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

CROSS-APPELLANT HOEVER'S EN BANC BRIEF

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Conraad Hoever v. R. Marks, et al.
No. 17-10792

CERTIFICATE OF INTERESTED PERSONS AND 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:

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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.

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

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

STATEMENT REGARDING ORAL ARGUMENT

Oral argument has been set for the week of February 22, 2021. 10/23/20 Briefing Letter. It is desired because it will aid the en banc Court's determination of this critical constitutional question.

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INTRODUCTION

The jury found that two defendants violated Appellant Conraad Hoever's constitutional rights seven times, including by threatening to starve him to death and to have other inmates "take care" of him unless he relinquished his First Amendment right to complain about government misconduct. In 47 states, the District of Columbia, and every American territory, the law of the land would have allowed the jury to consider Hoever's claim for punitive damages. This is so because every federal circuit holds either that 42 U.S.C. § 1997e(e) of the Prison Litigation Reform Act ("PLRA") permits a claim for punitive damages,[1] that § 1997e(e) does not extend to First Amendment claims at all,[2] or both.

That is, every federal circuit except this one. For the prisoner unlucky enough to be confined in Florida, Georgia, or Alabama, the PLRA bars his or her First Amendment claims for punitive damages. In this case, the jury awarded the maximum that current circuit law allows: one dollar in nominal damages

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[1] *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).

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

(approximately fifteen cents for each proven violation of clearly established constitutional law). This Court should reconsider its outlier position, hold that the PLRA does not bar punitive damages claims or First Amendment claims without physical injury, and remand this case for a jury to consider whether to award punitive damages.

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The District Court had jurisdiction over this 42 U.S.C. § 1983 action pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over final decisions of the United States District Court for the Northern District of Florida pursuant to 28 U.S.C. § 1291. This appeal is from a final order that disposed of all parties' claims.

Cross-Appellant Hoever timely petitioned for panel rehearing and rehearing en banc, 08/18/2020 Petition, and the Court granted rehearing en banc. 10/16/2020 Order.

STATEMENT OF THE ISSUE

1. Does the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(e), bar punitive damages for constitutional claims, including First Amendment claims, without a showing of physical injury?

STATEMENT 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.[3] 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.

According to sworn testimony at trial, one such threat occurred on July 20, 2013, when Cross-Appellee Nunez commanded Hoever to stand out in the sun by a fence and told him:

> [W]e've been killing inmates here for a long time and nobody can do a damn thing to us. . . . And one more grievance you write on [Appellant] Paul or any one of my boys, is going to be your last. I'm going to take you to confinement and starve you to death. Let this be a final warning for you. I should have sent you

[3] 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.

> packing right now, but this is the last warning. One more time you do this, I'm taking you to confinement and I'm starving you to death and I'm going to let [inmates] go on you. . . . I have inmates in the group that I can let them take care of you. I can let them kill you instead of us doing it ourself. . . . So I want -- I don't want you to ever write a grievance again on anybody or one of my boy, especially. If I see one more come across the desk of one of those officers, then this is going to be your last one.

Supp. App'x, Vol. II, Doc. 147 at 153:20-155:7.

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. Op. at 6. The District Court denied both motions and submitted the case to the jury. *Id*. The jury then returned a verdict in Hoever's favor. *Id*. at 7. It found that the officers violated Hoever's First Amendment rights seven different times. *Id.* Despite that finding, the jury was given no choice but to award him only $1.00 in nominal damages because the District Court granted the officers' early motion to dismiss compensatory and punitive damages, Doc. 57 at 2, and instructed the jury accordingly. Doc. 167-3 at 10; Doc. 127 at 3. 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.[4] *Id*. Hoever cross-appealed, challenging, *inter alia*, the District Court's dismissal of his punitive damages claims at the motion to

[4] 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*.

dismiss stage. *Id*. at 9. On appeal, the 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). Hoever's petition for rehearing en banc followed and the Court granted it. 10/16/2020 Order.

SUMMARY OF THE ARGUMENT

All circuits but this one hold that the Prison Litigation Reform Act, 42 U.S.C. § 1997e(e), permits punitive damages for First Amendment violations, regardless of any connection to a physical injury. Most of them correctly hold that the plain text of the statute requires a showing of physical injury only when plaintiffs bring claims "for mental or emotional injury." § 1997e(e). Claims for punitive damages are not claims "for mental or emotional injury"—they are claims for callous disregard for, or an intentional violation of, a constitutional right. They aim at punishment and

deterrence, not compensation. Any mental or emotional injury is a separate issue entirely.

Regardless of whether § 1997e(e) bars punitive damages without physical injury, though, it does not apply to First Amendment claims at all. That is because, as the majority of circuits to have addressed this issue have held, First Amendment claims allege harms to a fundamental liberty interest—which is similarly not a "mental or emotional injury."

Policy-wise, reading the statute to permit punitive damages without a showing of physical injury does no harm to the central purpose of the PLRA: to eliminate frivolous suits while facilitating meritorious ones. And the data show there is no flood of cases when that happens, either. It just means constitutional rights are further protected because there are real teeth behind lawsuits for real constitutional harms, *e.g.*, retaliation for protected speech or protected religious exercise. It is in fact antithetical to the policy of the PLRA that there shall be no deterrence for the violation of these "absolute" constitutional rights.

The District Court's order therefore should be vacated and the case should be remanded for a trial on punitive damages.

ARGUMENT

This Court's jurisprudence on 42 U.S.C. § 1997e(e) 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 of circuits that have considered whether § 1997e(e) applies to First Amendment claims. Most find it does not. 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 therefore at odds with the law of every other circuit—and the plain language of, and policy behind, the statute. Op. at 10.

I. The Plain Text of 42 U.S.C. § 1997e(e) Shows It Does Not Apply to Claims for Punitive Damages.

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":

> **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 text of § 1997e(e) must be construed using this Court's three rules for interpreting the 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). "For" in the statute is "a function word to indicate purpose." For (definition 1(a)), Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/for (last accessed Nov. 22, 2020). "Thus, accounting for the prepositional phrase, [§ 1997e(e)] applies only to federal civil actions brought with the purpose of remedying mental or emotional injury." *Carter v. Allen*, 940 F.3d 1233, 1239 (11th Cir. 2019) (Martin, J., dissenting). That is the very nature of a claim for compensatory damages.

In contrast, 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 permitted in cases involving "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law." *Smith v. Wade*, 461 U.S. 30, 51 (1983). 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). Tracking the words of the statute, then, 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 v. DeTella*, 319 F.3d 936, 940–42 (7th Cir. 2003) ("§ 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.

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 neither court meaningfully engaged "with what it means for a claim to be 'for mental or emotional injury.'" *Carter*, 940 F.3d at 1238–39 (Martin, J., dissenting).

One panel of this Court did engage with the plain meaning of this text—and came to the same conclusion Hoever urges. As Judge Martin noted in her *Carter* dissent, a panel held that the PLRA does not bar nominal damages in *Brooks v. Warden*, 800 F.3d 1295 (11th Cir. 2015). *See Carter*, 940 F.3d at 1239. The panel in *Brooks* recognized that a "nominal damages claim is not brought for 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*.

Other circuits come to the same conclusion once they meaningfully engage with § 1997e(e)'s textual limitation. In doing so, they have 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 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). Indeed, the only other circuit to find § 1997e(e) bars all punitive damages without a showing of physical injury (apart from this one) has since construed its precedent narrowly and recognized that § 1997e(e) permits punitive damages for some non-physical harm. *See Aref v. Lynch*, 833 F.3d 242, 265 (D.C. Cir. 2016).

Because § 1997e(e), by its plain text, applies only to actions "<u>for</u> mental or emotional injury," it does not bar actions <u>for</u> punitive damages.

II. The Policies Behind the PLRA Are Advanced When Punitive Damages Are Permitted Without a Showing of Physical Injury.

Congress' textual choice to preserve punitive damages by limiting the physical injury rule to claims "for . . . injury" squares with the PLRA's function. The statute protects meritorious challenges to the flagrant abuse of government power—the very sort of suit that permits a viable claim for punitive damages. Congress enacted the PLRA not only to reduce meritless prisoner suits, but also to ensure adequate consideration of meritorious ones. "Beyond doubt, Congress enacted [the PLRA] to reduce the quantity and *improve the quality* of prisoner suits." *Porter v. Nussle*, 534 U.S. 516, 524 (2002) (emphasis added).

Viable claims for punitive damages epitomize high-quality litigation directed at egregious abuses: such damages are available in Section 1983 actions only when government conduct is proven "to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith*, 461 U.S. at 56. And of course, a plaintiff must also demonstrate a violation of clearly established constitutional law to defeat qualified immunity, a formidable defense available to all but an officer who is either "plainly incompetent or [] who knowingly violate[s] the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

This case illustrates the point. A layman litigating pro se against experienced counsel in the district court, Hoever survived a gauntlet of challenges to his meritorious claims (Motion to Dismiss, Doc. 45; Motion for Summary Judgment,

Doc. 73; multiple denials of his Motions to Appoint Counsel, Docs. 17, 62;). The jury credited his testimony that Nunez threatened to starve Hoever to death in solitary confinement and have other inmates "take care" of him if he continued to file grievances. He prevailed against post-trial motions and an appeal challenging the jury's finding that the defendants violated the Constitution.

As these circumstances show, a dollar of recompense for constitutional violations proven to a jury can hardly be said to "improve the quality of prisoner suits." *Porter*, 534 U.S. at 524. That outcome—about 15 cents for each of the seven constitutional violations that the jury found—instead sends a message of impunity, regardless of the quality of the suit and the repugnance of the challenged government conduct. 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.

While enhancing meritorious litigation, allowing claims for punitive damages does not prompt a flood of frivolous litigation. Indeed, this is borne out by the data, which show that the flood warning is nothing but a diluvial delusion. Even accepting that "Congress was concerned with the number of prisoner cases being *filed*, and its intent behind the legislation was to reduce the number cases *filed*," *Harris*, 216 F.3d at 977 (emphasis in original), the contemporaneously filed amicus brief discusses

and shows how there was no great influx in cases being *filed* in the years after individual circuits determined that § 1997e(e) does not prohibit punitive damages.

Even if this were not the case, 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. There is no reason why the district courts in this circuit would not be able to proceed accordingly.

So there actually is no flood. But even if there were one, district courts here could tamp it down through the standard PLRA screening process and the heightened standards for punitive damages just like district courts do everywhere else.

III. Section 1997e(e) Also Does Not Apply to First Amendment Claims.

Not only does § 1997e(e) not apply to claims for punitive damages, it also does not apply to First Amendment injuries at all. 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 right to First Amendment freedoms is one of the "'absolute' rights . . . for which no proof of consequential harm is required to establish a violation." *Carter*, 940 F.3d at 1235 (W. Pryor, J., concurring) (quoting *Carey v. Piphus*, 435 U.S. 247, 266 (1978)). Actual harm is not required to establish a violation of those rights because it is so important "to organized society that those rights be scrupulously

observed." *Carey*, 435 U.S. at 266. First Amendment rights are also "rarely accompanied by physical injury." *Al-Amin*, 637 F.3d at 1197.

As a result, the majority of circuits to analyze the issue have concluded that "[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." *Rowe v. Shake*, 196 F.3d 778, 781–82 (7th Cir. 1999). *See also 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); *Toliver v. City of New York*, 530 F. App'x 90, 93 n.2 (2d Cir. 2013); *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998).

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 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.

Further, as explained by Sedgwick, traditional tort law recognizes personal liberty injuries as an entirely different class of injuries from mental injuries:

> The injuries for which the common law affords a remedy, and for which, therefore, in a proper case it gives reparation by way of damages, are all comprised in the following classes:
>
> Injuries to property.
>
> Physical injuries.
>
> *Mental injuries*.
>
> Injuries to family relations.
>
> *Injuries to personal liberty*.
>
> Injuries to reputation.

Arthur Sedgwick, A Treatise on the Measure of Damages 50–51 (8th ed. 1891) (emphasis added).

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, the requirement is not categorical but is triggered only when a prisoner seeks compensation "for mental or emotional injury." 42

U.S.C. § 1997e(e). This material variation of terms between these two sections of the same act "suggests a variation in meaning." Antonin Scalia and Bryan Garner, Reading the Law: The Interpretation of Legal Texts at Canon 25 (electronic edition). Perhaps more importantly, the Court's current rule 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 id.* at Canon 26 (describing the surplusage canon).

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.).

CONCLUSION

The magistrate judge in this case 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. 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 won at trial on seven separate First Amendment retaliation claims. Had his case been brought in any other circuit, the result would have been different as a pure matter of law. Every other circuit (except the Federal Circuit, which lacks jurisdiction over this type of case) would have allowed the jury to at least consider punitive damages.

Hoever's right to seek punitive damages therefore turns only on the issues presented herein as uniquely interpreted by this Court. That makes this the optimal case in which to meaningfully engage with the text of section 1997e(e), correct the Court's interpretation of it, and reverse and remand with instructions to hold a trial on punitive damages consistent with the Court's decision.

Respectfully submitted this 2nd day of December, 2020.

By: */s/ Phil Sandick*

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Pursuant to Fed. R. App. P. 28, 32, and 35 and 11th Cir. R. 35-7, I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32 and contains 4,006 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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: December 2, 2020

/s/ Phil Sandick
Phil Sandick

CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2020, I electronically filed the foregoing *Cross-Appellant Hoever's En Banc Brief* 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: December 2, 2020

/s/ Phil Sandick
Phil Sandick