No. 15-7619

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

MARVIN X. DAMON

*Plaintiff-Appellant*

v.

BART MASTERS, Warden; JOHN BOWLING, Food Service Administrator; J. TABOR, Assistant Food Service Administrator; JOHN BOYD, Food Service Employee

*Defendants-Appellees*

Appeal from the United States District Court
For the Southern District of West Virginia
Case No. 1:14-cv-26833
The Honorable David A. Faber

# AMICUS BRIEF OF RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER, AMERICAN CIVIL LIBERTIES UNION, AND ACLU OF WEST VIRGINIA FOUNDATION

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 15-7610 Caption: Damon v. Masters et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

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(name of party/amicus)

who is amicus, makes the following disclosure:
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1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/David M. Shapiro Date: 11/13/15

Counsel for: amici

## CERTIFICATE OF SERVICE

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I certify that on November 13, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Marvin Jerome Damon
FCI Hazelton
Federal Correctional Institution
PO Box 5000
Bruceton Mills, WV 26525

s/David M. Shapiro (signature) 11/13/15 (date)

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No. 15-7619 Caption: Damon v. Masters et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Civil Liberties Union of West Virginia Foundation
(name of party/amicus)

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## INTEREST OF *AMICI CURIAE*[1]

The Roderick and Solange MacArthur Justice Center is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. The MacArthur Justice Center became part of Northwestern University School of Law's Bluhm Legal Clinic in 2006. The MacArthur Justice Center has led battles against myriad civil rights injustices, including police misconduct, fighting for the rights of the indigent in the criminal justice system, and pursuing compensation for the wrongfully convicted. The MacArthur Justice Center regularly litigates cases aimed at ensuring the decent treatment of incarcerated men and women.

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, non-partisan organization with over 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Throughout its 95-year history, the ACLU has been deeply involved in protecting the rights of prisoners, and in 1972 created the National Prison Project to further this work. The ACLU has appeared in numerous federal cases involving the rights of prisoners, both as direct counsel and as amicus curiae.

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[1] Pursuant to Rule 29(c)(5), counsel for amici curiae states that no counsel for a party authored this brief in whole or in part, and no person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

The American Civil Liberties Union of West Virginia Foundation (ACLU-WV), an affiliate of the ACLU, is a nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the United States Constitution, the West Virginia Constitution, and our nation's civil rights laws. The ACLU-WV is committed to helping ensure the rights of all people, and particularly those who are most at risk of marginalization, such as prison inmates.

## ARGUMENT

The plaintiff in this case alleges that during the annual celebratory meal for his religious group, prison staff substituted kidney beans for navy beans, in violation of the dietary requirements of his faith. Some would dismiss this case as nothing more than a hill of beans—but it in fact presents an important question that strikes at the heart of religious liberty and has divided the Circuits: Does the Prison Litigation Reform Act prevent an incarcerated plaintiff from recovering compensatory damages for violations of Free Exercise Rights that do not result in physical injury?

The resolution of this question will have profound implications for the ability of men and women in prison to practice their faith, for the vast majority of Free Exercise infringements—forbidding worship, prohibiting access to religious texts, refusing visits with clergy, and banning sacred objects, to name a few—inflict an injury not to the body but to liberty and conscience. In short: "This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small … significance." *Cohen v. California*, 403 U.S. 15, 15 (1971).

In this case, both the Magistrate Judge and the District Judge concluded—wrongly, in the view of amici—that a prisoner cannot bring a claim for the deprivation of religious rights because prohibiting the practice of one's faith is a

mere "mental or emotional injury" under 42 U.S.C. § 1997e(e), a provision of the Prison Litigation Reform Act (PLRA). The Magistrate Judge reasoned that a prisoner's assertion of a Free Exercise claim requires a showing of physical injury, which the plaintiff failed to make. 2015 WL 5559858 at *6-*7. The District Judge held that the plaintiff could not proceed because he failed to allege even an emotional injury. 2015WL 5559803 at *3.[2]

Both of these holdings were wrong for the same reason—an injury to one's religious liberty under the First Amendment is neither a physical injury nor an emotional one. Rather, "[a] prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained." *Rowe v. Shake*, 196 F.3d 778, 781-82 (7th Cir. 1999).

## I. THERE IS A WELL-DEVELOPED CIRCUIT SPLIT OVER WHETHER THE PRISON LITIGATION REFORM ACT REQUIRES AN ADDITIONAL SHOWING OF PHYSICAL INJURY IN CASES ABOUT FIRST AMENDMENT INJURIES.

Section 1997e(e) provides that a prisoner may not bring a claim "for mental or emotional injury" unless the prisoner makes "a prior showing of physical injury

[2] Plaintiff never claimed that he suffered an emotional injury or a physical injury—he claimed that he had suffered an injury to his First Amendment rights. *See* Docket Nos. 1 and 2 (Complaint and Memorandum incorporated by reference into Complaint); *see also* Docket No. 31 (Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment), at 1 ("Plaintiff never made a claim in his complaint for emotional or psychological damages without a showing of physical injury, whereas such a claim is not an essential element to plaintiffs' first amendment claim…").

or the commission of a sexual act." 42 U.S.C. § 1997e(e). The statute does not require a "showing of physical injury" in *every* damages case, only in those cases where the plaintiff seeks compensation "for mental or emotional injury." The question therefore becomes whether a First Amendment injury is a species of "mental or emotional injury"— if not, the plain language of the statute does not require a "showing of physical injury" for the plaintiff to recover damages.

This question is the subject of a well-developed and equal split among the Circuits. Four Circuits hold that § 1997e(e) does not impose an additional physical injury requirement where a First Amendment injury exists. *King v. Zamiara*, 788 F.3d 207, 213 (6th Cir. 2015) (First Amendment injuries do not require additional showing of physical injury); *Rowe v. Shake*, 196 F.3d 778, 781-82 (7th Cir. 1999) (same); *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998) (same); *Toliver v. City of New York*, 530 F. App'x 90, 93 n.2 (2d Cir. 2013) (same). Four Circuits have reached the opposite conclusion. *Allah v. Al-Hafeez*, 226 F.3d 247, 250-51 (3d Cir. 2000) (additional showing of physical injury required); *Geiger v. Jowers*, 404 F.3d 371, 374-75 (5th Cir. 2005) (same result in *pro se* case); *Royal v. Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004) (same result over dissent by Judge Heaney); *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001) (same result).

## II. THIS COURT HAS ALREADY HELD THAT FIRST AMENDMENT INJURIES ARE NOT MERE MENTAL OR EMOTIONAL INJURIES.

While this Court has not decided the precise issue in this litigation—whether § 1997e(e) requires an additional showing of physical injury—Circuit precedent squarely rejects any attempt to dismiss First Amendment injuries as mere mental or emotional injuries. *Piver v. Pender Cnty. Bd. of Educ.*, 835 F.2d 1076 (4th Cir. 1987), dealt with retaliation against a teacher who supported an ousted principal. This Court found that the plaintiff suffered compensable damages because "injury to a protected first amendment interest can itself constitute compensable injury *wholly apart* from any 'emotional distress, humiliation and personal indignity, emotional pain, embarrassment, fear, anxiety and anguish' suffered by plaintiffs." *Id.* at 1082 (quotation omitted) (emphasis added). In this case, the District Court's attempt to equate First Amendment injuries with mere mental or emotional injuries did not acknowledge—and directly contradicted—this Court's admonition that these two categories of injury are separate and distinct.

## III. THE PLAIN MEANING OF THE TERM "MENTAL OR EMOTIONAL INJURY" DOES NOT ENCOMPASS INJURIES TO RELIGIOUS LIBERTY.

The Second, Sixth, Seventh, and Ninth Circuits hold that the violation of a free exercise or speech right is not a mere emotional injury—it is a separate category of harm, an injury to a fundamental liberty. Therefore, Section 1997e(e) permits a prisoner to bring a First Amendment damages claim without alleging a

physical injury. As the Sixth Circuit recently stated, requiring a prisoner to show physical injury in a First Amendment case would judicially nullify Congress' decision to limit the physical injury requirement to cases involving mere emotional injury:

> The statute provides that a prisoner may not bring a civil action *for mental or emotional injury* unless he has also suffered a physical injury… It says nothing about claims brought to redress constitutional injuries, which are distinct from mental and emotional injuries... Were we to construe § 1997e(e)… [as] grafting a physical-injury requirement onto claims that allege First Amendment violations as the injury, the phrase 'for mental or emotional injury' would be rendered superfluous.

*King v. Zamiara*, 788 F.3d 207, 213 (6th Cir. 2015). *See also Rowe v. Shake*, 196 F.3d 778, 781-82 (7th Cir. 1999) ("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."); *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 physical injury he can show, or any mental or emotional injury he may have incurred. Therefore, § 1997e(e) does not apply to First Amendment Claims regardless of the form of relief sought."); *Toliver v. City of New York*, 530 F. App'x 90, 93 (2d Cir. 2013).

The plain meaning of the term "mental or emotional injury" does not encompass infringements of religious liberty. Those who fought to establish religious freedom in America would recoil at the notion, adopted by the lower

court here, that the violation of religious freedom could be reduced to mere "mental or emotional injury." 42 U.S.C. § 1997e(e). The Pilgrims sailed for Plymouth Rock not because religious repression made them feel gloomy, but because it struck at the core of human freedom. Thomas Jefferson wrote Virginia's religious freedom statute not to assuage maladies that Zoloft would cure today but to prevent the "infringement of natural right." *Virginia Statute for Religious Freedom* (1785). When Justice Jackson wrote, "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion," *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), he was guarding human liberty from encroachment, not protecting warm and fuzzy feelings from "mental or emotional injury."

## IV. THE STRUCTURE OF THE PRISON LITIGATION REFORM ACT SHOWS THAT CONGRESS DID NOT INTEND TO IMPOSE A PHYSICAL INJURY REQUIREMENT ON CASES INVOLVING INJURIES TO RELIGIOUS LIBERTY.

The PLRA shows that Congress knew how to impose a blanket physical injury requirement on all categories of claims brought by incarcerated men and women. A separate provision of the Act, codified at 28 U.S.C. § 1915(g), creates a "three strikes" provision—a prisoner who has had three cases dismissed as frivolous, malicious, or failing to state a claim cannot proceed *in forma pauperis* in a subsequent case. The only exception to this rule is for subsequent cases involving serious physical injury:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, *unless the prisoner is under imminent danger of serious physical injury*.

28 U.S.C.A. § 1915(g) (emphasis added).

Had Congress intended to impose a physical injury requirement that encompassed all cases including religious liberty cases in 42 U.S.C. § 1997e(e), Congress would have followed the model it used in the three strikes provision, 28 U.S.C. § 1915(g). Rewritten in this manner, 42 U.S.C. § 1997e(e) would have read:

> No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18).

But instead of that hypothetical statute, Congress wrote:

> No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, *for mental or emotional injury suffered while in custody* without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18).

42 U.S.C. § 1997e(e)(emphasis added).

As in other cases where Congress employs different language in different portions of a statute, the use of an unqualified physical injury requirement in the three strikes provision of the PLRA "shows that Congress knew how to be clear" when it intended to impose a blanket requirement. *Abuelhawa v. United States*, 556

U.S. 816, 824 (2009). The Legislature's use of different language in Section 1997e(e) "highlights Congress's decision," *id.*, to limit that Section to cases brought "for mental or emotional injury." "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation omitted).

In light of the qualifying language that Congress included in 42 U.S.C. Section 1997e(e) but omitted from the three strikes provision, "[i]t would be a serious mistake to interpret section 1997e(e) to require a showing of physical injury in all prisoner civil rights suits. The domain of the statute is limited to suits in which mental or emotional injury is claimed." *Robinson v. Page*, 170 F.3d 747, 748 (7th Cir. 1999) (Posner, C.J.). Indeed, "if Congress had intended to apply § 1997e(e)'s restriction to all federal civil suits by prisoners, it could easily have done so simply by dropping the qualifying language 'for mental or emotional injury.'" *Royal v. Kautzky*, 375 F.3d 720, 729 (8th Cir. 2004) (Heaney, J., dissenting) (quotation omitted).

Thus, extending the physical injury requirement to cases involving First Amendment injuries would contravene a fundamental cannon of statutory interpretation, the rule against surplusage. The Court must give meaning to each

part of the statute—not ignore the clear limitation of Section 1997e(e) to cases involving "mental or emotional injury." As the Supreme Court has stated, "[i]n construing a statute we are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). "A court should not—and we will not—construe a statute in a manner that reduces some of its terms to mere surplusage." *Com. of Va. v. Browner*, 80 F.3d 869, 877 (4th Cir. 1996).

Furthermore, the PLRA was enacted against the background of ordinary tort law, which developed a distinction between physical injury claims and emotional distress claims. The PLRA's rule that recovery for mental or emotional injury requires physical injury appears similar to a rule prevalent in the common law of torts—"courts recognized emotional distress claims only when the psychic harm accompanied a physical injury." Michael Jay Gorback, *Negligent Infliction of Emotional Distress: Has the Legislative Response to Diane Whipple's Death Rendered the Hard-Line Stance of Elden and Thing Obsolete?*, 54 HASTINGS L.J. 273, 282 n. 52 (2002) (quotation omitted). In the common law of torts, emotional distress injuries—in contrast to violations of liberty—were defined as harm to a mental state: "Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame,

humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea." *Restatement (Second) of Torts* § 46 (1965). Traditionally, tort law recognized six types of injury that gave rise to damages, and the two that are relevant here, mental injuries and injuries to personal liberty, were separate and distinct. Thus, Sedgwick's Treatise on Damages stated:

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

Arthur Sedgwick, *A Treatise on the Measure of Damages* 50-51 (emphasis added). In short, dismissing First Amendment injuries as some mere subspecies of mental or emotional injures would contradict the traditional taxonomy, which differentiates between "mental injuries" and "injuries to personal liberty."

## V. THE LEGISLATIVE HISTORY SHOWS THAT CONGRESS DID NOT INTEND TO IMPOSE A PHYSICAL INJURY REQUIREMENT ON CASES INVOLVING INJURIES TO RELIGIOUS LIBERTY.

While the legislative history of the PLRA is limited, one thing is unmistakably clear: Congress intended to restrict frivolous lawsuits brought by prisoners. Judge Heaney's dissent in *Royal* surveys this Act's legislative history and then concludes:

> The legislative history of the PLRA shows a clear legislative intent to decrease the number of frivolous lawsuits filed by inmates …. Examples of such frivolous lawsuits presented by the Senators included: inadequate locker space; a bad haircut given by a prison barber; the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee; being served chunky instead of creamy peanut butter; being denied the use of a Gameboy video game; being issued shoes that were a quarter size too big; being served "hacked up" cake for dessert; prison officials throwing out an inmate's belongings after he escaped; and being denied dental floss. There is a clear difference between the types of claims listed by Congress and historically actionable and meritorious claims under the First and Fourteenth Amendments. When a plaintiff files suit for a violation of his First Amendment rights, his claim is based on a deprivation of an intangible right. Whether his claim is valid is not linked to the existence or severity of his mental or emotional anguish.

375 F.3d at 729-30. *See also Shaheed-Muhammad v. Dipaolo*, 393 F.Supp. 2d 80, 107 (D. Mass. 2005) (valid First Amendment claims that do not result in physical injury are not the sort of frivolous litigation targeted by the PLRA).

It would be absurd to equate legitimate religious liberty claims that do not result in physical injury with the sort of frivolous lawsuits that Congress sought to deter with the PLRA. Indeed, the Free Exercise cases judged meritorious by the

Supreme Court involving prisoners and non-prisoners alike have rarely, if ever, involved physical injury. In *Cruz v. Beto*, the Court reversed the dismissal of a prisoner's claim that he was punished, but not physically abused, for his religious beliefs. 405 U.S. 319, 320-23 (1972). The plaintiffs in *Burwell v. Hobby Lobby Stores, Inc*. were not physically injured by laws requiring them to fund certain methods of contraception. 134 S. Ct. 2751 (2014). The only physical injury in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, which addressed an ordinance prohibiting ritual animal slaughter, was inflicted on "chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles." 508 U.S. 520, 525 (1993). There was never any suggestion that the absence of physical injury to people somehow made these cases frivolous.

Moreover, in enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000, four years after the PLRA, Congress made it clear that religious liberty claims are a far cry from the frivolous litigation the PLRA aims to deter. Congress enacted RLUIPA to increase the protection of prisoners' religious exercise and "to provide very broad protection for religious liberty." *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015) (citation omitted). In RLUIPA, "Congress defined 'religious exercise' capaciously to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief [and] . . . mandated that

this concept 'shall be construed in favor of a broad protection of religious exercise…'" *Id.* at 860 (quoting 42 U.S.C. § 2000cc-5(7)(A); 2000cc-3(g)).

In *Cutter v. Wilkinson*, 544 U.S. 709, 717 n.5 (2005), the Court noted "typical examples" of religious injuries to prisoners cited in Congressional hearings on RLUIPA. Examples included failing to provide Halal food to Muslims, refusing to offer Jewish inmates sack lunches that would allow them to "break their fasts after nightfall," prohibiting Chanukah candles and communion wine, and destroying or disrespecting religious items, "such as the Bible, the Koran, the Talmud or items needed by Native Americans." *Id.* (citations omitted). The fact that none of these violations, which Congress enacted a statute to protect, involved physical injury strongly suggests that religious freedom claims are not the sort of frivolous lawsuits that the PLRA exists to derail.

## VI. THE DECISIONS THAT PURPORT TO GRAFT A PHYSICAL INJURY REQUIREMENT ONTO RELIGIOUS LIBERTY CASES ARE POORLY REASONED AND CONSIST PRINCIPALLY OF *IPSE DIXIT* ASSERTIONS.

The appellate cases that extend the physical injury requirement to First Amendment cases contain little or no analysis of the issue. In *Allah v. Al-Hafeez*, 226 F.3d 247, 250-51 (3d Cir. 2000), the Third Circuit equates injuries to religious freedom with emotional injuries but does not elaborate on its reason for doing so. Nor does the Court mention that, at the time of the decision, no appellate court had adopted this view, and two other Circuits had reached the opposite conclusion. *See*

*Rowe v. Shake*, 196 F.3d 778, 781-82 (7th Cir. 1999); *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998).

In *Searles v. Van Bebber*, 251 F.3d 869, 875-76 (10th Cir. 2001), the Tenth Circuit acknowledges that other Circuits have found First Amendment injuries not to be mere mental emotional injuries, but then states, "[w]e disagree." The disagreement, however, consists of an *ipse dixit* assertion that First Amendment violations are mental or emotional injuries. *Id.* at 876.

In *Geiger v. Jowers*, 404 F.3d 371, 374-75 (5th Cir. 2005), the Fifth Circuit reasons that because § 1997e(e) begins with the word "[n]o federal action," it must apply to all claims, including First Amendment claims. This analysis pretends that the limiting clause Congress inserted a few words later—"[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, *for mental or emotional injury*"—does not exist. Similarly, the Eighth Circuit based its holding on the fact that the statute does not contain a limiting clause that states "except for First Amendment violations," but entirely ignores the fact that Congress did limit the statute to cases brought "for mental or emotional injury." *Royal v. Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004).

## VII. THIS COURT SHOULD REACH THE ISSUE OF WHETHER "MENTAL OR EMOTIONAL INJURY" ENCOMPASSES INJURIES TO RELIGIOUS LIBERTY.

Perhaps some would consider litigation over legumes a poor forum to address a circuit split—but there are strong reasons to reach the issue in this case. First, while it is within the Court's power to affirm a decision on other grounds, unless this Court weighs in on the physical injury question, the lower court's incorrect resolution of that issue will remain good law.

Second, the majority of decisions by district courts in this Circuit hold—incorrectly in the view of amici and four Circuits—that First Amendment injuries constitute mere emotional injury. The failure to act in this case therefore will result in meritorious religious liberty claims continuing to be dismissed in this Circuit. Not only is the reasoning in the district court opinions conclusory, *see, e.g.*, *Owens v. FCI Beckley*, No. 12-cv-3620, 2013 WL 4519803, at *16 (S.D.W. Va. Aug. 27, 2013); *Lopez v. White*, No. 07-cv-163, 2010 WL 152103, at *3 (N.D.W. Va. Jan. 14, 2010), but they all ignore this Court's clear statement in *Piver* that "injury to a protected first amendment interest can itself constitute compensable injury wholly apart from any emotional distress, humiliation and personal indignity, emotional pain, embarrassment, fear, anxiety and anguish suffered by plaintiffs." 835 F.2d. at 1082 (quotation omitted).

Third, given the depth of the Circuit split, the Supreme Court likely will have to resolve the question at some point. The benefit of another court's analysis of the question could only aid the high court's deliberation.

## CONCLUSION

For the foregoing reasons, this Court should hold that when a prisoner alleges a First Amendment violation, 42 U.S.C. § 1997e(e) does not require an additional showing of physical harm.

Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

I, David M. Shapiro, hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 4,016 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ David M. Shapiro
David M. Shapiro

## CERTIFICATE OF SERVICE

The undersigned, counsel for Plaintiff-Appellant, hereby certifies that on November 13, 2015, a true and correct copy of the foregoing Appellant's Reply Brief was served electronically on all counsel via the CM/ECF system and that a copy was mailed to the Plaintiff via U.S. Mail:

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