No. 17-1035

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, AND J. SERRATO, CORRECTION OFFICER,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit reversibly erred insofar as it treated the non-mandatory character of a burdened religious practice as a relevant but not dispositive consideration in assessing whether challenged conduct on the part of prison officials imposed a substantial burden on the exercise of the prisoner's religious freedom.

2. Whether the Eleventh Circuit reversibly erred in rejecting Petitioner's argument that he did make a "prior showing of physical injury" within the meaning of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(e), without considering the alternative argument—not raised by Petitioner in the district court or the court of appeals—that Petitioner did not have to make such a showing to recover compensatory damages.

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BRIEF IN OPPOSITION

Respondents P. Belleis, J. Hall, K. Hampton, J. Kelley, T. Kriss, W. Messer, and J. Serrato respectfully submit this brief in opposition to the petition for a writ of certiorari filed by Conraad Hoever.

INTRODUCTION

Petitioner seeks reversal of an unpublished, per curiam opinion in which the Eleventh Circuit held that Respondent Kriss, a corrections officer, did not violate Petitioner's right to free exercise under the First Amendment by providing him with his own Spanish-language Bible while he was in administrative confinement. The keystone of the petition is that the circuits are split on the first question presented, as framed by Petitioner: whether, to establish a substantial burden on religious exercise, a plaintiff must show that a practice mandated by his religion was affected.

They are not split. The Eleventh Circuit is fully in line with the other circuits in holding that courts must consider whether a belief is sincere and whether a burden on that belief is substantial or instead a mere inconvenience. As this Court has recognized, whether a particular practice is mandatory is relevant, but not dispositive: A burden on what the practitioner deems a mandatory practice increases the likelihood that a substantial burden exists, although a substantial burden may exist absent any such showing. The Eleventh Circuit agrees. And Petitioner's insistence that the non-precedential decision below upended well-settled law in the Eleventh Circuit on this point

is belied by the opinion itself. The court's opinion relies on a number of factors—including the temporary nature of the deprivation—that would have been irrelevant if the non-mandatory character of the burdened practice had been dispositive.

Without a split on the first question presented—let alone a well-developed split—the petition does not warrant review. This case is a poor vehicle for considering that question: Petitioner asks this Court to decide whether the lower court correctly applied the "substantial burden" test; but the lower courts are divided on the threshold question whether that test applies in the first place, and that threshold issue is not properly before the Court. In addition, the decision below turned on application of settled law to an unusual set of facts; it is far from the clear that the court of appeals erred in applying that law; and any residual doubts concerning the correctness of the panel's decision are not sufficiently important to merit this Court's consideration.

Petitioner's second question presented likewise does not warrant this Court's review. That question is relevant only if this Court grants and reverses as to Petitioner's first question presented; it was not raised or passed on below; its resolution cannot change the outcome, even if the Court accepts review and reverses on the first question presented as well; and this Court has consistently denied other petitions raising the same essential issue. Accordingly, the Court should deny the petition for certiorari.

STATEMENT

1. At the time of the events giving rise to this case, Petitioner Conraad Hoever was an inmate in Florida's Franklin Correctional Institution. Respondent Kriss, a corrections officer, was assigned to Franklin and, on March 16, 2013, she was tasked with inventorying Petitioner's property because he was being placed in administrative confinement. Pet. App. 14a.

The prison's policies permitted Petitioner to keep one of his own Bibles in administrative confinement. Pet. App. 34a. And he was allowed to do so. Pet. App. 14a-16a; Pet. 14. For example, the "Inmate Impounded Personal Property List," which Petitioner signed, "shows the property that [Petitioner] was allowed to keep," and that list included a "Holy bible." Pet. App. 15a. Consistent with that evidence, Petitioner "submitted his own affidavit in which he state[d] that Defendant Kriss inventoried his property and wrote on the property slip that that he was provided a Holy Bible." *Id*.

Petitioner, however, presented evidence that he was provided only "his own Spanish Bible," Pet. 20a. In his sworn submissions to the district court, Petitioner did not allege that he could not read his own Spanish Bible at all; instead, he alleged that, based on his comparative proficiency in English, his Spanish Bible would not function as well as an English-language Bible. Pet. App. 15a-16a; *see* Pet. App. 45a (averring that he "did not know Spanish well enough such that the Spanish Bible could function *as an English Bible would*" (emphasis added)).

Petitioner also alleged that he told Officer Kriss that he needed one of his English Bibles and his daily devotionals but that she refused to go back and retrieve them. Pet. App. 45a. For her part, Kriss "declare[d] that [Petitioner] 'signed for his property and did not tell [her] that he needed another bible.'" *See* Pet. App. 14a-15a.

Petitioner spent 26 days in administrative confinement. Pet. App. 20a. After Petitioner was released from administrative confinement, his English-language Bibles were returned to him.[1]

2. Proceeding pro se, Petitioner asserted various claims against Respondents under 42 U.S.C. § 1983 in the U.S. District Court for the Northern District of Florida. Adopting the magistrate judge's thorough report and recommendation, the district court dismissed most of Petitioner's claims, including his claims for compensatory damages for mental and emotional injuries because he failed to assert a sufficient physical injury. Pet. App. 40a-41a; *see* 42 U.S.C. § 1997e(e). The magistrate judge diligently assessed Petitioner's claims, analyzing his due process claims, Pet. App. 30a-32a; his First Amendment claims, Pet. App. 32a-36a; his Eighth Amendment claim, Pet. App. 36a-37a; his supervisory liability claims, Pet. App. 37a-39a; his official-capacity claims, Pet. App. 39a-40a; his claims for compensatory damages, Pet. App. 40a-41a; and his claim for injunctive relief, Pet. App. 41a-42a. After careful consideration, the magistrate judge found that

[1] Petitioner filed a successful grievance with prison officials, but it was approved after he had been released.

Petitioner had presented plausible First Amendment claims for the denial of his religious materials and for the denial of his correspondence materials, and invited him to submit an amended complaint. Pet. App. 32a-36a, 43a.

Petitioner amended his complaint, reducing it to his free-exercise claim. After discovery, the magistrate judge issued a report and recommendation concluding that summary judgment should be granted for Respondents. The court found that the denial of an English-language Bible had "not been shown to have significantly burdened the exercise of his religious beliefs." Pet. App. 20a-21a. The court did not address whether engaging in daily Bible study was "mandatory"; instead, it noted only that the denial "was of importance to" Petitioner, but "the record demonstrate[d]" that it "was of a temporary nature" and thus it amounted only to "an inconvenience," not a substantial burden, particularly because he "had his own Spanish Bible and could pray." Pet. App. 20a.

In his objections to the magistrate judge's report and recommendation, Petitioner argued that a genuine dispute of material fact existed regarding whether his religious exercise was substantially burdened and that the determination of whether any burden was substantial was a question for the trier of fact. *Hoever v. Kriss*, No. 4:13-cv-372, ECF No. 74, at 7 (N.D. Fla., Mar. 11, 2016). The district court adopted the magistrate judge's report and recommendation and entered summary judgment for Respondents.

3. Still proceeding pro se, Petitioner appealed to the Eleventh Circuit. He presented seven issues on appeal, concerning: (1) his due process claims; (2) his

First Amendment right-of-access claims; (3) his Eight Amendment claim; (4) his supervisory liability claims; (5) his official capacity claims; (6) his compensatory damages claim; and (7) his free-exercise claim. *Hoever v. Bellelis*, No. 16-12108, Appellant's Br., at iv-vi (11th Cir. Feb. 17, 2017).

As to his compensatory damages claim, Petitioner argued only that he suffered a physical injury sufficient to overcome Section 1997e(e)'s bar and that the severity of his physical injury was a question for the jury. *Id.* at 22-24. He did not contend that he suffered, alleged, or proved any non-mental or non-emotional injury resulting from the purported free-exercise violation or that he was entitled to compensatory damages for any such injury.

As to his free-exercise claim, Petitioner presented the same arguments that he presented in the district court: That a genuine dispute of material fact existed and that only a jury, not the judge, could assess the extent of the burden on his religious exercise. *Id.* at 25-26. He did not address the effect of a practice's mandatory nature on the substantial burden analysis.

In an unpublished, per curiam opinion, the Eleventh Circuit affirmed. Pet. App. 1a (W. Pryor, Jordan, and Rosenbaum, JJ.). Most of the court's opinion addressed the various claims Petitioner asserted that are unrelated to this petition. Pet. App. 2a-6a. As relevant here, the court rejected Petitioner's argument that he suffered a sufficient physical injury under Section 1997e(e), explaining that because he "did not allege he suffered a physical injury *because of* [Respondent] Kriss's constitutional violations," his "recovery was necessarily limited to nominal

damages." Pet. App. 6a (emphasis added). Relying on the "brief denial" of Petitioner's study materials; the fact that he prayed and quoted Bible verses while in administrative confinement; and the "beneficial, not mandatory" nature of Petitioner's "engaging in daily studies," and relying on this Court's decision in *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 717-18 (1981), the court also held that Respondents did not "impos[e] a 'substantial burden' on his religious practice." Pet. App. 7a-8a.

Petitioner sought panel rehearing, again insisting that a finder of fact, not the court, should have "weighed" whether the burden on his religious exercise was substantial, but that petition was denied. Pet. 7.

REASONS FOR DENYING THE PETITION

I. THE COURTS OF APPEALS ARE NOT SPLIT ON THE FIRST QUESTION PRESENTED AND THIS CASE IS A POOR VEHICLE TO ADDRESS THE ISSUE.

The first question presented does not warrant this Court's review. The Eleventh Circuit's free-exercise jurisprudence is fully in line with that of other circuits: Under binding circuit precedent, the determinative question is not whether the challenged state action restricts "non-mandatory religious exercise," Pet. i, but whether the government has imposed a substantial burden on sincerely held religious beliefs.

Like other circuits, and like this Court, the Eleventh Circuit considers the mandatory nature (as interpreted by the religious practitioner) of a

burdened practice to *increase* the likelihood that a burden is substantial. To the extent the court below relied on the purportedly non-mandatory nature of Petitioner's religious practice, the court did not consider that fact alone to be dispositive, as evidenced by its reliance on factors that otherwise would have been irrelevant—*e.g.*, the duration of the denial and the ways in which Petitioner was able to engage in "religious exercise" notwithstanding "deprivation of a Bible written in English and devotional materials." Pet. App. 7a. As a result, and given the non-precedential opinion below, reversal would affect only the parties—it would affect only the application of a properly stated rule of law to these particular facts.

Moreover, this case is not a suitable vehicle for determining whether "the First Amendment extend[s] to a prisoner's non-mandatory religious exercise," Pet. i. Even if the Court were to assume that the court below viewed the nature of Petitioner's religious practice as dispositive, this issue was neither briefed nor analyzed below. And whether substantial-burden analysis is even appropriate in Free Exercise challenges to prison regulations is unsettled, meaning that opining on what that analysis entails could ultimately prove to be entirely hypothetical. Review is unwarranted, and summary reversal particularly so.

A. The Courts Of Appeals Agree That To Establish A Substantial Burden On Free Exercise, A Plaintiff Need Not Show That The Affected Religious Practice Is Mandatory.

The premise for Petitioner's asserted split is that the Eleventh Circuit "hold[s] that the substantial burden element of a free exercise claim requires the

prisoner to show that the burdened practice is mandated by her faith." Pet. 8. That is not the law in the Eleventh Circuit. In fact, the Eleventh Circuit agrees with the "four other circuits [that] hold that substantial burdens on a prisoner's religious observances are not limited to burdens on mandatory religious practices." Pet. 8-9. Put differently, Petitioner's asserted split does not exist.

1. The court below did not write on a blank slate. In applying the substantial burden test, the Eleventh Circuit does not require that a prisoner's burdened practice be religiously mandated. Quite the opposite.

In *Watts v. Florida International University*, 495 F.3d 1289 (11th Cir. 2007), the district court dismissed a free exercise claim because it concluded that the plaintiff had not alleged that the government "had substantially burdened his observation of a central religious belief." *Id.* at 1294. The Eleventh Circuit reversed, explaining that "[t]hat is the wrong standard." *Id.* Instead, the plaintiff need only have alleged that the government "ha[d] impermissibly burdened one of his 'sincerely held religious beliefs.'" *Id.* In a lengthy discussion, the court firmly rejected the notion that "the judiciary should determine the 'centrality' of a specific belief," noting that "it is beyond the competence of the courts to determine the centrality of a particular religious belief or practice. *The test is sincerity*, not centrality." *Id.* at 1295 (emphasis added).[2]

[2] Petitioner's explication of the law closely tracks the principles set out in *Watts*, citing many of the same cases. *See*

As subsequent cases confirm, the law in the Eleventh Circuit is that, if a plaintiff sincerely believes that a practice constitutes religious observation, the dispositive question becomes whether that practice has been substantially burdened, not whether the practice is "mandatory." *See Davila v. Gladden*, 777 F.3d 1198, 1205 (11th Cir. 2015) (in RFRA context, court looks to "'whether the [challenged rule] imposes a substantial burden on the ability of the objecting part[y] to conduct [himself] in accordance with [his] religious beliefs'" (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014) (emphasis omitted))); *see also id.* ("a burden is substantial when it 'prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief'" (quoting *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014))).

2. In determining whether a burden is substantial, whether a practice is mandatory is "obviously" *relevant* to the substantial-burden inquiry, not to the antecedent "sincerely held belief" inquiry. *Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002). That is because the fact that a practice is mandatory increases the likelihood that a burden is substantial. Other cases involved in Petitioner's purported split are in accord. *E.g., Ford v. McGinnis*, 352 F.3d 582, 593 (2d Cir. 2003) (Sotomayor, J.) ("Whether a particular practice is religiously mandated is surely relevant to resolving whether a particular burden is substantial.").

Pet. 12 & n.3*; see also* Amicus Br. of Muslim Advocates et al., at 6-7.

Indeed, this Court established the relevance of a mandatory practice in *Thomas*. 450 U.S. at 717-18. There, the Court held that "[w]here the state . . . denies [an important] benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Id.* So even though the government can substantially burden free exercise by impinging on a non-mandatory practice, whether a practice is mandatory is at least relevant: that a practice is mandatory increases the likelihood that a burden is substantial.

3. The decision below did not establish a new rule in the Eleventh Circuit that whether a practice was mandated is *dispositive* in the substantial burden analysis. (Nor, as an unpublished decision, could it have.) Instead, the court merely applied the uncontroversial proposition that, to constitute a substantial burden, the government's conduct must place more than an inconvenience or have more than an incidental effect on religious exercise. Pet. App. 7a (explaining that the deprivation "did not thwart [Petitioner's] religious exercise"). In applying this well-settled rule, the court referred to the non-mandatory nature of Petitioner's daily study as another relevant fact in determining whether the burden was substantial or merely incidental.

The court first recited the Eleventh Circuit's rule in RFRA cases: "[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.'" Pet. App. 7a (quoting *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004)) (alteration in original). That rule was properly stated, coming directly from this Court's decision in *Thomas*, 450 U.S. at 717-18; *see* Pet. App. 7a (citing *Thomas*, 450 U.S. at 717-18). In articulating that rule, moreover, the court below said that a substantial burden occurs *if* the conduct complained of precludes religiously mandated activity, not that a substantial burden occurs *only if* there is a limitation on religiously mandated activity. *See id.*

The court below also relied on *Midrash*, an RLUIPA case in which the Eleventh Circuit emphasized that "'substantial burden' requires something more than an incidental effect on religious exercise." *Midrash*, 366 F.3d at 1227. That burden must be "more than an inconvenience on religious exercise." *Id.* For example, "a substantial burden *can* result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct." *Id.* (emphasis added); *see also Thomas*, 450 U.S. at 717-18 (same).[3]

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[3] Earlier Eleventh Circuit decisions relying on *Midrash* similarly emphasize that the government's action must place more than an "incidental burden" or "inconvenience" on religious exercise. *Davila*, 777 F.3d at 1205 ("[T]o constitute a 'substantial burden' on religious practice, the government's action must be more than . . . incidental and must place more than an inconvenience on religious exercise." (internal quotation marks omitted) (alteration in original)); *Wilkinson v. GEO Grp., Inc.*, 617 F. App'x 915, 918 (11th Cir. 2015) ("At the very least, 'a

After properly setting forth the substantial-burden standard, the court below applied it to Petitioner's case. In so doing, the court did not hold that the non-mandatory nature of his practice was the sole fact on which the case turned. Instead, the court considered at least two other facts in concluding that "the brief denial of [Petitioner's] study materials" did not "impos[e] a 'substantial burden' on his religious practice." Pet. App. 8a. First, the court pointed to Petitioner's prayer and quoting of Bible verses while in disciplinary confinement. *Id.* In other words, Petitioner had alternative means of religious expression, of which he availed himself, including his own Spanish-language Bible. Second, the court relied on its characterization of the denial of Petitioner's study materials as "brief." *Id.* Thus, the court indisputably relied on the length of the deprivation in concluding that his religious exercise was not substantially burdened. This reliance echoed the district court's express reliance on the "temporary nature" of the denial. Pet. App. 20a. In sum, the court's description of Petitioner's daily studies as "beneficial, not mandatory," was not the dispositive fact in its analysis.

Petitioner is thus wrong in asserting that the Eleventh Circuit "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." Pet. 7 (emphasis added); *see id.* at

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substantial burden must place more than an inconvenience on religious exercise.'" (quoting *Midrash*, 366 F.3d at 1227)).

2, 6, 8, 12 (similarly asserting that the Court of Appeals held that there was no substantial burden "because" the burdened activity was non-mandatory). Nowhere in its brief analysis did the court say that; and, in light of the panel's reliance on factors that otherwise would have been irrelevant, its opinion did not hold that, *as a matter of law*, the non-mandatory nature of the practice was dispositive.

Nor did the court "limi[t] the substantial burden inquiry to religious practices mandated by a faith." *Id.* at 7. Although the court stated, without analysis, that "Hoever's averments established that engaging in daily studies was beneficial, not mandatory," Pet. App. 8a, that unadorned statement indicates that the non-mandatory nature of the practice was *relevant* to the substantial-burden analysis. It did not purport to repudiate prior circuit precedent holding that the dispositive inquiry is whether the government has substantially burdened a practitioner's sincerely held religious beliefs, regardless of whether those beliefs have to do with mandatory or non-mandatory religious practices. Similarly, the panel's passing statement is far too thin a reed on which to posit a new circuit split.[4]

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[4] Nor did the unpublished cases identified by amici hold that the non-mandatory nature of a practice was dispositive. In *Muhammad v. Sapp*, 388 F. App'x 892, 896 (11th Cir. 2010), an RLUIPA case, the court merely found that—like the court below here—plaintiff had not established that the government's conduct amounted to more than an "inconvenience." *See also Smith v. Governor for Alabama*, 562 F. App'x 806, 813 (11th Cir. 2014) (similar). In neither case did the court hold that the non-mandatory nature of a practice was dispositive.

Levitan v. Ashcroft helps to illustrate the problem with Petitioner's reading of the decision below. 281 F.3d 1313 (D.C. Cir. 2002). There, appellees argued that *Henderson v. Kennedy*, 253 F.3d 12 (D.C. Cir. 2001) had articulated "[a] requirement that a religious practice be mandatory to warrant First Amendment protection." *Id.* at 1319. The *Levitan* court rejected that contention, even though the panel in *Henderson* stressed that the challenged regulation did not prevent plaintiffs "from engaging in conduct their religion requires." 253 F.3d at 16. Although whether the government's conduct "affects a mandatory religious practice is, obviously, relevant evidence of an infringement on the free exercise of religion" (*Levitan*, 281 F.3d at 1320), nothing in *Henderson* indicated that *only* impingement of mandatory practices would violate the First Amendment. Instead, the *Henderson* court had "mentioned 'required' religious conduct in the context of a list of many scenarios that might have suggested that the [government's conduct] substantially burdened the plaintiff's religious freedom." *Id.* at 1320. Like the court below here, the *Henderson* court also relied on other facts to determine that the practice was not substantially burdened, and merely mentioned mandatory practice as a relevant factor.

4. Because the decision below applied settled law on which the courts of appeals are not split, the only reason to take the case is to decide whether the lower courts correctly applied that law to the particular facts present here. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10. This is not

one of the rare cases in which error correction from this Court is warranted. Several considerations support that conclusion.

First, it is far from clear that the lower courts reversibly erred. Notably, five judges—the magistrate judge, the district court judge, and all three judges on the Eleventh Circuit panel—concluded that the partial denial of *some* but not *all* of a prisoner's religious texts during a temporary period of administrative confinement did not rise to the level of a free-exercise violation in the unusual circumstances presented here; and the district court came to that conclusion without relying on the "non-mandatory" character of his religious exercise. In addition, the court of appeals did not make the legal error Petitioner asserts, and Petitioner does not cite any authority otherwise indicating that the lower courts incorrectly applied settled law to the particular facts present here.

Second, even assuming that the lower courts erred, the decision below is unpublished and therefore is "not considered binding precedent" within the Eleventh Circuit. *See* 11th Cir. R. 36-2.

Third, this case involves unusual facts that are unlikely to recur. It does not involve a prison policy prohibiting Bibles in administrative confinement; the policy here provides the opposite. It involves only a temporary deprivation, not a permanent deprivation. It involves only a partial deprivation, as Petitioner was provided his own Spanish-language Bible; and Petitioner's own submission indicated that he was able to make at least some use of his own Bible, although not as much use as he could have made of

his other Bibles. There is no reason to believe that deprivations of this kind occur frequently.[5]

Fourth, this case is not a good candidate for error correction because, even if this Court grants and reverses as to the first question presented, it is far from clear that Petitioner would be afforded any relief. On remand, Petitioner would *also* have to satisfy the test set out in *Turner v. Safley*, 482 U.S. 78 (1987) *and* overcome qualified immunity. And, even if this Court were to hold that the court of appeals erred inasmuch as it relied on the "non-mandatory" character of Petitioner's religious exercise, the district court did not rely on that rationale, demonstrating that this case does not turn on the alleged error of which Petitioner complains.

In sum, residual doubts concerning the correctness of the Eleventh Circuit's fact-intensive holding are not sufficiently important to merit this Court's review.

B. This Case Is A Poor Vehicle To Address Whether A Burdened Religious Practice Must Be Mandatory.

For several reasons, this case is a poor vehicle for resolving the principal question Petitioner presents.

First, Petitioner maintains that the Eleventh Circuit wrongly concluded that he had not established

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[5] In addition, although not relevant at the summary-judgment stage, it is far from clear that this case involves an intentional, rather than accidental, deprivation. *See* Pet. App. 14a-15a (noting that Officer Kriss "declare[d] that [Petitioner] 'signed for his property and did not tell [her] that he needed another bible'").

a substantial burden on his free exercise, but whether he must establish a substantial burden in this context to begin with is itself an issue that has divided the circuits. *See* Pet. 8-9 (noting that four circuits "hold that substantial burdens on a prisoner's religious observance are not limited to burdens on mandatory religious practices," while "[t]he Fifth Circuit follows a completely different rule" and "holds that a prisoner prosecuting a free exercise claim need not establish a substantial burden at all"); Br. of Muslim Advocates et al., at 5 n.3 (discussing the split). That question, however, was neither raised nor passed on below; is not fairly within the questions presented; and is thus not properly before this Court. Indeed, Petitioner himself invited the district court to apply the substantial-burden test, *see Kriss*, ECF No. 74, at 7, and has thus waived any argument that the court below erred insofar as it did not follow the Third and Fifth Circuit's contrary approach.

Put another way, Petitioner raises an issue regarding the proper application of the substantial burden analysis, but this Court has never decided whether the substantial burden analysis applies at all in this context. Petitioner may no longer raise that threshold issue, and he identifies no reason to review what could ultimately amount to a hypothetical question.

Second, the issue Petitioner asks this Court to consider was not fully developed below. The parties never briefed whether a religious practice must be mandatory to establish a substantial burden and, aside from the Eleventh Circuit's bare statement indicating that the non-mandatory nature of the

practice was *relevant*, the courts below never passed on it. By way of contrast, in the cases discussed by Petitioner the courts analyzed the issue at length. *See, e.g.*, *Ford v. McGinnis*, 352 F.3d 582, 593 (2d Cir. 2003) (Sotomayor, J.); *Levitan v. Ashcroft*, 281 F.3d 1313, 1319-20 (D.C. Cir. 2002). If and when this Court elects to resolve the First Amendment issue Petitioner presents, it should have the benefit of a reasoned lower court decision issued after full adversarial briefing.

Third, as explained above, it is far from clear that the Eleventh Circuit's decision turned on the question whether the First Amendment extends to a prisoner's non-mandatory religious exercise. Even if its decision could be construed to answer that question in the negative, this Court should not decide an important question of law in the context of a case that arguably does not implicate that issue.

Finally, Respondents and Petitioner agree that the First Amendment extends to a prisoner's non-mandatory religious exercise. If the Court takes up that issue, Pet. i, appointed counsel would be required to present full adversarial briefing.

C. Summary Reversal Is Not Warranted.

This case does not call for the "extraordinary remedy" of summary reversal. *Brosseau v. Haugen*, 543 U.S. 194, 207 (2004) (Stevens, J., dissenting); *see Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting) (explaining that summary reversal is "usually reserved by this Court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is

clearly in error"). Even when a purported error is of constitutional dimension, summary reversal "should be reserved for palpably clear cases of constitutional error." *Eaton v. City of Tulsa*, 415 U.S. 697, 707 (1974) (Rehnquist, J., dissenting). Yet it is unsettled whether substantial burden analysis is even applicable in this factual scenario. In addition, the decision below does not conflict with *any* of this Court's precedents, and Petitioner does not argue to the contrary. And, like countless other decisions of which this Court's review is sought, the decision below turned on the lower courts' application of the appropriate rule of law to the facts.

Petitioner's request for summary reversal is predicated on the assumption that "the court of appeals decided that he was wrong about what his own faith required of him." Pet. 25. The court of appeals did not make any such decision. The Eleventh Circuit stated in passing that "*Hoever's* averments established that engaging in daily studies was beneficial, not mandatory," Pet. App. 8a (emphasis added), *not* that "petitioner misunderstood what his own faith requires of him," Pet. 27. Circuit precedent is consistent with this Court's admonition that "[c]ourts are not arbiters of scriptural interpretation," *Id.* at 26 (quoting *Thomas*, 450 U.S. at 716); *see, e.g.*, *Davila*, 777 F.3d at 1204 (same).

At bottom, Petitioner argues that the panel's passing reference to "Hoever's averments," Pet. App. 8a, did not accurately summarize pertinent record evidence on that point. *See* Pet. 24-27. As explained above, the courts below relied on multiple considerations taken together. A request for error

correction based on a disputed assessment of record evidence concerning one particular fact that the court of appeals (but not the district court) deemed relevant to its analysis does not suffice to establish reversible error, is inappropriate for summary disposition, and is not sufficiently important to warrant this Court's review.[6]

II. THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER THE SECOND QUESTION PRESENTED.

A. The Second Question Presented Is Not Independently Certworthy.

Petitioner asserts a split on whether "42 U.S.C. § 1997e(e) permit[s] a prisoner to recover compensatory damages against prison officials who violate the First Amendment." Pet. i. As that formulation makes clear, the second question presented would be relevant only if this Court grants certiorari as to the first question presented and resolves that question in Petitioner's favor. For the reasons set forth in the preceding section, the question whether the Eleventh Circuit erred in resolving the merits of Petitioner's First Amendment claim does not warrant this Court's review. Moreover, Petitioner himself appears to recognize that his second question presented is not independently certworthy. *See* Pet.

[6] Unlike in *Ben-Levi v. Brown*, 136 S. Ct. 930 (2016) (mem.) (Alito, J., dissenting), the courts below did not address the standard set forth in *Turner v. Safley*, 482 U.S. 78, 89 (1987). The record there was thus far more developed, and the one-time deprivation that was contrary to prison policy and potentially a misunderstanding here is a far cry from the discriminatory policy at issue in *Ben-Levi*. Respondents, moreover, do not suggest that Petitioner "misunderstands his own religion." *Id.* at 933.

15-16. Accordingly, this Court should not grant review to determine whether Petitioner could have recovered certain damages if he had suffered a First Amendment violation.

B. The Second Question Presented Was Neither Raised Nor Passed On Below.

"[O]rdinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *see Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (explaining that question presented in petition but "not raised in Court of Appeals . . . [was] not properly before" the Court). The second question presented is not properly before the Court because it was neither raised by Petitioner nor passed on by the courts below. He did not press the alternative argument that he was entitled to recover damages for constitutional injuries without making a "prior showing of physical injury" within the meaning of 42 U.S.C. § 1997e(e). Instead, as discussed below, Petitioner repeatedly contended only that he did in fact suffer a sufficient physical injury to support recovery for mental and emotional injuries.

In his amended complaint, Petitioner did not specify any particular injury that he suffered but alleged only that he "spent twenty-six (26) days in confinement unable to practice his religion" and that "Defendant's (Kriss') actions violated Plaintiff's rights of freedom to exercise his religion under the First Amendment of the United States Constitution." Am. Compl., ECF No. 53, at 11, 12.

In response to Respondents' motion to dismiss, Petitioner argued only that he had indeed alleged a physical injury that would support recovery for mental and emotional damages under § 1997e(e) and that failing to allege a physical injury was not a "filing prerequisite for the Federal Civil Action itself" but a "limitation on recovery." Opp. to Mot. to Dismiss, ECF No. 43, at 23-24. Petitioner did not contend that he could recover compensatory damages without showing any physical injury.

In his report and recommendation, the magistrate judge held that even if Petitioner's alleged physical injury were related to his First Amendment claims, that injury was "de minimis" and thus Petitioner was "necessarily . . . limited to nominal damages." Pet. App. 40a-41a. Petitioner did not argue that his alleged constitutional injuries were compensable absent any showing of related physical injury, and the magistrate judge did not consider that issue. Similarly, in Petitioner's objections to the magistrate judge's report and recommendation regarding Respondents' motion to dismiss, he argued only that the magistrate judge had abused his discretion in holding that he had not suffered a sufficient physical injury. Objections to First Rept. & Recommendation, ECF No. 48, at 19-21.[7]

On appeal to the Eleventh Circuit, Petitioner again argued only that the district court abused its discretion in categorizing his alleged physical injury as "de minimis" and that the physical injury question should go to a jury. Appellant's Br. at 23-24. Yet again,

[7] The district court adopted the magistrate judge's report and recommendation. Pet. App. 22a-23a.

he did not argue that the purported First Amendment violations gave rise to independently compensable injuries to which Section 1997e(e) did not apply.

In affirming the district court, the Eleventh Circuit addressed Petitioner's argument that he had alleged a physical injury sufficient to justify recovery of compensatory damages. For example, the court explained, "Hoever argues that he incurred a sinus injury when exposed to chemical agents while in disciplinary confinement, but he challenged the conditions of his confinement on the ground it violated his right to due process." Pet. App. 7a. "Because no due process violation occurred," the court reasoned, "Hoever was not entitled to any damages on the basis of his sinus injury." *Id.* Similarly, the court explained that, whether or not Petitioner's alleged physical injuries were de minimis, the physical injuries he alleged were not attributable to the asserted constitutional violations. *Id.* at 6a ("Hoever did not allege he suffered a physical injury *because of* Kriss's constitutional violations." (emphasis added)). Consistent with the limited argument Petitioner presented, the Eleventh Circuit did not consider the argument that the asserted First Amendment violation gave rise to a compensable injury without any showing of physical injury, nor did it address whether such an argument would be consistent with circuit precedent. *See id.* at 6a-7a.

In sum, Petitioner argued that he did make a "prior showing of physical injury" within the meaning of § 1997e(e); but he did not advance the alternative argument that he could recover compensatory damages for his asserted First Amendment violation

without making such a showing. Thus, the second Question Presented—"whether prisoners who suffer a First Amendment violation, but not a physical injury, can recover compensatory damages," Pet. 15 (alterations omitted)—was never raised or passed on below and is not properly before this Court. *See August*, 450 U.S. at 362.

C. Even If Petitioner Had Preserved This Issue, The Same Outcome Would Have Obtained In Nearly Every Circuit.

Not only would reaching this issue not change the outcome of Petitioner's case, nearly every court of appeals would have affirmed the result reached by the district court.

1. In addition to the Eleventh Circuit, seven other Circuits have held that Section 1997e(e) bars claims premised on constitutional violations to the extent that a prisoner seeks to recover only mental or emotional injuries resulting from such violations. *See Davis v. D.C.*, 158 F.3d 1342, 1349 (D.C. Cir. 1998) ("§ 1997e(e) precludes claims for emotional injury without any prior physical injury, regardless of the statutory or constitutional basis of the legal wrong"); *Thompson v. Carter*, 284 F.3d 411, 417 (2d Cir. 2002) ("Section 1997e(e) applies to claims in which a plaintiff alleges constitutional violations so that the plaintiff cannot recover damages for mental or emotional injury for a constitutional violation in the absence of a showing of actual physical injury."); *Allah v. Al-Hafeez*, 226 F.3d 247, 251 (3d Cir. 2000) (holding that Section 1997e(e) bars recovery for mental or emotional injuries resulting from First Amendment violation); *Geiger v. Jowers*, 404 F.3d 371, 375 (5th

Cir. 2005) ("Section 1997e(e) applies to all federal civil actions in which a prisoner alleges a constitutional violation, making compensatory damages for mental or emotional injuries non-recoverable, absent physical injury."); *Cassidy v. Indiana Dep't of Corr.*, 199 F.3d 374, 376 (7th Cir. 2000) (recognizing the Seventh Circuit's "case law applying § 1997e(e) to constitutional torts" (citing *Rowe v. Shake*, 196 F.3d 778, 781 (7th Cir. 1999))); *Royal v. Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004) ("we read section 1997e(e) as limiting recovery for mental or emotional injury in all federal actions brought by prisoners"); *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001) ("The statute limits the remedies available, regardless of the rights asserted, if the only injuries are mental or emotional.").

Similarly, the Fourth and Sixth Circuits have suggested that Section 1997e(e) would prevent recovery for mental or emotional injuries resulting from constitutional violations. *See Wilcox v. Brown*, 877 F.3d 161, 169 (4th Cir. 2017) (suggesting that Section 1997e(e) could prevent "recovering compensatory damages 'for mental or emotional injury'" associated with First Amendment violations); *King v. Zamiara*, 788 F.3d 207, 212 (6th Cir. 2015) ("First Amendment rights are themselves injuries, apart from any mental, emotional, or physical injury that might also arise from the deprivation, and . . . § 1997e(e) does not bar all relief for injuries to First Amendment rights"). But neither Circuit has held that Section 1997e(e) does not apply to constitutional claims; instead, both hold only that constitutional violations can give rise to compensable injuries other than mental or emotional injuries.

Only the Ninth Circuit has concluded—without analysis—that "§ 1997e(e) does not apply to First Amendment Claims regardless of the form of relief sought." *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998). Yet in *Canell*, the plaintiff was "not asserting a claim for 'mental or emotional injury,'" *id.*, and thus the court had no occasion to consider whether Section 1997e(e) would bar recovery for mental or emotional injuries resulting from a constitutional violation. Accordingly, following *Canell*, the Ninth Circuit has on several occasions barred recovery for mental or emotional injuries resulting from constitutional violations. *See Oliver v. Keller*, 289 F.3d 623, 630 (9th Cir. 2002) ("To the extent that appellant has actionable claims for compensatory, nominal or punitive damages—premised on violations of his Fourteenth Amendment rights, and not on any alleged mental or emotional injuries—we conclude the claims are not barred by § 1997e(e)."); *Acosta v. Arpaio*, 466 F. App'x 556, 557 (9th Cir. 2011) (applying Section 1997e(e) to bar Fourth Amendment and Eighth Amendment claims); *Esslinger v. Worrall*, 89 F. App'x 622, 623 (9th Cir. 2004) (barring Fourteenth and Eighth Amendment claims).

In sum, no circuit has held that, notwithstanding Section 1997e(e), a prisoner can recover damages for mental or emotional injuries resulting from a constitutional violation without an accompanying physical injury.

Here, because Petitioner's alleged physical injury did not result from the purported First Amendment violation, the Eleventh Circuit affirmed the district court's rejection of his claim for mental or emotional

damages resulting from the purported First Amendment violation—a straightforward application of Section 1997e(e). With the possible exception of the Ninth Circuit (as discussed above), every circuit to have considered the issue would have done the same.[8]

2. Properly understood, the question in this case is whether plaintiffs can recover for actual injuries, resulting from constitutional violations, that are not conceptualized as mental or emotional injuries without establishing physical injury. Six circuits (the D.C., Second, Fourth, Sixth, Seventh, and Ninth Circuits) hold that constitutional violations can result in actual injuries that do not qualify as "mental or emotional injuries" barred by Section 1997e(e). *See* Pet. 16-18. Only a single circuit (the Third Circuit) has squarely rejected that proposition. The other circuits on which Petitioner relies, including the Eleventh Circuit, do not appear to have addressed that proposition.

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[8] The Eleventh Circuit also noted that, had Petitioner established a First Amendment violation, Section 1997e(e) would not bar him from recovering nominal damages. Pet. App. 6a. Every circuit to have addressed the issue agrees. *See Aref v. Lynch*, 833 F.3d 242, 266 (D.C. Cir. 2016) ("[E]very circuit . . . agrees that nominal damages are available in this context."); *Carter*, 284 F.3d at 418 (citing cases).

The Eleventh Circuit also concluded (Pet. App. 6a) that Section 1997e(e) would bar Petitioner from recovering punitive damages. Petitioner did not raise any issue concerning punitive damages in his petition and, in any event, has never argued that Section 1997e(e) does not bar punitive damages. Further, he is not entitled to punitive damages because, among other reasons, he did not establish a First Amendment violation. Thus, that distinct issue is not presented here.

Three of the circuits on which Petitioner relies have held only that Section 1997e(e) applies to constitutional claims and bars recovery for mental or emotional injuries absent physical injury; none of the three has considered whether Section 1997e(e) would bar recovery for injuries that are *not* mental or emotional in nature:

· Tenth Circuit: Citing *Searles v. Van Bebber*, 251 F.3d 869, 875-76 (10th Cir. 2001), Petitioner contends that the Tenth Circuit "equates injuries to First Amendment interests with mental or emotional injuries." Pet. 19. In *Searles*, however, the only damages at issue were for mental or emotional injuries: The jury awarded "'mental and emotional injuries' in the words of the verdict form." 251 F.3d at 874. The court held only that Section 1997e(e) barred those damages, explaining that it "limits the remedies available, regardless of the rights asserted, if the only injuries are mental or emotional." *Id.* at 876. Thus, the court did not consider whether constitutional violations can give rise to injuries other than mental or emotional injuries. In other words, the Tenth Circuit merely rejected the plaintiff's argument that Section 1997e(e) "should be construed to have no effect on First Amendment claims." *Id.* at 875.

· Eighth Circuit: Petitioner similarly notes that the Eighth Circuit held in *Royal v. Kautzky* that Section 1997e(e) applies to constitutional claims. 375 F.3d 720, 723 (8th Cir. 2004) ("[W]e read section 1997e(e) as limiting recovery for mental or emotional injury in all federal actions brought by prisoners."). Like the Tenth Circuit, however, the Eighth Circuit did not consider whether constitutional violations can give rise to injuries other than mental or emotional

injuries or whether such injuries would be compensable.

· Fifth Circuit: Although the Fifth Circuit has held that Section 1997e(e) applies even to constitutional claims—as with every other circuit to consider the issue—it made clear "that it is the nature of the relief sought, and not the underlying substantive violation, that controls." *Geiger v. Jowers*, 404 F.3d 371, 375 (5th Cir. 2005). As a result, the court held in *Geiger* only that "compensatory damages for mental or emotional injuries [are] non-recoverable, absent physical injury," *id.*, not that compensatory damages for other types of injuries resulting from constitutional violations would be unrecoverable.[9]

The Third Circuit has held that injuries resulting from constitutional violations qualify as "mental or emotional injuries" for which damages cannot be recovered absent a physical injury. *See Allah v. Al-Hafeez*, 226 F.3d 247, 250-51 (3d Cir. 2000). By contrast, the Eleventh Circuit bars the recovery of compensatory damages—regardless of the type of injury—but it has never confronted whether actual injuries other than mental or emotional injuries resulting from constitutional violations would fall into that category. *See Harris v. Garner*, 190 F.3d 1279, 1290 (11th Cir.), *reh'g en banc granted*, *op. vacated*,

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[9] *See also Hutchins v. McDaniels*, 512 F.3d 193, 196 (5th Cir. 2007) (plaintiff's "failure to allege any physical injury precludes his recovery of any compensatory damages for emotional or mental injuries suffered"); *Boyd v. Driver*, 495 F. App'x 518, 524 (5th Cir. 2012) ("the district court was correct to hold that the PLRA precludes Boyd from seeking compensatory damages for the mental suffering he alleged resulted from defendants' conduct").

197 F.3d 1059 (11th Cir. 1999), *& op. reinstated in part on reh'g*, 216 F.3d 970 (11th Cir. 2000).

In *Aref v. Lynch*, the D.C. Circuit made plain the critical distinction between the question whether § 1997e(e) applies to constitutional claims and the question whether, absent physical injury, the statute allows recovery of damages for injuries other than mental or emotional injuries resulting from constitutional violations. 833 F.3d 242 (D.C. Cir. 2016). There, the court distinguished *Davis v. District of Columbia*, 158 F.3d 1342 (D.C. Cir. 1998), where the court applied Section 1997e(e) to bar recovery of damages for mental or emotional injuries absent physical injury even though plaintiff asserted a constitutional violation. The *Aref* court explained that although *Davis* held that Section 1997e(e) does apply to constitutional claims, that does not mean that Section 1997e(e) bars recovery in such cases for injuries that are *not* mental or emotional. *See Aref*, 833 F.3d at 262. In other words, the Fifth, Eighth, Tenth, and Eleventh Circuits have issued holdings like that in *Davis*, but have *not* considered the further question decided in *Aref*.

In short, the circuits do not appear to be "intractably divided" regarding Section 1997e(e)'s application in this context. Pet. 15. Only the Third Circuit has clearly departed from the majority rule, while the others—including the court below—have not squarely decided the issue.

3. Even if this Court were to resolve this shallow split, the outcome in this case would be unaffected because Petitioner did not allege any actual injury resulting from any constitutional violation. The

circuits to hold that constitutional violations can give rise to injuries that are compensable absent physical injury require plaintiffs to establish such injuries "with sufficient certainty to avoid damages based either on pure speculation or the so-called inherent value of the rights violated," or only nominal damages can be awarded. *Aref*, 833 F.3d at 266 (quoting *Hobson v. Wilson*, 737 F.2d 1, 62 (D.C. Cir. 1984)).[10] In his amended complaint, Petitioner did not allege that he suffered any ascertainable non-mental, non-emotional injury resulting from the purported First Amendment violation. Nor did he proffer any evidence of such an injury. Thus, even if the circuits were intractably divided on this issue the Court should deny the petition as to the second question presented because "it is evident that the resolution of the conflict could not change the result reached below." SUPREME COURT PRACTICE, § 4.4(f), p. 249.

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[10] *See also Thompson v. Carter*, 284 F.3d 411, 416, 418 (2d Cir. 2002) (explaining that "Section 1997e(e) . . . does not restrict a plaintiff's ability to recover compensatory damages for actual injury" and that it would not "ba[r] an award of compensatory damages for the loss of [plaintiff's] property provided he can establish actual injury"); *Piver v. Pender Cty. Bd. of Educ.*, 835 F.2d 1076, 1082 (4th Cir. 1987) (explaining that constitutional injuries "can be compensated with substantial damages only to the extent that it is 'reasonably quantifiable'") (relied on by *Wilcox v. Brown*, 877 F.3d 161, 170 (4th Cir. 2017)); *King v. Zamiara*, 788 F.3d 207, 214 (6th Cir. 2015) ("a plaintiff must demonstrate that he or she suffered an actual injury in order to receive compensatory damages for violations of his or her constitutional rights"); *accord Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986) (holding that "*no* compensatory damages could be awarded for violation of [constitutional] right absent proof of actual injury").

D. This Court Has Consistently Denied Petitions That Served As Much Better Vehicles For Resolving Essentially the Same Issue.

This Court has denied four previous petitions for writs of certiorari that raised essentially the same issue as the second question presented—including a petition arising out of the Eleventh Circuit. *See King v. Zamiara*, 788 F.3d 207 (6th Cir. 2015), *cert denied*, 136 S. Ct. 794 (2016); *Royal v. Kautzky*, 375 F.3d 720 (8th Cir. 2004), *cert. denied*, 544 U.S. 1061 (2005); *Searles v. Van Bebber*, 251 F.3d 869 (10th Cir. 2001), *cert. denied*, 536 U.S. 904 (2002); *Harris v. Garner*, 216 F.3d 970 (11th Cir. 2000), *cert. denied*, 532 U.S. 1065 (2001). Petitioner identifies no changed circumstance that would warrant a different result here. And, in light of the vehicle problems discussed above, those other petitions would have provided much better opportunities for considering the availability of damages under 42 U.S.C § 1997e(e).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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