Ohio Northern University Law Review

Volume 43 | Issue 3 Article 6

2019

The Prison Litigation Reform Act: A Legislatively-Enacted andJudicially-Ratified Barrier Separating Prisoners from theProtections of the First Amendment

Jonathan Michael D'Andrea

Ohio Northern University
Law Review

Student Article

The Prison Litigation Reform Act: A Legislatively-Enacted and Judicially-Ratified Barrier Separating Prisoners from the Protections of the First Amendment

JONATHAN MICHAEL D'ANDREA*

Section 1997e(e) of the PLRA provides that prisoners cannot sue under federal law for mental or emotional injuries without first alleging a physical injury. Currently there is a circuit split regarding whether the PLRA allows prisoners to sue when their Free Speech and Free Exercise rights have been violated absent a showing of physical injury. Most federal circuits hold that First Amendment claims that do not also allege physical injuries necessarily allege only mental or emotional injuries, and thus claimants are precluded from receiving compensatory damages under the PLRA (the "broad" reading). The other circuits hold that First Amendment injuries are different in kind from mental or emotional injuries, and therefore the PLRA should not be read to prevent recovery of compensatory damages (the "narrow" reading).

This article argues that the narrow reading is correct because it is consistent with the Supreme Court's repeated affirmance of prisoners' First Amendment rights and right of access to the courts. The constitutional principles in these cases are inconsistent with the broad reading of the PLRA. Indeed, lower courts have expressly declared § 1997e(e) unconstitutional because it denies prisoners a remedy for First Amendment violations. Finally, although prisoners have First Amendment rights in theory, excessive speech regulations burden these rights. Because of this,

* Law Clerk, Allen County Court of Common Pleas. J.D., 2017, Ohio Northern University College of Law. Articles Research Editor, Ohio Northern University Law Review. B.A., 2014, University of Akron.

prisoners are susceptible to abuse and the broad reading leaves them without the ability to recover compensatory damages. Therefore, the narrow reading is necessary to safeguard prisoners' First Amendment rights.

TABLE OF CONTENTS

"These walls are funny. First you hate 'em, then you get used to 'em. Enough time passes, you get so you depend on them. That's institutionalized."[1]

INTRODUCTION

Imagine if you will, that you are an inmate in federal prison. You have been in prison for many years. When you first entered, you were a Baptist, but many years later you converted to Judaism.[2] Your religious beliefs are sincere. However, you are required to inform the prison of your change in

1. SHAWSHANK REDEMPTION (Castle Rock Entertainment 1994).

2. Religious conversions in prison are nothing new; indeed, religion can serve as a coping mechanism for inmates. *See*, *e.g.*, Shadd Maruna et al., *Why God is Often Found Behind Bars: Prison Conversions and the Crisis of Self-Narrative*, 3 RESEARCH IN HUMAN DEVELOPMENT 161, 164 (2006) (arguing, *inter alia,* that the phenomenological experience of prison is conducive to religious conversions); Lacey Schaefer et al., *Saved, Salvaged, or Sunk: A Meta-Analysis of the Effects of Faith-Based Interventions on Inmate Adjustment*, 96 THE PRISON JOURNAL 601, 616 (2016) (faith-based intervention programs may be effective with inmates). Perhaps this is why religion in prison is so widespread. *See* Mona Chalabi, *Are Prisoners Less Likely to be Atheists?*, FIVETHIRTYEIGHT (Mar. 12, 2015, 6:07 AM), http://fivethirtyeight.com/features/are-prisoners-less-likely-to-be-atheists/ ("Overall, almost 1 in every 1,000 prisoners will identify as atheist compared to 1 in every 100 Americans.").

religion if you wish to attend events and receive accommodations specific to Judaism. So that is what you do—you fill out a "change of religion" form with the prison chaplain and request permission to attend religious activities and receive other religious accommodations. Your request is granted.

Several years later you are transferred to a different prison due to overcrowding. At your new institution, you request similar religious accommodations from the prison chaplain. However, your request is denied because you inadvertently fail to indicate on your religious accommodation form that you are a member of the prison's group of inmates entitled to attend religious events: a requirement unknown to you. After months of filing new requests—which are again denied—you file an administrative grievance with the prison warden, seeking to compel the chaplain to accommodate you and your religious needs. After you file the grievance, the prison chaplain sends a report to the warden that fails to disclose your statements regarding your prior accommodations. Hence, as before, your administrative grievance is denied. At this point you are running out of options, so you decide to sue the prison chaplain and the warden in federal court for violating your right under the First Amendment to freely exercise your religion.

For Jimmy Searles, this grim imaginative scenario became a reality when he was denied religious accommodations by the warden and deputy warden of the prison where he was serving time.[3] Searles, by filing a *pro se* complaint, was simply seeking to vindicate his First Amendment rights.[4] In fact, he was initially awarded monetary damages by a federal district court.[5] However, the United States Court of Appeals for the Tenth Circuit promptly reversed and held that Searles could not recover compensatory damages because he suffered no physical injury—a requirement under the Tenth Circuit's interpretation of the Prison Litigation Reform Act (PLRA).[6] Searles is not alone. Countless prisoners are similarly precluded from accessing federal courts and seeking damages for First Amendment injuries unless they can also prove physical injuries.[7] This rule is the result of a broad judicial interpretation of the PLRA.[8]

---

3. Searles v. Van Bebber, 251 F.3d 869, 873 (10th Cir. 2001).

4. *Id.* at 873.

5. *Id.* at 874 (citing Searles v. Van Bebber, 64 F. Supp. 2d 1033 (D. Kan. 1999)) (Searles was awarded $3,650 in compensatory damages, $42,500 in punitive damages, and attorneys' fees).

6. *Id.* at 877.

7. *See infra* Part I.

8. *See infra* Part I; *see also* Corbett H. Williams, *Evisceration of the First Amendment: The Prison Litigation Reform Act and Interpretation of 42 U.S.C. § 1997e(e) in Prisoner First Amendment Claims*, 39 LOY. L.A. L. REV. 859, 861 (2006) (citing John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 438 (2001)).

The PLRA was enacted in 1995, and is generally aimed at curtailing prisoners' access to federal courts.[9] The PLRA provides that prisoners cannot sue under federal law for mental or emotional injuries without first alleging a physical injury.[10] Currently there is a circuit split regarding whether the PLRA allows prisoners to sue when their Free Speech and Free Exercise rights have been violated absent a showing of physical injury.[11] The majority of federal circuits hold that First Amendment claims that do not also allege physical injuries necessarily only allege mental or emotional ones, and thus claimants are precluded from receiving compensatory damages under the PLRA (the "broad" reading).[12] The other circuits hold that First Amendment injuries are different in kind from mental or emotional injuries and therefore the PLRA should not be read so as to prevent recovery of compensatory damages (the "narrow" reading).[13]

Scholars have previously written in favor of the narrow reading and conclude that Congress should amend the PLRA or that the Supreme Court should interpret it narrowly.[14] For example, Corbett Williams has argued that Supreme Court jurisprudence interpreting 42 U.S.C. § 1983, the text of § 1997e(e), and the congressional record all support the proposition that §

9. *See generally* Prison Litigation Reform Act of 1995, Pub. L. No. 104-34, 110 Stat. 1321-66 (codified as amended in scattered sections of 28 U.S.C. & 42 U.S.C.).

10. 42 U.S.C. § 1997e(e) ("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, United States Code).").

11. *Compare Searles*, 251 F.3d at 877 (holding trial court erred by refusing to give instruction requiring proof of physical injury before damages could be awarded for mental or emotional injuries), *and* Allah v. Al-Hafeez, 226 F.3d 247, 250-51 (3d Cir. 2000) (holding that § 1997e(e) bars prisoner's recovery of alleged mental and emotional injuries when plaintiff-prisoner fails to allege underlying physical injury in complaint), *and* Royal v. Kautzky, 375 F.3d 720, 723 (8th Cir. 2005) (holding § 1997e(e) limits recovery in all federal actions—including for alleged First Amendment violations—brought by prisoners seeking damages for mental or emotional injuries when no underlying physical injury is claimed), *and* Geiger v. Jowers, 404 F.3d 371, 375 (5th Cir. 2005) (holding that compensatory damages for mental or emotional injuries are non-recoverable absent a showing of physical injury under § 1997e(e)), *with* Rowe v. Shake, 196 F.3d 778, 781-82 (7th Cir. 1999) (holding that "[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"), *and* King v. Zamiara, 788 F.3d 207, 212 (6th Cir. 2015) (holding that "deprivations of First Amendment rights are themselves injuries . . . and § 1997e(e) does not bar all relief for injury to First Amendment Rights"), *and* Canell v. Lightner 143 F.3d 1210, 1213 (9th Cir. 1998) (holding "§ 1997e(e) does not apply to First Amendment Claims regardless of the form of relief sought.").

12. *See Searles*, 251 F.3d at 876-77; *Allah*, 226 F.3d at 250-51; *Royal*, 375 F.3d at 723; *Geiger*, 404 F.3d at 375.

13. *See Rowe*, 196 F.3d at 781-82; *Zamiara*, 788 F.3d at 212; *Canell*, 143 F.3d at 1213.

14. *See*, *e.g.*, Williams, *supra* note 8, at 881-82; James E. Robertson, *A Saving Construction: How to Read the Physical Injury Rule of the Prison Litigation Reform Act*, 26 S. Ill. U. L. J. 1, 29 (2001) ("§ 1997e(e) should not survive constitutional challenge if its strictures bar punitive damages absent a physical injury"); *see also* Marissa C.M. Doran, *Lawsuits as Information: Prisons, Courts, and a Troika Model of Petition Harms*, 122 YALE L.J. 1024, 1034 (2013) (arguing that the majority interpretation of § 1997e(e) violates the prisoners' First Amendment rights to access the courts).

1997e(e) should be construed narrowly so that plaintiff-prisoners are not denied their civil rights.[15] Others argue that courts should adhere to a broad reading.[16]

This Article argues that the narrow reading is proper not just as a matter of statutory interpretation, but also because it is consistent with the Supreme Court's repeated affirmance of prisoners' First Amendment rights and right of access to the courts. The constitutional principles in these cases are inconsistent with the broad reading of the PLRA. Specifically, Part I provides a background of the PLRA and an up-to-date description of the circuit split.[17] Indeed, the circuit split has been in existence for years and the United States Supreme Court has not yet taken up the issue, nor has Congress effectively amended the PLRA.[18] Part II.A examines Supreme Court principles regarding prisoners' First Amendment rights and right of access to the courts and concludes that these principles are inconsistent with the broad reading.[19]

Next, Part II.B discusses lower court decisions addressing the constitutionality of § 1997e(e).[20] Finally, Part II.C argues that although prisoners have First Amendment rights in theory, excessive speech regulations burden these rights. Because of this, prisoners are susceptible to abuse and the broad reading leaves them without the ability to recover compensatory damages.[21] Thus, the narrow reading is necessary to safeguard prisoners' First Amendment rights.[22]

I. BACKGROUND

The language of § 1997e(e) of the PLRA is the reason why the circuits are split. The provision states: "[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 suffered while in custody *without a prior showing of physical injury* or the commission of a sexual act . . ."[23] Thus, the PLRA prevents prisoners from filing complaints in federal court for non-physical injuries unless they are accompanied by physical injuries.[24] This rule

15. Williams, *supra* note 8, at 881-82.
16. *See*, *e.g.*, Molly R. Schimmels, *First Amendment Suits and the Prison Litigation Reform Act's "Physical Injury Requirement": The Availability of Damage Awards for Inmate Claimants*, 51 U. KAN. L. REV. 935, 936-37 (2003) (arguing, *inter alia*, that anecdotal evidence and policy support reading § 1997e(e) broadly).
17. *See infra* Part I.
18. *See infra* Part I.
19. *See infra* Part II.A.
20. *See infra* Part II.B.
21. *See infra* Part II.C.
22. *See infra* Part II.C.
23. 42 U.S.C. § 1997e(e) (emphasis added).
24. *Id*.

naturally raises the issue of whether prisoners are barred from filing complaints in federal court for Constitutional violations—for example, First Amendment injuries—absent a showing of some physical injury.

The majority of circuits—construing § 1997e(e) broadly—have answered this question in the affirmative, holding that First Amendment claims that do not also allege physical injuries necessarily allege only mental or emotional injuries, and thus claimants are precluded from receiving compensatory damages under the PLRA.[25] The remaining circuits—construing § 1997e(e) narrowly—have held that the PLRA should not be read so as to prevent recovery of compensatory damages for First Amendment injuries.[26] The circuits have been split for over a decade.[27]

A. The Prisoner Litigation Reform Act

In 1996, President Bill Clinton, fashioning a tough-on-crime stance,[28] signed the PLRA into law.[29] The purpose of the PLRA was to curb perceived increases in frivolous prisoner litigation in federal court.[30] In addition to § 1997e(e), the PLRA had many other components which, taken together, sought to decrease frivolous prisoner litigation in federal court, including: (1) a requirement that prisoners pay all of their filing fees; (2) a requirement to exhaust administrative remedies before suing in federal court; (3) a limitation on the amount of attorney's fees prisoners may obtain; (4) a limitation on the amount of lawsuits a prisoner can bring; and

---

25. *See Searles*, 251 F.3d at 877; *Allah*, 226 F.3d at 251; *Royal*, 375 F.3d at 723; *Geiger*, 404 F.3d at 375.

26. *See Rowe*, 196 F.3d at 781; *Zamiara*, 788 F.3d at 212; *Canell*, 143 F.3d at 1213.

27. *See generally* Williams, *supra* note 8 (discussing the circuit split).

28. *See*, *e.g.*, *Incarceration in the United States*, HUMAN RIGHTS WATCH, https://www.hrw.org/report/2009/06/16/no-equal-justice/prison-litigation-reform-act-united-states [hereinafter HUMAN RIGHTS WATCH] ("In the spring of 1996 Congress passed the Prison Litigation Reform Act, and President Clinton signed the bill into law on April 26, 1996. The PLRA brought sweeping and unprecedented changes in the ability of prisoners to seek relief in court from conditions that threaten their health and safety or otherwise violate their legal rights."); *see also* Jeff Stein, *The Clinton dynasty's horrific legacy: How "tough-on-crime" politics built the world's largest prison system*, SALON, (Apr. 13, 2015, 1:25 PM) http://www.salon.com/2015/04/13/the_clinton_dynastys_horrific_legacy_how_tough_on_crime_politics_built_the_worlds_largest_prison/ ("The 'New Democrat' spoke on the campaign trail of being tougher on criminals than Republicans; and the symbolism of the Rector execution was followed by a series of Clinton 'tough on crime' measures . . ."); *see also* Harvey Gee, *New Paradigms of Criminal Justice for the Twenty-First Century*, 27 OHIO N.U.L. REV. 29, 38 (2000) (describing how President Clinton favored the infamous "three-strikes" bandwagon in 1994).

29. *See generally* Prison Litigation Reform Act of 1995, Pub. L. No. 104-34, 110 Stat. 1321-66 (codified as amended in scattered sections of 28 U.S.C. & 42 U.S.C.).

30. *See* Williams, *supra* note 8, at 862 (citing Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1578 (2003) ("Proponents of the PLRA characterized it as a necessary measure to curtail massive abuse of the judicial process by prisoners filing meritless claims.")).

(5) a provision that revokes a prisoner's "good time credits" if the prisoner is found to have used the legal system as a form of harassment.[31]

Those who supported the legislation—and continue to defend it—argue that prior to the PLRA prisoners filed a relatively large amount of federal civil lawsuits[32] and most of these claims were frivolous.[33] On the other hand, opponents of the comprehensive PLRA counter that the bill received almost no congressional scrutiny, statistics regarding the rate of prisoner lawsuits were greatly exaggerated, and Congress relied heavily on anecdotes as opposed to solid statistical evidence regarding frivolous prisoner litigation.[34] Further, the Act has resulted in many false negatives; in other words, prisoners with valid claims have been impeded from having their claims heard in federal court.[35]

The specific provision of the PLRA at issue holds that "[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 suffered while in custody without a prior showing of physical injury or the commission of a sexual act . . ."[36] Section 1997e(e), like the PLRA in general, is not without controversy. Section 1997e(e) received very little attention from Congress; thus, it is not surprising that the there is a circuit split regarding its meaning and purpose.[37]

---

31. *Id.* at 862 (internal footnotes omitted). *See also* Mark C. Miller, *Constitutional Interpretation and Policy-Making: The Governance as Dialogue Movement*, 40 OHIO N.U.L. REV. 337, 352 (2013) (The PLRA also "reduced the ability of federal judges to manage state prisons and force the early release of prisoners.") (citing G. ALAN TARR, JUDICIAL PROCESS AND JUDICIAL POLICYMAKING 34 (4th ed. 2006)).

32. *See* Schimmels, *supra* note 16, at 938 ("Soon, prisoners' lawsuits accounted for a disproportionate number of all federal civil filings. In Arizona, for example, the state's 20,000 prisoners alone accounted for nearly as many federal civil filings in 1994 as the state's 3.5 million residents.").

33. *See id.* at 939 (citing Lyell v. Schachle, No. 1-95-0035, 1996 WL 391557, at *1 (D. Tenn. Feb 28, 1996) (prisoner filed a federal lawsuit alleging he was denied the right to obtain a second helping of ice cream). "The House and the Senate both sought to enact legislation to reduce the number of less-than-meritorious prisoner filings; and both quickly approved preliminary versions of what would eventually become the PLRA." *Id*. *See also* HUMAN RIGHTS WATCH, *supra* note 28 ("The proponents of the PLRA argued that prisoners were clogging the courts with an avalanche of frivolous lawsuits, thus impairing the quality of justice enjoyed by law-abiding persons.").

34. *See*, *e.g.*, HUMAN RIGHTS WATCH, *supra* note 28 (citing Schlanger, *supra* note 30, at 1692) (prisoners were filing lawsuits at about the same rate as non-prisoners); Williams, *supra* note 8, at 862, 863; Robertson, *supra* note 14, at 4 ("Congress passed the PLRA. The legislative history of § 1997e(e) is threadbare. The bill received little debate, and the Congressional record is virtually silent about the physical injury requirement of § 1997e(e).").

35. *See* HUMAN RIGHTS WATCH, *supra* note 28.

36. 42 U.S.C. § 1997e(e).

37. *See*, *e.g.*, Williams, *supra* note 8, at 864 ("Given the lack of any serious scrutiny of the subsection's purpose, meaning, or intended effect, it is hardly surprising that § 1997e(e) has produced inconsistent judicial application and has served to stifle not only frivolous litigation, but meritorious constitutional claims as well."); Robertson, *supra* note 14, at 3; *see also infra* Part I.B. (providing an updated and detailed account of the circuit split regarding the meaning of § 1997e(e)).

B. The Current State of the Circuits

Currently there is a circuit split regarding the proper interpretation of the PLRA. The majority of circuits have construed § 1997e(e) broadly, holding that First Amendment claims that do not also allege physical injuries necessarily only allege mental or emotional ones, and thus claimants are precluded from receiving compensatory damages under the PLRA.[38] This view is largely premised on the idea that the plain text of § 1997e(e) is unambiguous: prisoners must allege a physical injury before they can recover compensatory damages in *any* federal action, including an action to recover damages for First Amendment injuries.[39]

Conversely, the remaining circuits have construed § 1997e(e) narrowly, holding that the PLRA should not be read so as to prevent recovery of compensatory damages for First Amendment injuries.[40] These circuits hold the view that the nature of First Amendment violations are different from ordinary mental or emotional injuries.[41] Further, if Congress wanted to prevent prisoners from suing for First Amendment violations, then Congress would have explicitly said so in the statute.[42] Hence, under the minority view, prisoners are not precluded from recovering compensatory damages for First Amendment claims absent a showing of physical injury.[43]

The circuits have been split on this question for *over ten years*.[44] To date, Congress has yet to amend the PLRA so as to resolve the circuit split. Nor is it likely that the current "do-nothing Congress" will take proactive steps to resolve the split.[45] Likewise, the Supreme Court has not yet taken

---

38. *See Searles*, 251 F.3d at 877; *Allah*, 226 F.3d at 251; *Royal*, 375 F.3d at 723; *Geiger*, 404 F.3d at 375.

39. *See infra* Part I.B.

40. *See Rowe*, 196 F.3d at 781; *Zamiara*, 788 F.3d at 212-13; *Canell*, 143 F.3d at 1213.

41. *See Rowe*, 196 F.3d at 781; *Zamiara*, 788 F.3d at 212-13; *Canell*, 143 F.3d at 1213.

42. *See Rowe*, 196 F.3d at 781; *Zamiara*, 788 F.3d at 212-13; *Canell*, 143 F.3d at 1213.

43. *See Rowe*, 196 F.3d at 781; *Zamiara*, 788 F.3d at 212-13; *Canell*, 143 F.3d at 1213.

44. *See generally* Williams, *supra* note 8 (discussing the circuit split).

45. *See*, *e.g.*, Lauren French, *Congress Setting New Bar for Doing Nothing*, POLITICO (Mar. 22, 2016),
http://www.politico.com/story/2016/03/congress-supreme-court-budget-do-nothing-221057 ("It's gotten so small-ball that one congressman, a chairman of a highly influential committee, introduced legislation last week to recognize the national significance of magic."); Gary Legum, *Here are some of the insane things our do-nothing Congress is wasting taxpayer money on*, SALON (May 16, 2016), http://www.salon.com/2016/05/16/here_are_some_of_the_insane_things_our_do_nothing_congress_is_wasting_taxpayer_money_on/
(for example, in "a rare moment of comity," the President signed a bill into law designating the bison as our country's official national mammal); *see also* Evan C. Zoldan, *Congressional Dysfunction, Public Opinion, and the Battle over the Keystone XL Pipeline*, 47 LOY. U. CHI. L.J. 617, 621 (2015) ("Congress's inability to act has placed stress on other parts of our delicately balanced constitutional system. For example, presidential nominees to judicial and executive positions have languished in a kind of legislative limbo, receiving neither Senate confirmation nor rejection. As a result, key government positions have been left unfilled.").

up the issue; however, because of the current Supreme Court vacancy, it is hard to predict how the Court would decide.[46]

The current majority position holds that claimants are precluded from receiving compensatory damages for alleged First Amendment violations under the PLRA absent a prior showing of physical injury.[47] Generally, courts adhering to this position reason that the plain language of § 1997e(e) supports the broad, preclusive reading.[48] For example, in *Searles v. Van Bebber*,[49] discussed in the introduction, the United States Court of Appeals for the Tenth Circuit held that § 1997e(e) bars claims for compensatory damages based on First Amendment injuries absent a prior showing of physical injury.[50] The court reasoned that the plain language of the statute precluded conditioning application of the statute "on the nature of the plaintiff's allegedly infringed rights."[51] In addition, the court summarily rejected plaintiff's argument that the broad reading of § 1997e(e) would violate his constitutional right to access the courts.[52]

Likewise, in *Royal v. Kautzky*,[53] the United States Court of Appeals for the Eighth Circuit held that § 1997e(e) barred a prisoner's claim for compensatory damages based on a First Amendment violation.[54] In a very brief opinion, the court explained that Congress clearly manifested their intent to preclude *all* "Federal civil actions" absent a showing of physical injury in the plain text of § 1997e(e).[55] Similarly, in *Geiger v. Jowers*,[56] the United States Court of Appeals for the Fifth Circuit held that the plain text of § 1997e(e) supported the majority view.[57]

---

46. *See*, *e.g*., Erwin Chemerinsky, *Supreme Court vacancy could define its term*, LOS ANGELES DAILY NEWS, (Sept. 28, 2016, 10:37 AM) http://www.dailynews.com/opinion/20160928/supreme-court-vacancy-could-define-its-term-erwin-chemerinsky ("Having only eight justices seriously hinders the ability of the court to do its job. The justices clearly are reluctant to take cases that are likely to lead to 4-4 ties. This will cause them to shy away from issues where the court is likely to be evenly divided.").

47. *See Searles*, 251 F.3d at 877; *Allah*, 226 F.3d at 251; *Royal*, 375 F.3d at 723; *Geiger*, 404 F.3d at 375.

48. *See Searles*, 251 F.3d at 877; *Allah*, 226 F.3d at 251; *Royal*, 375 F.3d at 723; *Geiger*, 404 F.3d at 375.

49. 251 F.3d 869.

50. *Id*. at 877.

51. *Id*.

52. *Id*. "In sum, the restriction on damages of 42 U.S.C. § 1997e(e) does not violate plaintiff's right of access to the courts or otherwise run afoul of constitutional restrictions. Thus, the refusal to give the instruction requiring proof of physical injury, before any damages for mental or emotional injury could be awarded, was error." *Id*.

53. 375 F.3d 720.

54. *Id*. at 723.

55. *Id*.

56. 404 F.3d 372.

57. *Id*. at 375.

Finally, in *Allah v. Al-Hafeez*,[58] the United States Court of Appeals for the Third Circuit held that § 1997e(e) barred prisoners' claims for compensatory damages absent a prior showing of physical injury.[59] The court reasoned that the plain text of § 1997e(e) does not discriminate between claims based on Constitutional injuries and claims based on other legal injuries: the statute clearly bars *all* "Federal civil action[s]" brought to vindicate "mental or emotional injury suffered while in custody without a prior showing of physical injury."[60]

Further, the court explained that "general tort-law compensation theory" governs claims for compensatory damages brought under § 1983 (including the plaintiffs' claim for compensatory damages based on a First Amendment violation).[61] Thus, there must be some *actual, compensable injury* suffered by the plaintiff.[62] Because of this, and because the plaintiffs alleged no physical injuries, their claim for compensatory damages was expressly barred by § 1997e(e).[63]

In sum, the majority position clearly holds that the plain language of § 1997e(e) supports the broad, preclusive reading.[64] Unlike the Third Circuit in *Allah*, however, there was no discussion whatsoever by the Eight Circuit in *Royal*, the Tenth Circuit in *Searles*, or the Fifth Circuit in *Geiger* of the nature of claims for compensatory damages brought under § 1983 or the law governing such claims.[65] In the latter cases, there was only a discussion of the plain language of § 1997e(e).[66]

On the other hand, circuits that have adopted the minority view hold that the PLRA should not be read to prevent recovery of compensatory damages for First Amendment injuries.[67] In addition to relying on the language of the statute, these courts generally have recognized the fundamental difference between regular "mental or emotional injuries" and constitutional injuries.[68] For example, in *Canell v. Lightner*,[69] the United States Court of Appeals for the Ninth Circuit held that claims for compensatory damages based on First Amendment injuries are different in

58. 226 F.3d 247.
59. *Id*. at 251.
60. *Id*. at 250 (citing § 1997e(e)).
61. *Id*. (citing Carey v. Piphus, 435 U.S. 247, 255 (1978)).
62. *Id.* (citing Memphis Community Sch. Dist. V. Stachura, 477 U.S. 299, 308 (1986)).
63. *See Allah*, 226 F.3d at 251.
64. *See Searles*, 251 F.3d at 877; *Allah*, 226 F.3d at 251; *Royal*, 375 F.3d at 723; *Geiger*, 404 F.3d at 375.
65. *Compare Allah,* 226 F.3d at 251, *with Royal*, 375 F.3d at 723, *and Searles*, 251 F.3d at 877, *and Geiger*, 404 F.3d at 375. Nor was there much explanation as to *why* prisoners' constitutional right to access the courts was not violated under the broad reading. *See*, *e.g*., *Searles*, 251 F.3d at 877.
66. *See Royal*, 375 F.3d at723; *Searles*, 251 F.3d at 877; *Geiger*, 404 F.3d at 375.
67. *See Rowe*, 196 F.3d at 781; *Zamiara*, 788 F.3d at 212; *Canell*, 143 F.3d at 1213.
68. *See Rowe*, 196 F.3d at 781; *Zamiara*, 788 F.3d at 212-13; *Canell*, 143 F.3d at 1213.
69. 143 F.3d at 1210.

kind from "mental or emotional injury" and are thus not precluded under the PLRA.[70] As explained by the court:

> [t]he appellees in this case argue that this provision bars Canell's action because he is alleging only "mental or emotional injury" without the requisite physical injury. We disagree. Canell is not asserting a claim for "mental or emotional injury." He is asserting a claim for a violation of his First Amendment rights. 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.[71]

Likewise, in *Rowe v. Shake*,[72] the United States Court of Appeals for the Seventh Circuit held that § 1997e(e) *only* applies to claims for mental or emotional injuries—not for injuries allegedly resulting from Constitutional injuries.[73] The court reasoned that First Amendment injuries are different in kind from simple mental or emotional injuries and that "[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."[74]

Finally, the most recent circuit to adopt the minority position is the United States Court of Appeals for the Sixth Circuit in *King v. Zamiara*.[75] In *King*, the Sixth Circuit first recognized that "[t]he applicability of [§ 1997e(e)] to claims alleging First Amendment deprivations has been a matter of significant debate."[76] With that in mind, the court started by looking at the plain text of § 1997e(e).[77] While recognizing that most circuits have rendered the statutory text in favor of the broad reading, the Sixth Circuit rejected this notion by turning to a basic tool of statutory construction: namely, the rule against superfluous statutory language.[78] Indeed, the statute is utterly silent with regard to claims brought to redress

---

70. *Canell*, 143 F.3d at 1213.
71. *Id*.
72. 196 F.3d 778.
73. *Id*. at 781.
74. *Id*. (citing Robinson v. Page, 170 F.3d 747 (7th Cir. 1999)).
75. 788 F.3d 207.
76. *Id*. at 212.
77. *Id.* at 212-213.
78. *Id*. at 213. The rule stands for the proposition that "'interpretations that render certain statutory language
superfluous are disfavored.'" Jonathan D'Andrea, *Chesapeake Exploration, L.L.C. v. Buell*, 42 OHIO N.U. L. REV. 907, 913 (2016) (quoting JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 202 (Robert C. Clark et al. eds., 2d ed. 2013)).

constitutional injuries, which the court noted are "distinct from mental or emotional injuries."[79] Accordingly, the court explained:

> [w]ere we to construe § 1997e(e) as the majority of courts have done, thereby 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*. Therefore, the plain language of the statute does not bar claims for constitutional injury that do not also involve physical injury.[80]

Despite the longstanding split, Congress has yet to amend the PLRA. Nor is it likely that the current Congress will amend the statute so as to unify the circuits.[81] Michael J. Teter observes:

> [t]oday's Congress largely cannot act. The vacuum created by congressional gridlock pushes the other branches to take a more pronounced role in creating national policy - going beyond their traditional functions. But the inability to legislate means much more than just the failure to craft policy; it also means that Congress cannot effectively check the other branches.[82]

Because of congressional gridlock, it is *possible* that the PLRA may remain unamended for some time, leaving prisoners with legitimate First Amendment injuries unable to receive compensation for said injuries in federal courts.

Similarly, the Supreme Court has not yet taken up the question, although the Court is much more likely to hear cases where the circuits are split.[83] Chief Justice John Roberts himself has "emphasized that circuit splits are far and away the most important consideration in deciding whether to grant cert petitions."[84] In fact, Supreme Court Rule 10 notes that one of the factors the Court considers in deciding whether to grant certiorari is whether there is a circuit split with regard to an important question of federal law.[85] However, because of the recent addition of Justice Neil

---

79. *King*, 196 F.3d at 213.

80. *Id*. (emphasis added).

81. *See*, *e.g*., Zoldan, *supra* note 45, at 621. *See also* Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2013 WIS. L. REV. 1097 (2013).

82. Teter, *supra* note 81, at 1100-01.

83. *See*, *e.g*., Evan Bernick, *The Circuit Splits are Out There—and the Court Should Resolve Them*, THE FEDERALIST SOCIETY (Aug. 13, 2015), http://www.fed-soc.org/publications/detail/the-circuit-splits-are-out-thereand-the-court-should-resolve-them.

84. *Id*.

85. *Id*. (citing Sup. Ct. R. 10).

Gorsuch to the Supreme Court, it is hard to predict which way the Court would decide in a hypothetical case where the Court granted certiorari.[86]

II. DISCUSSION

This Article argues that the narrow reading is proper not just as a matter of statutory interpretation, but also because it is consistent with the Supreme Court's repeated affirmance of prisoners' First Amendment rights and right to access federal courts. The constitutional principles in these cases are inconsistent with the broad reading of the PLRA. First, Part II.A examines Supreme Court principles regarding prisoners' First Amendment rights and right of access to the courts and concludes that these principles are inconsistent with the broad reading.[87] Second, Part II.B discusses lower court decisions addressing the constitutionality of § 1997e(e).[88] Finally, Part II.C argues that although prisoners have First Amendment rights in theory, excessive speech regulations burden these rights. Because of this, prisoners are susceptible to abuse and the broad reading leaves them without the ability to recover compensatory damages. Thus, the narrow reading is necessary to safeguard prisoners' First Amendment rights.[89]

A. Principles in Supreme Court Jurisprudence Preclude the Broad Reading

The broad reading of § 1997e(e) effectively denies prisoners access to federal court when they seek to recover damages for First Amendment violations.[90] Underlying this rule is the policy behind the PLRA, which is to discourage frivolous prisoner litigation.[91] However, as detailed below, this rule is inconsistent with principles in Supreme Court cases dealing with prisoners' First Amendment rights and right to access the courts.[92] Time and again, the Supreme Court has affirmed the idea that incarceration does not wholly strip a person of their First Amendment rights and their fundamental right to access the courts. In effect, the broad reading renders these holdings meaningless because it forecloses a plaintiff's ability to

86. *See*, *e.g.*, Chemerinsky, *supra* note 46; *see also What Could Gorsuch Mean for the Supreme Court?*, POLITICO (Feb. 01, 2017), http://www.politico.com/magazine/story/2017/02/neil-gorsuch-supreme-court-future-214724 (discussing how Justice Gorsuch's appointment might impact the Court).

87. *See infra* Part II.A.

88. *See infra* Part II.B.

89. *See infra* Part II.C.

90. *See supra* Part I.B.

91. *See* Schimmels, *supra* note 16, at 939 (quoting 141 Cong. Rec. S14626 (daily ed. Sept. 29, 1995)).

92. *See*, *e*.g., Robertson, *supra* note 14, at 16-18 (arguing that several constitutional norms are inconsistent with applying the prior physical injury rule of the PLRA to plaintiffs claiming compensatory damages for constitutional injuries).

recover compensatory damages when their First Amendment rights are violated.

First, the Supreme Court has adopted the proposition that incarceration does not wholly strip a prisoner of their First Amendment rights. For example, in *Procunier v. Martinez*,[93] the United States Supreme Court was confronted with the question of whether prison regulations censoring inmate mail and prohibiting the use of legal assistants and law students violates the First Amendment.[94] Regarding the censorship regulation, the Court articulated a new standard: (1) "[T]he regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression . . . ."; and (2) "[T]he limitation of First Amendment freedoms must be no greater is than necessary or essential to the protection of the particular governmental interest involved."[95] Presumably, state actions that deviate from these requirements give prisoners a cause of action.[96]

Applying the new standard, the Court held that the censorship regulations gave prison officials broad discretion based on personal preferences and biases to determine which mail to censor.[97] Thus, the Court explained that the regulations did not further a substantial government interest unrelated to the suppression of expression.[98] Nor were the regulations narrowly drawn so as to prevent arbitrary interference by the government: thus, there must be procedural safeguards in place so as to protect prisoners' First Amendment rights.[99] Indeed, *Martinez* stands for the proposition that government regulations burdening said rights must further a substantial governmental interest unrelated to the censorship of expression and be narrowly drawn.[100]

Similarly, thirteen years later in *Turner v. Safley*,[101] the Supreme Court held that prison regulations restricting inmate speech violate the First Amendment unless they are reasonably related to legitimate penological interests.[102] In determining whether regulations are reasonably related to legitimate penological interests, courts must consider several factors, including: (1) "[T]here must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to

93. 416 U.S. 396 (1974).
94. *Id*. at 398.
95. *Id*.
96. *See id*.
97. *Id*. at 415.
98. *Martinez*, 416 U.S. at 415.
99. *Id*. at 418-19.
100. *See id.*
101. 482 U.S. 78 (1987).
102. *Id*. at 89.

justify it"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and (4) "the absence of ready alternatives is evidence of the reasonableness of a prison regulation."[103] *Turner* stands for the oft quoted proposition that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution."[104]

Martinez and *Tuner* firmly demonstrate the Supreme Court's ratification of the idea that incarceration does not wholly strip a prisoner of their First Amendment rights.[105] Prisoners clearly have First Amendment rights.[106] However, a legal right without a remedy is valueless. As explained by Chief Justice Marshall: "'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'"[107] Our government will cease to be termed a government of laws "if the laws furnish no remedy for the violation of a vested legal right."[108] The broad reading of § 1997e(e) effectively leaves prisoners without a remedy when their First Amendment rights have been violated.[109] Thus, the holdings of *Martinez* and *Tuner* support a narrow reading of § 1997e(e).[110]

Nor is the broad view consistent with Supreme Court cases dealing with prisoners' fundamental right of access to the courts. "There is little doubt that a prisoner's most important right is access to the courts. Without access, prisoners have neither a forum in which to question the conditions and constitutionality of their confinement, nor an arena in which to seek vindication of other alleged rights violations."[111] The Supreme Court has routinely upheld the principle that prisoners have a fundamental right of access to the courts.

For example, in *Johnson v. Avery*,[112] the Supreme Court struck down a regulation in a Tennessee prison that prevented inmates from advising or assisting each other in legal matters, including assisting an inmate file habeas corpus petitions.[113] The Court explained that prisoners have a

103. *Id*. at 89-91.
104. *Id*. at 84.
105. *See Martinez*, 416 U.S. at 413-14; *Turner*, 482 U.S. at 89.
106. *See Martinez*, 416 U.S. at 413-14; *Turner*, 482 U.S. at 89.
107. Marbury v. Madison, 5 U.S. 137, 163 (1803).
108. *Id*. at 163.
109. *See supra* Part I.B.
110. *See Martinez*, 416 U.S. at 413-14; *Turner*, 482 U.S. at 89.
111. Steven D. Hinckley, *Bounds and Beyond: A Need to Reevaluate the Right of Prison Access to the Courts*, 22 U. RICH. L. REV. 19 (1987).
112. 393 U.S. 483 (1969).
113. *Id*. at 485, 489.

fundamental right to access the courts so as to present their complaints and that this right cannot be hampered.[114] The Tennessee regulation, however, tended to restrict this right.[115] As explained by the Court:

> [t]here can be no doubt that Tennessee could not constitutionally adopt and enforce a rule forbidding illiterate or poorly educated prisoners to file habeas corpus petitions. Here Tennessee has adopted a rule which, in the absence of any other source of assistance for such prisoners, effectively does just that. The District Court concluded that "for all practical purposes, if such prisoners cannot have the assistance of a 'jail-house lawyer,' their possibly valid constitutional claims will never be heard in any court." The record supports this conclusion.[116]

Likewise, in *Bounds v. Smith*,[117] the Supreme Court held that North Carolina's failure to supply prison inmates with an adequate law library violated prisoners' Constitutional right of access to the court system.[118] According to Steven Hinckley, "the *Bounds* decision was the culmination of thirty-six years of landmark federal court decisions that markedly enhanced a prisoner's ability to seek redress of complaints before courts of law."[119] To be sure, *Bounds* was somewhat narrowed by the Court's decision in *Lewis v. Casey*;[120] however, the fundamental right remains.[121] The broad reading of § 1997e(e) cuts against the spirit of both *Avery* and *Bonds* insofar as it effectively denies prisoners their right of access to the courts. Although the form of state action in *Avery* and *Bonds* (i.e., prison regulations) is different from the form of state action here (i.e., Congress enacting § 1997e(e)), the same principle should apply: prisoners have a fundamental right of access to the courts and this right cannot be denied absolutely.[122]

---

114. *Id*. at 485 ("Since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed.").

115. *Id*. at 487.

116. *Id*. at 487.

117. 430 U.S. 817 (1977).

118. *Id*. at 821.

119. Hinckley, *supra* note 111, at 20.

120. 518 U.S. 343 (1996).

121. *See id*. at 350 (citing *Bounds*, 430 U.S. at 817, 821, 828) ("The right that *Bounds* acknowledged was the (already well-established) right of *access to the courts*) (emphasis in original).

122. *See Avery*, 393 U.S. at 484; *Bounds*, 430 U.S. at 821.

B. Lower Court Decisions Addressing the Constitutionality of § 1997e(e)

Currently only one court has expressly considered the constitutionality of § 1997e(e) as applied to a prisoner's First Amendment claim.[123] In *Siggers-El v. Barlow*, the United States District Court for the Eastern District of Michigan squarely addressed the issue of whether § 1997e(e) is unconstitutional as-applied to a prisoners' First Amendment retaliation claim against a prison official when the claim does not allege a physical injury.[124] In *Siggers-El*, the plaintiff, in accordance with prison rules, asked the defendant—a prison official—to disburse money from the plaintiff's prison account to his attorney so that his attorney could assist him with an appeal.[125] Instead of immediately obliging plaintiff's request—which he was required by law to do—the defendant proceeded to harass the plaintiff about his decision to seek an attorney for help.[126] Ultimately, the defendant failed to disburse the funds.[127]

The plaintiff then complained to the defendant's supervisor, explaining his need to pay his attorney so that he may pursue an appeal with his assistance.[128] The supervisor reprimanded the defendant and ordered him to comply with plaintiff's request, at which point the defendant failed to do so.[129] In an act of retaliation, the defendant verbally threatened plaintiff for going over his head and transferred the plaintiff to a new facility.[130] The transfer caused plaintiff to lose his prison job, prevented him from paying his attorney, and prevented him from seeing his daughter.[131] The plaintiff successfully sued defendant in federal court and won damages at trial.[132] The defendant moved for a new trial, arguing that § 1997e(e) precludes plaintiff's award of compensatory damages because plaintiff alleged no physical injury.[133]

The court overruled defendant's motion for a new trial on the grounds that § 1997e(e) is unconstitutional as-applied to the facts of the case.[134] The court reasoned that the broad reading of § 1997e(e) would impermissibly shield officials from potential liability for egregious constitutional

123. Siggers-El v. Barlow, 433 F.Supp.2d 811 (E.D. Mich. 2006).
124. *Id.*, 433 F.Supp.2d at 815-16.
125. *Id*. at 814.
126. *Id*.
127. *Id*.
128. *Siggers-El*, 433 F.Supp.2d at 814.
129. *Id*. at 815
130. *Id*.
131. *Id*.
132. *Id*.
133. *Siggers-El*, 433 F.Supp.2d at 815.
134. *Id*.

violations so long as no physical injury occurred.[135] The court laid out the following hypothetical:

> [i]magine a sadistic prison guard who tortures inmates by carrying out fake executions - holding an unloaded gun to a prisoner's head and pulling the trigger, or staging a mock execution in a nearby cell, with shots and screams, and a body bag being taken out (within earshot and sight of the target prisoner). The emotional harm could be catastrophic but would be non-compensable. On the other hand, if a guard intentionally pushed a prisoner without cause, and broke his finger, all emotional damages proximately caused by the incident would be permitted.[136]

Furthermore, the court recognized that First Amendment violations are rarely accompanied by physical injuries.[137] Thus, "[the broad reading] would defeat congressional intent and render constitutional protections meaningless. If § 1997e(e) is applied to foreclose recovery in First Amendment actions, it would place the First Amendment itself 'on shaky constitutional ground.'"[138] Finally, the court noted that the impetus behind § 1997e(e) was to discourage frivolous prisoner litigation, *not* to allow "'prison officials to violate inmate First Amendment rights with impunity.'"[139]

The United States Court of Appeals for the Seventh Circuit has also addressed the constitutionality of § 1997e(e), albeit not in the context of First Amendment claims.[140] In *Zehner v. Trigg*, the plaintiffs were prisoners who were assigned by defendant correction officers to work in a kitchen for two years that was exposed to asbestos.[141] The plaintiffs alleged no physical injuries and sued for emotional damages.[142] The lower court granted defendant's motion for summary judgement pursuant to § 1997e(e) because plaintiffs alleged no physical injuries.[143]

On appeal, the plaintiffs challenged the constitutionality of § 1997e(e), arguing that by enacting the statute, Congress stripped federal courts of their power to remedy constitutional violations.[144] The court rejected plaintiff's

135. *Id*. at 816.
136. *Id*.
137. *Id*.
138. *Siggers-El*, 433 F.Supp.2d at 816 (quoting Percival v. Rowley, No. 1:02-CV-363, 2005 WL 2572034, *2 (W.D. Mich. 2004) (unpublished)).
139. *Id*. at 816 (quoting *Percival*, No. 1:02-CV-363, 2005 WL 2572034, at *2).
140. Zehner v. Trigg, 133 F.3d 459 (7th Cir. 1997).
141. *Id.* at 461.
142. *Id*.
143. *Id*.
144. *Id*.

argument.[145] The court first explained that Congress need not provide a damage remedy for every constitutional violation.[146] For example, the Eleventh Amendment prohibits a damage remedy for constitutional violations in certain circumstances.[147]

Next, the court reasoned that Congress created the § 1983 damages provision even though the Supreme Court has never held that the provision is constitutionally required.[148] Thus, the court stated: "it would be odd to conclude that Congress may not take away by statute what it has given by statute."[149] The court concluded that § 1997e(e) was a constitutionally valid restriction on damages.[150] However, the court was careful to note that "there is a point beyond which Congress may not restrict the availability of judicial remedies for the violations of constitutional rights *without in essence taking away the rights themselves*."[151]

The broad reading of § 1997e(e) is unconstitutional as applied to First Amendment claims that do not allege physical injuries because the rule does exactly what the seventh circuit in *Zehner* says it cannot do: it essentially takes away a prisoner's First Amendment rights.[152] As the court in *Siggers* noted, rarely are First Amendment injuries accompanied by physical injuries;[153] thus, the broad rule will foreclose virtually any First Amendment action brought by a prisoner.[154] Further, the broad rule strays from Congress' intent behind the PLRA: Congress could not have intended to preclude *valid* constitutional claims.[155] Therefore, courts must refuse to "'adopt an interpretation of section 1997e(e) under which the availability of judicial remedies for the violations of constitutional rights would be restricted to the point where Congress would in essence be taking away the rights themselves by rendering them utterly hollow promises.'"[156]

C. The Narrow Reading is Necessary to Safeguard Prisoners' First Amendment Rights

While it is true that prisoners' have First Amendment rights in theory, excessive speech regulations by prisons burden these rights. Because of

145. *Zehner*, 133 F.3d at 461.
146. *Id*.
147. *Id*.
148. *Id*. at 462.
149. *Id*.
150. *Zehner*, 133 F.3d at 462.
151. *Id*. (emphasis added).
152. *Compare id.* at 462, *with supra* Part. I.B.
153. *Siggers-El*, 433 F.Supp.2d at 816.
154. *See id.* at 816.
155. *See id*.
156. *See id*. (quoting Mason v. Schriro, 45 F.Supp.2d 709 (W.D. Mo. 1999)).

this, prisoners are highly susceptible to abuse and the broad reading leaves them without the ability to recover compensatory damages. [157] Thus, the narrow reading is necessary to safeguard prisoners' First Amendment rights.

As explained earlier, the Supreme Court has held that prisoners are entitled to the protections of the First Amendment.[158] However, as a matter of fact, prisoners' First Amendment rights have been "saddled" with an inordinate amount of regulations by prisons.[159] David M. Shapiro argues that government officials, specifically prison and jail officials, have relatively avoided judicial scrutiny and have created unjustified speech regulations burdening prisoners' First Amendment Rights.[160] Shapiro has categorized many of these arbitrary speech regulations.[161] For example, prisons have prohibited many seemingly benign items, including: case law, medical textbooks, lunar maps, crime novels, a Malcolm X biography, biographies of President Barrack Obama, a cat picture, and others.[162] Even more concerning, prisons have been able to enforce such regulations without much judicial scrutiny.[163]

In light of these restrictions, prisoners in jurisdictions that adhere to the broad reading are highly susceptible to abuse because they are prohibited from suing for compensatory damages.[164] This is especially troublesome given the fact that the United States has one of the highest incarceration rates in the world.[165] For example, in 2011 the United States Supreme Court ordered the State of California to lower its prison population by almost 40,000 inmates because massive overcrowding left thousands of inmates without basic medical care.[166] Recognizing this, the narrow reading of § 1997e(e) is necessary to safeguard prisoners' constitutional guarantees.

---

157. *See supra* Parts I.B, II.A. *See also* David M. Shapiro, *Lenient in Theory, Dumb in Fact*: *Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. 972 (2016) (examining speech regulations in prisons that run afoul of the *Turner* standard).

158. *See Martinez*, 416 U.S. at 413-14; *Turner*, 482 U.S. at 89.

159. Shapiro, *supra* note 157, at 974.

160. *Id.* at 977.

161. *See generally id.*

162. *See id.* at 995-1000.

163. *See id.* at 977.

164. *See supra* Part I.B.

165. *See*, *e.g.*, Tyjen Tsai & Paola Scommegna, *U.S. Has World's Highest Incarceration Rate*, POPULATION REFERENCE BUREAU (Aug. 2012), http://www.prb.org/Publications/Articles/2012/us-incarceration.aspx ("Since 2002, the United States has had the highest incarceration rate in the world."); Michelle Ye Hee Lee, *Yes, U.S. locks people up at a higher rate than any other country*, WASH. POST (Jul. 7, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/;
see also Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court's "Culture of Death"*, 34 OHIO N.U.L. REV. 861, 867 (2008) ("By 2005, more than 1.5 million persons were incarcerated in U.S. prisons on any given day, and an additional 750,000 were incarcerated in local jails.").

166. Brown v. Plata, 563 U.S. 493, 499 (2011).

Absent this safeguard, prisoners like Jimmy Searles are unable to rectify their First Amendment rights.[167]

CONCLUSION

The broad reading of § 1997e(e) strips prisoners of their ability to remedy First Amendment injuries.[168] Recognizing this, several federal circuits—avoiding a discussion of whether § 1997e(e) is unconstitutional as-applied to prisoners' First Amendment claims—have interpreted the statute narrowly, holding that Congress did not intend to apply the prior physical injury rule to these claims.[169] Notably, at least one federal district court has expressly declared § 1997e(e) unconstitutional on these grounds.[170] The narrow interpretation is proper not just as a matter of statutory interpretation, but also because it is consistent with the Supreme Court's repeated affirmance of prisoners' First Amendment rights and right of access to the courts.[171] Furthermore, due to the restrictive nature of incarceration, prisoners' First Amendment rights are heavily burdened.[172] Because of this, prisoners are more susceptible to abuse, and the broad reading leaves them without the ability to recover compensatory damages.[173]

167. *See Searles*, 251 F.3d at 873.
168. *See supra* Part I.B.
169. *See supra* Part I.B.
170. *See supra* Part II.B.
171. *See supra* Part II.A.
172. *See supra* Part II.C.
173. *See supra* Part II.C.