No. 21-1020

IN THE

Supreme Court of the United States

BENOIT BLANC,
WARDEN OF EMORY PRISON
Petitioner,
v.

HARLAN THROMBEY
Respondent.

ON WRIT OF CERTIORARI FOR THE
UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

TRANSCRIPT OF THE RECORD
2021 Civil Rights and Liberties Moot Court Competition

Emory University School of Law
15th Annual Civil Rights and Liberties
Moot Court Competition
October 14 – October 16, 2021
Atlanta, Georgia

INSTRUCTIONS

1. Do not cite to any case that was decided after the date in which certiorari was granted in this case (August 16, 2021).

2. Assume that all administrative remedies were exhausted under the Prison Litigation Reform Act, 42 U.S.C. §. 1997e(a).

3. Assume that all motions, defenses, and appeals were timely filed in accordance with the Federal Rules of Civil Procedure and that both issues may be litigated together in the same case.

4. Assume that the scope of the requested relief complies with the Prison Litigation Reform Act, 18 U.S.C. § 3626(a)(2).

5. Questions or clarifications should be directed to the Co-Directors of the Civil Rights and Liberties Moot Court Competition. All such inquiries should be emailed to emorymootcourt@gmail.com by October 8, 2021.

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BENOIT BLANC,
WARDEN OF EMORY PRISON
Petitioner,
v.

HARLAN THROMBEY
Respondent.

ORDER GRANTING WRIT OF CERTIORARI

The petition for writ of certiorari to the Supreme Court of the United States is granted, limited to the following questions:

I. Whether a physical injury is needed to recover compensatory damages for a First Amendment violation under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(e).

II. Whether this Court should further explain or reexamine the "reasonable relationship" standard created in *Turner v. Safley*, 482 U.S. 78 (1987).

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

Harlan Thrombey,	)	
	)	
Plaintiff - Appellant,	)	
	)	
v.	)	Docket No. 21-3301
	)	
Benoit Blanc,	)	Date: August 16, 2021
Warden, Emory Prison, in his	)	
individual and official capacity.	)	
	)	
Defendant - Appellee.	)	

OPINION AND ORDER

AUBURN, Circuit Judge, delivered the opinion of the Court. BACARDI, Circuit Judge, filed a concurring opinion. CLAIRMONT, Circuit Judge, filed a dissenting opinion.

I. INTRODUCTION

This case presents two issues: first, whether a physical injury is required to recover compensatory damages under the Prison Litigation Reform Act ("PLRA"), and second, whether the regulation promulgated by Emory Prison violates the First Amendment right to free speech under the *Turner* standard. The U.S. District Court for the District of Emory answered in the negative, granting Defendant Warden Benoit Blanc's motion for summary judgment and denying Plaintiff Harlan Thrombey's cross-motion for a permanent injunction. For the reasons stated below, we **REVERSE** and grant the permanent injunction.

II. BACKGROUND

A. Facts

Plaintiff-Appellant Harlan Thrombey was convicted of murder in 2016 and sentenced to serve life in Emory Prison, a high-security penal institution under the supervision of Defendant-Appellee Warden Benoit Blanc. Emory Prison holds approximately one thousand inmates. The prison has five floors, and each floor has four blocks of approximately fifty inmates. Mr. Thrombey is incarcerated on Block 2A.

Emory Prison has a large collection of board games donated by a local Church that are popular amongst the inmates. One game in particular was beloved amongst those incarcerated in Block 2A. For three years, Mr. Thrombey and a group of inmates in the Block would gather in the common area each Wednesday and Sunday evening to play Clue. Clue is a murder mystery game. Players move around the board—a mansion—pretending to be one of the game's six suspects.

They collect clues from which to deduce three things: which suspect murdered the game's perpetual victim, with which weapon, and in what room. Mr. Thrombey's adoration for the game was evident: he regularly played twice a week and dove into role play and investigation. He gained a reputation in the Block for his theatrics, becoming known for his many accents and eccentric imitations of Clue's six characters.

In 2019, Emory Prison experienced an unprecedented rise in violence. In a year, the prison reported twenty stabbings and two deaths. Two stabbing incidents occurred in Block 2A, with the remaining stabbing and death incidents occurring in separate high security areas.

Warden Blanc was concerned with the escalating violence and threat to prison security. On January 6, 2020, Warden Blanc approved and implemented a new regulation that prohibited the receipt of any form of entertainment, including video and board games, that "incited violence." As a result of the new regulation, over half the donated board games in Emory Prison were removed, including Clue. The only games remaining in Block 2A were a stack of cards, Sorry!, Risk, and Bible-Opoloy.[1]

Mr. Thrombey was devastated by the loss of his favorite game. Guards and other inmates in Block 2A reported that Mr. Thrombey became disconnected: he lost all interest in socialization, spent most of the day in bed, and ate less. On January 16, 2020, Mr. Thrombey filed a grievance at Emory Prison, complaining that the regulation prohibiting him from playing Clue violated his rights. Warden Blanc denied his grievance, and his appeal was subsequently denied by the Central Appeal Office.

B. Procedural History

On July 1, 2020, Mr. Thrombey filed a claim under 42 U.S.C. § 1983 in the U.S. District Court for the District of Emory, alleging that the regulation was unconstitutional and a violation of his First Amendment right to free speech. Along with his complaint, Mr. Thrombey included five affidavits. Mr. Thrombey and two others in his Block submitted affidavits explaining that, in their experience, Clue did not incite violence and instead encouraged camaraderie. Mr. Thrombey also recruited Mr. Ransom Drysdale, a recently hired prison guard at Emory Prison, and Dr. Marta Cabrera, an expert in psychology, to write affidavits in support of his claim. Mr. Drysdale's affidavit expressed that, in his point of view, it was "ridiculous" to connect Clue to the violence, and instead he opined that the violence "could be attributed to a rise in gang affiliation, retaliation against snitches, and growing frustration with poor prison management." Dr. Cabrera's expert affidavit analogized and discussed numerous psychological studies showing no connection between videogames and violent behavior.[2]

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[1] In Sorry!, players move their pieces around the board, attempting to get all of their pieces "home" first. In Risk, players rotate who controls their "armies" of playing pieces with which they attempt to conquer territories from other players. In Bible-Opoloy, players compete to purchase the most property in biblical cities in order to build churches.

[2] The lower court qualified these witnesses as experts under *Daubert*.

In response, Warden Blanc submitted two affidavits--one from himself and one from the Deputy Warden of Security--stating their belief that playing Clue presented a risk of violence that threatened prison order and security. The affidavits explained that "the essential theme of murder in Clue was dangerous, especially since it was played by criminals convicted of violent crimes, many of whom had prior murderous tendencies."

Warden Blanc subsequently moved for summary judgment on two grounds. First, he argued that the damages claim was barred under the PLRA's physical injury requirement, and second, he argued that the regulation was constitutional and met the *Turner* standard. In response, Mr. Thrombey filed a partial cross-motion seeking a permanent injunction against the enforcement of the regulation, also citing *Turner*.

On November 11, 2020, the U.S. District Court for the District of Emory granted summary judgement as to damages for Warden Blanc on the first grounds. The District Court then denied the request for a permanent injunction, and granted Blanc's motion for summary judgment.

Mr. Thrombey appealed both issues to this Court.

III. DISCUSSION

A. A Physical Injury Is Not Required to Recover Compensatory Damages for a First Amendment Violation Under the PLRA.

Today, this circuit joins the Fourth, Fifth, Seventh, Ninth, and D.C. Circuits in deciding that, under the PLRA, a physical injury is not needed to recover compensatory damages for First Amendment violations. *Carter v. Allen*, 940 F.3d 1233, 1253 (11th Cir. 2019). Specifically, we find that Mr. Thrombey does not need to show a physical injury for a violation of his First Amendment right to free speech to recover compensatory damages.

The PLRA includes a provision, §1997e(e), that states **"**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." 42 US.C. § 1997e(e). The courts are split on whether the "prior showing of a physical injury" requirement applies to situations where someone is requesting compensatory damages for a violation of their First Amendment rights. The Fourth, Fifth, Seventh, Ninth, and D.C. Circuits read the physical injury requirement as excluding First Amendment claims, whereas the Third, Fifth, Eighth, Tenth, and Eleventh Circuits include First Amendment claims in the physical injury requirement and subsequent bar on compensatory damages. *Carter*, 940 F.3d at 1253. This circuit joins the first group for three reasons. First, constitutional injuries, in other contexts, are thought of as separate and distinct injuries. Second, the language of that statute supports a narrow interpretation. Third, when drafting the statute, Congress did not intend on including violations of First Amendment rights in their bar on compensatory damages.

First, constitutional injuries are traditionally thought of as separate injuries that have their own rationale for recovery of compensatory damages. In *Wilcox v Brown*, the Fourth Circuit

understood that First Amendment claims automatically "entitle a plaintiff to judicial relief" notwithstanding any other injuries. 877 F.3d 161, 170 (4th Cir. 2017). Following that logic, the court did not apply §1997e(e) to the prisoner's claim and instead allowed him to prove his eligibility for compensatory damages without a physical injury. *Wilcox*, 877 F.3d at 170. The Fourth Circuit follows this logic in other contexts as well, recognizing that an "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 Cty. Bd. of Educ.*, 835 F.2d 1076, 1082 (4th Cir. 1987) (emphasis added). Under §1997e(e), the injuries identified are "mental or emotional" and fit squarely in the list of wholly separate injuries in *Piver*. First Amendment interests are unlike the mental or emotional injuries a plaintiff may experience in both the PLRA context and other contexts. That special distinction does not disappear once we are in the context of a prison. Similarly, the Sixth Circuit uses a similar form of analysis, stating that First Amendment violations allow for judicial relief in their own right, completely separate from any requirements for physical, mental, or emotional injuries. *King v. Zamiara*, 788 F.3d 207, 212 (6th Cir. 2015). Also, the Seventh Circuit identifies deprivations of First Amendment rights as "standing alone... a cognizable injury." *Rowe v. Shake*, 196 F.3d 778, 781 (7th Cir. 1999). The D.C. Circuit adds to this analysis by stating that damages are awarded for constitutional injuries in general, as showcased in *Heck v Humphrey* when the court understood these injuries as "an independently cognizable injury." *Aref v. Lynch*, 833 F.3d 242, 264 (2016). Constitutional rights, and specifically violations of First Amendment interests, are especially important for us to uphold. They are integrated into the fabric of American ideals and should not be eliminated in the prison context. If they are treated with special care in other contexts, then that treatment should be applied to our reading of the PLRA.

In Mr. Thrombey's situation, his First Amendment rights were violated the moment Emory Prison decided to censor his board games. Mr. Thrombey spent years crafting his Wednesday and Sunday game nights only for Emory Prison and Warden Blanc to violate his First Amendment right to free speech. Like the court in *Wilcox*, this Court will not apply §1997e(e) to a disanalogous situation. The bar on compensatory damages without a showing of a physical injury does not include First Amendment violations.

Second, the statute's language does not include First Amendment violations. The statute uses the term "for mental or emotional injury" in defining if there is a physical injury requirement. In *King v. Zamiara*, the Sixth Circuit aptly explained that the physical injury requirement only applies to those mental or emotional injuries, which are categorically different from constitutional injuries. 788 F.3d at 213. Constitutional injuries and mental or emotional injuries are two separate kinds of injuries and therefore the PLRA bar on compensatory damages would not apply to Mr. Thrombey's case. Likewise, the D.C. Circuit recognizes that the drafters of the statute wrote the physical injury requirement only into "mental or emotional" injuries. *Aref*, 833 F.3d at 263-264. If a prisoner asserts a different injury, like Mr. Thrombey did, then they are outside of the confines of §1997e(e). First Amendment injuries operate completely separately from the "mental or

emotional" injuries that Congress identified in the PLRA. The Ninth Circuit asserted the distinction between the two injuries when they highlighted that compensatory damages could always result for First Amendment violations, regardless of a physical injury. *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998). Congress' precise language in drafting this statute reflects the narrow kinds of injuries impacted by this part of the PLRA. If they wanted to include constitutional injuries in their physical injury requirement they would have written "no Federal civil action may be brought by a prisoner . . . for *any* injury suffered while in custody without a prior showing of physical injury." *Aref*, 833 F.3d at 263. Prisoners can experience other injuries and those injuries would not have the physical injury requirement that "mental or emotional" injuries have. Mr. Thrombey's First Amendment claim fits into the kinds of injuries not written into the statute and reading it to include this kind of injury is not reflective of the plain meaning of the statute.

Third, Congress did not intend to prohibit prisoners from recovering compensatory damages for First Amendment violations. The PLRA was created against the backdrop of a spike in prison litigation and specifically frivolous suits. *Id*. at 265. Still, members of Congress wanted to make sure the PLRA did not bar "serious, potentially meritorious claims." *Id*. In the legislative history, Senator Jon Kyl stated "prisoners still have the right to seek legal redress for meritorious claims..." *See* 141 CONG. REC. 26,553 (1995). Also, Senator Storm Thurmond echoed this sentiment by saying "this amendment will allow meritorious claims to be filed, but gives the judge broader discretion to prevent frivolous and malicious lawsuits filed by prison inmates." *See also id*. at 27,0444. Blocking a prisoner's ability to bring a claim does not comport with Congress' intent in crafting the PLRA. Mr. Thrombey is included in the group Senators Kyl and Thurmond were seeking to protect because his claim is a meritorious one. Once Warden Blanc and Emory Prison removed Clue!, Mr. Thrombey spent most of his day in bed, ate less, and became disinterested in socializing. This is the same man who once gathered groups of incarcerated people to play Clue! twice a week. His once eccentric and animated expressions were gone because of the removal of his favorite game, a violation of his core First Amendment right to free speech. This claim is not included in the frivolous claims Congress tried to avoid. Requiring Mr. Thrombey to prove a physical injury is not in line with Congress' intent in creating the statute and would require an overly-broad reading of the statute.

We conclude that Mr. Thrombey can recover compensatory damages for the violation of his First Amendment freedom of speech without showing a physical injury.

B. The Regulation Is Unconstitutional Since It Does Not Satisfy the *Turner* Standard.

"When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions…" *Procunier v. Martinez*, 416 U.S. 396, 428 (1974) (Marshall, J., concurring). It is well-established that prison walls do not form a barrier separating prison inmates from the protections of the Constitution, including the First Amendment right to freedom of

speech. *See Turner v. Safley*, 482 U.S. 78, 84 (1987). Freedom of speech includes not only the right to utter, but the right to receive and the right to freedom of inquiry and of thought. *See Beard v. Banks*, 548 U.S. 521, 543 (2006) (*quoting Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)). Plainly, the regulation at issue in this case strikes at the core of the First Amendment rights to receive, to inquire, to think, to create.

Mr. Thrombey argues on appeal that he is entitled to permanent injunctive relief to repeal the Emory Prison regulation that effectively banned Clue. In support, he cites that his First Amendment claim does not satisfy the *Turner* standard. We agree.

In *Turner v. Safley*, the Supreme Court determined that prison regulations that restrict inmates' constitutional rights are nevertheless valid if they are reasonably related to legitimate penological interests. 482 U.S. at 89. In assessing the "reasonableness" of a prison regulation that infringes on First Amendment interests, a court must consider four factors: (1) whether the regulation has a "valid, rational connection" to a legitimate penological goal; (2) whether alternative means of exercising First Amendment rights remain open; (3) the impact that accommodating the asserted right will have on other prisoners and prison employees; and (4) whether there are easy and obvious alternative means of accommodating the asserted right. *Id.* at 89-91. The four factors are all important, but the first one can act as a threshold factor regardless which way it cuts. *See id.* For that reason, the analysis today will focus squarely on the first factor.

Inmates, like Mr. Thrombey, have the burden of proving the regulation's invalidity. *See Overton v. Bazzetta*, 539 U.S. 126, 132 (2003). To meet that burden, Mr. Thrombey asserts that the regulation removing Clue is not rationally related to the goal of deterring violence. In support of his position, Mr. Thrombey provided affidavits rebuking the prison's proffered reasoning. The affidavits spanned from inmates, to a guard, to an expert in the field of psychology.

The only evidence Warden Blanc provided was two response affidavits, one from himself and another from the Deputy Warden of Security. The two reasoned that the prohibition was meant to maintain prison security. They explained that the rising stabbing incidents in the prison needed to be addressed, and board games that mimicked violence could lead to the actual development thereof. They elaborated that Clue involved discussion of differing means of murder, and thus is problematic and jeopardizes the safety and security of the institution.

While it is beyond dispute that prison violence resulting in injury and death to inmates is of great concern, regulations impeding on the First Amendment still require scrutiny. There must be a fair balance between legitimate penological concerns and the well-settled proposition that inmates do not give up all constitutional rights by virtue of incarceration. In other words, "a prison inmate retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Turner*, 482 U.S. at 95.

The central question turns on whether a rational relationship exists between the indisputably legitimate penological interest cited by Warden Blanc's policy and the removal of

Clue from the prison's board game repertoire. Mr. Thrombey contends that his five affidavits delivered compelling testimony that there was no rational relationship. Warden Blanc posits that they do not. Warden Blanc relies upon *Singer v. Raemisch*, a Seventh Circuit case, in his position.

In *Singer v. Raemisch*, Singer, an inmate, challenged a policy banning Dungeons & Dragons, a role-playing game which the prison prohibited citing concerns over gang affiliation. 593 F.3d 529, 531 (7th Cir. 2010). Singer produced an "impressive trove" of affidavits—fifteen in total—to challenge the existence of a rational relationship. *Id.* at 536. The affiants included other inmates as well as three role-playing game experts. *Id.* at 533.

The *Singer* court was not persuaded. In their view, none of the affiants were "sufficiently versed in prison security concerns." *Id.* at 536. Simply put, their affidavits did not carry the same weight as the sole affidavit from the prison's gang expert who reached the opposite conclusion. This was seminal to the Seventh Circuit, as they determined that the central inquiry under *Turner* was "whether the prison officials are rational in their belief that, if left unchecked, D&D could lead to gang behavior among inmates and undermine prison security in the future." *Id.* A "plausible explanation" from the prison was sufficient for the Seventh Circuit to satisfy *Turner*. *Id.*

But today, we hold that plausibility is not sufficient in the Thirteenth Circuit. We disagree with the Seventh Circuit's conclusion in *Singer*, and instead hold that a prison official must be more than "rational in their belief:" their belief, too, must be supported by evidence. Rationality requires reasoning, and the role of the court to make evidentiary determinations. This is consistent with the *Turner* court's understanding of the standard.

Turner, in part, challenged a regulation that permitted an inmate to marry only with the permission of the superintendent of the prison, and provided that such approval should be given only when there were compelling reasons to do so. 482 U.S. at 82. In overturning the regulation, the Supreme Court specifically noted the lack of evidence presented by the prison. *Id.* at 98 ("[W]ith respect to the security concern emphasized in petitioners' brief--the creation of 'love triangles'--petitioners have pointed to nothing in the record suggesting that the marriage regulation was viewed as preventing such entanglements").

Turning to the facts presented here, we find that Mr. Thrombey meets his burden at the summary judgment stage of demonstrating facts sufficient to show that there is no rational relationship under the first prong of the *Turner* standard for three reasons. First, Dr. Cabrera's affidavit presents technical and analytical studies that rebuts the prison's position that board games, including Clue, incite violence. While her expertise lies in video games, it is common sense that these games visually depict violence in a way that Clue simply does not. On the other hand, the Warden and Deputy Warden of security speculate that there is a rational relationship in an abstract sense. Only their belief is presented absent plausible evidence linking Clue to any stabbing incident.

Second, Mr. Thrombey presented an affidavit from Guard Drysdale. Though he may have only briefly worked at Emory Prison, Guard Drysdale would be "versed in prison security concerns," much to the Seventh Circuit's delight. Thus, his affidavit further undermines the Warden's position.

Third, the inmates, too, made persuasive points in their affidavits. Common sense suggests that there is no logical connection between Clue and violence. Instead, policy interests dictate that access to board games can increase prison safety and security. Board games foster camaraderie or teamwork and offer entertainment that is innovative and mentally stimulative.

Taken together, we conclude that Mr. Thrombey has more than proven that not even the first prong of the *Turner* standard is satisfied here. Thus, it is sufficient to conclude on this record that the prison regulation violates his First Amendment right to free speech. The Emory Prison regulation prohibiting Clue is an exaggerated response to an otherwise valid security concern: rising violence. Accordingly, we find it appropriate to award Mr. Thrombey injunctive relief.[3]

IV. CONCLUSION

For the foregoing reasons, this Court reverses the grant of summary judgment, and instead grants a permanent injunction against the regulation. It is so ordered.

[3] The parties agree that all other prerequisites for injunctive relief and damages are met. We do not here address these issues, and in particular, qualified immunity is not an issue before this Court.

BACARDI, Circuit Judge, concurring.

I join in both the result and analysis of the Majority. While I agree with the Majority's conclusion in this specific case, I find that the emerging split with *Singer v. Raemisch*, 593 F.3d 529 (7th Cir. 2010), is merely a symptom of a bigger problem with the *Turner* standard. I write separately today to express my view that the *Turner* standard requires reexamination by our highest court.

In *Turner v. Safley*, the Supreme Court declared that any restriction on the First Amendment rights of incarcerated individuals must be justified by a reasonable relationship between the restriction and legitimate penological interests. 482 U.S. at 89. But, as the split demonstrates, the Court left open to interpretation whether simple belief or supporting evidence was requisite to the finding of a reasonable relationship. Until the Supreme Court provides further explanation, the resulting confusion will continue to lead to many nonsensical burdens on free speech in prison.

Ultimately, any modification of existing law regarding the *Turner* standard can come only from the Supreme Court, and the role of this Court is to apply the standard, not to modify it. However, the standard has widespread reach: this Court deals with dozens of prison cases each year and has considerable experience trying to implement *Turner* appropriately. As a result, I choose to use this concurrence to explain several reasons I believe it would be appropriate for the Supreme Court to reconsider the reasonable relationship standard created in *Turner*.

In the past decade, a variety of scholars and jurists have criticized the *Turner* standard for exceeding its intended boundaries. The standard was created to balance two conflicting considerations at play in prison First Amendment prison cases: the "policy of judicial restraint regarding prisoner complaints" and "the need to protect constitutional rights." *Id*. at 85 (quoting *Procunier v. Martinez*, 416 U.S. 396, 406 (1974)). Yet, in practice, prison officials often act as if unconstrained by judicial review in matters affecting the speech of those in their custody. We must ask whether the practical applications of the *Turner* standard stay true to the purpose of its inception.

As an initial matter, courts are abusing their discretion and granting prisons far more deference than *Turner* requires. In *Beard v. Banks*, the Supreme Court sent a reminder that "*Turner* requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective." 548 U.S. at 536. Yet, *Turner* marked the first and last time that the *Turner* standard resulted in the invalidation of a prison regulation in a case before the Supreme Court. *See* Trevor N. McFadden, Note, *When to Turn to Turner? The Supreme Court's Schizophrenic Prison Jurisprudence*, 22 J.L. & POL. 135, 143 (2006). Consequently, it is no surprise that lower courts continue to uphold even illogical regulations with flimsy to no evidentiary support. In turn, prison officials proceed to impede on the First Amendment rights of

the incarcerated with practical impunity, meaning on balance, judicial restraint will practically always prevail.

This very concern was shared by Justice John Paul Stevens, who authored numerous dissents on the issue. The dissents began with *Turner v. Safley* itself, in which he expressed wariness that the "[a]pplication of the standard would seem to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern." 482 U.S. at 100-101.

Moreover, as a policy matter, the *Turner* standard allows for arbitrary, and oftentimes absurd, restrictions on speech. Judicial deference has been complicit in allowing even the worst rules to remain on the books.[4] As this pattern continues, prisons will continue to promulgate unjustifiable regulations resulting in senseless litigation, rather than using their time and resources to address the structural and systemic issues that actually undermine prison security, such as underfunding and short staffing.

Finally, the Congressional passage of RFRA, followed by RLUIPA, created a doctrinal paradox. In the context of religious expression, RLUIPA effectively—though narrowly—overruled *Turner*. RLUIPA provides that no government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution unless the government demonstrates that it furthers "a compelling governmental interest" and is done so "by the least restrictive means." 42 U.S.C. § 2000cc-1. In other words, RLUIPA creates a divide along First Amendment activity in prison: free exercise claims are reviewed under strict scrutiny, while free speech claims are governed by a highly deferential *Turner* standard. Thus, for example, if Emory Prison had determined Monopoly improperly encouraged gambling, per say, that game would be banned while Bible-Opoly remained.

Notably, there is little evidence that a strict scrutiny standard undermines prison security. As the Supreme Court cited in *Cutter v. Wilkinson*, "[f]or more than a decade, the federal Bureau of Prisons has managed the largest correctional system in the Nation under the same heightened scrutiny standard as RLUIPA without compromising prison security, public safety, or the constitutional rights of other prisoners." *5*44 U.S. 709, 725 (2005). Accordingly, the Supreme Court itself acknowledges that perhaps the *Turner* court's concern for deference owed to corrections officials was exaggerated.

In conclusion, the *Turner* standard, as it presently functions, is unsustainable. With this concurrence, I add my voice to an ensemble of scholars urging the Supreme Court to intervene.

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[4] *See*, *e.g.*, *Munson v. Gaetz*, 673 F.3d 630, 631 (7th Cir. 2012) (refusing to deliver *Physician's Desk Reference* because it referenced "DRUGS," even though the book was available in the prison library); Brief of the Correctional Association of New York as Amicus Curiae Supporting Respondent at 13 n.14 (confiscating a map of the moon and other planets because "all maps present a risk of escape).

CLAIRMONT, Circuit Judge, dissenting.

I disagree with the Majority's holdings on these two important constitutional issues. For the following reasons, I respectfully dissent.

I. The PLRA Requires a Physical Injury for Recovery.

The first question today is whether a physical injury is required to recover compensatory damages under §1997e(e) of the PLRA. The majority incorrectly asserts that a physical injury is not needed for First Amendment violations. Their interpretation of the PLRA is not in line with the text of the statute, seeing as the drafters of the PLRA did not carve out a special exception for constitutional injuries. Therefore, we should broadly interpret the statute to include Mr. Thrombey's First Amendment freedom of speech claim.

The majority correctly notes the circuit split on this issue but fails to acknowledge the rationale that the Third, Fifth, Eight, Tenth, and Eleventh Circuits follow. *Carter v. Allen*, 940 F.3d 1233, 1253 (11th Cir. 2019). The rationale they utilize follows two concepts that should be applied to the present case, (1) the plain text of the statute does not carve out an exception for violations of First Amendment rights and (2) plaintiffs have other ways of vindicating their rights that does not include compensatory damages.

In drafting the PLRA, Congress decided to write a statute that applies to "*no* Federal civil action…" 42 US.C. § 1997e(e) (emphasis added). They did not write "some" or "excluding First Amendment violations" or "constitutional injuries aside," they wrote "no." In the absence of any showing of an exception, the court should not and cannot read an exception into the statute. The Eighth Circuit points out that Congress did not intend for the bar on compensatory damages to apply for only certain federal actions. *Royal v. Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004). The language of the statute is clear, and we should not interpret the bar to mean "no Federal civil action [except for First Amendment violations]." *Royal*, 375 F.3d at 723. Similarly, the Tenth Circuit recognizes that there is no provision in the PLRA that changes the kinds of damages being sought based on the kinds of rights asserted by the plaintiff. *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001). The bar is all inclusive of Federal civil actions and interpreting the statute to mean otherwise is disingenuous to the drafter's intent and the plain text. It is not the court's role nor our responsibility to allow Mr. Thrombey compensatory damages claim here if he cannot show a physical injury for his alleged First Amendment violation. The majority recognizes the importance of Congress' language in their opinion, but incorrectly applies that to the "mental or emotional" injuries portion of §1997e(e). The predicate of that portion is "no Federal civil action," which includes all injuries. Moreover, First Amendment injuries here are in fact mental and emotional injuries by their very nature. The majority cherry picks the portions that they would like to apply a plain meaning interpretation only to come to a result that is not in line with the language of the statute. Additionally, the majority tries to assert that because constitutional injuries are treated differently in other contexts, then they should not be impacted by this portion of the

PLRA. This interpretation is not correct because it ignores precedent. If we start to treat constitutional injuries differently because of general ideas about their "value" we risk having an inaccurate analysis on compensatory damages. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310 (1986). That is not a factor for evaluating compensatory damages and should not be read into our interpretation of the PLRA. Additionally, the Fifth Circuit highlights that there is no rationale for treating First Amendment injuries any different in the PLRA context. *Geiger v. Jowers*, 404 F.3d 371, 374-375 (5th Cir. 2005). In *Geiger v. Jowers*, the Fifth Circuit emphasizes "it is the nature of the relief sought, and not the underlying substantive violation, that controls." 404 F.3d at 374-375. Here, Mr. Thrombey is alleging compensatory damages for his First Amendment violation, which would fit neatly into the bar on compensatory damages without the showing of a physical injury.

Besides compensatory damages, a plaintiff can vindicate their rights through nominal or punitive damages. *Hoever v. Marks*, 993 F.3d 1353 (11th Cir. 2021). The PLRA bars compensatory damages for those "mental or emotional" injuries that §1997e(e) mentions. In deciding to follow the statute, I would not foreclose all damages for Mr. Thrombey and others like him. In fact, he is still able to recover something for his injuries and potentially receive compensatory damages, provided that he shows a physical injury. The door is not completely shut for Mr. Thrombey and those similarly situated. If he were to show a physical injury, it would need to be more than *de minimis*. *Alexander v. Tippah Cnty. Miss.*, 351 F.3d 626, 631 (5th Cir. 2003). In *Carter v Hubert*, the Fifth Circuit explained that weight loss does not satisfy the standard for a physical injury. 452 F. App'x 477, 479 (5th Cir. 2011). Here, Mr. Thrombey has indicated he has eaten less and therefore may have lost weight. While this may be related to the removal of Clue! from Emory Prison, it does not satisfy the physical injury requirement under §1997e(e). Even though it may be harder to show a physical injury for constitutional violations, like the court in *Murray v Edwards Ct. Sheriff's Dep't* noted, it should not change our interpretation of the statute. 248 F. App'x 993, 995 (10th Cir. 2007). It is not impossible for a plaintiff to demonstrate a physical injury and in the event that they do show a physical injury, they can recover compensatory damages. If not, the plaintiff is not shut out from pursuing other forms of damages. In *Allen v Reynolds*, the court recognized the plaintiff's mental or emotional injuries with the loss of photos that were "priceless and irreplaceable." 475 F. App'x 280, 284 (10th Cir. 2012). While the plaintiff suffered a violation of his First Amendment rights with the retaliatory taking of his property, he did not suffer a physical injury. *Allen*, 475 F. App'x at 284. Thus, the court did not award him the $50,000 in compensatory damages he requested. *Id*. Similar to the plaintiff in *Allen*, Mr. Thrombey did not suffer a physical injury, and therefore is not eligible for compensatory damages. Both men did have an emotional response to something being removed from their life, Mr. Allen with the family photos and Mr. Thrombey with Clue!, but both men also did not suffer physically. The fact that these men dealt with potential First Amendment violations should not change our analysis today and instead demonstrates how the language of the statute includes all actions, regardless of the cause.

Therefore, this Court should hold that Mr. Thrombey is required to show a physical injury for his First Amendment freedom of speech claim in order to recover compensatory damages. Since there is no record of such injury, Mr. Thrombey would not receive any compensatory damages.

II. The *Turner* Standard is Important Precedent That Is Satisfied Here.

Today, the Majority misinterprets the *Turner* standard, and the Concurrence undermines decades of precedent in prison litigation, paying the principle of *stare decisis* no mind and lacking all deference given to prison officials.

Almost thirty years ago, the Supreme Court articulated the *Turner* standard based on a balance of respect for the First Amendment and the necessary deference owed to prison officials. *See Turner*, 482 U.S. at 85. At its inception, the Supreme Court was clear: "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Id*. (quoting *Procunier*, 416 U.S. at 405). The Supreme Court understood that deference was needed to maintain prison security and that restraint was necessary so as to not impede on the officials' authority mandated by the legislature. As Justice O'Connor wrote: "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id*. at 89.

The decision to create a highly discretionary standard was not a whim, but based upon decades of precedent in prison cases, all which put forth a critical policy interest: prison safety and security. *See*, *e.g*., *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) ("Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."). In invalidating this regulation, we risk further chaos and loss of life.

Accordingly, and in response to the Concurrence, the *Turner* standard does not require reexamination. Not once has it been doubted in its thirty years of application; courts apply it every term without question, and the Supreme Court has emphasized time and again that the burden is intended to be weighty. *See*, *e.g*., *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) ("We must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them."). Perhaps most importantly, principles of *stare decisis* support maintaining the current standard because it continues to serve paramount societal interests. Stare decisis is a "foundation stone of the rule of law." *Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 798 (2014). Given the longstanding nature of the standard, the importance of prison security, and the overwhelming reliance interests, principles of *stare decisis* weigh heavily in favor of upholding the *Turner* standard. As the Concurrence correctly pointed out, RLUIPA narrowed the standard in religious expression cases. Thus, Congress's decision to leave other First Amendment causes of action untouched demonstrates legislative acquiescence. The

potential for disruption counsels against judicial modification, and any change should come from the legislature.

Nor is further explanation of the standard needed. The Majority got it wrong. Today, the Majority improperly shoulders prison officials with an evidentiary obligation far beyond the bar set by the *Turner* Court. The Majority oversteps the Supreme Court's jurisdiction by modifying the existing law, and in doing so, the Majority narrows the standard's intentionally discretionary nature and erodes the tradition of trust afforded to prison officials' expertise.

The Emory Prison regulation satisfies the *Turner* standard, as it is not nearly as stringent as the Majority makes it out to be. The *Turner* standard requires prison regulations that impinge on inmates' constitutional rights to be "reasonably related" to the prison's penological interests. 482 U.S. at 89. At its core, the "reasonably related" standard boils down to whether the prison officials put forth a valid, logical connection between the regulation and the penological interest. Here, they did.

Warden Blanc and his Deputy Warden of Security used their combined years of leadership experience in detention centers to assess and deduce a response to the alarming rise in stabbing incidents. Presumably, Emory Prison already had generations of policies in place to minimize threats to safety and security. In this instance, those were not enough, so Warden Blanc and his Deputy Warden of Security used their expertise to address the connection between inciteful forms of entertainment and the escalating violence. And in removing Clue, they again voiced a valid, logical connection: the central theme of murder. It is entirely plausible that at a high-security prison, those convicted of murder and violent assaults should not be left to fantasize about whether the game's victim was killed by revolver or wrench.

Once the appropriate judgment is given to the Warden and Deputy Warden of Security, it is clear that Mr. Thrombey's testimony misses the mark and cannot carry his formidable burden. First, Mr. Thrombey presented his own affidavit alongside two others from his Block. While these affiants may be inmates and thus aware to some extent of prison security, their expertise comes from the wrong side of the bars.

Second, Mr. Thrombey offered an affidavit from Mr. Drysdale, a recently hired prison guard. Recently hired. While his perspective certainly deserves deference as a prison official, he only briefly worked within the carceral system. His knowledge simply cannot override the expertise of the Warden and Deputy Warden of Security.

Third and finally, Mr. Thrombey provided an expert affidavit from Dr. Cabrera, a well-regarded psychologist. While her knowledge entitles respect, it falls short. Her expertise is limited to video games and violence; a different connection than what we have here. For example, many of those studies are limited to the effects of the games on children, but in prison we are presented with an adult population already predisposed to violence. Dr. Cabrera has not worked in prison

and is not versed in the complexity of prison management. Her knowledge in this specific context is not owed the deference that courts afford to prison officials.

Mr. Thrombey is incarcerated, and "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Sandin v. Conner*, 515 U.S. 472, 485 (1995). Though Mr. Thrombey has lost access to his favorite game, multiple games still remain in his Block. Prison comes with the loss of privileges, and access to Clue does not quash the serious safety concerns Emory Prison faces. For the foregoing reasons, I would find that the *Turner* standard—a standard of significant importance—is satisfied. Likewise, because the Majority and Concurrence improperly constrict and criticize the *Turner* standard, I dissent.