilkinson*, 544 U.S. 709, 716 n.5 (2005). These included: failing to provide Halal

food to Muslims, refusing to offer Jewish inmates sack lunches that would allow them to "break their fasts after nightfall," prohibiting Chanukah candles and Communion wine, and destroying or desecrating religious items, "such as the Bible, the Koran, the Talmud or items needed by Native Americans . . . ." *Id.* (quoting *Protecting Religious Freedom after* Boerne v. Flores: *Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 58–59 (1997) (prepared statement of Donald W. Brooks, Reverend, Diocese of Tulsa, Oklahoma)).

Resolving this issue is important to corrections officials and prisoners alike. Two years ago, the Attorney General of Michigan asked this Court to resolve the same question that this case presents, describing it as an "important national issue." Petition for Writ of Certiorari at 3, *King v. Zamiara*, 788 F.3d 207 (6th Cir. 2015) (No. 15-259), 2015 WL 5158773, at *3. The Michigan petition explained that "assuring uniform application of the PLRA is especially important because "[p]risoner litigation continues to 'account for an outsized share of filings' in federal district courts." *Id.* at 9 (quoting *Jones v. Bock*, 549 U.S. 199, 203 (2007)).

The split has deepened since the Court denied certiorari in *Zamiara*. At the time, three circuits had not decided the question. With decisions from the Fourth and D.C. Circuits in the past two years, that number has dwindled to one. *See Aref*, 833 F.3d at 265; *Wilcox*, 877 F.3d at 170. The issue is ripe for this Court's resolution.

C. The holdings of five circuits contradict the plain language and the intent of the statute.

The Court should also grant certiorari because the five circuits to extend the physical injury requirement to First Amendment claims have misapprehended the plain language and intent of the statute. The physical injury requirement applies only to cases "brought . . . for mental or emotional injury." 42 U.S.C. § 1997e(e). First Amendment claims are brought for violations of liberty, not for mere mental or emotional harm.

1. If Congress had intended to impose a physical injury requirement that encompassed all cases brought by prisoners—including First Amendment cases—it would not have limited the physical injury requirement to actions brought for mental or emotional injury. Rewritten in this manner, 42 U.S.C. § 1997e(e) would have read:

> No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18).

Instead of enacting that hypothetical statute, Congress limited the physical injury requirement to "civil action[s] . . . brought . . . for mental or emotional injury." 42 U.S.C. § 1997e(e).

Extending the physical injury requirement to all claims brought by prisoners would nullify Congress's limitation of the requirement to cases brought for mental or emotional injury. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to

every word Congress used."). Congress's qualification makes it clear that "[t]he domain of the statute is limited to suits in which mental or emotional injury is claimed." *Robinson v. Page*, 170 F.3d 747, 748 (7th Cir. 1999) (Posner, C.J.). Therefore, "[i]t would be a serious mistake to interpret section 1997e(e) to require a showing of physical injury in all prisoner civil rights suits." *Id.*

Under the plain language of the statute, a First Amendment claim is not "brought . . . for mental or emotional injury." Such a claim is brought for an injury to liberty. The Pilgrims sailed for the New World because religious repression struck at the core of human freedom, not because they suffered "mental or emotional injury" that a psychiatrist might cure today. Thomas Jefferson wrote Virginia's religious freedom statute not to protect warm and fuzzy feelings but to prevent the "infringement of natural right." Virginia Statute for Religious Freedom (1786), Va. Code Ann. § 57-1 (2011).

Petitioner likewise does not study the Bible to avoid feeling gloomy. He does so to prevent "starvation of the soul" and estrangement from God. Pet. App. 8a. As this case illustrates, First Amendment claims are not mental or emotional injury claims.

2. Prohibiting compensatory damages for First Amendment violations is inconsistent with congressional intent. Congress enacted the PLRA to restrict frivolous lawsuits brought by prisoners. *Woodford v. Ngo*, 548 U.S. 81, 97 (2006). Congress considered examples of such lawsuits that included: "being served chunky instead of creamy peanut butter; being denied the use of a Gameboy video game; being issued shoes that were a quarter size too big; being served 'hacked up' cake for dessert; prison officials throwing out an inmate's belongings after he escaped; and be-

ing denied dental floss." *Royal v. Kautzky*, 375 F.3d 720, 729-30 (8th Cir. 2004) (Heaney, J., dissenting) (quotation omitted).

There is no correlation between physical injury to a plaintiff and the merit of her First Amendment claim. Meritorious First Amendment claims brought by prisoners and non-prisoners alike almost never involve physical injury. The only physical injury in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, which addressed an ordinance prohibiting ritual animal slaughter, was inflicted on "chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles." 508 U.S. 520, 525 (1993). In *Cruz v. Beto*, the Court reversed the dismissal of a prisoner's claim that he was punished, but not physically abused, for his religious beliefs. 405 U.S. 319, 320-23 (1972). The plaintiffs in *Burwell v. Hobby Lobby Stores* were not physically injured by laws requiring them to fund certain methods of contraception. 134 S. Ct. 2751 (2014).

Because physical injury has nothing to do with the merit of a First Amendment claim, extending the physical injury requirement to such claims would not advance the intent of the PLRA—curbing frivolous litigation.

III. The Court should also consider summary reversal on the free exercise claim.

If the Court does not wish to grant plenary review to consider the questions presented, it should summarily reverse the judgment of the court of appeals on the nominal damages component of the free exercise claim. Petitioner averred that he considers studying the Bible and reading devotionals each day to be mandatory, and he explained the religious basis for

that belief. Pet. App. 46a. The court of appeals decided that he was wrong about what his own faith required of him. *Id.* 8a. That determination is an affront to religious freedom and warrants summary reversal.

1. The court of appeals purported to overrule petitioner's understanding of his own religion. Petitioner submitted an affidavit opposing summary judgment in which he stated that his faith requires him to study the Bible and devotionals each day:

> Reading my daily devotional and the Bible texts that go along with that devotional is my spiritual food that I practice daily to avoid falling from the grace and mercy Jesus Christ bestowed upon me, and to make my day right. *I am obligated by my religion to do so on a daily basis*.
>
> Not practicing my religion and not reading my Bible and my daily devotionals imposes a substantial burden on my religious right.
>
> I compare the deviation of not reading and practicing my daily tasks/religion for 26 days an abomination and becoming a p[a]riah of the Christian faith and a complete dead/starvation of the soul.
>
> I believe what Jesus Christ said in Luke 9:23 that "if any man will come after me, let him deny himself, and take up his cross daily, and follow me" that he meant that I have to exercise my daily devotionals. If I don't, I am unworthy of following him.

Id. 46a (emphasis added).

Disregarding petitioner's belief that daily Bible study is obligatory, the court of appeals opined that he "established that engaging in daily studies was beneficial, not mandatory." *Id.* 8a. That is the opposite of what petitioner averred, based on his understanding of the Book of Luke. *Id.* 46a. In finding that petitioner's faith did not mandate daily study, the court necessarily rejected petitioner's own understanding of what Luke 9:23 demands of him. Pet. App. 46a.

2. This error warrants summary reversal because it so blatantly contradicts the Court's precedent. "Courts are not arbiters of scriptural interpretation." *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981). The Eleventh Circuit gave it a whirl anyway.

In *Holt v. Hobbs*, the Court unanimously held that the lower court "went astray" in concluding that a prison's ban on beards did not impose a substantial burden on a Muslim prisoner's religious exercise. 135 S. Ct. at 862–63. It did not matter if "not all Muslims believe[d] that men must grow beards" because religious liberty does not only extend to beliefs shared by all adherents of a faith. *Id.* While *Holt* considered the substantial burden prong of RLUIPA, the same principle applies to the substantial burden analysis under the First Amendment: "[T]he protection of RLUIPA, *no less than the guarantee of the Free Exercise Clause*, is 'not limited to beliefs which are shared by all of the members of a religious sect.'" *Id.* (emphasis added) (quoting *Thomas,* 450 U.S. at 715–16).

3. When the court of appeals concluded that petitioner misunderstood what his own faith requires of him, it made the same mistake that prompted Justice Alito's dissent from denial of certiorari in *Ben-Levi v. Brown*, 136 S. Ct. 930 (2016) (Alito, J., dissenting from denial of cert.). Ben-Levi, a Jewish prisoner, wished to hold a religious study group. *Id.* at 931. Justice Alito opined that the court of appeals erred in concluding that "Ben–Levi's religious exercise was not burdened because he misunderstands his own religion. If Ben–Levi truly understood Judaism . . . he would recognize that his proposed study group was not consistent with Jewish practice . . . ." *Id.* at 933. Justice Alito would have summarily reversed the decision below because "[t]he argument that a plaintiff's own interpretation of his or her religion must yield to the government's interpretation is foreclosed by our precedents." *Id.* at 934.

The court of appeals repeated the *Ben-Levi* error in this case. It failed to consider whether petitioner's loss of the ability to study the Bible "imposed a substantial burden on [his] ability to exercise *his* religious beliefs, as *he* understands them." *Id.* Had the court of appeals asked the right question and considered petitioner's affidavit in light of what petitioner understands his religion to require of him, the court could not have found, as a matter of law, that a substantial burden did not exist.

4. The argument for summary reversal is even stronger here than in *Ben-Levi*, for two reasons. First, this case illustrates that the same error has recurred, despite Justice Alito's admonition in *Ben-Levi*. The

full Court's intervention may be necessary to discourage further errors of the same type.

Second, judicial excursions into ecclesiastical law become especially fraught when, as in the decision below, a court not only defines religious doctrine but goes one level deeper by separating "mandatory" doctrines from "beneficial" ones. Pet. App. 8a. In other words, "[t]o confine the protection of the First Amendment to only those religious practices that are mandatory would necessarily lead us down the unnavigable road of attempting to resolve intra-faith disputes over religious law and doctrine." *Ford*, 352 F.3d at 593 (Sotomayor, J.).

The Court should summarily reverse the judgment below as to petitioner's free exercise claim. It was not the province of the lower court to explain a faith to one of its adherents.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari or summary reversal.

Respectfully submitted,

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