

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5154

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YASSIN MUHIDDIN AREF, DANIEL MCGOWAN,  
and KIFAH JAYYOUSI,

Plaintiffs-Appellants,

v.

LORETTA E. LYNCH, CHARLES SAMUELS, D. SCOTT DODRILL,  
LESLIE S. SMITH, and FEDERAL BUREAU OF PRISONS,

Defendants-Appellees.

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On Appeal from the United States District Court for the District of  
Columbia, No. 1:10-cv-00539, Honorable Barbara J. Rothstein

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**BRIEF OF AMICI CURIAE THE LEGAL AID SOCIETY OF THE CITY  
OF NEW YORK, THE AMERICAN CIVIL LIBERTIES UNION, AND THE  
AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL IN  
SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL**

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## Certificate as to Parties, Rulings, and Related Cases

**Parties and Amici.** Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Plaintiffs-Appellants. Amici appearing in this Court include The Legal Aid Society of the City of New York, the American Civil Liberties Union, the American Civil Liberties Union of the Nation's Capital, and the Seton Hall University School of Law, Center for Social Justice.

**Rulings Under Review.** References to the rulings at issue appear in the Brief for Plaintiffs-Appellants.

**Related Cases.** This case has not previously been before this Court. Counsel is aware of no related cases.

Dated: November 4, 2015

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### **Certificate Regarding Consent, Authorship, and Separate Briefing**

All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a). No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the Amici Curiae, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(c)(5).

Counsel for Amici certify that a separate brief is necessary, because no other amicus brief of which Amici are aware addresses in detail the legislative history and treatment by the circuit courts of the language regarding "mental or emotional" injury under 42 U.S.C. § 1997e(e). Nor does any other amicus brief discuss the Supreme Court precedent regarding actual, intangible injuries that is applicable to the proper understanding of section 1997e(e), as Amici argue. *See* D.C. Circuit Rule 29(d). To the best of the knowledge of Amici, one other amicus brief will be filed in support of Appellants. Amici understand that the other amicus brief, to be filed by the Seton Hall University School of Law, Center for Social Justice, will focus on Appellants' substantive constitutional claims, rather than the proper interpretation of section 1997e(e). Thus, there is no overlap with the arguments presented by Amici. In light of the different, important, and complex issues

presented in these briefs, counsel for Amici certify that filing a joint brief is not practicable and that it is necessary to submit separate briefs.

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### **Corporate Disclosure Statement**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Amici state that none of the Amici has a parent corporation and no publicly held corporation owns 10% or more of the stock of any Amicus.

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### Interest of Amici

The Legal Aid Society of the City of New York is a private, non-profit organization that has provided free legal assistance to indigent persons in New York City for over 125 years. It is the largest provider of criminal defense services in New York City, and large numbers of its clients are held in City jails. In addition, through its Prisoners' Rights Project ("PRP"), established in 1971, the Society seeks to ensure the protection of prisoners' constitutional and statutory rights through litigation and advocacy on behalf of prisoners in the New York State prisons and the New York City jails. PRP has been involved in litigation concerning the interpretation of the Prison Litigation Reform Act ("PLRA") virtually since the statute's enactment, both as counsel and as amicus curiae.<sup>2</sup>

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, nonpartisan organization with approximately 500,000 members dedicated to the principles of liberty and equality embedded in the Constitution. Founded more

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2. See *Amador v. Andrews*, 655 F.3d 89 (2d Cir. 2011); *Johnson v. Testman*, 380 F.3d 691(2d Cir. 2004); *Benjamin v. Jacobson*, 172 F.3d 144 (2d Cir. 1999) (en banc), *cert. denied*, 528 U.S. 824 (1999); Brief of Amici Curiae American Civil Liberties Union, The Legal Aid Society, *et al.* Supporting Petitioners, *Jones v. Bock*, 548 U.S. 199 (2007) (Nos. 05-7058, 05-7142), 2006 WL 2364683; Brief of Amici Curiae American Civil Liberties Union, The Legal Aid Society, *et al.* Supporting Respondent, *Woodford v. Ngo*, 548 U.S. 81 (2006) (No. 05-416), 2006 WL 284226.

than 90 years ago, the ACLU has participated in numerous cases before this Court involving the scope and application of constitutional rights, both as direct counsel and as amicus curiae. The ACLU established the National Prison Project in 1972 to protect and promote the civil and constitutional rights of incarcerated persons. In furtherance of that goal, the Project has brought numerous cases on behalf of prisoners seeking to ensure that conditions of confinement comply with the Constitution. This case is of significant interest to the ACLU in light of the case's potential consequence for the ability of prisoners to seek redress for violations of their constitutional rights. The American Civil Liberties Union of the Nation's Capital is the Washington, D.C., affiliate of the ACLU.

### **Summary of Argument**

One question presented by the district court's decision is whether the statutory limitation of recovery for "mental or emotional injury" in 42 U.S.C. § 1997e(e) precludes compensatory relief to prisoners for all non-physical injuries arising from violations of the Constitution of the United States.<sup>3</sup> Among other injuries, Appellants here asserted that violations of their constitutional rights arising from their confinement in restrictive Communications Management Units

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3. This brief's focus on section 1997e(e) does not imply that Amici do not support Appellants on their other arguments for reversal.

caused the destruction of their familial relationships, hampered their rehabilitation (thereby affecting their eventual qualification for release), and interfered with protected First Amendment activity. Such injuries are not physical, but neither are they “mental or emotional” as that phrase is properly understood. Rather, they are actual, if intangible, injuries arising from the deprivation of constitutionally-protected interests and are not subject to the limitation in section 1997e(e).

The district court concluded that Appellants had “allege[d] only mental or emotional injury and no physical injury” and that therefore Appellants’ claims for monetary relief were barred by section 1997e(e).<sup>4</sup> In reaching this conclusion, the district court held that certain of Appellants’ alleged harms were too “speculative” or “abstract” to merit compensation and that overall, Appellants had “failed to articulate how their . . . alleged injuries constitute compensable harms . . . that are distinct from ‘mental or emotional injury.’”<sup>5</sup> The court emphasized that “even with respect to the violation of one’s constitutional rights, the plaintiff must

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4. July 12, 2013 Order Granting in Part and Denying in Part Defendants’ Consolidated Motion to Dismiss (“Order”) at JA-292; *see also id.* at JA-295 (characterizing Appellants’ individual-capacity claims as “based only on mental or emotional injury”), JA-296 (“Plaintiffs’ claims against Defendant Smith in his individual capacity are barred by the PLRA.”).

5. *Id.* at JA-293, JA-294.

articulate how that violation actually causes him injury.”<sup>6</sup>

Amici agree that compensatory damages for violations of constitutional rights are available only when an actual injury has been suffered. Amici also agree that section 1997e(e) bars prisoners’ recovery of compensatory damages for mental or emotional injury without a corresponding physical injury. Where, however, prisoners have alleged constitutional violations giving rise to actual injuries that are not mental, emotional, or physical in character, section 1997e(e) does not prevent them from being compensated for the harm they have suffered.

The Bill of Rights was not enacted to protect people from mental or emotional distress. Rather, it was enacted to safeguard the people’s liberty interests. To characterize a deprivation of liberty as nothing more than a “mental or emotional injury,” as some circuits have done, is to trivialize our most basic constitutional protections. Prisoners should be permitted to recover for actual, if intangible, injuries – other than mental or emotional injuries – arising from the deprivation of their constitutional rights while incarcerated, even where there is no physical injury. This result is consistent with the statutory language and purpose, Supreme Court and D.C. Circuit precedent, and the importance of compensatory damages in redressing and deterring constitutional harms.

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6. *Id.* at JA-294.

## Argument

### I. Section 1997e(e) Does Not Prohibit Compensation For Actual, Intangible Injuries Distinct From Mental Or Emotional Distress.

#### A. The text of section 1997e(e) does not bar recovery of damages for all non-physical injuries.

Section 1997e(e), entitled “Limitation on Recovery,” provides that:

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).

The federal courts of appeals, including the D.C. Circuit, have uniformly interpreted section 1997e(e) as limiting the recovery of damages, but not as precluding the filing of actions.<sup>7</sup> All circuits further agree that section 1997e(e) does not limit a prisoner’s right to seek injunctive and declaratory relief.<sup>8</sup>

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7. See, e.g., *Davis v. Dist. of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998) (agreeing that section 1997e(e) “is merely a limitation on damages”); *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002) (“Both in its text and in its caption, Section 1997e(e) purports only to limit recovery for emotional and mental injury, not entire lawsuits.”).

8. See, e.g., *Thompson*, 284 F.3d at 418 (citing cases). Courts generally permit the award of nominal damages but are divided on the award of punitive damages under section 1997e(e). Compare *Hutchins v. McDaniels*, 512 F.3d 193, 196-98 (5th Cir. 2007) with *Al-Amin v. Smith*, 637 F.3d 1192, 1199 (11th Cir. 2011).



The Second, Sixth, Seventh, and Ninth Circuits have held that prisoners suffering actual injuries arising from deprivations of constitutional rights may be compensated without a showing of physical injury, to the extent that such injuries are distinct from “mental or emotional” injuries.<sup>9</sup> In concluding that section 1997e(e) does not preclude compensatory damages for all actual, non-physical injuries arising out of constitutional violations, these courts have correctly interpreted the statute.

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9. *See King v. Zamirara*, 788 F.3d 207, 212 (6th Cir. 2015) (“[D]eprivations of First Amendment rights are themselves injuries, apart from any mental, emotional, or physical injury that might also arise from the deprivation, and . . . § 1997e(e) does not bar all relief for injuries to First Amendment rights”), *petition for cert. filed* (U.S. Aug. 31, 2015) (No. 15-259); *Thompson*, 284 F.3d at 416 (section 1997e(e) “does not restrict a plaintiff’s ability to recover compensatory damages for actual injury” arising from constitutional violations); *id.* at 418 (section 1997e(e) does not bar “an award of compensatory damages for the loss of Thompson’s property [without due process] provided he can establish actual injury”); *Robinson v. Page*, 170 F.3d 747, 749 (7th Cir. 1999) (“If the suit contains separate claims, neither involving physical injury, and in one the prisoner claims damages for mental or emotional suffering and in the other damages for some other type of injury, the first claim is barred by the statute but the second is unaffected.”); *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998) (“The deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any . . . mental or emotional injury he may have incurred.”).

By contrast, certain other circuits have assumed that any injuries that are not physical, including those arising from constitutional violations, are necessarily “mental or emotional” within the meaning of section 1997e(e).<sup>10</sup> In those circuits, prisoners who have suffered actual but intangible injuries – distinct from mental and emotional distress – based on deprivation of their constitutional rights are left without a damages remedy. Those circuits have misconstrued the language and purpose of section 1997e(e).

The plain language of section 1997e(e) does not categorically bar damages claims for constitutional injury that do not also involve physical injury.<sup>11</sup> Insofar as courts have simply presumed that *any* injury that is not physical must be mental

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10. See, e.g., *Brooks v. Warden*, 800 F.3d 1295, 1307 (11th Cir. 2015) (“[A]n incarcerated plaintiff cannot recover either compensatory or punitive damages for constitutional violations unless he can demonstrate a . . . physical injury.”); *Royal v. Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004) (rejecting argument that First Amendment violation “does not involve mental or emotional injury”); *Allah v. Al-Hafeez*, 226 F.3d 247, 250 (3d Cir. 2000) (“Allah seeks substantial damages for the harm he suffered as a result of defendants’ alleged violation of his First Amendment right to free exercise of religion,” but “the only actual injury that could form the basis for the award he seeks would be mental and/or emotional injury.”).
  11. See *Robinson*, 170 F.3d at 748 (“Section 1997e(e), as its wording makes clear, is applicable only to claims for mental or emotional injury. It has no application to a claim involving another type of injury . . . that is neither mental nor emotional.”).

or emotional, they have rendered the phrase “mental or emotional” superfluous,<sup>12</sup> contrary to the basic principle of statutory construction that requires every term in a statute to be given effect.<sup>13</sup> Had Congress wished to achieve the end presumed by those courts, the statute could simply have provided that “no Federal civil action [for damages] may be brought by a prisoner . . . for any injury suffered while in custody without a prior showing of physical injury.” The words “mental or emotional,” then, were necessarily intended to describe a limited subset of normally compensable injuries for which recovery would be precluded by statute where there is no physical injury.

**B. The statutory purpose of section 1997e(e) supports prisoners’ rights to seek compensation for violations of constitutional rights.**

The legislative history of the PLRA is sparse, particularly as it relates to section 1997e(e).<sup>14</sup> Nothing in the legislative history suggests that section

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12. *See King*, 788 F.3d at 213; *Amaker v. Haponik*, No. 98-2663, 1999 WL 76798, at \*7 (S.D.N.Y. Feb. 17, 1999) (“If Congress had intended to apply § 1997e(e)’s restriction to all federal civil suits by prisoners, it could easily have done so by simply dropping the qualifying language ‘for mental or emotional injury.’”).

13. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

14. *See* 141 Cong. Rec. S14,626-29 (daily ed., Sept. 29, 1995); *see also Zehner v. Trigg*, 952 F. Supp. 1318, 1325 (S.D. Ind. 1997) (“The legislative history contains virtually no discussion specifically concerning . . . § 1997e(e).”).

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1997e(e)'s purpose was to categorically preclude prisoners from seeking compensatory damages for actual, albeit non-physical, injuries arising from constitutional violations, such as limitations on free speech rights or deprivations of liberty or property. To the contrary, Senator Hatch assured the Senate that “[o]ur legislation . . . will ensure that Federal court orders are limited to remedying actual violations of prisoners’ rights” and that he did “not want to prevent inmates from raising legitimate claims.”<sup>15</sup>

What little legislative history there is demonstrates that the central purpose of the statute was to limit frivolous or trivial prisoner litigation.<sup>16</sup> Senator Hatch

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Commentators similarly have noted that “discussion of the physical injury requirement [in section 1997e(e)] was usually relegated to a short mention among other, largely procedural reforms included in the PLRA.” Jennifer Winslow, *The Prison Litigation Reform Act’s Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant To?*, 49 U.C.L.A. L. Rev. 1655, 1663-64 (2002); see also James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A “Not Exactly” Equal Protection Analysis*, 37 Harv. J. on Legis. 105, 114 (2000) (“[N]o aspect of the PLRA received less congressional deliberation than § 1997e(e).”).

15. 141 Cong. Rec. S14,626-27 (daily ed. Sept. 29, 1995); see also *id.*, at 14,628 (statement of Sen. Reid that if prisoners “have a meritorious lawsuit, of course they should be able to file”); *id.* (statement of Sen. Thurmond that “[t]his amendment will allow meritorious claims to be filed”).
16. Cases cited on the Senate floor as examples of frivolous or trivial claims included the cases eventually decided in *Beaty v. Berry*, 145 F.3d 1336 (9th

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introduced the amendment in the Senate as the “prison litigation reform amendment to do away with frivolous lawsuits.”<sup>17</sup> Two of the amendment’s co-sponsors, Senators Dole and Thurmond, remarked respectively that “[t]his amendment will help put an end to the inmate litigation fun-and-games” and that “[w]e have an opportunity here to put a stop to the thousands and thousands of frivolous lawsuits filed by the prisoners across this nation.”<sup>18</sup> The types of prisoner grievances about which Congress expressed concern included “a defective haircut by a prison barber,” “the failure of prison officials to invite a prisoner to a pizza party,” and “being served chunky peanut butter instead of the creamy variety.”<sup>19</sup>

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(Footnote continued from previous page)

Cir. 1998) (prisoner alleged due process violation for a 30-day suspension of his video game privileges), and *Doran v. McGinnis*, No. 95-1490, 1996 U.S. App. LEXIS 2796 (6th Cir. 1996) (prisoner alleged that several prison officials planted mind control devices in his head). *See* 141 Cong. Rec. S14,629 (daily ed. Sept. 29, 1995) (statement of Sen. Kyl).

17. 141 Cong. Rec. S14,626 (daily ed. Sept. 29, 1995).

18. *Id.* at S14,626, S14,628.

19. *Id.* at S14,626 (statement of Sen. Dole).

In short, there is no basis to conclude that Congress intended section 1997e(e) to prevent prisoners from obtaining compensatory damages for actual deprivations of their constitutional rights, and every reason to conclude that Congress did *not* so intend.

**C. This Circuit has not addressed the question presented.**

The D.C. Circuit has examined section 1997e(e) only once and has not addressed whether that provision's limitation on recovery applies to inmates seeking compensatory damages for non-physical injuries other than mental or emotional distress. In *Davis v. District of Columbia*, 158 F.3d 1342 (D.C. Cir. 1998), an inmate sought money damages based on an allegation that a correctional officer “broke the seal on the [inmate’s] medical files and disclosed their contents to others without the [inmate’s] consent.”<sup>20</sup> The Court affirmed dismissal of the complaint under section 1997e(e) on the grounds that the inmate had “alleged resulting emotional and mental distress, *but no other injury*.”<sup>21</sup>

*Davis* thus does not purport to interpret section 1997e(e) in the context of money damages for non-physical injuries other than mental or emotional distress. Appellants here alleged that they suffered actual harm, distinct from mental or

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20. *Davis*, 158 F.3d at 1345.

21. *Id.* (emphasis added).

emotional distress, as a consequence of the deprivation of their constitutional rights. Among other injuries, Appellants alleged that their unlawful and prolonged confinement in restrictive Communications Management Units deprived them of their liberty without due process and thereby “hamper[ed] [their] ability to engage in meaningful rehabilitation,”<sup>22</sup> “placed a substantial burden on their ability to maintain the integrity of their familial relationships,”<sup>23</sup> and prohibited them from engaging in protected First Amendment activities.<sup>24</sup> Nowhere does *Davis* suggest that prisoners would be precluded from recovering money damages as compensation for such actual, albeit intangible, harms.<sup>25</sup> Rather, *Davis* is consistent with the conclusion that harm to constitutional interests of the kind

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22. JA-39 (¶ 9); *see also* JA-56-57 (¶¶ 66-68).

23. JA-53 (¶ 49); *see also* JA-48 (¶¶ 33-34), 51 (¶ 42), 54 (¶ 55), 55-56 (¶¶ 59-65), 103 (¶ 232), 104 (¶ 240).

24. *See* JA 81-82 (¶ 150), 103-04 (¶¶ 236-38).

25. Other courts have made the distinction that Amici advocate here. For example, in *Cassidy v. Ind. Dep’t of Corrections*, 199 F.3d 374, 377 (7th Cir. 2000), the Seventh Circuit held that while plaintiff’s damages claims for mental and emotional harm were barred by section 1997e(e), plaintiff was entitled to “pursue all of his other claims for damages.” These claims included loss of opportunity, loss of participation in prison activities, loss of access to prison programs and services, and loss of freedom of movement and social contact. *Id.* at 375-76.

alleged by Appellants is not properly categorized as “mental or emotional injury” for the purposes of section 1997e(e).

## **II. Prisoners’ Rights To Seek Compensation For Deprivations Of Constitutional Rights Should Be Protected.**

### **A. Courts award compensatory damages for non-physical constitutional injuries distinct from mental or emotional distress.**

Both the Supreme Court and the D.C. Circuit have recognized that compensatory damages may be awarded for intangible constitutional harms that are distinct from both physical injury and mental or emotional distress.<sup>26</sup> In *Carey v. Phipus*, 435 U.S. 247 (1978), the Supreme Court emphasized that courts should compensate for actual injuries arising from constitutional violations even if such an injury would not be compensable under the common law tort rules of damages.<sup>27</sup>

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26. See *Carey v. Phipus*, 435 U.S. 247, 264 (1978); *Hobson v. Wilson*, 737 F.2d 1, 61-62 (D.C. Cir. 1984); see also *United States v. Burke*, 504 U.S. 229, 235 (1992) (compensatory damages may “redress intangible elements of injury that are deemed important, even though not pecuniary in their immediate consequences”) (internal citation and quotation marks omitted); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 311 n.14 (1986) (damages may be awarded “for a nonmonetary harm that cannot easily be quantified”) (citing cases); cf. *Halperin v. Kissinger*, 606 F.2d 1192, 1207 (D.C. Cir. 1979) (“Even if a constitutional violation inflicts only intangible injury, compensation is still appropriate.”).

27. *Carey*, 435 U.S. at 258-59; see also *id.* at 258 (“The purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not

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The Court noted, for example, that plaintiffs asserting claims “for racial discrimination, the denial of voting rights, and the denial of Fourth Amendment rights” may recover compensatory damages to the extent they can prove “some actual, if intangible, injury” flowing from the constitutional deprivation.<sup>28</sup>

The D.C. Circuit in *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), likewise recognized that “intangible interests must be compensated if they can be conceptualized and if harm can be shown with sufficient certainty.”<sup>29</sup> The Court specifically distinguished between injuries compensable by reference to common law tort doctrine – such as “pain and suffering” and “emotional distress” – and separately compensable injuries to constitutional interests that would “go uncompensated on the basis of traditional common law principles.”<sup>30</sup> In the latter

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recognize an analogous cause of action.”); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240 (1969) (“The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired.”); *Hobson*, 737 F.2d at 60 (“Where the common law offers no protection to an interest analogous to that protected by a constitutional right, we must adapt those rules to assure adequate compensation.”).

28. *Carey*, 435 U.S. at 264.

29. *Hobson*, 737 F.2d at 62 (citing *Carey*, 435 U.S. at 258).

30. *Id.* at 61, 62.

category, the *Hobson* Court identified such “First Amendment compensable rights” as the loss of opportunity to participate in a political demonstration and the restriction of an inmate’s access to books.<sup>31</sup> The Court observed that plaintiffs can sufficiently demonstrate a compensable “injury to a protected interest” if they can marshal evidence showing that the constitutional deprivation resulted in their “involuntary diversion from a protected activity.”<sup>32</sup>

Courts regularly conclude that plaintiffs seeking recovery of damages under 42 U.S.C. § 1983 or analogous *Bivens* actions (such as the instant case) have alleged compensable constitutional injuries that, unlike mental and emotional distress, may have no close analogue in common law tort principles.<sup>33</sup> For example, the Sixth Circuit has observed that compensable harms under section 1983 include “intangible injury to [the plaintiff’s] constitutional and dignitary interest in being free from searches of his personal residence unsupported by

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31. *Id.*

32. *Id.*

33. *See, e.g., Campbell v. Miller*, 373 F.3d 834, 835 (7th Cir. 2004) (“Damages are a normal, and adequate, response to an improper search or seizure.”); *Simmons v. Cook*, 154 F.3d 805, 809 (8th Cir. 1998) (affirming compensatory damages for Eighth Amendment claims of paraplegic prisoners placed in solitary confinement); *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997) (harm caused by fabrication of evidence “is redressable in an action for damages under [section] 1983”).

probable cause.”<sup>34</sup> The Eighth Circuit held that a plaintiff was entitled to compensatory damages for “the injury he suffered by being placed in segregation in retaliation for exercising a constitutional right.”<sup>35</sup> And the Seventh Circuit concluded that a prisoner was entitled to seek compensatory damages for an array of intangible harms, including loss of access to prison programs and services.<sup>36</sup>

Even under traditional common law tort principles, damages for mental or emotional injury are treated as a category separate from damages for other sorts of intangible injury.<sup>37</sup> The *Hobson* Court listed “several interests protected by

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34. *Ellison v. Balinski*, 625 F.3d 953, 959 (6th Cir. 2010).

35. *Trobaugh v. Hall*, 176 F.3d 1087, 1089 (8th Cir. 1999); *see also Hazle v. Crofoot*, 727 F.3d 983, 992 (9th Cir. 2013) (violation of plaintiff’s First Amendment rights constituted “actual injury” mandating compensatory damages); *Toliver v. City of New York*, 530 Fed. Appx. 90, 93 n.2 (2d Cir. 2013) (section 1997e(e) does not bar recovery of damages “for injuries to [plaintiff’s] First Amendment rights”); *Rowe v. Shake*, 196 F.3d 778, 781-82 (7th Cir. 1999) (“A deprivation of First Amendment rights standing alone is a cognizable injury. . . . 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.”).

36. *Cassidy*, 199 F.3d at 375-77; *see also, e.g., Brooks v. Andolina*, 826 F.2d 1266, 1269-70 (3d Cir. 1987) (prisoner entitled to compensatory damages “for the actual injuries he suffered as a result of his unconstitutional placement in punitive segregation for thirty days,” including loss of visiting, phone, and library privileges).

37. The leading nineteenth-century damages treatise divided damages into six classes: injuries to property, physical injuries, mental injuries, injuries to

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common law tort rules that might be relevant to constitutional deprivations,” distinguishing “pain and suffering [and] emotional distress” from other compensable, intangible injuries such as the impairment of prospects for future employment and injury to reputation.<sup>38</sup> Damage to reputation and alienation of associates are also separately cognizable from mental and emotional distress in defamation law.<sup>39</sup>

Likewise, courts consider loss of liberty an independently cognizable injury

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family relations, injuries to personal liberty, and injuries to reputation. Arthur G. Sedgwick & Joseph H. Beale, Jr., 1 *A Treatise on the Measure of Damages* § 39, pp. 50-51 (8th ed. 1891).

38. *Hobson*, 737 F.2d at 61 (internal quotation marks and citation omitted); *see also Stachura*, 477 U.S. at 307. (identifying “impairment of reputation” and “mental anguish and suffering” as compensable under common law).
39. *See, e.g.*, Charles T. McCormick, *Handbook on the Law of Damages* 422 (1935) (separating out three components of “general” damages in defamation cases, “injury to reputation,” “loss of business,” and “wounded feelings and bodily suffering resulting therefrom”); *see also Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 65 (1966) (categories of damages in libel cases “may include general injury to reputation, consequent mental suffering, [and] alienation of associates”).

in false imprisonment,<sup>40</sup> false arrest,<sup>41</sup> or malicious prosecution<sup>42</sup> cases. Such injuries warrant compensation separate from any mental or emotional distress:

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40. See, e.g., *Gardner v. Federated Dept. Stores, Inc.*, 907 F.2d 1348, 1353 (2d Cir. 1990) (recommending damages of \$50,000 for loss of liberty to “redress the denial of free movement and [dignitary injuries] as a result of the unlawful detention, and not the physical and mental injuries arising from the incident”); see also Sedgwick, *supra* note 37, at § 49, pp. 70-71 (“For an illegal restraint of the plaintiff’s personal liberty compensation may be recovered. This is something different from either the loss of time or the physical injury or mental suffering caused by the imprisonment.”); Dan B. Dobbs, *Handbook on the Law of Remedies: Damages, Equity, Restitution* 529 (1st ed. 1973) (“The general damages recoverable . . . do not require specific proof of emotional harm to the plaintiff. . . . Thus general damages for . . . false imprisonment and like torts are not dependent upon actual proof of such harm.”).
41. See, e.g., *Dellums v. Powell*, 566 F.2d 216, 227 (D.C. Cir. 1977) (in *Bivens* action for common law and Fourth Amendment violations, affirming damages award “for the insult of false arrest, any subsequent humiliation or mistreatment, and the duration of loss of liberty”); *Martinez v. Port Auth. of N.Y. & N.J.*, 445 F.3d 158, 161 (2d Cir. 2006) (loss of liberty is separately compensable from emotional distress in false arrest claim); *Alla v. Verkay*, 979 F. Supp. 2d 349, 371 (E.D.N.Y. 2013) (“An individual subjected to a false arrest is entitled to two types of compensatory damages: (1) for loss of liberty and (2) for physical and emotional distress.”).
42. See *Heck v. Humphrey*, 512 U.S. 477, 484 (1994) (“[A] successful malicious prosecution plaintiff may recover, in addition to general damages, compensation for any arrest or imprisonment, including damages for discomfort or injury to his health, or loss of time and deprivation of the society.”) (internal quotation marks and citation omitted); *Pitt v. Dist. of Columbia*, 491 F.3d 494, 510-11 (D.C. Cir. 2007) (malicious prosecution actionable under section 1983).

The damages recoverable for loss of liberty for the period spent in a wrongful confinement are separable from damages recoverable for such injuries as physical harm, embarrassment, or emotional suffering; even absent such other injuries, an award of several thousand dollars may be appropriate simply for several hours' loss of liberty.<sup>43</sup>

Applying this approach to section 1997e(e) supports the conclusion that prisoners' attempts to recover for actual but intangible injuries arising from constitutional deprivation, such as the inability to maintain family relationships or to engage in protected First Amendment activity, are not claims of "mental or emotional injury," though such injury may *also* be caused by constitutional violations. Nothing in section 1997e(e) requires this Court to abandon the sensible and legally correct position that the universe of compensable injury cannot be divided into only the two categories of "physical" and "mental or emotional."<sup>44</sup>

**B. Supreme Court precedent does not preclude recovery for actual, intangible harm suffered due to constitutional deprivations.**

As established above, the Supreme Court has made it clear that plaintiffs may recover compensatory damages for actual, albeit intangible, harm suffered as a result of the deprivation of constitutional rights or the invasion of

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43. *Kerman v. City of New York*, 374 F.3d 93, 125-26 (2d. Cir. 2004).

44. *See Hobson*, 737 F.2d at 62.

constitutionally-protected interests.<sup>45</sup> This conclusion is not disturbed by the Court's holding, in *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986), that “damages based on the abstract ‘value’ or ‘importance’ of constitutional rights are not a permissible element of compensatory damages.”<sup>46</sup>

In *Stachura*, a teacher brought an action seeking money damages for alleged violations of his First and Fourteenth Amendment rights in connection with his suspension.<sup>47</sup> At trial, the district court instructed the jury on “the standard elements of compensatory [and punitive] damages” and then, as a separate instruction, “charged that damages also could be awarded based on the *value* or *importance* of the constitutional rights that were violated.”<sup>48</sup> In vacating the resulting jury award, the Supreme Court observed that damages in civil rights actions “must always be designed to compensate injuries caused by the constitutional deprivation.”<sup>49</sup> The Court concluded that the jury had awarded

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45. *Carey*, 435 U.S. at 264; *see also Stachura*, 477 U.S. at 311 n.14 (damages may be awarded “for a nonmonetary harm that cannot easily be quantified”).

46. *Stachura*, 477 U.S. at 310.

47. *See id.* at 300-02.

48. *Id.* at 302 (emphasis added).

49. *Id.* at 309 (emphasis in original) (internal quotation marks and citation omitted); *see also Carey*, 435 U.S. at 254.

damages based on instructions that “plainly authorized . . . two distinct types of ‘compensatory’ damages,” only one of which was “based on respondent’s actual injury.”<sup>50</sup> The Court then concluded that the instructions permitting additional damages based on the abstract value of constitutional rights were impermissible, because such damages were “not truly compensatory.”<sup>51</sup>

The *Stachura* Court took care to distinguish its holding from cases awarding damages solely to compensate for actual harm suffered due to a deprivation of constitutional rights, even when that harm “cannot easily be quantified.”<sup>52</sup> The

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50. *Stachura*, 477 U.S. at 305.

51. *Id.* at 309 n.13. The *Stachura* Court declined to treat the challenged instructions as falling within the traditional tort remedy of “presumed damages,” a “substitute for ordinary compensatory damages” that may be applied to harms that are “likely to have occurred but difficult to establish.” *Id.* at 310-11 (emphasis omitted). The Court reasoned that presumed damages are unnecessary when the jury is “fully authorized to compensate respondent for both monetary and nonmonetary harms caused by petitioners’ conduct.” *Id.* at 312. While presumed damages traditionally have been applied in the context of privacy or defamation, *see Doe v. Chao*, 540 U.S. 614, 621 (2004), the Second and Sixth Circuits have relied in part on the concept of presumed damages in awarding compensatory damages for intangible constitutional harms. *See King*, 788 F.3d at 213-14 (interpreting 42 U.S.C. § 1997e(e)); *Kerman*, 374 F.3d at 130. This Court need not reach the application of presumed damages in order to find that Section 1997e(e) does not categorically bar compensatory damages for actual harm suffered as a result of constitutional violations.

52. *Stachura*, 477 U.S. at 311 n.14; *see also Carey*, 435 U.S. at 264.



Court agreed, for example, that plaintiffs who are unlawfully prevented from exercising their right to vote have “suffered compensable injury.”<sup>53</sup> The Court explained that the result, in those instances, “did not rest on the ‘value’ of the right to vote as an abstract matter,” but on the recognition “that the plaintiff had suffered a particular injury – his inability to vote in a particular election – that might be compensated through substantial money damages.”<sup>54</sup>

Supreme Court jurisprudence thus presents no bar to the ability of prisoners to seek money damages for actual, albeit intangible, constitutional harms. To the contrary, the Supreme Court has explained that “the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question.”<sup>55</sup> Following the Supreme Court’s guidance, compensatory awards for constitutional deprivations can and should be made based on the prisoner’s ability to prove the actual, compensable harm caused by the violation – whether it is loss of liberty, inability

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53. *Stachura*, 477 U.S. at 311 n.14 (citing *Lane v. Wilson*, 307 U.S. 268 (1939); *Nixon v. Herndon*, 273 U.S. 536 (1927)).

54. *Id.*; *cf. Kerman*, 374 F.3d at 130 (“The present case does not involve . . . an attempt to vindicate an abstract societal interest. Rather, it involves an anything-but-abstract physical detention.”).

55. *Carey*, 435 U.S. at 259; *see also Hobson*, 737 F.2d at 60-62.

to exercise First Amendment freedoms, or damage done to familial relationships – to the extent that harm is distinct from allegations of mental or emotional distress.<sup>56</sup>

**C. Compensatory damages serve a valuable role in deterring violations of constitutional rights.**

“Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect.”<sup>57</sup> The district court’s apparent

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56. *See, e.g., King*, 788 F.3d at 215-16 (affirming award of \$1,475 for retaliatory prison transfer that hampered plaintiff from obtaining affidavits for litigation); *Hazle*, 727 F.3d at 992 (finding award of compensatory damages mandatory for atheist plaintiff imprisoned for refusal to engage in religious drug rehabilitation); *Sallier v. Brooks*, 343 F.3d 868, 880 (6th Cir. 2003) (affirming award of \$750 in compensatory damages for each instance of unlawful opening of legal mail); *Goff v. Burton*, 91 F.3d 1188, 1192 (8th Cir. 1996) (affirming \$2250 award at \$10 a day for lost privileges resulting from a retaliatory transfer to a higher security prison); *Brooks*, 826 F.2d at 1269-70 (prisoner entitled to compensatory damages for loss of visiting, phone, and library privileges); *H.C. by Hewett v. Jarrard*, 786 F.2d 1080, 1088 (11th Cir. 1986) (“Compensatory damages are appropriate where juveniles have wrongfully received solitary confinement.”); *Cornell v. Gubbles*, No. 05-1389, 2010 WL 3928198, at \*3 (C.D. Ill. Sept. 29, 2010) (awarding \$500 when plaintiff’s letters were opened and read over prison PA system); *Lowrance v. Coughlin*, 862 F. Supp. 1090, 1120 (S.D.N.Y. 1994) (awarding significant damages for repeated retaliatory prison transfers, segregation, and cell searches); *Vanscoy v. Hicks*, 691 F. Supp. 1336, 1338 (M.D. Ala. 1988) (awarding \$50 for pretextual exclusion from religious service, without evidence of mental anguish or suffering).
57. *Carey*, 435 U.S. at 254; *see also Bell v. Hood*, 327 U.S. 678, 684 (1946) (“[W]here federally protected rights have been invaded, it has been the rule

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interpretation of section 1997e(e) would confound this purpose. There are many well-established constitutional violations that do not typically or naturally give rise to an associated physical injury, such as disenfranchisement, restrictions on speech or exercise of religion, lack of access to prison libraries, or deprivation of liberty or property without due process.<sup>58</sup> Under the formulation adopted by the district court, however, prisoners would be effectively precluded from seeking compensatory relief for actual harm caused by any such violations, simply because that harm had no intrinsic physical component.<sup>59</sup>

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from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.”).

58. *See, e.g., Bounds v. Smith*, 430 U.S. 817, 828 (1977) (access to prison library); *Wilkinson v. Austin*, 545 U.S. 209, 222-23 (2005) (protected liberty interest of inmates); *cf. Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (“The loss of a First Amendment right is frequently presumed to cause irreparable harm based on the intangible nature of the benefits flowing from the exercise of those rights.”) (internal quotation marks and citation omitted).
59. *Cf. Robinson*, 170 F.3d at 748 (“It would be a serious mistake to interpret section 1997e(e) to require a showing of physical injury in all prisoner civil rights suits.”). If, as the district court concluded, Appellants’ allegations of harm to their constitutional interests were too “speculative” or “abstract” to be distinguished from mental or emotional injury in this instance, Order at JA-293-94, then it is difficult to see how any plaintiff can adequately plead actual, intangible harm not subject to the limitations of section 1997e(e).

Nor is the availability of injunctive or declaratory relief alone sufficient to further the goals of our system of constitutional protections. “The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations.”<sup>60</sup> Actions for damages, more so than other forms of relief, are capable not only of compensating for harms done, but of deterring future harms.<sup>61</sup> As a result, “[t]o the extent aggrieved parties [have] less incentive to bring a damages claim against individuals, the deterrent effect of the *Bivens* remedy would be lost.”<sup>62</sup> Without the threat of damages, a bad actor would be free to abuse his position by violating the constitutional rights of prisoners as much and as often as he wished, secure in the knowledge that (as long as he did not cause physical injury) the worst thing that could happen would be that a court would tell him to stop.

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60. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001); *see also Doe v. Dist. of Columbia*, 697 F.2d 1115, 1124 (D.C. Cir. 1983) (“[T]he Supreme Court has often observed that constitutional tort actions – both of the section 1983 and of the *Bivens* variety – have an important deterrent function.”).

61. *Carlson v. Green*, 446 U.S. 14, 21 (1980) (“It is almost axiomatic that the threat of damages has a deterrent effect.”); *see also Butz v. Economou*, 438 U.S. 478, 506 (1978) (“In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.”).

62. *Malesko*, 534 U.S. at 69 (internal quotation marks and citations omitted).

Moreover, as the Supreme Court has noted, “[i]njunctive or declaratory relief is useless to a person who has already been injured,” because such remedies are necessarily forward-looking and are not available to redress past wrongs.<sup>63</sup> If a prisoner is wrongfully confined for two years in conditions that violate his constitutional rights, but released from those conditions as soon as his suit is filed, then he would have no remedy for the constitutional violation other than damages.<sup>64</sup> Similarly, a prisoner whose First Amendment rights have been violated would have no judicial recourse except money damages to redress any injury arising from this violation, if the violation had ceased by the time a court ruled on the merits of his claim.

There are many ways to deprive people of their constitutional rights without laying a finger on them. The presence of a physical injury should not be the determinant of whether prisoners whose constitutional rights were violated can

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63. *Butz*, 438 U.S. at 504; *see Davis*, 158 F.3d at 1348 (declaratory and injunctive relief only available if there is “a real and immediate threat that the alleged wrong will recur”) (internal quotation marks and citation omitted).

64. *See Ford v. Bender*, 768 F.3d 15, 29 (1st Cir. 2014) (“A prisoner’s challenge to prison conditions or policies is generally rendered moot by his transfer or release. . . . Any declaratory or injunctive relief . . . would have no practical impact on the inmate’s rights and would not redress in any way the injury he originally asserted.”) (internal quotation marks and citations omitted).

seek compensatory relief or be left without a remedy for the harms suffered. Such an interpretation of section 1997e(e) would eviscerate settled doctrine protecting prisoners against unconstitutional deprivations, by limiting the scope of that protection to those circumstances where the deprivation happens to be accompanied by a physical injury.

### Conclusion

For the foregoing reasons, the district court's judgment should be reversed to the extent that it rested upon the erroneous conclusion that damages are not available for actual injuries arising from violations of Appellants' constitutional rights in the absence of physical injury.

Dated: November 4, 2015

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### Certificate of Compliance

I certify that, pursuant to Rules 29(c)(7) and 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,548 words excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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