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 REPLY BRIEF

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 AND SOLANGE
MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington, DC 20002
(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

Attorneys for Appellee/Cross-Appellant/Plaintiff Conraad Hoever

Conraad Hoever v. R. Marks, et al.

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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:

Agarwal, Amit, Solicitor General, Office of the Attorney General, Tallahassee, Florida, counsel for Defendants Marks, Paul, and Nunez.

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

American Civil Liberties Union, Amicus.

American Civil Liberties Union of Georgia, Amicus.

Americans for Prosperity Foundation, Amicus.

Baum, Christopher, Senior Deputy Solicitor General, Office of the Attorney General, Tallahassee, Florida, counsel for Appellants/Cross-Appellees/Defendants Marks, Paul, and Nunez.

Cato Institute, Amicus.

The Center for Access to Justice, Amicus.

Davis Wright Tremaine, counsel for Amici.

Florida Justice Institute, Amicus.

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.

Harris, Jorden, counsel for Amici.

Hoever, Conraad, Appellee/Cross-Appellant/Plaintiff

Human Rights Defense Center, Amicus.

Johnson, Bruce, counsel for Amici.

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

Kalinowski IV, Caesar, counsel for Amici.

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

Meals, Darcy M., counsel for Amici.

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

Neily III, Clark M., counsel for Amici.

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.

Pepson, Michael, Counsel for Amici.

Percival, James, Chief Deputy Solicitor General, Office of the Attorney General, Tallahassee, Florida, counsel for Appellants/Cross-Appellees/Defendants Marks, Paul, and Nunez.

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

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

Ram, Megha, Roderick and 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.

Schweikert, Jay R., counsel for Amici.

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

Southern Center for Human Rights, Amicus.

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(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.

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ARGUMENT

This Court voted to hear one issue – and only one issue – en banc:

> 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?

Defendants concede that § 1997e(e) does not require a showing of physical injury for a punitive damages claim. That amounts to an acknowledgment that this Court's outlier decisions in *Harris v. Garner*, 216 F.3d 970 (11th Cir. 2000) (en banc), and *Al-Amin v. Smith*, 637 F.3d 1192 (11th Cir. 2011), must be overruled. Mr. Hoever agrees. That should end the en banc proceeding.

Defendants nevertheless misquote the en banc issue by eliding "42 U.S.C. § 1997e(e)" in an attempt to inject an improper argument into these en banc proceedings. This new argument relates to a separate statute that places some limitations on "prospective relief" for "prison conditions" claims. 18 U.S.C. § 3626; *see Johnson v. Breeden*, 280 F.3d 1308, 1326 (11th Cir. 2002) (holding punitive damages are available under § 3626 as long as they are supported by the factual circumstances of the case).

The Court first should refuse to consider Florida's argument that § 3626 categorically bars punitive damages in prison conditions cases because the en banc question presented does not fairly encompass this new position. To allow gamesmanship like Defendants' here would permit litigants to hijack en banc

proceedings by dodging issues of "exceptional importance" simply by ignoring them and distracting the Court with issues on which the Court has *not* granted en banc review. Fed. R. App. P. 35(a)(2); 11th Cir. R. 35-3.

To be clear, Defendants now raise a brand-new theory that they did not raise before the magistrate judge, the district judge, or the original panel of this Court. Defendants now contend that a separate statute, 18 U.S.C. § 3626, bars punitive damages in prison conditions cases "as a categorical matter" – no matter how serious the physical injury, and even if prison staff torture, rape, or murder people in their custody. Def. Br. at 17. No appellate court has ever adopted this extreme and outlandish view, it has not been briefed in this case, and it is not before this en banc Court. "Given the narrow question presented for en banc review and the fact that the panel never had the opportunity to address this argument," the Court should hold, as it has before, that it will not address this new issue that was not fairly implicated by the en banc question presented. *Yarbrough v. Decatur Hous. Auth.*, 931 F.3d 1322, 1327 (11th Cir. 2019).

In any event, Defendants' argument lacks merit. This Court has long held that the statute Defendants cite *does not* bar punitive damages as a categorical matter. *See Johnson*, 280 F.3d at 1326. Literally every circuit in the nation agrees that

punitive damages are available under the PLRA.[1] That is not surprising because the term "punitive damages" does not appear even once in the entire PLRA or in any draft of the bill.

And in reams of legislative history spanning 896 pages,[2] the term "punitive damages" comes up exactly once, in passing, buried in an anecdote in an op-ed that happened to be placed into the Congressional Record. *See* 141 Cong. Rec. S7,527 (1995). It is simply incredible to suggest that Congress took the radical step of categorically banning punitive damages in all prison conditions cases without addressing punitive damages directly in the statute *and* without a single Senator, Representative, witness, report, or draft saying a single word about them.

Moreover, in the quarter century since Congress enacted the PLRA, Congress has declined to disturb the unanimous construction of § 3626 that it does not bar all

[1] *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, 216–17 (6th Cir. 2015); *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); *Oliver v. Keller*, 289 F.3d 623, 629–30 (9th Cir. 2002); *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). The Federal Circuit does not have jurisdiction over these claims.

[2] *See* Prison Litigation Reform Act: Legislative History, *available at* https://www.law.umich.edu/facultyhome/margoschlanger/Pages/PrisonLitigationReformActLegislativeHistory.aspx (compiling the statute's legislative history).

punitive damages – even though it "possesses a ready remedy" to alter judicial misinterpretations, *United States v. Johnson*, 481 U.S. 681, 686 (1987), and it declined to amend § 3626 when it revised other provisions of the PLRA. *See* VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013, PL 113-4, March 7, 2013, 127 Stat 54 (amending 42 U.S.C. § 1997e(e)). Contrary to Defendants' position, courts have consistently found that punitive damages are available in prison conditions cases. *See* n.1, *supra*. To believe Defendants, this settled appellate authority and consistent trial practice have been dead wrong all these years. But the Court should not reach any of that because § 3626 is not before this Court en banc.

I. Defendants Concede That 42 U.S.C. § 1997e(e) Does Not Bar Punitive Damages Absent Physical Injury.

Defendants now agree with Mr. Hoever that § 1997e(e) "is most reasonably construed not to categorically preclude the recovery of punitive damages for any kind of violation, constitutional or statutory, absent a showing of physical injury or the commission of a sexual act." Def. Br. at 50. They base this on a number of reasons, including that the "overwhelming weight of judicial authority holds that the phrase 'civil action . . . *for* mental or emotional injury' is best understood to address

compensatory rather than punitive damages." *Id.* at 52 (emphasis in original) (citations omitted).[3]

II. Section 1997e(e) Does Not Apply To Concrete Harms Resulting From First Amendment Violations.

This appeal concerns only the availability of punitive damages for Mr. Hoever's First Amendment claim. Mr. Hoever's rehearing petition, and the Court's en banc order, implicate two separate reasons why § 1997e(e) does not apply to his First Amendment claim for punitive damages: (1) the provision does not apply to any claim for punitive damages; and (2) the provision also does apply to First Amendment claims. As the parties now agree that § 1997e(e) does not apply to punitive damages claims, the Court need not reach the second issue.

But should the Court decide to address the second issue, Defendants are incorrect that § 1997e(e) bars Mr. Hoever from recovering for losses flowing from the deprivation of his First Amendment rights. The Supreme Court has long

[3] Mr. Hoever can hardly be blamed for telling the jury that a verdict in his favor would result in nominal damages only. At the time, the district court had already dismissed his claims for compensatory and punitive damages, and this Court's binding precedent required exactly that. *Harris v. Garner*, 216 F.3d 970 (11th Cir. 2000) (en banc); *Al-Amin v. Smith*, 637 F.3d 1192 (11th Cir. 2011). Further, unlike Mr. Hoever, Defendants were represented by counsel at trial and could easily have told the jury that Mr. Hoever could appeal and attempt to get further damages.

Additionally, in describing Mr. Hoever's PLRA "strikes," *see* Def. Br. at 2–3, Defendants fail to disclose that none of them had accrued at the time he filed this case, which is when a district court assesses strikes under the PLRA. *See* 18 U.S.C. § 1915(g).

recognized that deprivations of constitutional rights, including First Amendment rights, can be compensable by substantial money damages without evidence of anything but the constitutional deprivation itself. For example, "a plaintiff who was illegally prevented from voting in a state primary election" was properly considered to have "suffered compensable injury." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 311 n.14 (1986) (describing *Nixon v. Herndon*, 273 U.S. 536 (1927)). The Supreme Court in *Stachura* clarified that *Nixon*'s holding "did not rest on the 'value' of the right to vote as an abstract matter; rather, the Court recognized that the plaintiff had suffered a particular injury – his inability to vote in a particular election – that might be compensated through substantial money damages." *Stachura*, 477 U.S. at 311 n.14. The point of *Stachura* is that a plaintiff who recovers for actual harm flowing from a deprivation may not recover *additionally* based on the abstract value of the right.

Defendants misread Mr. Hoever's brief to assert that he seeks compensation for the *abstract value* of the First Amendment rights that Defendants violated. That is also incorrect. Like *Nixon* and the "long line of cases, going back to Lord Holt's decision in *Ashby v. White*, 2 Ld. Raym. 938, 92 Eng. Rep. 126 (1703)," Mr. Hoever seeks "the money value of *the particular loss* that [he] suffered." *Stachura*, 477 U.S. at 311 n.14 (emphasis added).

In First Amendment claims, such losses come in different forms. These include being prevented from exercising one's faith, reading religious texts, participating in religious observances, accessing reading materials, or being punished for engaging in protected First Amendment activity. In *Watseka v. Illinois Public Action Council*, an organization was awarded "$5,000 for lost First Amendment rights" when a local solicitation ordinance prevented a door-to-door political canvass. 796 F.2d 1547, 1559 (7th Cir. 1986), *aff'd*, 479 U.S. 1048 (1987). "[W]e should not belittle such constitutional rights by saying they are worth nothing more than the mental distress they may cause." *Carter v. Allen*, 940 F.3d 1233, 1241 (11th Cir. 2019) (Martin, J., dissenting).

Any case that involves a First Amendment claim will involve non-mental or emotional harm by virtue of the constitutional deprivation itself.[4] Neither the general law of constitutional remedies nor § 1997e(e) prevents a prisoner from seeking compensatory and punitive damages for losses flowing from infringement of First Amendment rights.

[4] To the extent a plaintiff inexplicably seeks only mental or emotional injury for a First Amendment violation, § 1997e(e) may bar money damages for that claim. That is not the case here.

III. Contrary to Defendants' Brand-New Argument, 18 U.S.C. § 3626 Does Not Categorically Abolish Punitive Damages in Prison Conditions Cases.

A. The En Banc Court Should Refuse to Consider Defendants' Brand-New Argument.

At this late stage of the proceedings, the en banc Court should not consider Defendants' newly-minted argument that § 3626 categorically bars punitive damages. Defendants cite no previous instance in which a federal appeals court considered a wholly new issue that was not fairly encompassed by the en banc question. *See* Fed. R. App. P. 35(a)(2); 11th Cir. R. 35-3; Def. Br. at 42 n.7.

A majority of the active judges of this circuit voted in favor of rehearing en banc whether 42 U.S.C. § 1997e(e) bars punitive damages for constitutional claims without a showing of physical injury. *See* Oct. 23, 2020 Briefing Notice at 1. They did not vote to hear whether punitive damages should be barred in *every* prison conditions case, whether punitive damages are barred by *any* section of the PLRA, or whether *Johnson* should be overruled. None of those issues were before the Court prior to Defendants' en banc brief and they are not properly before the Court now.

This Court has rejected similar maneuvers. *See, e.g.*, *Yarbrough v. Decatur Hous. Auth.*, 931 F.3d 1322, 1327 (11th Cir. 2019) (refusing to address new issue raised en banc "[g]iven the narrow question presented for en banc review and the fact that the panel never had the opportunity to address this argument"); *United States v. Stein*, 881 F.3d 853, 859 (11th Cir. 2018) (same). So have other circuits.

See, e.g., *SEC v. Tambone*, 597 F.3d 436, 450 (1st Cir. 2010) (en banc) (holding, of an argument raised for the first time en banc, "Today is too late."); *Atwater v. City of Lago Vista*, 195 F.3d 242, 245 n.3 (5th Cir. 1999) (en banc) (refusing to consider argument presented for first time in en banc brief even though panel below had considered the argument *sua sponte*). The Eleventh Circuit has a "long-standing rule that [it] will not consider issues that were argued for the first time in a petition for rehearing." *United States v. Pipkins*, 412 F.3d 1251, 1253 (11th Cir. 2005). If anything, the rule should be tightened once the Court votes to hear a narrow question.

The Court should reject Defendants' new gambit for another reason, too: It contradicts the very argument Defendants advanced – and prevailed on – before the district court and the panel. Defendants previously argued that under the PLRA, a plaintiff in a prison conditions case could obtain punitive damages by demonstrating physical injury, but that Mr. Hoever failed to do so. *See* Doc. 45 at 19–21; Appellant-Cross Appellee Resp. & Reply Br. 42–46. The district court agreed, Doc. 51 at 11–12, as did the panel, which recognized that sufficient allegations of physical injury "would remove Hoever's punitive damages claims from the PLRA's damages bar." *Hoever v. Carraway*, 815 Fed. Appx. 465, 469 (11th Cir. 2020).

Defendants now contradict the position they advocated and prevailed on. The PLRA, they now contend, bars punitive damages categorically, regardless of the presence or absence of physical injury. This reversal contradicts the long-standing

principle that "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *Zedner v. United States*, 547 U.S. 489, 504 (2006) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)).

The Court should not countenance and thereby incentivize such tactics. Think you are going to lose under the statute mentioned in the question presented? Substitute in a new statute and argue about that one, even if your new position contradicts your old one. En banc is no time for a Hail Mary.

B. The Plain Meaning of § 3626 Does Not Categorically Abolish Punitive Damages in Prison Conditions Cases.

The Court first held in *Johnson* that punitive damages are "prospective relief" under § 3626(g).[5] Defendants agree. *Johnson* then holds that courts must undertake the individualized factual inquiry from § 3626(a) to decide whether punitive damages are available in any particular case. Defendants here disagree, arguing that, contrary to *Johnson*, "as a categorical matter, punitive damages cannot satisfy th[e] strict requirements" of § 3626(a). Def. Br. at 17.

[5] This issue is not before the en banc Court. Should the Court ever decide to address *Johnson*'s prospective relief holding, there are a multitude of weighty reasons why "prospective relief" does not include punitive damages. *See generally* Lisa Benedetti, *Comment: What's Past is Prologue: Why the PLRA Does Not—and Should Not—Classify Punitive Damages As Prospective Relief*, 85 WASH. L. REV. 131 (2010).

Defendants are wrong. If § 3626 abolished punitive damages in all prison conditions cases, surely the statute would have said so – something to the effect of "punitive damages shall not be available in prison conditions cases." While Defendants purport to interpret the statute on its plain meaning, they base their argument on just the opposite – a hidden meaning. And they did not "discover" this hidden meaning until the en banc stage of this case. Indeed, it has gone virtually unnoticed in the twenty-five years since Congress enacted the PLRA.

Categorically abolishing punitive damages in all prison conditions cases would have marked a radical change, so Congress would have been plain. The punitive damages remedy is deeply rooted in both the common law of torts and 42 U.S.C. § 1983, the statute that provides Mr. Hoever's cause of action here. Even by 1851, the availability of punitive damages as a tort remedy did not "admit of argument," had been affirmed by "repeated judicial decisions for more than a century," and constituted a "well-established principle of the common law." *Day v. Woodworth*, 54 U.S. 363, 371 (1851). Consistent with the common law background, the Supreme Court has long recognized that "punitive damages are available" in § 1983 actions. *Smith v. Wade*, 461 U.S. 30, 35–36 (1983) (quoting *Carlson v. Green*, 446 U.S. 14, 22 (1980)).

Abolishing punitive damages in all prison conditions cases, therefore, would have marked a major revolution in the law of remedies. Congress would have

enacted the change directly and not obliquely. After all, Congress does not "hide elephants in mouseholes." *Whitman v. American Trucking Associations*, 531 U.S. 457, 468 (2001) (Scalia, J.).

Here, according to Defendants, Congress not only employed a mousehole, but put it at the end of a maze. Nowhere did Congress categorically bar any form of relief. On the contrary, Congress affirmatively set out various requirements for prospective relief, including that such relief be "narrowly drawn." § 3626(a). It borders on the absurd to suggest that Congress included detailed factual requirements for "prospective relief" with the intent that those requirements act as a legal – not factual – bar to the availability of a form of money damages.

This is the antithesis of plain meaning. If the statute abolished punitive damages, surely it would contain a reference to punitive damages. But there is not a single one in the text of § 3626 or the PLRA as a whole. Nor does any *draft* of § 3626 or the PLRA so much as mention punitive damages. In fact, no one involved in the legislative process uttered a *single word* about punitive damages in the entire history of the PLRA's enactment in a legislative history spanning 896 pages. S*ee* n.2, *supra*.

C. This Court, and Every Other Federal Circuit, Has Expressly Rejected the View that the PLRA Categorically Abolishes Punitive Damages.

In holding that punitive damages are "prospective relief" under § 3626(g), this Court in *Johnson* observed that § 3626 establishes only factual limits on prospective

relief, not that the statute categorically prohibits such relief. Thus, *Johnson* requires that district courts evaluate punitive damages awards on a case-by-case basis: "A punitive damages award must be no larger than reasonably necessary to deter the kind of violations of the federal right that occurred in the case[,] should be imposed against no more defendants than necessary to serve that deterrent function[, and must be] the least intrusive way of doing so." *Johnson*, 280 F.3d at 1325. The Court explained that "[m]any factors may enter into that determination." *Id.*

Courts in this Circuit have applied *Johnson* routinely for almost 20 years, sometimes concluding that the criteria of § 3626(a)(1) indeed warrant an award of punitive damages. *See, e.g.*, *Key v. Kight*, 2017 WL 915133, *21–*22 (S.D. Ga., Mar. 8, 2017) (undertaking the narrowness-need-intrusiveness analysis set out in *Johnson* and recommending $25,000 in punitive damages in a use of force case), *report and recommendation adopted*, 2017 WL 1128601 (S.D. Ga., Mar. 24, 2017); *Thomas v. Scott*, 2016 WL 3512207, *13–*14 (M.D. Ga., June 22, 2016) (undertaking the narrowness-need-intrusiveness analysis and concluding that punitive damages are appropriate); *Shropshire v. Johnson*, 2015 WL 261017, *12 (S.D. Ala., Jan. 21, 2015) (same); *Benton v. Rousseau*, 940 F.Supp.2d 1370, 1379–80 (M.D. Fla. 2013) (same); *Hudson v. Singleton*, 2006 WL 839339, *3–*7 (S.D. Ga., Mar. 27, 2006) (same).

Like this Court, every federal appellate court recognizes that the PLRA does not categorically abolish punitive damages. Across the country, courts have consistently awarded punitive damages in prison conditions cases in the twenty-five years since Congress enacted the PLRA.[6]

D. Congress Has Ratified Appellate Courts' Uniform Conclusion That the PLRA Does Not Categorically Abolish Punitive Damages.

Congress has ratified this overwhelming view that the PLRA does not categorically abolish punitive damages in prison conditions cases. *Johnson*, for example, has been on the books for nearly 20 years. Congress has not "fixed" the statute to legislatively overrule *Johnson* or the monolithic view of every federal appellate court that the PLRA does not categorically eliminate punitive damages in prison conditions cases. *See* n.2, *supra*.

These circumstances warrant the strictest adherence to the rule of *stare decisis* because longstanding precedents interpreting statutes receive heightened deference: Courts are "loath . . . to overturn [such] cases judicially when Congress, by its

[6] Contrary to Defendants' argument, *see* Def. Br. at 23, there is nothing unusual about the fact that § 1997e(e) prohibits compensatory damages for mental or emotional injury but does not bar punitive damages. Congress apparently concluded that prisoners should not receive damages as compensation for their mental or emotional injuries without a prior showing of physical injury or the commission of a sexual act – but that punitive damages must remain available as a deterrent when an officer's conduct is so egregious as to meet the standard for a punitive award under § 1983. There is nothing illogical or puzzling about that.

positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively." *Flood v. Kuhn*, 407 U.S. 258, 283–84 (1972).

In fact, Congress did not disturb § 3626 when it amended the PLRA in other respects. *See* VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013, PL 113-4, March 7, 2013, 127 Stat 54 (amending 42 U.S.C. § 1997e(e)). This was not some general or unrelated amendment, either. It dealt *exclusively* with monetary damages.

Specifically, Congress altered the physical injury rule by allowing monetary damages for mental or emotional injury not only when accompanied by physical injury but also when accompanied by the "commission of a sexual act (as defined in section 2246 of title 18, United States Code)." *Id.* By considering and amending a different aspect the PLRA's monetary damages regime, Congress endorsed the uniform conclusion of the courts of appeal that the PLRA does not categorically bar punitive damages. When reauthorization of the Violence Against Women Act *strengthened* monetary damages as a deterrent against the sexual abuse of prisoners, Congress obviously did not jettison the settled rule and replace it with Defendants' preferred one – under which officers enjoy categorical immunity from punitive damages, even when they enable rape or perpetrate it themselves.

These circumstances compel adherence to *stare decisis*. For example, the Supreme Court found it "of crucial importance that the existence of disparate-impact liability is supported by amendments to the [Fair Housing Act]" because when Congress enacted the amendments, "all nine Courts of Appeals to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims," and Congress did not disturb these unanimous decisions. *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 535 (2015); *see also Manhattan Properties, Inc. v. Irving Trust Co.*, 291 U.S. 320, 336 (1934) (where Congress has amended an Act without disturbing a portion of it, "[t]his is persuasive that the construction adopted by the [lower federal] courts has been acceptable to the legislative arm of the government"); *Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 244, n.11 (2009) ("When Congress amended [an Act] without altering the text of [the relevant provision], it implicitly adopted [this Court's] construction of the statute"). Similarly, Congress has endorsed the settled judicial construction of the PLRA – the Act does not categorically bar punitive damages in prison conditions suits.

E. Defendants' Position Would Have Extreme Consequences.

Holding that § 3626 categorically bars punitive damages in prison condition cases would have extreme effects. To start, the same logic would apply to nominal damages. After all, they are also "relief other than compensatory monetary

damages." 18 U.S.C. § 3626(g). But every court in the nation recognizes that nominal damages are available.

Perhaps more disturbingly, there are countless PLRA prison condition violations that are so heinous that punitive damages must be available to punish the wrongdoer and deter future wrongdoing. Under Defendants' proposed interpretation, though, punitive damages would be barred in the prison and jail condition context, regardless of how extreme the physical injury, death, or rape.

Some examples illustrate the point, and the first comes right from Florida. A December 2020 Department of Justice Notice sent pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 *et seq.* ("CRIPA") detailed a "long-standing pattern of criminal charges, discipline, and documented allegations of staff sexual abuse" at a Florida correctional institution. *See* United States Department of Justice, *Investigation Of The Lowell Correctional Institution – Florida Department Of Corrections (Ocala, Florida)* at 1 (Dec. 2020) *available at* https://www.justice.gov/opa/press-release/file/1347811/download. One guard was accused in 2017 of sexually abusing a female prisoner, "causing lesions on the prisoner's throat from oral sex, and then retaliating against the prisoner when she refused his sexual advances. Even though FDOC verified the prisoner's injuries, FDOC never completed the investigation for the 2017 incident, and the officer

remained employed until his arrest in July 2020" – on separate charges of sexual misconduct with another inmate. *Id.* This is only one example from the Notice.

Then there is South Carolina prisoner Baxter Vinson, who was placed in a restraint chair for two hours after cutting his own abdomen. *T.R. v. S.C. Dep't of Corr.*, No. 2005-CP-40-2925, Order Granting Judgment in Favor of Plaintiffs at 19 (S.C. Ct. C.P. Jan. 8, 2014). A video recording of the incident showed that Vinson was "eviscerating, with his intestine coming out of the abdominal wall." *Id.* Guards could be seen "tightening the restraints, thereby putting additional pressure on [Vinson's] abdomen." *Id.*

Finally, Vaughn Dortch was a "mentally ill inmate" of California's Pelican Bay State Prison who "suffered second-and third-degree burns over one-third of his body" when a group of correctional officers held him, handcuffed, in a bathtub filled with "scalding" water. *Madrid v. Gomez*, 889 F. Supp. 1146, 1166 (N.D. Cal. 1995). During the incident, which took place in the prison infirmary, a nurse heard one of the officers say, "looks like we're going to have a white boy before this is through . . . his skin is so dirty and so rotten, it's all fallen off." *Id.* at 1167. The nurse observed that "from just below the buttocks down, [Dortch's] skin had peeled off and was hanging in large clumps around his legs, which had turned white with some redness." *Id.*

It is hard to read these accounts. Like countless others, though, they are real. It would be both extreme and extremely dangerous if punitive damages were no longer available to punish and deter them.

F. Defendants' Fall-Back Position Also Fails.

Perhaps appreciating that their argument to overrule *Johnson* and categorically ban punitive damages is both radical and incorrect, Defendants fall back on a different argument: Punitive damages may be available if a prisoner-plaintiff and a defendant-officer happen to remain at the same facility. This version of the argument fares no better.

Of course, an inmate transfer is hardly a guarantee that the officer and the prisoner will never encounter each other again. The prisoner might always be transferred back to the old facility, so the availability of punitive damages would change throughout a case based on the happenstance of where the prisoner and the officer happened to be located at a given time. Indeed, an officer-defendant could intentionally evade liability in an ongoing case by resigning, transferring to a different facility, or seeking to have the plaintiff transferred to a different facility.

In addition, so long as the plaintiff died as a result of an officers' misconduct, punitive damages would be unavailable since the officer could no longer abuse the plaintiff. And victims of rape and other abuse would face a choice: stay at the

attacker's facility and risk encountering him/her again, or seek a transfer and forfeit punitive damages.

CONCLUSION

This Court voted to hear one issue that it deemed of such "exceptional importance" that it should be heard en banc: Whether 42 U.S.C. § 1997e(e) bars punitive damages for constitutional claims without a showing of physical injury. Both Mr. Hoever and Defendants agree that it does not. That should be the end of it.

Defendants nevertheless ask this Court to affirm the district court on a novel ground, never before raised in this case and not encompassed by the en banc question presented. The Court should make clear that this tactic is unacceptable.

The Court should then find that § 1997e(e) does not bar punitive damages for constitutional claims without a showing of physical injury, overrule *Harris v. Garner*, 216 F.3d 970 (11th Cir. 2000) (en banc), and *Al-Amin v. Smith*, 637 F.3d 1192 (11th Cir. 2011), and remand this case for a trial on punitive damages.

[Signatures on next page]

Respectfully submitted this 25th day of January, 2021.

By: */s/ Phil Sandick*

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 AND SOLANGE
MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington, DC 20002
Phone: (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
Phone: (404) 881-7000
andy.tuck@alston.com
phil.sandick@alston.com
alan.pryor@alston.com

Attorneys for Appellee/Cross-Appellant/Plaintiff Conraad Hoever

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 4,751 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: January 25, 2021

/s/ Phil Sandick
Phil Sandick

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2021, 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: January 25, 2021

/s/ Phil Sandick
Phil Sandick