No. 17-10792

In the United States Court of Appeals for the Eleventh Circuit

CONRAAD L. HOEVER,
Plaintiff-Appellant-Cross Appellant,

v.

C. CARRAWAY, Correctional Officer, et al., *Defendants,*
R. MARKS, Correctional Officer, C. PAUL, Correctional Officer Sergeant,
Defendants-Appellants-Cross Appellees.

On Appeal from the
United States District Court for
the Northern District of Florida,
Case No. 4:13-cv-00549-MW-GRJ

Motion of American Civil Liberties Union, American Civil Liberties Union of Georgia, Americans for Prosperity Foundation, Cato Institute, The Center for Access to Justice, Florida Justice Institute, Human Rights Defense Center, and Southern Center for Human Rights For Leave To File En Banc *Amicus Curiae* Brief in Support of Plaintiff-Cross-Appellant Hoever

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29 and 11th Cir. Rule 26.1-1, 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 from Appellee's Rehearing En Banc:

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

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

In addition, *amici* submit the following corporate disclosure information about themselves:

Amicus curiae American Civil Liberties Union is a not-for-profit corporation with no parent company or publicly held affiliates.

Amicus curiae American Civil Liberties Union of Georgia is a not-for-profit corporation with no parent company or publicly held affiliates.

Amicus curiae Americans for Prosperity Foundation is a not-for-profit corporation with no parent company or publicly held affiliates.

Amicus curiae Cato Institute is a not-for-profit corporation with no parent company or publicly held affiliates.

Amicus curiae The Center for Access to Justice is a not-for-profit entity within the Georgia State University College of Law, part of the University System of Georgia, which has no parent company or publicly held affiliates.

Amicus curiae Florida Justice Institute is a not-for-profit corporation with no parent company or publicly held affiliates.

Amicus curiae Human Rights Defense Center is a not-for-profit corporation with no parent company or publicly held affiliates.

Amicus curiae Southern Center for Human Rights is a not-for-profit corporation with no parent company or publicly held affiliates.

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/ *Bruce E.H. Johnson*
Bruce E.H. Johnson

I. INTRODUCTION AND RELIEF REQUESTED

The American Civil Liberties Union ("ACLU"), American Civil Liberties Union of Georgia ("ACLU of Georgia"), Americans for Prosperity Foundation ("AFPF"), Cato Institute ("Cato"), The Center for Access to Justice ("The Center"), Florida Justice Institute ("FJI"), Human Rights Defense Center ("HRDC"), and Southern Center for Human Rights ("SCHR") (collectively, proposed "*amici*"), are a collection of nonpartisan, nonprofit organizations dedicated to promoting and protecting civil liberties provided for under the Bill of Rights. *Amici* respectfully request leave, pursuant to Federal Rule of Appeal 29 and 11th Circuit Rules 29-1 and 29-2, to file the accompanying *amicus* brief in support of the *en banc* rehearing in this matter.

II. STATEMENT OF INTEREST

Amici have a significant interest in ensuring that the constitutional rights of incarcerated persons are protected and enforced and that their right to access the courts is not impeded.

The ACLU and ACLU of Georgia are steadfast defenders of First Amendment freedoms. The ACLU is a nationwide organization founded in 1920 with nearly two million members and supporters dedicated to protecting the fundamental liberties and basic civil rights guaranteed by state and federal Constitutions. The ACLU of Georgia is one of the 52 affiliates of the ACLU and

is devoted to civil rights advocacy on behalf of its approximately 11,000 members and 83,000 supporters. Like the national ACLU, the ACLU of Georgia is dedicated to protecting the fundamental liberties and basic constitutional civil rights, to include those of incarcerated persons.

AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. As part of this mission, it appears as amicus curiae before federal and state courts. AFPF is interested in this case because it believes that victims of government misconduct should be able to vindicate their constitutional rights, including First Amendment rights, by holding the responsible officials accountable for their unlawful actions.

Cato is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice focuses on the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement and prison officials.

The Center supports those working to ensure meaningful access to the courts and equal treatment in the civil and criminal justice systems, with a regional focus

on the South. To that end, the Center convenes stakeholders, engages in research and public education, and trains the next generation of lawyers to serve the public interest. The Center supports efforts to increase and protect access to justice for all marginalized populations, including litigation to ensure incarcerated individuals' rights.

FJI is a nonprofit organization founded in 1978 that regularly represents incarcerated people throughout the state of Florida in civil rights cases seeking to improve the conditions of prisons and jails. Through its advocacy and speech, it seeks redress for people who have suffered abuse and harm at the hands of prison officials.

HRDC is a nonprofit charitable organization headquartered in Florida that advocates in furtherance of the human rights of people held in state and federal prisons, local jails, immigration detention centers, civil commitment facilities, Bureau of Indian Affairs jails, juvenile facilities, and military prisons. HRDC's advocacy efforts include publishing two monthly publications, *Prison Legal News*, which covers national and international news and litigation concerning prisons and jails, as well as *Criminal Legal News*, which is focused on criminal law and procedure and policing issues, as well as publishing and distributing self-help and legal reference books for prisoners.

SCHR is a non-profit public interest law firm which is dedicated to enforcing the civil rights of people in the criminal justice system.

The *amici* are well positioned to submit an *amicus* brief in this case. They have long been committed to defending the First Amendment rights of individuals, to include incarcerated persons.

III. REASONS WHY AN *AMICUS* BRIEF IS DESIRABLE

First Amendment rights—whether exercised by the imprisoned or free citizen—represent the foundation of American civil liberties and rights guaranteed against intrusion by government actors. The matter before this Circuit now, *Hoever v. Carraway*, No. 17-10792 (11th Cir. 2020), concerns the First Amendment rights of prisoners and will have widespread precedential effects within this Circuit regarding the future protection of those rights. As identified in Mr. Hoever's Petition for Rehearing En Banc filed August 18, 2020, and putative *amici*'s previously admitted *amicus curiae* brief filed on September 23, 2020, the underlying panel Opinion conflicts with the existing law of every sister Circuit to address the issue. Although bound by this Court's earlier erroneous decision in *Al-Amin v. Smith*, 637 F.3d 1192, 1199 (11th Cir. 2011), the decision nonetheless inherently undermines the First Amendment rights of all Eleventh Circuit citizens. As this Court has now vacated the panel's earlier decision, *amici* respectfully request the opportunity to assist the en banc Court with its review of the case.

The *amici* are well positioned to submit an *amicus* brief and assist the Court in this matter. They have long been committed to defending individuals' First Amendment rights and have been at the forefront of numerous cases addressing the Prison Litigation Reform Act ("PLRA") and the First Amendment rights of prisoners. The ACLU and ACLU of Georgia have been involved in many cases addressing the First Amendment rights of prisoners, and SCHR recently provided an *amicus* brief in support of HRDC in *Prison Legal News v. Jones*, 139. S.Ct. 795 (2019) (*cert denied*)—a case which addressed the First Amendment right of incarcerated persons to receive mail. Moreover, institutions like Cato and AFPF regularly participate as amicus in constitutional matters across the nation, furthering their goals in educating the judiciary and protecting the public's civil liberties.

Amici are also uniquely positioned to apprise the Court of the implications of this decision. As civil rights practitioners and policy advocates who regularly advocate and advise on behalf of citizens' First Amendment rights, *amici* are well versed in the complex constitutional issues involving the very issues presented here. Furthermore, *amici* have a substantial interest in assisting the Court with other attendant First Amendment issues raised by *Hoever* that the Plaintiff/Cross-Appellant's brief necessarily omits. Given that they seek solely to provide the Court with such support, in light of the important constitutional issues raised by

this matter, *amici* submit that the appended amicus brief is desirable and relevant to the Court's consideration.

IV. CONCLUSION

For the foregoing reasons, *amici* respectfully request this Court grant them leave to file the *amicus curiae* en banc brief that is submitted herewith.

RESPECTFULLY SUBMITTED this 2nd day of December, 2020.

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APPENDIX A

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2020, I electronically filed the foregoing motion for leave to participate as *amici curiae* 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/ *Bruce E.H. Johnson*
Bruce E.H. Johnson

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I. SUMMARY OF ARGUMENT

A jury found that correctional officers repeatedly threatened to kill Mr. Hoever in retaliation for filing grievances about institutional misconduct and mistreatment, violating his First Amendment rights. Applying this Circuit's precedent, the trial court concluded he was barred from receiving punitive damages by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e. This wrongful outcome not only deprives Mr. Hoever of just compensation for his injuries but also allows countless abuses of citizens' constitutional rights to go virtually unchecked.

Current Eleventh Circuit precedent mistakenly interprets the PLRA to require that an incarcerated person suffer physical injury to receive punitive damages for a First Amendment violation. Every other circuit, however, has concluded that a prisoner may recover punitive damages for a First Amendment violation without having suffered physical injury. This is not only consistent with the plain language of the statute but also reflects the fact that irrevocable harm occurs when a citizen's fundamental rights are violated.

Indeed, violations of First Amendment rights are unlikely to be accompanied by physical injury, although such violations cause severe and irreparable harm. This case aptly illustrates this point: correctional officers threatened Mr. Hoever with extreme violence in retaliation for his speech about their abuse. But filing

grievances is the *sole* mechanism for Mr. Hoever to protect *any* of his rights while incarcerated. So while he may not have suffered physical injury from those threats, he suffered substantial harm from the correctional officers' attempts to remove his only means for reporting abuse.

II. ARGUMENT

Although the panel's opinion correctly applied this Circuit's earlier precedent, that underlying case law is based on a misreading of the PLRA and a misunderstanding of the nature of First Amendment injuries. Furthermore, broader damages are especially important in cases where a prisoner faces retaliation for expressing grievances because all reports regarding *physical* harm also necessarily flow through that same process. In light of persuasive authority recognizing that substantial harm does accompany non-physical injuries to First Amendment rights, this Circuit should abrogate *Al-Amin v. Smith*, 637 F.3d 1192 (11th Cir. 2011), and vindicate the First Amendment rights of its citizens.

A. The Eleventh Circuit Stands Alone in Diminishing First Amendment Harms

In every other circuit, citizens can seek compensatory damages or punitive damages when rogue correctional officers intentionally and severely violate their First Amendment rights. *Compare Carter v. Allen*, 940 F.3d 1233 (11th Cir. 2019), *with Aref v. Lynch*, 833 F.3d 242 (D.C. Cir. 2016). This Circuit is the *only* circuit to interpret § 1997e(e) to bar such damages when the prisoner alleges no

physical injury. *See Al-Amin*, 637 F.3d at 1999. Given the Supreme Court's admonition that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," *Turner v. Safley*, 482 U.S. 78, 84 (1987), this Circuit should reverse the panel's earlier decision and overrule *Al-Amin*'s mistaken holding.

Despite the Court's admonition, an earlier panel in this Circuit eliminated *both* compensatory and punitive damages for violations of prisoners' First Amendment rights. That outcome results from a misinterpretation of the PLRA's physical injury requirement and a misunderstanding of the purpose of punitive damages. Most detrimentally, however, *Al-Amin*'s holding miscomprehends the very real severity of First Amendment harms. First Amendment violations are not likely to come accompanied by physical injury, and nominal damages do nothing to deter the most egregious abuses of fundamental speech and religious freedoms.

Even the D.C. Circuit—which had held that § 1997e(e) generally bars punitive damages absent physical injury, *see Davis v. District of Columbia*, 158 F.3d 1342 (D.C. Cir. 1998)—now expressly allows punitive damages for violations of First Amendment rights. *Aref*, 833 F.3d at 266. In fact, that court also recognized the implausible nature of the immunity implicitly afforded by *Al-Amin*'s holding, "find[ing] it hard to believe that Congress intended to afford *virtual immunity* to prison officials even when they commit blatant constitutional

violations, as long as no physical blow is dealt." *Id.* at 265 (emphasis added). As that court reasoned, barring punitive damages for violations of constitutional rights entirely removes the deterrent value of meritorious First Amendment claims, affording "virtual immunity" to prison officials for egregious harms.

As explained below, incarcerated citizens regularly suffer severe injury to their religious and speech rights without sustaining physical injury. And prisoners' formal grievances are the primary means of addressing prisoner abuse, which is otherwise shielded from public view. In other words, there are few ways outside the formal grievance process for anyone to protect the constitutional rights of the incarcerated. But eliminating punitive damages for violations of prisoners' First Amendment rights does more than substantially harm prisoners; it allows grave constitutional violations by rogue correctional officers to go unchecked and potentially *unnoticed*. Mr. Hoever's case particularly illustrates this point: *Al-Amin*'s holding led to the rejection of punitive damages for his *meritorious* claims despite the clear need to deter the blatant misconduct that occurred.

B. Allowing Punitive Damages Will Improve Access to Justice Without Creating "A Flood of Litigation"

The Supreme Court has long held that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974). Among the constitutional rights a prisoner retains, access to the courts remains one of the most vital. *See Cooper v. Pate*, 378 U.S.

546 (1964) (state prisoner may pursue a claim in federal court for a violation of constitutional rights under §1983). Although the PLRA does seek to bar frivolous litigation, its purpose was never to bar recovery for potentially meritorious claims. In fact, Congress reaffirmed its commitment to protecting First Amendment rights in prison when it later passed the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq*. Nonetheless, this Circuit's earlier interpretation of the PLRA merely focuses on "stem[ming] the flood of prisoner lawsuits in federal court." *See generally Carter*, 940 F.3d at 1237 (quoting *Harris v. Garner*, 216 F.3d 970, 972 (11th Cir. 2000)). But such concerns over a "flood" of prisoner litigation are wholly unfounded.

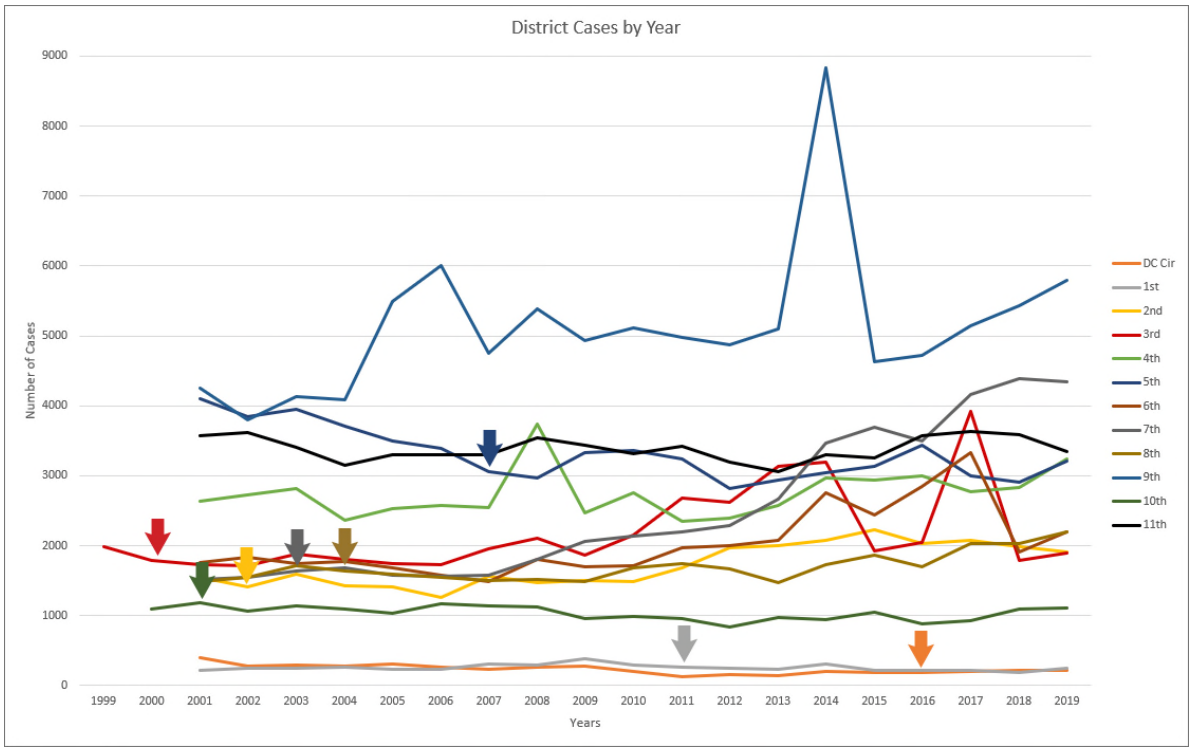
Although prisoner civil rights lawsuits understandably increased in the years after the Court began recognizing prisoners' rights under § 1983,[1] courts have not seen a similar increase in cases filed when *punitive damages* are allowed for civil

[1] Jim Thomas, *Prisoner Litigation: The Paradox of the Jailhouse Lawyer*, 110 (1988). This increase in litigation must also be understood in the context of a rapidly increasing prison population. *See* James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly" Equal Protection Analysis*, 37 Harv. J. on Legis. 105, 142 (2000) (noting that the "explosion" in prison litigation was due to rapid growth of the prison population, while the rate of filings per 1000 inmates actually decreased); *see also* Seth Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 Wm. & Mary Bill Rts. J. 427, 485 (1997) (noting that the overall rate of civil rights litigation per prisoner remained approximately the same during the 1980s and 1990s).

rights claims. Analyzing publicly available data from the U.S. Courts,[2] there is no evidence that this Circuit's inmates would become more litigious if this Court overruled *Al-Amin*. In circuits that have considered the issue, the number of "civil rights" and "prison conditions" cases filed by prisoners continues to fluctuate over time. As shown pictographically in the chart below, there is no association between a Circuit court's[3] decision regarding availability of punitive damages for constitutional claims without physical injury and the subsequent number of prisoner lawsuits filed. Simply put, there is no reason to suspect a sudden flood of litigation if this Circuit were to correct course and join the majority of other circuits.

[2] Data compiled from the U.S. Courts website, www.uscourts.gov, Statistics & Reports, Data Tables, reviewing the "Civil Federal Judicial Caseload Statistics" table (C-3) and analyzing changes in the number of "prison civil rights" and "prison conditions" cases in the "prisoner petitions" category.

[3] The relevant points in each circuit to consider the issue are as follows: *Aref*, 833 F.3d at 265; *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).



C. Violation of Citizens' First Amendment Rights Involves Irrevocable Harm

"A prisoner does not shed such basic First Amendment rights at the prison gate. Rather, he 'retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.'" *Procunier v. Martinez*, 416 U.S. 396, 422–23 (1974) (citations omitted). Indeed, prisoners' First Amendment rights can be violated in ways that cause substantial and irrevocable harm. As the Supreme Court recently reaffirmed, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Catholic Diocese of Brooklyn v. Cuomo*, __ S. Ct. __, 2020 WL 6948354,

at *3 (2020) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).[4] This Circuit's earlier misreading of the PLRA allows those harms to go unchecked and ignores the reality that punitive damages are often the only tool available to deter such injuries.

In addition to First Amendment speech rights, incarcerated citizens' *religious* rights may be retaliated and discriminated against with racist undertones. Religious groups can be actively oppressed and restricted from using prison facilities with dire consequences for nonconformity, even if such harmful consequences are not "physical" per se. *See, e.g.*, *Cruz v. Beto*, 405 U.S. 319, 319 (1972) (prisoner "placed in solitary confinement on a diet of bread and water for two weeks, without access to newspapers, magazines, or other sources of news" for sharing his Buddhist religious materials);[5] *Cavin v. Mich. Dep't of Corr.*, 927 F.3d

[4] In fact, other circuits have determined that the deprivation of First Amendment rights entitles a plaintiff to judicial relief *wholly aside from* any physical, mental, or emotional injury. *See, e.g.*, *King v. Zamiara*, 788 F.3d 207, 212 (6th Cir. 2015) (citing cases and holding that "deprivations of First Amendment rights are themselves injuries, apart from any mental, emotional, or physical injury that might also arise from the deprivation"); *Rowe v. Shake*, 196 F.3d 778, 781–82 (7th Cir. 1999).

[5] Although some plaintiffs eschew settlement in order to prove their allegations, *e.g. Arroyo Lopez v. Nuttall*, 25 F. Supp. 2d 407 (S.D.N.Y. 1998), indigent *pro se* prisoners often do not have the resources to engage in prolonged litigation. Thus, while some of the cases *amici* cite may have resolved at earlier stages of litigation—or even before the PLRA was enacted—those are identified as emblematic of possible institutional abuses regarding First Amendment rights. Punitive damages would only be available in meritorious cases where, as here, a

455, 458 (6th Cir. 2019) (discrimination against inmate's religious ceremonies, holidays, and practices); *Salahuddin v. Mead*, 174 F.3d 271, 273 (2d Cir. 1999) (inmate denied access to chaplain on multiple occasions under pretense); *Ganther v. Ingle*, 75 F.3d 207, 209 (5th Cir. 1996) (denying religious group access to facilities by "citing a prison policy that the chapel only be used for distinct religions, rather than distinct denominations within religions"); *Meyer v. Teslik*, 411 F. Supp. 2d 983, 988 (W.D. Wis. 2006) (inmate denied access to Native American religious ceremonies and threatened with further retaliation).

Most perniciously for their right to free exercise of religion, however, incarcerated citizens can have their own faith used against them as part of the misconduct. *E.g. Valdez v. City of New York*, 2013 WL 8642169, at *12 (S.D.N.Y. 2013) (inmate labeled as a gang member based on his practice of Catholic religion, including going to Mass and keeping a personal Bible). Already deprived of many other rights, malfeasant correctional officers further citizens' humiliation by also:

- depriving prisoners of religious foods to force them to violate their religious beliefs, *see, e.g.*, *Thompson v. Holm*, 809 F.3d 376, 380 (7th Cir. 2016); *Searles*, 251 F.3d at 873; *McElyea v. Babbitt*, 833 F.2d 196, 200 (9th Cir. 1987);
- intentionally disrupting prayer, *McEachin v. McGuinnis*, 357 F.3d 197, 204–05 (2nd Cir. 2004); *Arroyo Lopez*, 25 F. Supp. 2d at 408–09;

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factfinder determines that a defendant violated a prisoner's First Amendment rights.

- purposely forcing incarcerated citizens to desecrate themselves by acting in contravention of their religious beliefs, *see, e.g.*, *Williams v. Bitner*, 455 F.3d 186, 188 (3d Cir. 2006); *Hayes v. Long*, 72 F.3d 70, 74 (8th Cir. 1995); *Omar v. Casterline*, 288 F. Supp. 2d 775, 781–82 (W.D. La. 2003); and
- intentionally losing, confiscating, or stealing sacred religious items necessary for prisoners' worship, *e.g.*, *Priest v. Holbrook*, 741 F. App'x 510 (9th Cir. 2018) (federally controlled eagle feathers); *Carter v. Hubert*, 452 F. App'x 477, 479 (5th Cir. 2011) (inmate's Bible and other religious pamphlets).

Prisoners can also be forced to decide between observing their faith or facing further discrimination. *See, e.g.*, *Butts v. Martin*, 877 F.3d 571, 585 (5th Cir. 2017) (officer forced Jewish prisoner to choose between eating a meal and wearing his yarmulke); *Jackson v. Raemisch*, 726 F. Supp. 2d 991, 995 (W.D. Wis. 2010) (officer told inmate that "his only options were to refrain from praying at work or to quit his job"). Although these violations of religious freedoms leave no physical scars, the damage to one's liberty and fundamental religious rights is severe. Individuals in this nation have a right to their own sincere beliefs without degradation from government officials. Punitive damages for these injuries are not only just but *necessary* to deter these kinds of intentional blatant violations of constitutional rights.

D. Defendants' Violations of Mr. Hoever's Right to Expression Caused Irrevocable Harm

Like Mr. Hoever's case, our nation's case law is replete with discussions of correctional officers' retaliatory threats of physical violence that leave no physical

injury. *See Dobbey v. Ill. Dep't of Corr.*, 574 F.3d 443, 446 (7th Cir. 2009) (correctional officer hung a noose in front of black prisoners); *Irving v. Dormire*, 519 F.3d 441, 449–50 (8th Cir. 2008) (correctional officer threatened to kill prisoner, offered bounty and weapons to others); *Bruce v. Ylst*, 351 F.3d 1283, 1289 (9th Cir. 2003); *Northington v. Jackson*, 973 F.2d 1518, 1524 (10th Cir. 1992) (officers "surprised and threatened to kill him" by "plac[ing] a revolver to [his] head and threaten[ing] to pull the trigger"). As a result, all other circuits have found that prisoners may recover damages for proven injuries because "a wanton act of cruelty … was brutal despite the fact that it resulted in no measurable physical injury to the prisoner." *Burton v. Livingston*, 791 F.2d 97, 100 (8th Cir. 1986) (correctional officer pointed gun at black prisoner, cocked it, called him infamous slur, and repeatedly threatened to shoot him).

Less straightforward forms of retaliatory abuse are far more difficult to detect, report, and deter. Correctional officers can "non-physically" retaliate against First Amendment rights in ways that are meant to physically restrict or control prisoners—resulting in other forms of non-physical harms. Examples include:

- repeatedly transferring prisoners to prevent them from filing grievances or accessing the courts, *see, e.g.*, *Smith v. Fla. Dep't of Corr.*, 713 F.3d 1059, 1065 (11th Cir. 2013);

- making false allegations or filing false disciplinary reports to restrict other liberties, *see, e.g.*, *Gomez v. Vernon*, 255 F.3d 1118, 1127 (9th Cir. 2001); *Hicks v. Ferrero*, 241 F. App'x 595, 598 (11th Cir. 2007); and
- placing an incarcerated citizen in solitary confinement to cut off all outside contact, *see, e.g.*, *Martin v. Duffy*, 858 F.3d 239, 250 (4th Cir. 2017) (prisoner "remained in segregation for 110 days" as part of retaliation); *Smith v. Villapando*, 286 F. App'x 682, 685 (11th Cir. 2008) (retaliatory allegations resulting in disciplinary confinement).

Retaliation against expression of grievances is arguably the most impactful and harmful First Amendment violation a prisoner can suffer. Without access to the grievance process, a prisoner is entirely at the whims of reprobate correctional officers. *See Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 254 n.2 (C.C.D. Cal. 1879) ("The common impression that a prisoner under sentence is pretty much at the arbitrary disposal of his keeper is not only exceedingly erroneous, but it is one that leads to many abuses.") (quoting Hon. Thomas M. Cooley, *Recent American Decisions*, 18 Am. L. Reg. 676, 685 (1879)). Retaliation therefore robs a prisoner of due process because it actually does eliminate those "avenues of relief" relied upon by the Court in *Al-Amin*. *See Al-Amin*, 637 F.3d at 1196 (quoting *Harris v. Garner*, 190 F.3d 1279, 1289 (11th Cir. 1999)). "[F]or state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State." *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973). Given this reality, it is vital that a prisoner be able to bring a grievance against the rogue correctional officers who control virtually every aspect of his life.

Recognizing that "the First Amendment bars retaliation for protected speech," *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998), the circuits unanimously permit prisoners to bring § 1983 claims against corrections officers for retaliation in response to the filing of formal grievances. Prisoner grievances are also necessary because there is little oversight of prisoner treatment. Institutional issues at the Alabama Department of Corrections perfectly illustrate this problem. In 2020, the Department of Justice ("DOJ") found that "in Alabama's prisons, cruel treatment of prisoners by staff is common and de-escalation techniques are regularly ignored."[6] Other states within the Circuit, such as Georgia, have also been found to have "egregious conditions" in violation of prisoner rights.[7] Most concerning, the DOJ report on state prison conditions in Alabama found that "use of force investigations are frequently inadequate" because correctional officers rarely document the investigative steps taken, list potential witnesses, identify individuals interviewed, or conduct any investigation at all.[8]

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[6] U.S. Dep't of Justice, *Investigation of Alabama's State Prisons for Men* ("2020 DOJ Report"), 22, United States Attorney's Offices for the Northern, Middle, and Southern Districts of Alabama, 2020, *available at* https://www.justice.gov/crt/case-document/file/1297031/download.

[7] *See* Human Rights Watch Prison Project, *Prisons in the United States of America*, *available at* https://www.hrw.org/legacy/advocacy/prisons/u-s.htm.

[8] 2020 DOJ Report, *supra* at 16-19.

The filing of formal grievances by prisoners is a key component of prison oversight because it shines light on the misconduct of rogue correctional officers, exhausts other necessary remedies, and allows information regarding egregious abuses to reach beyond the prison walls and before a court. The need for punitive damages is accentuated in cases like this, where it is proven that officers threatened a prisoner in retaliation for filing grievances. Nominal damages are simply insufficient to deter the harm suffered by the violation of prisoners' First Amendment rights.

III. CONCLUSION

Because "[t]he day has passed when an inmate must show a court the scars of torture in order to make out a complaint under § 1983," *Burton*, 791 F.2d at 100, and such a conflicted reading of the PLRA has been dismissed by all other circuits, this En Banc Court should abrogate *Al-Amin* and vindicate the First Amendment rights of its incarcerated citizens.

Respectfully submitted this 2nd day of December, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29 and 35 and 11th Cir. R. 35, I hereby certify that:

1. *Amici* state that pursuant to Fed. R. App. P. 29(a)(4)(E), no party's counsel authored the brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person, other than *amici*, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

2. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and because this brief contains 3,699 words, excluding the parts of the brief exempted by 11th Cir. R. 35-1.

3. 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/ *Bruce Johnson*
Bruce Johnson

CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2020, I electronically filed the foregoing Brief of American Civil Liberties Union, American Civil Liberties Union of Georgia, Americans for Prosperity Foundation, Cato Institute, The Center for Access to Justice, Florida Justice Institute, Human Rights Defense Center, and Southern Center for Human Rights in Support of Plaintiff-Cross Appellant Hoever 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

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