No. 17-10792

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CONRAAD HOEVER,

Appellee/Cross-Appellant/Plaintiff,

v.

R. MARKS, et al.,

Appellants/Cross-Appellees/Defendants.

Appeal from the United States District Court for the Northern District of Florida
Case No. 4:13-cv-00549-MW-GRJ
The Honorable Mark E. Walker

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Andrew J. Tuck
Phil Sandick
Alan F. Pryor
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-7000
andy.tuck@alston.com
phil.sandick@alston.com
alan.pryor@alston.com

David M. Shapiro
RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-0711
david.shapiro@law.northwestern.edu

Megha Ram*
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
777 6th Street NW, 11th Fl.
Washington, DC 20001
(202) 869-3438
megha.ram@macarthurjustice.org

*Admitted only in California; not admitted in D.C. Practicing under the supervision of the Roderick & Solange MacArthur Justice Center

Attorneys for Appellee/Cross-Appellant/Plaintiff Conraad Hoever

Conraad Hoever v. R. Marks, et al.
11th Circuit Docket No. 17-10792

CERTIFICATE OF INTERESTED PERSONS & CORPORATE DISCLOSURE STATEMENT

The undersigned hereby certifies the following list of trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that may have an interest in the outcome of this appeal:

Alston & Bird LLP, counsel for Appellee/Cross-Appellant/Plaintiff Conraad Hoever.

Gonzalez, Eric, former Assistant Attorney General, Office of the Attorney General, Tallahassee, Florida, counsel for Defendants Marks, Paul, and Nunez.

Graper, Marcus O., Senior Assistant Attorney General, Office of the Attorney General, Tallahassee, Florida, counsel for Appellants/Cross Appellees/Defendants Marks, Paul, and Nunez.

Gwaltney, William W., former Assistant Attorney General, Office of the Attorney General, Tallahassee, Florida, counsel for Appellants/Cross Appellees/Defendants Marks, Paul, and Nunez.

Hoever, Conraad, Appellee/Cross-Appellant/Plaintiff

Jones, The Honorable Gary R., Magistrate Judge for the Northern District of Florida.

Marks, Robert, employee of the Florida Department of Corrections, Appellant/Cross-Appellee/Defendant.

Moody, Ashley, Attorney General, Office of the Attorney General, Tallahassee, Florida counsel for Appellants/Cross-Appellees/Defendants Marks, Paul, and Nunez.

Nunez, John, former employee of the Florida Department of Corrections, Defendant, Cross-Appellee, and former Appellant.

Paul, Caleb, employee of the Florida Department of Corrections, Appellant/Cross-Appellee/Defendant.

Pryor, Alan, Alston & Bird LLP, counsel for Appellee/Cross-Appellant/Plaintiff Conraad Hoever.

Ram, Megha, Roderick and Solange MacArthur Justice Center, counsel for Appellee/Cross-Appellant/Plaintiff Conraad Hoever.

Roderick & Solange MacArthur Justice Center, counsel for Appellee/Cross-Appellant/Plaintiff Conraad Hoever.

Sandick, Phil, Alston & Bird LLP, counsel for Appellee/Cross-Appellant/Plaintiff Conraad Hoever.

Shapiro, David, Roderick and Solange MacArthur Justice Center, counsel for Appellee/Cross-Appellant/Plaintiff Conraad Hoever.

Tuck, Andrew, Alston & Bird LLP, counsel for Appellee/Cross-Appellant/Plaintiff Conraad Hoever.

Walker, The Honorable Mark E., District Judge for the Northern District of Florida.

Pursuant to Eleventh Circuit Rule 26.1-3, the undersigned further certifies that no publicly traded company or corporation has an interest in the outcome of the case or appeal.

/s/ David M. Shapiro
David M. Shapiro

RULE 35(b)(1) STATEMENT

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: Whether punitive damages are available to a prisoner who suffers a First Amendment violation that is not accompanied by physical injury.

The panel opinion at issue held that 42 U.S.C. § 1997e(e) "prevent[s] a prisoner from recovering . . . punitive damages, even for constitutional violations[,] unless he can show that he suffered a physical injury." Panel Opinion ("Op.") at 10. This conclusion conflicts with authoritative decisions of every other United States Court of Appeals decision on this issue. Four judges of this Court have already expressed that they are "amenable to reconsidering [the Circuit's] interpretation of section 1997e(e)" in an appropriate case, *i.e.*, where a different interpretation would make a "difference to the disposition of the appeal." *Carter v. Allen*, 940 F.3d 1233, 1236 (11th Cir. 2019) (W. Pryor, J., respecting the denial of rehearing en banc); *see id*. at 1237 & n.1 (Martin, J., dissenting from the denial of rehearing en banc, joined in this regard in n.1 by J. Pryor, J. and Jordan, J.) (noting that these "issues are worthy of en banc consideration").

This is such a case. The issue is made for rehearing en banc because it is purely legal and regularly recurs. It concerns a provision of the Prison Litigation Reform Act:

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).

42 U.S.C. § 1997e(e).

The availability of punitive damages for First Amendment claims implicates two dramatic circuit splits regarding the interpretation of this statute, and this Court currently follows the more restrictive minority rule on both questions. The overwhelming majority of federal appellate authority holds that § 1997e(e)'s restrictions do not bar claims for punitive damages unaccompanied by physical injury (even if they might bar claims for compensatory damages unaccompanied by physical injury). *Hutchins v. McDaniels*, 512 F.3d 193, 198 (5th Cir. 2007); *Royal v. Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004); *Calhoun v. DeTella*, 319 F.3d 936, 941-42 (7th Cir. 2003); *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002); *Kuperman v. Wrenn*, 645 F.3d 69, 73 & n.5 (1st Cir. 2011); *Allah v. Al-Hafeez*, 226 F.3d 247, 251-52 (3d Cir. 2000); *Searles v. Van Bebber*, 251 F.3d 869, 881 (10th Cir. 2001).

Separately, most circuits also hold that § 1997e(e) does not extend to First Amendment claims *at all* because a First Amendment injury is not mere "mental or emotional injury" but an injury to liberty. *Wilcox v. Brown*, 877 F.3d 161, 170 (4th Cir. 2017); *Aref v. Lynch*, 833 F.3d 242, 265 (D.C. Cir. 2016); *King v. Zamiara*, 788

F.3d 207, 213 (6th Cir. 2015); *Rowe v. Shake*, 196 F.3d 778, 781-82 (7th Cir. 1999); *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998); *Toliver v. City of New York*, 530 F. App'x 90, 93 n.2 (2d Cir. 2013).

The panel opinion stands in stark contrast to the majority rule on both questions at once, holding that § 1997e(e) bars First Amendment claims for punitive damages. Had this case been brought in any other circuit, the result would have been different as a pure matter of law. Every other circuit (with the exception of the Federal Circuit, which lacks jurisdiction over this type of case) holds: (1) § 1997e(e) does not apply to punitive damages claims, (2) § 1997e(e) does not apply to First Amendment claims, or (3) § 1997e(e) applies neither to First Amendment claims nor to punitive damages claims. This petition thus presents "questions of exceptional importance" because they are "issue[s] on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue[s]."

s/David M. Shapiro
David M. Shapiro
RODERICK AND SOLANGE
MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 E. Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0711
david.shapiro@law.northwestern.edu

Megha Ram*
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
777 6th Street NW, 11th Fl.
Washington, DC 20001
(202) 869-3438
megha.ram@macarthurjustice.org

Andrew J. Tuck
Phil Sandick
Alan F. Pryor
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-7000
andy.tuck@alston.com
phil.sandick@alston.com
alan.pryor@alston.com

*Admitted only in California; not admitted in D.C. Practicing under the supervision of the Roderick & Solange MacArthur Justice Center

Attorneys for Appellee/Cross-Appellant/Plaintiff Conraad Hoever

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ISSUE WARRANTING EN BANC CONSIDERATION

Whether punitive damages are available to a prisoner who suffers a First Amendment violation that is not accompanied by physical injury.

PRIOR PROCEEDINGS AND DISPOSITION OF THE CASE

Plaintiff Conraad Hoever litigated this case *pro se* in the district court, alleging that correctional officers violated his First and Fourteenth Amendment rights by retaliating against him for filing grievances. Panel Opinion ("Op.") at 3. The district court dismissed Hoever's claims for compensatory and punitive damages as barred by 42 U.S.C. § 1997e(e) because it found Hoever did not allege he suffered physical injury during these retaliations.[1] Doc. 51 at 12; Doc. 57 at 1.

The case proceeded to trial on Hoever's nominal damages claim as to three of the four defendants. Op. at 4-6. The parties presented conflicting testimony about whether the officers attempted to prevent Hoever from filing additional grievances by harassing and threatening him. *Id*. Hoever also offered testimony from two other inmates who confirmed they had observed the officers threaten him. *Id*. at 6.

The officers moved for judgment as a matter of law at the close of Hoever's evidence and again at the close of their evidence. *Id*. The district court denied both motions and submitted the case to the jury. *Id*. The jury then returned a verdict in

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[1] Prior to trial, the district court dismissed Hoever's claims for violation of due process, for declaratory and injunctive relief, and all of Hoever's claims against the defendants in their official capacities. Op. at 2.

Hoever's favor. *Id*. at 7. It found that the officers violated Hoever's First Amendment rights and awarded him $1.00 in nominal damages. *Id*. Following the verdict, the district court denied the officers' motion for new trial and entered judgment in Hoever's favor. *Id*. at 7-8.

Two of the officers appealed.[2] *Id*. at 8. Hoever cross-appealed, challenging, *inter alia*, the district court's dismissal of his punitive damages claims at the motion to dismiss stage. *Id*. at 9. On appeal, this Court granted Hoever's motion for appointment of counsel. 3/12/2018 Order.

The Panel rejected Hoever's arguments that § 1997e(e) does not bar First Amendment claims for punitive damages. Op. at 11-12. In so holding, the Panel expressly recognized Hoever's invitation "to reconsider [its] position that punitive damages generally are not available to prisoners whose constitutional rights are violated without physical injury." *Id*. at 12 n.5. "Even were we persuaded by Hoever's arguments," the Panel explained, it was "bound to follow a prior binding precedent unless and until it is overruled by this Court en banc or by the Supreme Court." *Id*. (quotation marks and citation omitted). This petition for rehearing en banc followed.

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[2] The third officer, J. Nunez, also filed a notice of appeal following the entry of judgment. Op. at 3 n.1. Nunez was subsequently voluntarily dismissed from the appeal. *Id*.

ARGUMENT

I. The Panel's Holding That 42 U.S.C. § 1997e(e) Bars First Amendment Claims for Punitive Damages Makes This Court the Singular Outlier Among All Federal Appellate Courts.

This Court breaks with the vast majority of federal appellate authority, which holds that § 1997e(e) bars only compensatory damages and not punitive damages. Separately, this Court also stands in the minority by holding that § 1997e(e) applies to First Amendment claims. In sum, the panel's conclusion that a prisoner may not "recover[] compensatory or punitive damages . . . for constitutional violations unless he can show that he suffered a physical injury" is at odds with the law of every other Circuit. Op. at 10.

A. The Panel's Conclusion That 42 U.S.C. § 1997e(e) Bars Claims for Punitive Damages Splits With the Majority of Federal Appellate Authority.

The vast majority of circuits that have considered the issue hold that § 1997e(e) does not require a showing of physical injury to obtain punitive damages. *See Kuperman v. Wrenn*, 645 F.3d 69, 73 & n.5 (1st Cir. 2011); *Hutchins v. McDaniels*, 512 F.3d 193, 198 (5th Cir. 2007); *Royal v. Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004); *Calhoun v. DeTella*, 319 F.3d 936, 941-42 (7th Cir. 2003); *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002); *Searles v. Van Bebber*, 251 F.3d 869, 881 (10th Cir. 2001); *Allah v. Al-Hafeez*, 226 F.3d 247, 251-52 (3d Cir. 2000). Only this Court and the D.C. Circuit hold otherwise. *See Al-Amin v. Smith*,

637 F.3d 1192, 1199 (11th Cir. 2011); *Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998).[3]

The plain language of the statute makes it clear that the majority rule is also the correct rule. In standing with the extreme minority, this Court contravenes the three rules it otherwise uses to interpret the Prison Litigation Reform Act ("PLRA"): "(1) Read the statute; (2) read the statute; (3) read the statute!" *Daker v. Comm'r, Ga. Dep't of Corr.*, 820 F.3d 1278, 1283 (11th Cir. 2016). The statutory text does not bar any "civil action" by a prisoner absent "a prior showing of physical injury or the commission of a sexual act." 42 U.S.C. § 1997e(e). Rather, it only bars such an action if it is "for mental or emotional injury"—the very nature of a claim for compensatory damages. *Id.*

In contrast to compensatory damages, the purpose of punitive damages is not to compensate for an injury (physical, mental, or otherwise) or to make the plaintiff whole, but to penalize misconduct and deter it in the future. Punitive damages "are aimed not at compensation but principally at retribution and deterring harmful conduct." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492 (2008); *see also Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986). Thus, tracking the words

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[3] Subsequently, the D.C. Circuit construed *Davis* "narrowly," recognizing that § 1997e(e) permits punitive damages for some non-physical harm. *Aref v. Lynch*, 833 F.3d 242, 265 (D.C. Cir. 2016).

of the statute, punitive damages are not "for mental or emotional injury" because they are not "for . . . injury" at all. 42 U.S.C. § 1997e(e).

Rather, punitive damages are "for" deterrence and retributive justice, a wholly separate function from compensation "for . . . injury." Courts adopting the majority rule read the text closely and follow this logic. *See, e.g.*, *Calhoun*, 319 F.3d at 940-42 ("[Section] 1997e(e), as the plain language of the statute would suggest, limits recovery 'for mental and emotional injury,' but leaves unaffected claims for nominal and punitive damages."); *Thompson*, 284 F.3d at 418; *Allah*, 226 F.3d at 252.

Permitting claims for punitive damages would not prompt a flood of frivolous litigation: the heightened standards for obtaining punitive damages, combined with the PLRA's screening requirement, 42 U.S.C. § 1997e(c), allow courts to quickly dispense with frivolous punitive damages claims. Moreover, the consequences of departing from the statutory text and categorically eliminating claims for punitive damages are sobering. Barring both compensatory and punitive damages absent a showing of physical injury "would give prison officials free reign to maliciously and sadistically inflict psychological torture on prisoners, so long as they take care not to inflict any physical injury in the process." *Calhoun*, 319 F.3d at 940. Such a regime permits officials to commit violations egregious enough to both defeat qualified immunity and call for punitive damages—and to escape with only $1.00 in liability.

The panel here relied on *Harris v. Garner*, 216 F.3d 970 (11th Cir. 2000) (en banc) and *Al-Amin v. Smith*, 637 F.3d 1192 (11th Cir. 2011), in which this Court held that that the physical injury requirement extends to punitive damages claims. *See* Op. at 10-11. Yet *Harris* was decided before other Circuits coalesced around the majority view that a claim for punitive damages falls outside the statute's limitation to claims "for mental or emotional injury." *See supra* pp. 3-5.

Since *Harris*, this Court has become an outlier on the punitive damages question. Although the Court decided *Al-Amin* over a decade after *Harris*, *Al-Amin* nevertheless followed *Harris* without addressing the contrary logic, textual reasoning, and holdings of other Circuits that had developed in the eleven intervening years. *Al-Amin*, 637 F.3d at 1198. The Court should grant rehearing in order to consider—for the first time—the textual arguments that have convinced the overwhelming majority of federal courts to reject the rule set forth in *Harris*.

B. The Law in This Circuit—That 42 U.S.C. § 1997e(e) Applies to First Amendment Claims—Splits With the Majority of Federal Appellate Authority.

Aside from whether § 1997e(e) applies to claims for punitive damages, the panel decision also breaks with the majority rule in a deep circuit split over whether § 1997e(e) has anything to do with First Amendment injuries in the first place. Six Circuits hold that § 1997e(e) does not require a showing of physical injury in a First Amendment case. *Wilcox v. Brown*, 877 F.3d 161, 170 (4th Cir. 2017); *Aref*, 833

F.3d at 265; *King v. Zamiara*, 788 F.3d 207, 213 (6th Cir. 2015); *Rowe v. Shake*, 196 F.3d 778, 781-82 (7th Cir. 1999); *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998); *Toliver v. City of New York*, 530 F. App'x 90, 93 n.2 (2d Cir. 2013).

Five Circuits disagree. *Al-Amin*, 637 F.3d at 1196; *Geiger v. Jowers*, 404 F.3d 371, 374-75 (5th Cir. 2005); *Searles*, 251 F.3d at 876; *Allah*, 226 F.3d at 250-51; *Royal*, 375 F.3d at 723 (over a dissent by Judge Heaney).

Here, too, the majority rule comports with the plain text. The statute 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). An injury to one's First Amendment interests is neither a mental nor an emotional injury. It is instead a separate category of harm—an injury to a fundamental liberty. The statute therefore does not extend the physical injury requirement to First Amendment claims because these are not claims "for mental or emotional injury." *See Rowe*, 196 F.3d at 781-82 ("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."); *Aref*, 833 F.3d at 264 ("[N]ot every non-physical injury is by default a mental or emotional injury."); *Canell*, 143 F.3d at 1213 ("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.").

Given the central importance of expressive and religious freedom in the history of this nation, it strains credulity to suggest Congress would view harm to fundamental First Amendment liberty as mere "mental or emotional injury." 42 U.S.C. § 1997e(e). Thomas Jefferson wrote Virginia's religious freedom statute, for instance, to prevent the "infringement of *natural right*," not mere emotional harm. Virginia Statute for Religious Freedom (1786), Va. Code Ann. § 57-1 (2011) (emphasis added). 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 therapist might cure today. Similarly, the First Amendment's speech clause exists to protect "the fundamental personal right[]" of freedom of speech, *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938), not emotional well-being.

In any case, if Congress intended to apply a physical-injury requirement to every single claim, the statute would simply have provided: 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. *See Aref*, 833 F.3d at 263; *Zamiara*, 788 F.3d at 213. Congress knew how to create a categorical physical injury requirement—and did so in another provision of the PLRA. *See* 28 U.S.C. § 1915(g) (prohibiting *in forma pauperis* actions by prisoners with three strikes "unless the prisoner is under imminent danger of serious physical injury").

In the provision at hand, however, the requirement is not categorical across the board but is triggered only when a prisoner seeks compensation for "mental or emotional injury." 42 U.S.C. § 1997e(e). In light of Congress's choice to insert this qualifying language, "[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. The 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.).

This Court's current rule, however, treats the statute's limitation to claims for "mental or emotional injury" as mere surplusage, replacing the statute's claim-specific requirement to show physical injury with a categorical requirement that is at war with the statutory text. *See* Antonin Scalia & Bryan A. Garner, Reading Law: An Interpretation of Legal Texts 174-79 (2012) (describing the surplusage canon); *see also 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."). Here again, the Court should grant rehearing en banc to harmonize its law with the statutory text and majority rule.

As noted above, the D.C. Circuit is the only federal appellate court that agrees with this Circuit that § 1997e(e) applies to punitive damages claims. *See Al-Amin*, 637 F.3d at 1199; *Davis*, 158 F.3d at 1348. But the D.C. Circuit also holds that § 1997e(e) does not apply to First Amendment claims at all. *Aref*, 833 F.3d at 265.

Therefore, this circuit is the lone outlier among all the circuits on the issue presented here—whether a prisoner may recover punitive damages for a First Amendment injury without a prior showing of physical injury or a sexual act.

II. Members of This Court Are "Amenable To Reconsidering" the Circuit's Interpretation of Section 1997e(e), and This Case Presents a Perfect Vehicle to Do So.

This Court recently considered a petition for rehearing en banc on an identical issue. *See Carter v. Allen*, 940 F.3d 1233 (11th Cir. 2019). In doing so, several members of this Court expressed interest in reconsidering the same issues presented by this petition, but viewed the *Carter* case as a poor vehicle for doing so. In particular, because the jury rejected Carter's First Amendment claim on the merits, theoretical eligibility for punitive damages would not have affected the outcome.

This case presents the exact opposite scenario: The jury found that the defendants violated Hoever's First Amendment rights. But the jury could award nothing more than nominal damages under current Circuit law interpreting the PLRA. In this case, in contrast to *Carter*, a change in Circuit law would entitle Hoever to claim punitive damages for seven separate First Amendment violations that a jury has already established. *See* Appellants' Appendix, Vol. III, Jury Verdict, Tab 127 at 1-2.

Judge Martin dissented from the denial of rehearing en banc in *Carter* and called on the Court to "align [its] jurisprudence with the text of the PLRA." 940 F.3d

at 1237 (Martin, J., dissenting from denial of rehearing en banc). Because "[p]unitive damages are not for the purpose of remedying mental or emotional injury," Judge Martin explained, the Court's "precedent holding the PLRA bars punitive damages strays from the text of the statute, and is thus mistaken." *Id.* at 1239. Judge Martin went on to explain that her statutory analysis "applies with equal force" to damages for other claims, including injury to "the exchange of ideas." *Id.* at 1241.

Indeed, Judge Martin noted that her reasoning is similar to the reasoning in *Brooks v. Warden*, 800 F.3d 1295 (11th Cir. 2015), where a panel of this Court held that the PLRA does not bar nominal damages. *Id.* at 1239. The *Brooks* Court recognized that a "nominal damages claim is not brought <u>for</u> mental or emotional injury." *Id.* (quoting *Brooks*, 800 F.3d at 1308). "Rather, [nominal damages] vindicate[] deprivations of certain absolute rights that are not shown to have caused actual injury." *Id.* (quotation marks and citation omitted). Because the same is true of punitive damages, Judge Martin reasoned, the "*Brooks* panel's logic applies with equal force to punitive damages claims." *Id.*

Although they believed *Carter* was a poor vehicle for en banc review, Judges Jordan and Jill Pryor "agree[d] with the statutory analysis set forth in [Judge Martin's] dissent," and expressed interest in considering the issues "in an appropriate case." *Id.* at 1237 n.1.

Judge William Pryor wrote separately in *Carter*. He explained that while he was "not ready to stake a firm position about whether—or to what extent—[the Court's] precedents are incorrect," he was "inclined to agree" that (1) punitive damages for violations of "absolute rights" such as First Amendment liberty are not "for mental or emotional injury suffered"; and (2) punitive damages for at least some violations of nonabsolute rights are similarly not "for mental or emotional injury." *Carter*, 940 F.3d at 1235 (William Pryor, J., respecting the denial of rehearing en banc). He went on to explain that he "might be amenable to reconsidering [the Circuit's] interpretation of section 1997e(e) in an appropriate appeal." *Id*. at 1236.

This is just such an "appropriate appeal." *Id*. The magistrate judge determined that Hoever was "barred by the PLRA from seeking . . . punitive damages" for the sole reason that he "alleged no physical injury in connection with his First Amendment claims." Doc. 51 at 12. The district court adopted this recommendation. *Id.*; Doc. 57. This Court affirmed, noting that it has interpreted Section 1997e(e) "as preventing a prisoner from recovering . . . punitive damages, even for constitutional violations unless he can show that he suffered a physical injury." Op. at 10.

Hoever's right to seek punitive damages therefore turns only on the issues presented in this petition. There is no reason to delay "reconsidering [this Circuit's] interpretation of section 1997e(e)." *Carter*, 940 F.3d at 1236 (William Pryor, J., respecting the denial of rehearing en banc).

CONCLUSION

The Court should grant panel rehearing or rehearing en banc.

Respectfully Submitted,

s/David M. Shapiro
David M. Shapiro
RODERICK AND SOLANGE MACARTHUR
JUSTICE CENTER
NORTHWESTERN PRITZKER SCHOOL OF
LAW
375 E. Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0711
david.shapiro@law.northwestern.edu

Megha Ram*
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
777 6th Street NW, 11th Fl.
Washington, DC 20001
(202) 869-3438
megha.ram@macarthurjustice.org

Andrew J. Tuck
Phil Sandick
Alan F. Pryor
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-7000
andy.tuck@alston.com
phil.sandick@alston.com
alan.pryor@alston.com

* Admitted only in California; not admitted in D.C. Practicing under the supervision of the Roderick & Solange MacArthur Justice Center

Attorneys for Appellee/Cross-Appellant/Plaintiff Conraad Hoever

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Pursuant to Fed. R. App. P. 35 and 11th Cir. R. 35, I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 35(b)(2)(A) and because this brief contains 2,989 words, excluding the parts of the brief exempted by 11th Cir. R. 35-1.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman typeface.

Dated: August 18, 2020

/s/ David M. Shapiro
David M. Shapiro

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2020, I electronically filed the foregoing *Petition for Panel Rehearing and Rehearing En Banc* with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: August 18, 2020

/s/ David M. Shapiro
David M. Shapiro