No. 17-1035

IN THE
SUPREME COURT OF THE UNITED STATES

CONRAAD HOEVER,
Petitioner,
v.

P. BELLEIS, CHIEF OF SECURITY COLONEL, ET AL.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* MUSLIM ADVOCATES, THE RUTHERFORD INSTITUTE, AND THE NATIONAL COUNCIL OF JEWISH WOMEN IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. For many faiths, certain observances are important but not mandatory. In a free exercise case, a plaintiff must establish that the government imposed a burden on a religious practice. The court of appeals furthered confusion in the lower courts by holding that only interference with a practice mandated by an incarcerated person's faith can burden the incarcerated person's right to the free exercise of religion.

The first question presented is:

Does the First Amendment extend to an incarcerated person's non-mandatory religious exercise?

2. Section 42 U.S.C. 1997e(e), a provision of the Prison Litigation Reform Act, states that an incarcerated person may not bring a claim "for mental or emotional injury" unless the incarcerated person makes "a prior showing of physical injury or the commission of a sexual act." In six circuits, this provision permits incarcerated persons to recover compensatory damages for First Amendment violations unaccompanied by a physical injury or sexual act. In five other circuits, the opposite is true: compensatory damages are prohibited.

The second question presented is:

Does 42 U.S.C. § 1997e(e) permit an incarcerated person to recover compensatory damages against prison officials who violate the First Amendment?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. Restricting non-mandatory religious practices burdens the right to free exercise of religion 5

A. Limiting the Free Exercise Clause's protections to "mandatory" practices conflicts with this Court's precedent and impermissibly requires state actors to make religious decisions 6

B. Limiting the protections of the Free Exercise Clause to "mandatory" practices excludes many important religious practices 12

II. Deprivations of religious liberty do not require a showing of physical harm under the Prison Litigation Reform Act 14

A. The PLRA's plain meaning and legislative history demonstrate that it was not intended to deprive inmates of compensatory damages for violations of religious liberty 16

B. The availability of a compensatory damages remedy serves as an important deterrent against violations of religious liberty in prisons 18

TABLE OF CONTENTS--Continued

Page

C. There is no adequate alternative to compensatory damages for violations of religious liberty in the prison context 21

III. Conclusion 24

TABLE OF AUTHORITIES

Page

CASES:

Al-Amin v. Smith,
637 F.3d 1192 (11th Cir. 2011)............................ 22

Aref v. Lynch,
833 F.3d 242 (D.C. Cir. 2016).............................. 22

Ashby v. White,
(1703) 87 Eng. Rep. 808....................................... 17

Burwell v. Hobby Lobby Stores, Inc.,
134 S. Ct. 2751 (2014).. 7

Butts v. Martin,
877 F.3d 571 (5th Cir. 2017).................................. 5

Butz v. Economou,
438 U.S. 478 (1978)...18, 22

Chesser v. Walton,
No. 12-cv-1198, 2016 WL 6471435
(S.D. Ill. Nov. 2, 2016).. 21

City of Riverside v. Rivera,
477 U.S. 561 (1986).. 18

Cruz v. Beto,
405 U.S. 319 (1972).. 3

Davis v. District of Columbia,
158 F.3d 1342 (D.C. Cir. 1998)............................ 22

TABLE OF AUTHORITIES--Continued

Page

Elrod v. Burns,
427 U.S. 347 (1976)... 18

Ford v. McGinnis,
352 F.3d 582 (2d Cir. 2003) 6, 14

Frazee v. Ill. Dep't of Emp't Sec.,
489 U.S. 829 (1989).. 9

Grayson v. Schuler,
666 F.3d 450 (7th Cir. 2012).......................7, 12, 13

Hamdi v. Rumsfeld,
542 U.S. 507 (2004)... 19

Harlow v. Fitzgerald,
457 U.S. 800 (1982)... 20

Harris v. Garner,
216 F.3d 970 (11th Cir. 2000).............................. 15

Hernandez v. Comm'r,
490 U.S. 680 (1989).. 6

Hobby Lobby Stores, Inc. v. Sebelius,
723 F.3d 1114 (10th Cir. 2013).............................. 7

Hobson v. Wilson,
737 F.2d 1 (D.C. Cir. 1984)................................. 17

Hoever v. Belleis,
703 F. App'x 908 (11th Cir. 2017) 4, 15

TABLE OF AUTHORITIES--Continued

Page

Hutchins v. McDaniels,
512 F.3d 193 (5th Cir. 2007)................................ 22

Johnson v. Killian,
No. 07-cv-6641, 2009 WL 1066248
(S.D.N.Y. April 21, 2009)..................................... 21

Levitan v. Ashcroft,
281 F.3d 1313 (D.C. Cir. 2002)........................12, 14

McCreary County v. ACLU of Ky.,
545 U.S. 844 (2005)... 7

Meachum v. Fano,
427 U.S. 215 (1976).. 21

Midrash Sephardi, Inc. v. Town of Surfside,
366 F.3d 1214 (11th Cir. 2004).............................. 4

Monroe v. Gerbin,
No. 16-cv-02818
(S.D.N.Y. Dec. 27, 2017) 10, 11

Muhammad v. Sapp,
388 F. App'x 892 (11th Cir. 2010) 8

O'Lone v. Estate of Shabazz,
482 U.S. 342 (1987).. 11

Owen v. City of Independence,
445 U.S. 622 (1980).. 18

TABLE OF AUTHORITIES--Continued

Page

Pearson v. Callahan,
555 U.S. 223 (2009)... 20

Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church,
393 U.S. 440 (1969)... 7

Richardson v. McKnight,
521 U.S. 399 (1997)... 20

Scheuer v. Rhodes,
416 U.S. 232 (1974)... 20

Smith v. Riley,
No. 10-cv-2583, 2013 WL 1176076,
(N.D. Ala. Feb. 7, 2013) 10

Smith v. Wade,
461 U.S. 30 (1983)... 22

Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly,
309 F.3d 144 (3d Cir. 2002) 13

Thomas v. Review Bd. of Ind. Emp't Sec. Div.,
450 U.S. 707 (1981)...7, 9

Thompson v. Carter,
284 F.3d 411 (2d Cir. 2002) 22

TRW Inc. v. Andrews,
534 U.S. 19 (2001)... 16

TABLE OF AUTHORITIES--Continued

Page

Turner v. Safley,
482 U.S. 78 (1987) 11

United States v. Moon,
718 F.2d 1210 (2d Cir. 1983) 14

Williams v. Wilkinson,
645 F. App'x 692 (10th Cir. 2016) 12

Zelman v. Simmons-Harris,
536 U.S. 639, 679 n.4 (2002) 3

Ziglar v. Abbasi,
137 S. Ct. 1843 (2017) 20

STATUTES:

42 U.S.C. § 1997e(e) 4, 14, 15, 16

42 U.S.C. § 2000cc-1 2

Prison Litigation Reform Act of 1995,
Pub. L. 104-134, 110 Stat. 1321-71 16

OTHER AUTHORITIES:

Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1159 (1991) 2

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TABLE OF AUTHORITIES--Continued

Page

Mona Chalabi, *"Are Prisoners Less Likely to Be Atheists?"*, FiveThirtyEight (Mar. 12, 2015) 8

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1 Arthur G. Sedgwick & Joseph H. Beale, Jr., *A Treatise on the Measure of Damages* (8th ed. 1891) 17

BRIEF OF *AMICI CURIAE* MUSLIM ADVOCATES, THE RUTHERFORD INSTITUTE, AND THE NATIONAL COUNCIL OF JEWISH WOMEN IN SUPPORT OF PETITION FOR CERTIORARI

Amici Curiae Muslim Advocates, The Rutherford Institute, and The National Council of Jewish Women respectfully submit this *amici curiae* brief in support of Petitioners.[1]

INTERESTS OF *AMICI CURIAE*

Amicus curiae **Muslim Advocates**, a national legal advocacy and educational organization formed in 2005, works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. The issues at stake in this case directly relate to Muslim Advocates' work fighting religious discrimination against vulnerable communities.

Amicus curiae **The Rutherford Institute** is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing pro bono legal representation to individuals whose civil liberties are threatened and in educating the public about

[1] Pursuant to Supreme Court Rule 37.2(a), amici sent timely notice to all parties, and all parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, its members, and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

constitutional and human rights issues, including freedom of religion. To that end, the Institute actively participates in cases addressing the First Amendment's religion clauses. The Institute served as amicus curiae in prior religious freedom cases before this Court, including *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), *Sossamon v. Texas*, 563 U.S. 277 (2011); *Cutter v. Wilkinson*, 544 U.S. 709 (2005); and *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987).

Amicus curiae **The National Council of Jewish Women** (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Principles state that: "Religious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain democratic society." Consistent with its Principles and Resolutions, NCJW joins this brief.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The free exercise of religion is among the most important liberties protected by the Constitution. As members of this Court have noted, "[t]he free exercise clause . . . . was specially concerned with the plight of minority religions." *Zelman v. Simmons-Harris*, 536

U.S. 639, 679 n.4 (2002) (Thomas, J., concurring) (quoting Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1159 (1991)). Accordingly, when the protections of the Free Exercise Clause are weakened, it is often minority religions that suffer most.

The erosion of these religious liberties is especially likely to begin in prisons. Incarcerated persons must forego many liberties upon becoming incarcerated; while the law seeks to protect the religious liberty of this population, *see* 42 U.S.C. § 2000cc-1 (protecting the religious exercise of institutionalized persons), they often lack the resources or the political power to enforce and vindicate their rights. Strong constitutional and statutory protections are, all too often, all that keeps an incarcerated person's right to free exercise from being lost. That is why, as this Court has held, "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of penalty." *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972).

Petitioner, who is Christian, was denied such a "reasonable opportunity" to practice his religion. Prison officials refused Petitioner's request for an English-language Christian Bible during his time in solitary confinement—providing him instead with only a Spanish-language Bible he could not read. The courts below compounded the error by dismissing Petitioner's suit for damages over this deprivation.

This case merits review by this Court because the Eleventh Circuit's opinion fails to protect the Petitioner's religious freedom in two ways.

First, the Eleventh Circuit held that there is no burden on a plaintiff's right of free exercise unless "the conduct complained of 'completely prevents the individual from engaging in religiously mandated activity or requires participation in an activity prohibited by religion.'" *Hoever v. Belleis*, 703 F. App'x 908, 912 (11th Cir. 2017) (quoting *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004)) (internal punctuation omitted). Because Petitioner's access to the Bible was "beneficial, but not mandatory" for his exercise of Christianity, the court held that his religious practice was not burdened for purposes of the Free Exercise Clause. *Id.* at 913. Such a requirement conflicts with this Court's precedents and the holdings of other circuits. This holding not only improperly asks state officials to determine what religious practices are mandatory and non-mandatory, it fails to protect many fundamental religious practices that are crucial to religious adherents in many traditions.

Second, the lower court's ruling applies the Prison Litigation Reform Act ("PLRA") to bar Petitioner and other incarcerated persons deprived of religious liberty from recovering compensatory damages for the violation of their religious freedom unless they can show that they have suffered a physical injury. *Id.* at 912. This results from the Eleventh Circuit's erroneous conclusion that a loss of religious liberty constitutes "mental or emotional injury" for purposes of the PLRA. *Id.* (quoting 42 U.S.C. § 1997e(e)). In doing so, the court reaffirmed its position in a long-standing split among the courts of appeals which has left many of the nation's incarcerated persons without the necessary recourse to deter and compensate their losses of religious liberty.

Unless this Court steps in to correct this error and resolve the circuit split on both points, the deprivation of constitutional rights will continue, and, for many of the most vulnerable Americans, the promise of the Constitution's protections for religious liberty will remain out of reach. Accordingly, the Court should reverse the Eleventh Circuit's decision.[2]

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ARGUMENT

I. Restricting non-mandatory religious practices burdens the right to free exercise of religion.

The Court should grant certiorari in this case to resolve the critical issue of whether the Free Exercise Clause protects a plaintiff's non-mandatory religious exercise.

Because the Eleventh Circuit continues to rely on this impermissible condition, it is important that the Court makes clear that such a requirement is not a part of the test for a burden on religious practice under the Free Exercise Clause.[3]

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[2] *Amici* take no position on the merits of Petitioner's underlying criminal conviction.

[3] Whether a plaintiff pleading a violation of the Free Exercise Clause must show a substantial burden on religious practice, or if some lesser showing is required, is itself a question that has divided the courts of appeal. *See Butts v. Martin*, 877 F.3d 571, 585-86 & n.7 (5th Cir. 2017) (discussing the decisions of the various courts of appeals, noting that the Eighth, Ninth, and Tenth Circuits require that the religious burden in a free exercise

A. Limiting the Free Exercise Clause's protections to "mandatory" practices conflicts with this Court's precedent and impermissibly requires state actors to make religious decisions.

A rule that only "mandatory" religious practices qualify for protection under the Free Exercise Clause conflicts with both the explicit holdings and the logic of this Court's First Amendment jurisprudence.

By requiring state actors—prison officials in the first instance, and courts in exercising judicial review over those decisions—to determine what constitutes a "mandatory" religious practice, the Eleventh Circuit's rule necessarily runs afoul of the Establishment Clause. In evaluating a plaintiff's belief, the court's "scrutiny extends *only* to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature." *Ford v. McGinnis*, 352 F.3d 582, 590 (2d Cir. 2003) (Sotomayor, J.) (emphasis added). This Court has been clear that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Comm'r,* 490 U.S. 680, 699 (1989); *see also Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707,

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claim be substantial, the Third and Fifth Circuits do not, and the Second Circuit has assumed-without-deciding that a substantial burden is required). While the Court need not decide that issue to resolve Petitioner's case, a grant of certiorari here would provide an opportunity for welcome guidance regarding the standard for stating a free exercise claim.

716 (1981) ("Courts are not arbiters of scriptural interpretation."); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1153 (10th Cir. 2013) (en banc) (Gorsuch, J., concurring) ("[I]t . . . is not, the place of courts of law to question the correctness or the consistency of tenets of religious faith, only to protect the exercise of faith."), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). "Plainly, the First Amendment forbids civil courts from" "determin[ing] matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion." *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969) (unanimous). As Justice O'Connor recognized, the Framers of the Free Exercise Clause knew that "line-drawing between religions is an enterprise that, once begun, has no logical stopping point." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 884 (2005) (O'Connor, J., concurring).

Adhering to this precedent, six circuit courts have held that a religious practice need not be mandatory in order for its restriction to trigger scrutiny under the Free Exercise Clause. *See* Pet'r's Br. at 9-11 (listing cases from five circuits); *Grayson v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012) (Posner, J.) ("[O]ptional as distinct from mandatory religious observances aren't excluded" from the protection of the Free Exercise Clause.).

Despite the example of the other courts of appeals, the Eleventh Circuit's error in this case is not an isolated incident. The Eleventh Circuit has also previously relied on the non-mandatory nature of a religious practice to deprive an incarcerated person of

his rights. In *Muhammad v. Sapp*, the Eleventh Circuit considered a free exercise claim by an incarcerated Muslim who sought a qibla compass, which would permit him to locate Mecca so he could properly direct his prayers. 388 F. App'x 892, 896 (11th Cir. 2010). In holding that the plaintiff had not demonstrated a substantial burden on his religious exercise, the Eleventh Circuit relied in part on evidence that the compass was "permissible and a useful item to have" but was not "mandatory." *Id*. Accordingly, the court found there was no substantial burden on the plaintiff's religious exercise and affirmed the grant of summary judgment on this claim. *Id*.

Government actors asked to make these determinations must inevitably rely on their own experience if they are called to sit in judgment on the beliefs of adherents. Such a process offers the opportunity for unscrupulous actors to give special weight to beliefs that accord with the decider's own preferences and reflect the decider's point of view.

While state officials should not make religious determinations on behalf of any adherent, the harm is especially great for those who belong to minority faiths. Because even the best-intentioned government actors is likely to have less information about minority faiths, their assessments of what is mandatory for those faiths will be especially prone to error or guessing. The best available data suggests that minority faiths are overrepresented in U.S. prisons. For instance, in 2013, the Federal Bureau of Prisons represented that 8.4% of the federal prison population self-identified their religion as "Muslim" and 3.1% as "Native American," while U.S. Census

data placed the total number of Americans with those faiths at only .6% and .1%, respectively.[4]

For example, the Indiana Supreme Court held that a Jehovah's Witness who believed that constructing tanks for the military was against his creed made a "personal philosophical choice rather than a religious choice," with that court giving "significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets." *Thomas*, 450 U.S. at 715. This Court reversed that decision because "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Id*. at 715-16. The Court noted that "[i]ntrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses." *Id*. at 715. This Court has adhered to this principle on numerous occasions. *See, e.g., Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 832-34 (1989) (holding that claimant's belief that he could not work on Sunday was protected by the Free Exercise Clause even when other members of his faith did not share the belief).

In spite of this Court's guidance, courts and other state actors in the Eleventh Circuit continue to make independent judgments about the proper nature of a incarcerated person's religious practice. For example, the St. Clair Correctional Facility in Alabama instituted a policy requiring a Religious

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[4] Mona Chalabi, "Are Prisoners Less Likely to Be Atheists?", FiveThirtyEight (Mar. 12, 2015), https://fivethirtyeight.com/features/are-prisoners-less-likely-to-be-atheists/ (last accessed Mar. 1, 2018).

Activities Review Committee ("Committee") to approve all requests for religious accommodation. *See Smith v. Riley*, No. 10-cv-2583, 2013 WL 1176076, at *3-4 (N.D. Ala. Feb. 7, 2013), *report and recommendation adopted,* 2013 WL 1178673 (N.D. Ala. Mar. 14, 2013), *aff'd sub nom. Smith v. Governor for Ala.*, 562 F. App'x 806 (11th Cir. 2014). When an incarcerated person practicing the religion of Odinism requested items for his religious practice, the Committee relied on its own research into the Odinist religion to find that one of the items was not "religiously necessary" and that a requested holy day "did not have the same significance" as other holy days which had been approved. *Id*. at *5-6. The magistrate judge, in a report and recommendation later affirmed by both the district court and the Eleventh Circuit, found that the plaintiff failed to show a substantial burden under the Free Exercise Clause in part because he had not "point[ed] the court to religious authorities for support of his requests" for his religious practices—even as the magistrate noted he was assuming the incarcerated person was sincere in his religious belief. *Id*. at *7.

Outside the Eleventh Circuit, this result would have been different. For instance, in New York—where the Second Circuit has made clear that courts are not to engage in an inquiry beyond the sincerity of a plaintiff's religious belief—a district court recently rejected an attempt by prison officials to override an incarcerated person's sincere belief. A Muslim incarcerated at Otisville Correctional Facility in New York requested an accommodation permitting him to consume his diabetes medication after sundown, as was required by his faith. *See Monroe v. Gerbin*, No. 16-cv-02818, at *5-6 (S.D.N.Y. Dec. 27, 2017), ECF No. 92. After initially accommodating this request, the

prison officials reversed course based on the religious opinion of a prison chaplain, who expressed the opinion—not shared by the plaintiff—that this particular consumption of medicine was permitted by Islam under an exception to the rule of fasting during Ramadan. *Id*. at *25. Fortunately, the district court, relying on this Court's precedent and the Second Circuit's interpretation thereof, rejected this argument and found that the plaintiff had alleged a substantial burden on his free exercise of religion. *See id*.

The harm caused by the Eleventh Circuit's rule would be great. Such a rule would require courts to dismiss all claims in which an incarcerated person alleges interference with a non-mandatory burden. This would leave prisons free to ban any and all non-mandatory religious activity, as defined by the prisons and the courts, without violating the Free Exercise Clause.

Nor would a rule protecting non-mandatory religious practices lead to an explosion of frivolous claims. Existing doctrine has made clear that even "[w]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). Prison officials will have the same opportunity to establish their rationale for a rule restricting non-mandatory religious exercise that they presently do for mandatory religious exercise in the Eleventh Circuit. Nor have the Courts of Appeals for the Second, Seventh, Ninth, Tenth, and D.C. Circuits collapsed under the weight of additional litigation

after holding that the Free Exercise Clause protects non-mandatory religious practices.

Outsourcing to prison officials and courts a determination of what is religiously "mandatory" will result in many sincere believers being deprived of the chance to practice their religion—which is the very evil the Free Exercise Clause is meant to prohibit. Unless the Court corrects the Eleventh Circuit's error, these incidents will only multiply.

B. Limiting the protections of the Free Exercise Clause to "mandatory" practices excludes many important religious practices.

Even if courts and prison officials were able to make unerring judgments about whether a given plaintiff's religious practice is or is not "mandatory," a Free Exercise Clause that only protected mandatory conduct would leave many important religious practices unprotected.

Many religions include practices that are considered fundamentally important to adherents but that are not necessarily deemed mandatory. Courts outside the Eleventh Circuit have properly extended the protection of the Free Exercise Clause to similarly non-mandatory practices in the prison context. *See, e.g., Williams v. Wilkinson*, 645 F. App'x 692, 704–05 (10th Cir. 2016) (holding that an incarcerated Muslim's religiously-motivated request for a kosher diet implicated the Free Exercise Clause even though he did not allege that he needed the diet to practice his religion); *Grayson v. Schuler*, 666 F.3d 450, 454–55 (7th Cir. 2012) (finding the Free Exercise Clause protected Rastafarian taking the Nazirite Vow of

Separation); *Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002) (finding incarcerated Catholics were entitled to wine for Communion because "[m]any cherished religious practices are performed devoutly by adherents who nonetheless do not or cannot insist that those practices are mandated."). The Eleventh Circuit's construction of the Free Exercise Clause would permit prison officials to burden any of these rights without permitting incarcerated persons to invoke the protections of the First Amendment.

Outside the prison context, adherents are also threatened by a rule that only mandatory religious practices can be burdened the Free Exercise Clause. For example, the Third Circuit considered a free exercise claim by Orthodox Jews seeking to establish an eruv ceremonial area that would, among other things, permit disabled congregants to attend synagogue. *See Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002). The city borough council refused to permit the plaintiffs to place the markers of the ceremonial area on city property. The appeals court declined the council's invitation to investigate whether the plaintiffs were engaged in "optional" or "mandatory" religious conduct in seeking to establish an eruv ceremonial area because "[n]either the Supreme Court nor our Court has intimated that only compulsory religious practices fall within the ambit of the Free Exercise Clause." *Id.* at 171-72. Many spiritual practices that matter deeply to adherents are undertaken for motives other than strict compliance with a mandatory religious tenet. For example, "[a] Catholic who vows to obey the Rule of St. Benedict and therefore avoid 'the meat of four-footed animals' is performing a religious observance even though not a mandatory one." *Grayson*, 666 F.3d at 454. A Free Exercise Clause that is limited to

mandatory practices leaves these important acts of non-mandatory worship unprotected against government interference.

Requiring a showing of mandatory practices may exclude not only certain religious practices, but entire religions. Under a construction of the Free Exercise Clause that protects only mandatory religious practices, "religions that lack the concepts of commandments necessary for the salvation of the soul would find themselves outside the scope of the First Amendment protection altogether. Nothing in the free exercise clause suggests that it only protects religions that incorporate mandatory tests." *Levitan*, 281 F.3d at 1320; *accord Ford*, 352 F.3d at 593. As the Second Circuit has held, "under the Religion Clauses, everyone is entitled to entertain such view respecting his relations to what he considers the divine and the duties such relationship imposes as may be approved by that person's conscience, and to worship in any way such person thinks fit so long as this is not injurious to the equal rights of others." *United States v. Moon*, 718 F.2d 1210, 1226-27 (2d Cir. 1983). Only by rejecting the Eleventh Circuit's focus in this case on the mandatory nature of a religious practice can this Court preserve the freedom of religion for adherents of all faiths.

II. Deprivations of religious liberty do not require a showing of physical harm under the Prison Litigation Reform Act.

This case also provides the Court an opportunity to resolve the long-standing conflict among the federal courts of appeals over whether harms to religious liberty constitute "mental or emotional injuries" for purposes of the Prison

Litigation Reform Act ("PLRA") in 42 U.S.C. § 1997e(e), and accordingly are not a basis for recovering compensatory damages absent proof that the incarcerated person has suffered physical harm.

The PLRA bars an incarcerated person from bringing a "[f]ederal civil action . . . for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act." 42 U.S.C. § 1997e(e). The statute does not define "mental or emotional injury," nor does it make any reference to constitutional harms. Six courts of appeals have held that a deprivation of an incarcerated person's religious liberty is not properly cognized as "mental or emotional injury," and accordingly have recognized the availability of a compensatory damages remedy. *See* Pet'r's Br. 16-18. Five courts of appeals have reached the opposite conclusion, holding that a deprivation of religious freedom under the Free Exercise Clause constitutes a "mental or emotional injury" under the statute and thus that compensatory damages are unavailable to incarcerated persons without a predicate physical injury. *See id*. at 18-19.

The Eleventh Circuit has long held that the PLRA bars compensatory damages for First Amendment harms without a physical injury. *See Harris v. Garner*, 216 F.3d 970, 984-85 (11th Cir. 2000). In its opinion below, the Eleventh Circuit adhered to this holding. *See Hoever v. Belleis*, 703 F. App'x 908, 912 (11th Cir. 2017) (citing *Harris* at 984-85). In doing so, the Eleventh Circuit thereby removes a critical deterrent against the violation of incarcerated persons' constitutional rights, including their religious liberty. Because Congress did not intend to leave incarcerated persons unprotected

against violations of their religious liberty, this Court should grant certiorari, reverse the Eleventh Circuit's holding, and clarify that the PLRA does not require a showing of physical injury to seek compensatory damages for constitutional harms.

A. The PLRA's plain meaning and legislative history demonstrate that it was not intended to deprive inmates of compensatory damages for violations of religious liberty.

The PLRA establishes a requirement of physical harm only for suits seeking compensation for "mental or emotional injury." 42 U.S.C. § 1997e(e). The error of the Eleventh Circuit (and the other four courts of appeals that have taken the same view) is in construing this language to include claims for deprivations of constitutional rights, which are not simply claims for "mental or emotional harm."

As Petitioner makes clear, Congress was perfectly capable of stating that all suits by incarcerated persons seeking damages for any non-physical injury are barred. Pet'r's Br. 22. By using the phrase "mental or emotional harm," Congress instead established a bar to a more limited category of cases. Insofar as courts have simply presumed that *any* injury that is not physical must be mental or emotional, they have rendered the phrase "mental or emotional" superfluous, contrary to the basic principle of statutory construction that requires every term in a statute to be given effect. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

This false presumption that all non-physical harm must be mental or emotional also defies the

well-established, centuries-old legal history against which Congress was legislating. When Congress passed the PLRA in 1995,[5] deprivations of personal liberty were widely understood to be distinct as a legal matter from mental or emotional harms. For example, the leading nineteenth-century damages treatise divided damages into six classes: injuries to property, physical injuries, mental injuries, injuries to family relations, injuries to personal liberty, and injuries to reputation. 1 ARTHUR G. SEDGWICK & JOSEPH H. BEALE, JR., A TREATISE ON THE MEASURE OF DAMAGES 44-51 & n.1 (8th ed. 1891). Similarly, American jurisprudence had long recognized that "injury to a First Amendment-protected interest could itself constitute compensable injury wholly apart from any 'emotional distress, humiliation and personal indignity, emotional pain, embarrassment, fear, anxiety and anguish' suffered by plaintiffs." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 315 (1986) (Marshall, J., concurring in the judgment) (quoting *Hobson v. Wilson*, 737 F.2d 1, 62 (D.C. Cir. 1984)). Deprivations of voting rights have also been held to be compensable through damages awards for centuries, dating back to Lord Holt's celebrated Queen's Bench opinion in the eighteenth-century case *Ashby v. White*. (1703) 87 Eng. Rep. 808 (Holt, C.J., dissenting) (An invasion of voting rights permitted a recovery of compensatory damages even without any pecuniary loss because "an injury imports a damage, when a man is thereby hindered of his right."), *rev'd and dissent adopted*, 91 Eng. Rep. 665. The difference between First Amendment injuries and mental or emotional injuries can also be seen in the doctrine holding that, unlike mental or emotional injuries,

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[5] *See* Prison Litigation Reform Act of 1995, Pub. L. 104-134, 110 Stat. 1321-71.

"[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" for purposes of a preliminary injunction. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion).

The Eleventh Circuit and its sister circuits that have adopted a contrary position thus defy the obvious intent of the statute in reading the PLRA statutory provision to include violations of religious liberty as "mental or emotional injury."

B. The availability of a compensatory damages remedy serves as an important deterrent against violations of religious liberty in prisons.

The availability of compensatory damages is critical to protecting the religious liberty of incarcerated persons. The possibility of financial liability helps to deter prison officials from violating individuals' religious liberty in the first place. Such "controls on government" are necessary because "angels [do not] govern men." The Federalist No. 51 (James Madison). Deterring future violations is one of the important purposes of statutes governing civil rights claims. *See Owen v. City of Independence*, 445 U.S. 622, 651 (1980) ("Moreover, [42 U.S.C.] § 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well.").

This Court has recognized that "the damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future." *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986); *accord Butz v. Economou*, 438 U.S. 478, 506 (1978) ("In

situations of abuse, an action for damages against the responsible individual can be an important means of vindicating constitutional guarantees."). Damages deter violations of rights by making officials internalize the costs of their illegal activity rather than forcing their victims to bear it. *See* John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 Va. L. Rev. 47, 72 (1998). Faced with the choice between respecting someone's religious liberty and risking liability by violating it, officials are more likely to follow the law.

This deterrence is especially important for incarcerated persons. As this Court has noted, "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse." *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004) (plurality opinion). Incarcerated persons face a power imbalance unlike any other persons in modern society; they generally lack political power and are often unable to access redress outside of the courts. Renowned law professor Erwin Chemerinsky has correctly observed that prisons are among "the places where aggressive judicial review is most essential . . . [because] the authoritarian nature of these institutions makes them places where serious abuses of power and violations of rights are likely to occur; and . . . the political process is extremely unlikely to provide any protections." Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 Suffolk U.L. Rev. 441, 458 (1999); *see also id.* at 459 (noting incarcerated persons "are classic discrete and insular minorities, who have little political power. Those in prisons, for example, are routinely and permanently disenfranchised."). Further, deprivations of religious liberty in prisons often involve "individual instances

of discrimination or law enforcement overreach, which due to their very nature are difficult to address except by way of damages actions after the fact." *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017). Damages thus serve to protect the religious liberty of society's most vulnerable.

Nor is the prospect of expanding the number of constitutional claims by incarcerated persons cause for concern. Qualified immunity ensures that the benefits of deterrence do not impose unreasonable costs on defendants. The qualified immunity doctrine "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties responsibly." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). By immunizing officials from liability for all but violations of "clearly established" rights, *id.*, qualified immunity allows officials to make difficult choices without fearing litigation at every turn. *See Richardson v. McKnight,* 521 U.S. 399, 407-08 (1997) (qualified immunity protects "government's ability to perform its traditional functions"); *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974) (qualified immunity protects officials who exercise discretion and encourages them to exercise good judgment).

Construing the PLRA to permit constitutional claims for damages without a showing of physical injury, then, would not place an unreasonable burden on government officials. Only the worst actors—those who take action that a reasonable person would know to be unlawful—would be liable. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Permitting the Eleventh Circuit's faulty construction of the PLRA to

cut off a damages remedy for free exercise harms altogether would upset the balance that qualified immunity strikes between the government's ability to function and the First Amendment's protection for religious liberty.

C. There is no adequate alternative to compensatory damages for violations of religious liberty in the prison context.

The other major remedy available to a victim of religious discrimination—injunctive relief—is not an adequate substitute for compensatory damages in the prison context. Prison officials may provide or deny incarcerated persons religious accommodations at will and may transfer incarcerated persons among units with different rules and accommodations at almost any time. *See, e.g.*, *Meachum v. Fano*, 427 U.S. 215, 228 (1976). This makes it very easy for a defendant government official or agency to moot a case brought by an incarcerated person premised on injunctive relief. *See, e.g., Chesser v. Walton*, No. 12-cv-1198, 2016 WL 6471435, at *1, *4 (S.D. Ill. Nov. 2, 2016) (finding claims moot because incarcerated plaintiff had been transferred to a different facility); *Johnson v. Killian*, No. 07-cv-6641, 2009 WL 1066248 at *1 (S.D.N.Y. April 21, 2009) (mooting incarcerated Muslim's Religious Freedom Restoration Act claim challenging prison's group prayer policy of incarcerated Muslim by transferring him to another federal prison). Not only does this remove a major incentive for the incarcerated person to continue the litigation (and entirely moot the claims of plaintiffs who did not plead an action for nominal or punitive damages); these strategic transfers can also slow the

development of the law by denying courts the chance to rule on substantive disputes.

While the availability of nominal damages[6] may serve to avoid mootness as a formal matter under the PLRA, the D.C. Circuit has noted "the illusory nature, in practice, of such relief." *Aref v. Lynch*, 833 F.3d 242, 265 n.17 (D.C. Cir. 2016). "[N]ominal damages do little to deter repetition of the illegal conduct and do not provide any compensation for actual harms suffered." *Id*. (citing *Butz*, 438 U.S. at 506). As such, the availability of nominal damages does nothing to alter the urgency of this Court's intervention to find that the PLRA does not bar suits for compensatory damages for violations of the First Amendment.[7]

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[6] Courts generally permit the award of nominal damages but are divided on the availability of punitive damages under section 1997e(e). *Compare Hutchins v. McDaniels*, 512 F.3d 193, 196-98 (5th Cir. 2007) ("[W]e recognize that § 1997e(e) does not bar [Plaintiff's] recovery of nominal or punitive damages.") *and Thompson v. Carter*, 284 F.3d 411, 417-18 (2d Cir. 2002) (holding that the PLRA bars compensatory damages but "does not limit the availability of nominal damages for the violation of a constitutional right or of punitive damages.") *with Al-Amin v. Smith*, 637 F.3d 1192, 1199 (11th Cir. 2011) ("[A]ccording to the law of our circuit, the PLRA precludes the recovery of punitive damages in the absence of physical injury.") *and Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998) (holding punitive damages unavailable under the PLRA for mental or emotional injuries).

[7] Punitive damages also do not adequately replace compensatory damages, since, as the D.C. Circuit noted, "[p]unitive damages are never awarded as a matter of right, and the standard is understandably high—requiring evil motive or reckless indifference to the rights of others." *Aref*, 833 F.3d at 265 n.17 (citing *Smith v. Wade*, 461 U.S. 30, 51-52 (1983)).

Because prisons are so easily able to moot incarcerated persons' claims (as discussed *supra*), incarcerated persons must have an incentive to continue to pursue the vindication of their rights. Only the most dedicated incarcerated persons will persevere in a legal matter when both injunctive relief and compensatory damages are unavailable. This is particularly true because incarcerated persons who maintain lawsuits against prisons and prison officials often face harassment and retaliation. *See* John J. Gibbons & Nicholas De B. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons*, 22 Wash. U.J.L. & Pol'y 385, 514 (2006) (noting that a survey by the Correctional Association of New York found that more than half of incarcerated persons who file grievances report experiencing retaliation for making a complaint against staff); Kitty Calavita & Valerie Jenness, APPEALING TO JUSTICE: PRISONER GRIEVANCES, RIGHTS, AND CARCERAL LOGIC 68 (2015) (reporting a study that showed over 70% of incarcerated persons believed correctional officers retaliate against incarcerated persons who file grievances). Removing an incentive for incarcerated persons to pursue their claims effectively insulates bad actors in the prison system from facing any responsibility for their unconstitutional actions.

For many plaintiffs—and especially those who are incarcerated—foreclosing compensatory damages will in many instances make the Free Exercise Clause's promise to protect their religious liberty little more than a dead letter. Without the possibility of having to pay damages, government defendants can often moot meritorious suits for injunctive relief by granting last-minute relief or transferring incarcerated persons to a different facility where they

must re-start the process of obtaining a religious accommodation. Thus, the potential for compensatory damages serves to deter government officials from violating the religious liberty rights of some of society's most vulnerable.

III. Conclusion

For the foregoing reasons, the Court should grant the Petitioner's petition for certiorari, and reverse the Eleventh Circuit's opinion.

Respectfully submitted,

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