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, J. SERRATO, CORRECTION OFFICER,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Table Of Authorities ii
Reply Brief For Petitioner 1
I. The first question warrants review. 2
A. Among the courts of appeals, the Eleventh Circuit alone holds that burdens on non-mandatory practices are lawful per se 2
B. This case is an excellent vehicle to address the split. 7
C. The first question presented is important. 9
II. The second question warrants review 10
Conclusion 12

TABLE OF AUTHORITIES

Cases

Ben-Levi v. Brown, 136 S. Ct. 930 (2016) 7
Caspari v. Bohlen, 510 U.S. 383 (1994) 8
Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995) 2, 3, 4, 5
Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater, 2 F.3d 1514 (11th Cir.1993) 3
Citizens United v. Fed. Election Com'n., 558 U.S. 310 (2010) 8
Cohen v. California, 403 U.S. 15 (1971) 10
Davies v. Toole, No. 5:16-cv-65, 2016 WL 7257004 (S.D. Ga. Dec. 14, 2016) 3
Davilla v. Watts, No. 2:15-cv-171, 2016 WL 1706172 (S.D. Ga. Apr. 28, 2016) 3
Floyd v. Williams, No. 6:15-cv-103, 2016 WL 490633 (S.D. Ga. Jan. 12, 2016) 3
Hill v. Gramiak, No. 5:15-cv-40, 2015 WL 9463178 (S.D. Ga. Dec. 28, 2015) 3
Hoke v. Lyle, No. 6:16-cv-45, 2016 WL 4197590 (S.D. Ga. Aug. 8, 2016) 3
Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374 (1995) 8
Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004) 2, 3
Ohio v. Robinette, 519 U.S. 33 (1996) 7-8
Perez v. Watts, No. 2:15-cv-76, 2015 WL 9592536 (S.D. Ga. Dec. 31, 2015) 3
Rosales v. Watts, No. 2:15-cv-94, 2016 WL 53879 (S.D. Ga. Jan. 4, 2016) 3
Shaw v. Upton, No. 6:16-cv-6, 2016 WL 4385855 (S.D. Ga. Aug. 15, 2016) 3
Simmons v. Williams, No. CV614–111, 2015 WL 1945315 (S.D. Ga. Apr. 29, 2015) 3

Simmons v. Williams, No. 6:14-cv-111,
2017 WL 3427988 (S.D. Ga. Aug. 9, 2017) 3

Townsend v. Headley, No. 1:15-cv-02256-KOB-HGD,
2016 WL 3573125 (N.D. Ala. May 11, 2016) 3

Turner v. Safely, 482 U.S. 78 (1987) 9

United States v. Grubbs, 547 U.S. 90 (2006) 7

United States v. Sec'y, Florida Dep't of Corr.,
No. 12-22958-CIV, 2015 WL 1977795
(S.D. Fla. Apr. 30, 2015) 3-4

Warner v. City of Boca Raton,
267 F.3d 1223 (11th Cir. 2001) 2, 6

Watts v. Florida International University,
495 F.3d 1289 (11th Cir. 2007) 4

Wilkinson v. GEO Group, Inc.,
617 F. App'x 915 (11th Cir. 2015) 3, 5

Statutes

42 U.S.C. § 1997e(d)(2) 9, 11

REPLY BRIEF FOR PETITIONER

Respondents' concession that "the First Amendment extends to a prisoner's non-mandatory religious exercise," Br. in Opp. 19, contradicts their position below, amounts to a confession of error, and calls for this Court's consideration of the first question presented.

The Eleventh Circuit has held many times that only burdens on mandatory practices can be substantial. Contrary to their current position, Respondents argued below that a substantial burden "either compels the religious adherent to engage in conduct that his religion forbids (such as eating pork, for a Muslim or Jew) or forbids him to engage in conduct that his religion requires (such as prayer)." ECF No. 68 (Defs.' Mot. Summ. J.) at 8. Both the district court and the court of appeals agreed that only burdens on mandatory observances can be substantial. Pet. App. 18a–19a; 7a–8a. Consistent with its longstanding precedent, the court of appeals rejected Petitioner's free exercise claim on that basis. *Id.* 7a–8a.

The Court should also grant certiorari on the second question presented, which concerns the compensatory damages claim. Six circuits would have decided that question differently. In many cases, the need to resolve one question in order to reach a second question counsels against reviewing the second question. But here, the court of appeals' answer to the first question—and its mandatory-practice rule—are patently incorrect. Because the first issue is unlikely to divide the Court, there is every reason to believe the full Court would reach the second question if review were granted on both questions.

I. The first question warrants review.

A. Among the courts of appeals, the Eleventh Circuit alone holds that burdens on non-mandatory practices are lawful per se.

1. The Eleventh Circuit regularly holds that an imposition on a non-mandatory religious practice cannot—as a matter of law—constitute a substantial burden. The decision below adheres to these prior Eleventh Circuit holdings. The Eleventh Circuit is split with five other circuits on this issue. Pet. 16–18.

Over two decades ago, the Eleventh Circuit ruled in *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995), that only burdens on mandatory religious exercise can be substantial. *Cheffer* held that a federal statute restricting protests in front of abortion clinics did not impose a substantial burden on protesters for a single reason: The protesters "[did] not assert that the exercise of their religion *requires* them to use physical force or threats of physical force to prevent abortions" and "[did] not argue that the exercise of their religion *requires* them to physically obstruct clinic entrances." *Id.* at 1522 (emphasis added).

Six years later, in *Warner v. City of Boca Raton*, the court stated that under *Cheffer*, "a person's exercise of religion would be substantially burdened *only if* he were prevented from engaging in religiously mandated activity, or required to participate in activity prohibited by his religion." 267 F.3d 1223, 1227 (11th Cir. 2001) (citing *Cheffer*, 55 F.3d at 1522).

Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004), in which two Jewish congregations challenged a zoning ordinance, applies

the same rule. The court concluded that "an individual's exercise of religion is 'substantially burdened' if a regulation completely prevents the individual from engaging in religiously mandated activity, or if the regulation requires participation in an activity prohibited by religion." *Id.* at 1227 (citing *Cheffer,* 55 F.3d at 1522, and *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater,* 2 F.3d 1514, 1550 (11th Cir.1993)).

Wilkinson v. GEO Group, Inc., a prisoner free exercise case, stated the rule again: "To prove that his religious exercise was substantially burdened, [a prisoner] *must* present evidence that he was coerced to perform conduct that his religion forbids or prevented from performing conduct that his religion *requires*." 617 F. App'x 915, 918 (11th Cir. 2015) (emphasis added) (citing *Midrash Sephardi, Inc.*, 366 F.3d at 1227).

Eleventh Circuit district courts have applied this rule again and again.[1] In *United States v. Sec'y, Florida Dep't of Corr.*, the court threw out a claim

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[1] *E.g.*, *Simmons v. Williams*, No. 6:14-cv-111, 2017 WL 3427988, at *15 (S.D. Ga. Aug. 9, 2017); *Townsend v. Headley*, No. 1:15-cv-02256-KOB-HGD, 2016 WL 3573125, at *3 (N.D. Ala. May 11, 2016); *Davies v. Toole*, No. 5:16-cv-65, 2016 WL 7257004, at *5 (S.D. Ga. Dec. 14, 2016); *Shaw v. Upton*, No. 6:16-cv-6, 2016 WL 4385855, at *4 (S.D. Ga. Aug. 15, 2016); *Hoke v. Lyle*, No. 6:16-cv-45, 2016 WL 4197590, at *6 (S.D. Ga. Aug. 8, 2016); *Davilla v. Watts*, No. 2:15-cv-171, 2016 WL 1706172, at *6 (S.D. Ga. Apr. 28, 2016); *Floyd v. Williams*, No. 6:15-cv-103, 2016 WL 490633, at *4 (S.D. Ga. Jan. 12, 2016); *Rosales v. Watts*, No. 2:15-cv-94, 2016 WL 53879, at *6 (S.D. Ga. Jan. 4, 2016); *Perez v. Watts*, No. 2:15-cv-76, 2015 WL 9592536, at *4 (S.D. Ga. Dec. 31, 2015); *Hill v. Gramiak*, No. 5:15-cv-40, 2015 WL 9463178, at *3 (S.D. Ga. Dec. 28, 2015); *Simmons v. Williams*, No. CV614–111, 2015 WL 1945315, at *8 (S.D. Ga. Apr. 29, 2015).

challenging Florida's refusal to provide kosher diets to prisoners because the United States did not show that Florida "completely prevents a prisoner from engaging in religiously mandated activity, or forces a prisoner to participate in an activity prohibited by his or her religion . . ." No. 12-22958-CIV, 2015 WL 1977795, at *14 (S.D. Fla. Apr. 30, 2015).

Respondents claim—incorrectly, and without citing a germane case—that the mandatory nature of a practice is merely relevant to the substantial burden inquiry in the Eleventh Circuit. Br. in Opp. 9–11. *Watts v. Florida International University*, on which Respondents rely, rejects a central-practice rule but explicitly reaffirms the mandatory-practice rule: "Watts must plead that he believes his religion *compels* him to take the actions that resulted in his termination." 495 F.3d 1289, 1297 (11th Cir. 2007) (emphasis added). The relevant question here is whether a *mandatory* practice is required. *Watts* answers that question in the affirmative. *Id.*

2. Although they now disavow the contention, Respondents argued below that only burdens on mandatory religious exercise can be substantial. In moving for summary judgment, Respondents drew on the *Cheffer/Warner/Midrsash Sephardi/Wilkinson* line of cases: "The Eleventh Circuit defines 'substantial burden' as one that either compels the religious adherent to engage in conduct that his religion forbids (such as eating pork, for a Muslim or Jew) or forbids him to engage in conduct that his religion *requires* (such as prayer)." ECF No. 68 (Defs.' Mot. Summ. J.) at 8 (emphasis added) (citing *Cheffer*, 55 F.3d at 1522). Respondents argued that "no reasonable jury could believe that Defendant's conduct resulted in a 'substantial burden' that

completely prevented [Petitioner] from engaging in *religiously mandated activity*." *Id.* at 10 (emphasis added) (citing *Cheffer*, 55 F.3d at 1522).

The district court agreed: "[A] plaintiff 'must present evidence that he was coerced to perform conduct that his religion forbids or prevented from performing conduct that his religion requires.'" Pet. App. 18a–19a (quoting *Wilkinson*, 617 F. App'x at 918).

Respondents pressed the same argument in the court of appeals, asserting that under Eleventh Circuit precedent, a prisoner "'must present evidence that he was coerced to perform conduct that his religion forbids or prevented from performing conduct that his religion *requires*.'" Appellees' Br. at 26 (emphasis added) (quoting *Wilkinson*, 617 F. App'x at 918).[2]

3. The court of appeals—consistent with its own precedent, the district court opinion, and Respondents' arguments—held that Petitioner could not establish a substantial burden because Kriss burdened a religious exercise that was "beneficial, not mandatory." Pet. App. 8a.

The opinion below states that a substantial burden occurs where a prison "'requires participation in an activity prohibited by'" a prisoner's faith—a circumstance not relevant here—or where the prison "'completely prevents the individual from engaging in religiously mandated activity.'" *Id.* at 7a. After setting forth the mandatory standard, the court of appeals

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[2] Because Respondents now disavow their arguments below on this issue, appointment of amicus counsel may be appropriate, as they note. *See* Br. in Opp. 17.

applies it to dispose of Petitioner's claim: "Hoever's averments established that engaging in daily studies was beneficial, not mandatory. We cannot say that the brief denial of Hoever's study materials imposed a 'substantial burden' on his religious practice." *Id.* at 8a; *see also* Brief *Amici Curiae* of Professors Douglas Laycock and Michael W. McConnell at 7 ("[T]he Eleventh Circuit applied its 'non-mandatory' rule to hold that studying the Bible is not a protected exercise because it is 'beneficial, not mandatory' under the plaintiff's religious beliefs.") (quoting Pet. App. 8a.))

Contrary to Respondents' argument, Br. in Opp. 10–14, the court of appeals' opinion does not say that the mandatory nature of a religious practice is merely relevant to the substantial burden inquiry. The opinion does not contain the word "relevant," or any similar term, and it does not describe a mandatory practice as a mere factor in the substantial burden analysis. *Id.* at 7a–8a. The court sought to minimize its holding with dicta describing the denial of the Bible as "brief," *id.* at 8a, but the decision turns on the mandatory-practice rule—a prisoner alleging that the government prevented him from practicing his faith must demonstrate a burden that "'completely prevents the individual from engaging in religiously mandated activity.'" *Id.* at 7a. Rooted in circuit precedent, that rule posits that "a person's exercise of religion [is] substantially burdened *only if* he [is] prevented from engaging in religiously mandated activity, or required to participate in activity prohibited by his religion." *Warner*, 267 F.3d at 1227 (emphasis added).

4. The prevalence of the mandatory-practice rule in Eleventh Circuit precedent shows that the issue is certain to recur. Although the decision here is

unpublished, the Eleventh Circuit has set forth and applied the same rule in published cases including *Cheffer*, *Warner*, and *Midrash Sephardi*. This case therefore provides a vehicle to consider the circuit split created by the Eleventh Circuit's mandatory-practice rule.

5. This case applied the mandatory-practice rule in a particularly draconian manner. The Eleventh Circuit not only demanded a mandatory practice but overruled Petitioner's "own interpretation of his . . . . religion." *Ben-Levi v. Brown*, 136 S. Ct. 930, 934 (2016) (Alito, J., dissenting from denial of certiorari). Petitioner asserted that he is "*obligated* by [his] religion to [read a devotional and the Bible] on a daily basis," Pet. App. 46a (emphasis added), but the court found that Petitioner "established that engaging in daily studies was beneficial, not mandatory." *Id.* at 8a. Thus, the court held that Petitioner was wrong about what his own religion requires of him.

B. This case is an excellent vehicle to address the split.

1. The parties agree that in the Fifth Circuit, a prisoner need not establish a substantial burden to make out a free exercise claim. Pet. 11; Br. in Opp. 18. But Respondents are incorrect that this feature of Fifth Circuit law creates a vehicle problem.

In this case, it would be open to the Court to adopt the Fifth Circuit's rule that a substantial burden is not required. That issue is predicate to deciding whether a substantial burden on a mandatory practice is required. The Court may consider an "issue [that] is 'predicate to an intelligent resolution of the question presented.'" *United States v. Grubbs*, 547 U.S. 90, 94 n.1 (2006) (quoting *Ohio v. Robinette*, 519

U.S. 33, 38 (1996)); *see also Caspari v. Bohlen*, 510 U.S. 383, 390 (1994).

The Court would not be prevented from considering the Fifth Circuit's view just because Petitioner, litigating pro se, did not ask the Eleventh Circuit to overrule its binding precedent and adopt the Fifth Circuit's rule. Because Petitioner properly preserved his First Amendment claim, the Court would not be constrained to the "precise arguments" in support of that claim that Petitioner advanced in the lower courts. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *see also Citizens United v. Fed. Election Com'n.*, 558 U.S. 310, 330–31 (2010).

Of course, the Court could also hold that a substantial burden on a mandatory religious practice is not required and remand the nominal damages claim on that basis alone. The Court would not need to consider the Fifth Circuit's view that a substantial burden is not required at all.

2. Some of Respondents' vehicle concerns reflect a misunderstanding of the record. The fact that the record suggests that Petitioner knows some Spanish is irrelevant because he clearly averred in a sworn statement (his verified complaint) that "he does not know Spanish enough to read [the Bible]" and could not practice his faith without an English Bible. Pet. App. 49a. Nor is it true that Petitioner used the Spanish Bible to recite prayers. *See* Br. in Opp. 13. Petitioner could only recite prayers that he knew from memory. Pet. App. 7a–8a, ECF No. 68-3 (Defs.' Mot. Summ. J. Ex. C) at 4. He could not read the Bible due to the language barrier, and he could not read his daily devotionals at all because Kriss withheld them. Pet. App. 49a.

3. Respondents posit that a remand on the nominal damages claim would be futile because Petitioner would ultimately lose under the legitimate penological interest test of *Turner v. Safely*, 482 U.S. 78 (1987). Not so. There is no legitimate penological interest in Kriss's decision to violate jail policy by refusing to provide Petitioner with a Bible he could understand. *See* Pet. 14. The combination of qualified immunity and the *Turner* standard is not fatal either. The district court denied Respondents' motion to dismiss the free exercise claim on qualified immunity grounds and did not reach the question in granting summary judgment, and Respondents did not even assert qualified immunity in the court of appeals. Pet. App. 40a, 18a–21a.

C. The first question presented is important.

The decision below threatens religious liberty by continuing a long line of Eleventh Circuit precedent holding that only an imposition on a mandatory religious practice can constitute a substantial burden. *See supra* at 2-4. Not only did the lower court depart from this Court's precedent and the precedent of every circuit to consider that issue, but it compounded the error by rejecting Petitioner's understanding of his own faith. *See supra* at 7.

True, a reversal limited to the first question presented could only result in nominal damages for Petitioner. Nor would there be a windfall of attorney's fees, since the Prison Litigation Reform Act limits attorney's fees to 150% of damages in a case brought by a prisoner, a mere $1.50 in the case of nominal damages. 42 U.S.C. § 1997e(d)(2). But this petition is not about money; it is about protecting religious

freedom and discountenancing circuit precedent that has gone astray. "This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance." *Cohen v. California*, 403 U.S. 15, 15 (1971).

II. The second question warrants review.

The second question presented would have been resolved differently in six circuits. Pet. App. 16a–18a. Respondents' arguments against reviewing the second question are meritless and reflect a misunderstanding of what the question is.

1. Respondents note that if the Court granted review on both questions, it would only need to reach the second question if the first question were decided in Petitioner's favor. Br. in Opp. 21–22. That consideration is far less significant here than it is in most cases because it is almost unimaginable that the first question would *not* be decided in Petitioner's favor. The proposition that only a burden on a mandatory practice can constitute a substantial burden is indefensible and contrary to this Court's precedent, as Respondents acknowledge. Br. in Opp. 19. The Court would almost certainly reach the second question if it granted review on both questions.

2. 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?" Pet. i. Respondents are incorrect to assert that the second question was not pressed or passed upon below. Br. in Opp. 22–25. The court of appeals passed on that issue when it stated: "Hoever could not recover compensatory or punitive damages from Kriss" on the free exercise claim

because "[t]he Prison Litigation Reform Act bars a prisoner from commencing a 'civil action . . . for mental or emotional injury suffered while in custody without a prior showing of physical injury.'" Pet. App. 6a (quoting 42 U.S.C. § 1997e(e)).

3. The remainder of Respondents' discussion of the second question sets up and knocks down a straw question—not the actual question presented. The issue is whether there is a physical injury requirement for compensatory damages in *First Amendment cases* brought by prisoners. Pet. i. Respondents' substitute question is whether there is a physical injury requirement for compensatory damages in *all constitutional cases* brought by prisoners. Br. in Opp. 28.

It may be true, as Respondents assert, that only the Third Circuit holds that compensatory damages can be awarded for *any* constitutional claim regardless of physical injury, Br. in Opp. 28, but Respondents fail to address what matters: In contrast to the decision below, six circuits hold that compensatory damages may be awarded for a *First Amendment* claim regardless of physical injury. Pet. 16–18. This Court should resolve that manifest division of authority.

CONCLUSION

The Court should grant the petition.

Respectfully Submitted,

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MAY 2018