

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

MOTION TO FILE AMICUS BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(b), Amici curiae Roderick and Solange MacArthur Justice Center, American Civil Liberties Union, and ACLU of West Virginia Foundation request this Court's leave to file an amicus brief on a single issue presented by this case: 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? As detailed below, this is an important issue of law that has sharply divided the Circuits and presents an issue of first impression in this Court.

A. Interest of *Amici Curiae*

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 90-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.

The American Civil Liberties Union of West Virginia Foundation (ACLU-WV) 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.

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.

B. Reasons that an Amicus Brief Is Desirable and Relevant

Title 42 U.S.C. § 1997e(e), a provision of the Prison Litigation Reform Act, provides:

Limitation on recovery

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).

The Federal Circuits are deeply divided as to whether this provision requires a plaintiff who suffers an injury to religious liberty or free speech to make an additional showing of showing of physical injury. Four Circuits hold that Section 1997e(e) does not impose an additional physical injury requirement where a First Amendment injury exists—because an injury to these liberties is not a mere mental or emotional injury. *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 Bebbler*, 251 F.3d 869, 876 (10th Cir. 2001) (same result). In this Circuit, the issue is one of first impression.

In the proceedings below, the government argued that the plaintiff's Free Exercise claim should be dismissed because the plaintiff did not suffer a physical injury, but the government did not alert the District Court that a deep division of

authority on this issue has emerged.¹ The plaintiff proceeded *pro se* in the District Court, as he does here. The briefing below also did not inform the District Court of this Court's holding, albeit not in the context of the PLRA, 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." *Piver v. Pender Cnty. Bd. of Educ.*, 835 F.2d 1076, 1082 (4th Cir. 1987) (quotation omitted).

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. 2015 WL 5559803 at *3

Both of these holdings were wrong for the same reason—as Four Circuits have held, 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).

¹ Defendants' Memorandum of Law in Support of Their Motion To Dismiss, or in the Alternative, Motion for Summary Judgment (Docket #26) at 10-11.

Perhaps because the government's brief did not mention it, neither the Magistrate Judge nor the District Court Judge acknowledged the Circuit split in their opinions. Accordingly, the proposed amicus brief may be necessary to ensure this important issue of law is fully and fairly presented to this Court.

C. Position of the Parties

The government refused to consent to the filing of an amicus brief. Plaintiff consented.

CONCLUSION

For the foregoing reasons, amici respectfully request this Court's leave to file their brief.

Respectfully Submitted,

s/David M. Shapiro

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CERTIFICATE OF SERVICE

The undersigned, counsel for Plaintiff-Appellant, hereby certifies that on November 13, 2015, a true and correct copy of the foregoing 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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