No. 16-6411

United States Court of Appeals
FOR THE FOURTH CIRCUIT

GREGORY CARTER,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of West Virginia

REPLY BRIEF OF APPELLANT

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Case law leaves little doubt that long-lasting injuries that significantly disrupt mobility and require surgery and other extensive treatment—like those Mr. Carter suffered after falling in his flooded cell—are more than *de minimis* for purposes of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b). But as the government would have it, Mr. Carter should be left with no recourse. To reach this end, the government relies primarily on its conclusory assertion that Mr. Carter's injuries pre-dated his incarceration and were unremarkable. This Court should reject this argument because it ignores both (1) facts in the record, and (2) the rule of law commonly known as the "thin-skull" doctrine that entitles Mr. Carter to recover for his injuries even if they might not have occurred but for a pre-existing physical condition.

Relying on statements in unpublished opinions, the government also argues that Section 1346(b)(2)'s "physical injury" requirement (as a threshold to suing for emotional injury) strips the district court of the jurisdiction granted by Section 1346(b)(1) for personal injury claims against the federal government generally. The government provides neither statutory text nor legislative history to support this point.

Instead, the government discounts nearly uniform circuit precedent holding that 42 U.S.C. § 1997e(e)'s similar language—which limits recovery under 42 U.S.C. § 1983—does not bar jurisdiction even in the absence of physical injury. And the government fails to address Mr. Carter's argument that a claim under Section 1346(b)(1) for "personal injury" caused by the government's negligence survives regardless whether that injury is sufficient to recover for emotional or mental damages under Section 1346(b)(2).

Finally, the government's argument that Section 1346(b)(2)'s "physical injury" requires more than a *de minimis* physical injury lacks merit. In support, the government cites a variety of cases and fragments of the legislative history, and invokes the maxim *de minimis non curat lex* (*i.e.*, the law does not concern itself with trifles). But those cases are flawed, the provided legislative history is incomplete, and the maxim has not been uniformly applied. In accordance with the plain meaning of Section 1346(b)(2) and in line with recognized principles of statutory interpretation and the more complete legislative history, this Court should conclude that the statute imposes no such threshold. For all of these reasons, this Court should reverse and

remand for the district court to reach the merits of Mr. Carter's FTCA claim.

I. MR. CARTER SUFFERED MORE THAN *DE MINIMIS* INJURIES, AND HIS PRE-EXISTING CONDITIONS DO NOT ALTER THAT DETERMINATION.

The government deems Mr. Carter's injuries *de minimis* because it asserts that his injuries pre-dated his incarceration. Gov't Br. at 15-16. But Mr. Carter has sufficiently alleged that his May 2014 falls in his flooded prison cell exacerbated his pre-existing ankle and neck injuries, and those exacerbated injuries constitute more than *de minimis* physical injuries.

Mr. Carter's pre-existing injuries do not preclude a finding that the injuries he sustained while in prison are more than *de minimis*. *See Kaufman v. United States*, Civ. No. 1:12-0237, 2014 WL 2565550, at *14 (S.D. W. Va. June 6, 2014) (finding that "more than a slight and temporary aggravation of [the] pre-existing" condition constituted more than *de minimis* injury). Contrary to the government's claim that Mr. Carter's "chronic" symptoms did not change after his May 2014 falls, *see* Gov't Br. at 15-16, the medical records indicate that his injuries were improving before the falls and then deteriorated after, Opening

Br. at 5-9. In the period leading up to his falls, medical records indicate that Mr. Carter no longer needed a boot cast, JA 156, and his crutch had been replaced with a cane, JA 63. These changes support Mr. Carter's assertion that his ankle injuries were "on the road to recovery." JA 156.

The exacerbation of Mr. Carter's injuries from the falls resulted in more than *de minimis* injuries that required extensive and prolonged medical attention. Opening Br. at 16-21. The government casually describes Mr. Carter's injuries as nothing more than minimal pain and swelling, and makes the unsupported statement that "none of [Mr. Carter's] post-May 2014 symptoms appeared out of the ordinary, particularly for someone of his age and medical history." Gov't Br. at 17. But the government ignores facts in the medical record that highlight the severity of Mr. Carter's post-fall injuries. Most critically, the government's brief omits the conclusion of Dr. Sayed A. Zahir, the prison's orthopedic surgeon, that Mr. Carter will likely require surgery to repair his ankle—a possibility not contemplated before Mr. Carter's

May 2014 falls.[1] JA 141. An injury requiring surgery exceeds any *de minimis* bar that Section 1346(b)(2) might impose. Opening Br. at 19 (citing *Samuelson v. City of New Ulm*, 455 F.3d 871, 876 (8th Cir. 2006)).

The government also expends not a word addressing (1) the injuries' significant interference with Mr. Carter's mobility, (2) the duration of those injuries, or (3) the extensive medical treatment Mr. Carter required due to the prison's negligence. *See*, *e.g.*, JA 60, 137, 139; Opening Br. at 16-21 (citing *Ussery v. Mansfield*, 786 F.3d 332, 337-38 (4th Cir. 2015); *Young v. Prince George's Cty.*, 355 F.3d 751, 758 n.3 (4th Cir. 2004); *Taylor v. McDuffie*, 155 F.3d 479, 485 (4th Cir. 1998); *Copeland v. Locke*, 613 F.3d 875, 881 (8th Cir. 2010)).[2] The medical records show that Mr. Carter's ankle injuries have persisted for close to two years, JA 34-142, and his neck sprain/strain resulting from the falls endured without improvement for over two months, JA 76. After the

[1] As Mr. Carter noted in his opening brief, although not in the district court record, Dr. S. Brett Whitfield, another orthopedic surgeon, agreed with Dr. Zahir's evaluation that surgery may be required. Opening Br. at 10 n.1, 17 n.3; JA 227.

[2] Mr. Carter's opening brief mistakenly indicated that *Copeland* was decided by the Eleventh Circuit, rather than the Eighth Circuit.

falls, Mr. Carter needed intensive treatment, including the prescribed use of an athletic ankle brace, JA 137, and anti-inflammatory medication for his neck, JA 74. He also complained repeatedly that his pain had worsened after his falls. JA 73, 87, 97. Finally, it was not until after Mr. Carter's falls that medical providers diagnosed his ankle injuries as tenosynovitis, JA 135, and tendonitis, JA 137, 139. Although his injuries may be "chronic," his symptoms have not been static and cannot be attributed solely to his prior injuries.

Furthermore, even if the government is correct that Mr. Carter is a somewhat vulnerable plaintiff due to his "age and medical history," Gov't Br. at 17, West Virginia's well-established "thin-skull" rule entitles Mr. Carter to recover for damages caused by the negligence of prison employees even if those injuries might not have occurred but for a pre-existing physical condition. *See Shia v. Chvasta*, 377 S.E.2d 644, 645, 648 (W. Va. 1988) (explaining that the "thin-skull" rule "is an accurate statement of the law" in West Virginia); *Reynolds v. City Hosp., Inc.*, 529 S.E.2d 341, 347-48 (W. Va. 2000) (discussing the "thin skull" jury instruction in the context of plaintiff's frailty and age); *see also* Opening Br. Section III (explaining that West Virginia law

provides the substantive law for this FTCA tort). The "thin-skull" rule applies to both the "re-activation of a condition that was previously under control" and the "aggravation of a pre-existing physical . . . condition." Jacob A. Stein, Personal Injury Damages Treatise § 11:1 (3d ed. 2016); *see Crinkley v. Holiday Inns, Inc.*, 844 F.2d 156, 163 (4th Cir. 1988). Thus, even if Mr. Carter's previously-suffered ankle and neck injuries predisposed him to new injuries, that fact cannot be used to diminish the severity of the injuries he sustained after falling in his cell. The record and existing case law demonstrate that those new injuries exceed a *de minimis* threshold.

II. SECTION 1346(B)(2)'S "PHYSICAL INJURY" REQUIREMENT DOES NOT IMPLICATE JURISDICTION.

The government asserts that the FTCA's jurisdictional grant is subject to various statutory limitations and, citing only conclusory sentences in several unpublished cases, argues that when Congress added Section 1346(b)(2)'s physical injury requirement, "it sought to further limit the scope of FTCA jurisdiction." Gov't Br. at 13-14, 14 n.4. The government provides neither statutory text nor legislative history to support that assertion.

To be sure, Section 1346(b)(2) limits prisoners' ability to "bring a civil action against the United States . . . for mental or emotional injury . . . without a prior showing of physical injury." But nothing in the text of Section 1346(b)(2) suggests that Congress intended to limit the jurisdiction conferred by Section 1346(b)(1), which provides district courts with "exclusive jurisdiction of civil actions on claims against the United States . . . [for] personal injury . . . caused by the negligent or wrongful act or omission" of a government employee under state tort law. This ambiguity stands in contrast with instances in which Congress explicitly chose to limit FTCA jurisdiction. *See*, *e.g.*, 28 U.S.C. § 2680 (specifying that "the provisions of . . . section 1346(b) shall not apply" to fourteen specific types of claims). In the absence of any statutory text or legislative history demonstrating that Congress intended § 1346(b)(2) to limit jurisdiction under the FTCA, this Court should reject the government's bare assertion of congressional intent. *Cf. United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1637-38 (2015) (noting that because "the FTCA treats the United States more like a commoner than like the Crown . . . this Court has often rejected the

Government's calls to cabin the FTCA on the ground that it waives sovereign immunity").

The government also disagrees with Mr. Carter's argument that the "physical injury" requirement in Section 1346(b)(2) should be interpreted in harmony with the similar language of 42 U.S.C. § 1997e(e). *See* Gov't Br. at 14. Section 1997e(e) limits the recovery available to prisoners bringing claims under 42 U.S.C. § 1983 for violations of their constitutional rights by state and local officials, and it provides as follows: "No Federal civil action may be brought by a prisoner . . . for mental or emotional injury suffered while in custody without a prior showing of physical injury . . . ." Many courts have held that Section 1997e(e) does not bar recovery of nominal or other damages in the absence of more than *de minimis* physical injury, never questioning jurisdiction over that Section 1983 claim. Opening Br. at 33-34; *see, e.g.*, *Calhoun v. DeTella*, 319 F.3d 936, 940 (7th Cir. 2003) (emphasizing that although Section 1997e(e) "may limit the relief available to prisoners who cannot allege a physical injury . . . it does not bar their lawsuits altogether"); *Mitchell v. Horn*, 318 F.3d 523, 533 (3d Cir. 2003) (explaining that "regardless how we construe 1997e(e)'s

physical injury requirement, it will not affect [the plaintiff's] ability to seek nominal or punitive damages for violations of his constitutional rights" (citation omitted)). Failing Section 1997e(e)'s "physical injury" requirement therefore does not strip jurisdiction under Section 1983, leaving petitioners able to claim other damages for personal injury.

The government contends that the same interpretation should not apply to Section 1346(b)(2)'s similar language because 1346(b) creates jurisdiction, whereas Section 1997e(e) does not. *See* Gov't Br. at 14. This argument misses the mark because both Section 1346(b)(1) and Section 1983 create a cause of action that gives rise to jurisdiction in federal courts. True, Section 1346(b)(1) explicitly confers jurisdiction. But Section 1983 provides a cause of action through which the district courts have jurisdiction under 28 U.S.C. § 1343, which confers jurisdiction over certain civil rights claims. *See, e.g.*, *Crosby v. City of Gastonia*, 635 F.3d 634, 639 n.5 (4th Cir. 2011) ("Federal subject matter jurisdiction over a § 1983 civil rights claim also lies specifically in accordance with 28 U.S.C. § 1343(a), which confers jurisdiction upon the district courts . . . ."); *Myers v. Loudoun Cty. Pub. Sch.*, 418 F.3d 395, 398 n.2 (4th Cir. 2005) ("Original jurisdiction over suits alleging a cause

of action under § 1983 is vested in the district courts pursuant to 28 U.S.C.A. § 1343 . . . ."); *Goldsmith v. Mayor & City Council of Balt.*, 987 F.2d 1064, 1067 (4th Cir. 1993) ("[A]lleging federal question jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343 . . . ."). The fact that Section 1983 does not include a provision conferring jurisdiction therefore is of no moment.

Section 1346(b)(2) and Section 1997e(e) are derived from the same originating statute and share the Prison Litigation Reform Act's ("PLRA") purpose and text. They should therefore be read equivalently: just as Section 1997e(e) limits the recovery available under Section 1983 without depriving the district court of jurisdiction to award nominal or other damages, so too should Section 1346(b)(2) be read equivalently to limit the recovery available under Section 1346(b)(1) without depriving the district court of jurisdiction under Section 1346(b)(1). Thus, even if Mr. Carter's physical injuries are *de minimis*, Section 1346(b)(1) confers jurisdiction over Mr. Carter's tort claim either for nominal damages or for compensatory damages. *See Harper v. Consol. Bus Lines*, 185 S.E. 225, 226 (W. Va. 1936) ("Where an actionable wrong by the defendant is shown, the plaintiff may

recover nominal damages from the mere fact of such wrong." (quoting *Watts v. Norfolk & W.R. Co.*, 19 S.E 521 (W. Va. 1894))); *cf. Rohrbaugh v. Wal-Mart Stores*, *Inc.*, 572 S.E.2d 881, 887 (W. Va. 2002) (finding nominal damages available for invasion of privacy tort claims). In other words, Section 1346(b)(1) confers jurisdiction over Mr. Carter's claim for any non-mental or emotional injury. *Cf. Rowe v. Shake*, 196 F.3d 778, 781 (7th Cir. 1999) ("[Section] 1997e(e) applies only to claims for mental or emotional injury. Claims for other types of injury do not implicate the statute." (citation omitted)).

Even if Section 1346(b)(2)'s "physical injury" requirement is a jurisdictional bar, the district court should not have dismissed Mr. Carter's claim under Federal Rule of Civil Procedure 12(b)(1). Instead, because the purported jurisdictional question—the extent of the injuries caused by the prison's negligence—mirrors one of the elements of the tort claim he has alleged (causation of damages), the district court should have proceeded to a merits determination. This Court has deemed a Rule 12(b)(1) dismissal inappropriate when the facts necessary to establish jurisdiction are intertwined with the merits determination. *See Kerns v. United States,* 585 F.3d 187, 195-96 (4th

Cir. 2009) (explaining that because the FTCA's jurisdictional question regarding whether federal employee was acting within scope of employment was "intertwined" with merits of the claim, the "district court should assume jurisdiction and assess the merits of the claim"); *Adams v. Bain*, 697 F.2d 1213, 1220 (4th Cir. 1982) (finding that when "the [jurisdictional] facts are so intertwined with the facts upon which the ultimate issues on the merits must be resolved . . . 12(b)(1) is an inappropriate basis upon which to ground the dismissal"). If, as the government contends, Mr. Carter's claim presented a jurisdictional dispute, the district court should have found jurisdiction and proceeded to the merits of Mr. Carter's claim.

III. SECTION 1346(B)(2) DOES NOT REQUIRE MR. CARTER TO SHOW MORE THAN *DE MINIMIS* PHYSICAL INJURY.

The government contends that Congress intended Section 1346(b)(2) to require that Mr. Carter show more than *de minimis* physical injury to meet that section's "physical injury" requirement. For this assertion, the government relies primarily on the uncontested point that Congress's intent in passing the PLRA was to curb frivolous prisoner litigation. *See* Gov't Br. at 10-13; Opening Br. at 14, 27-30. But Congress tied that intent to a particular means: the statutory language.

Because the government ignores the plain statutory language and important legislative history, it overstates the types of cases this provision was meant to curtail.

The government relies on opinions of sister circuits applying a *de minimis* bar to Section 1997e(e) and a couple of unpublished FTCA cases. *See* Gov't Br. at 10-12. But those cases either ignore or refuse to apply the plain meaning of the statute. *See*, *e.g.*, *Harris v. Garner*, 190 F.3d 1279 (11th Cir. 1999) (rejecting the plain meaning of "physical injury" to further statutory purpose, but failing to address the roles of the PLRA's other restrictive provisions in the legislative scheme and the full legislative history);[3] *Oliver v. Keller*, 289 F.3d 623, 627-28 (9th Cir. 2002) (same); *Mitchell*, 318 F.3d at 534-36 (same).[4] These cases notwithstanding, the plain meaning doctrine governs: "physical injury"

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[3] *Harris* was later vacated, 197 F.3d 1059 (11th Cir. 1999), and then reinstated in part on rehearing en banc, 216 F.3d 970 (11th Cir. 2000). The government does not cite to *Harris*, but it cites to *Brooks v. Warden*, 800 F.3d 1295 (11th Cir. 2015), Gov't Br. at 11, which relies on *Harris*.

[4] The government also cites to *Flanory v. Bonn*, 604 F.3d 249 (6th Cir. 2010) and *Sublet v. Million*, 451 F. App'x 458 (5th Cir. 2011). Gov't Br. at 10-13. But the government fails to recognize, let alone respond to, Mr. Carter's argument that those cases rely on *Siglar v. Hightower*, 112 F.3d 191 (5th Cir. 1997), a case that misreads Supreme Court precedent. Opening Br. at 18 n.4, 25 n.8.

means any physical injury. Opening Br. at 21-31 (explaining Supreme Court precedent requiring plain meaning interpretation of undefined statutory terms).

The government contends that the doctrine of *de minimis non curat lex*—the idea that the law generally "does not concern itself with trifles"—overrides plain meaning and militates for reading a *de minimis* bar into the statute. *See* Gov't Br. at 12-13. But courts do not uniformly rely upon that maxim. For instance, applying the doctrine to require more than *de minimis* physical injury in Section 1997e(e) would have rendered the Supreme Court's decision in *Wilkins v. Gaddy*, 559 U.S. 34, 39-40 (2010), largely superfluous. In *Wilkins*, the Court held that a prisoner's allegation of *de minimis* injuries does not necessarily preclude an Eighth Amendment excessive force claim under Section 1983. *Id.* at 37-38. There would have been little reason for the Supreme Court to grant certiorari and decide the issue if Section 1997e(e) otherwise barred Wilkins' claims for alleging only *de minimis* injuries. After all, Section 1997e(e) applies to almost all Eighth Amendment prisoner excessive force claims and would bar virtually all of the Eighth Amendment *de minimis* injury claims permitted by

Wilkins.[5] But although the law generally "does not concern itself with trifles," the Supreme Court nonetheless went on to decide the case, indicating that it does not always apply the maxim *de minimis non curat lex*. And the legislative history and statutory scheme of the PLRA demonstrate that the maxim especially does not apply to Section 1346(b)(2)'s "physical injury" requirement. Opening Br. at 22-30.

Tellingly, the government fails to respond to two critical points. First, Congress qualified "physical injury" when it so desired, as demonstrated by the "*serious* physical injury" requirement in 28 U.S.C. § 1915(g) (emphasis added), another provision of the PLRA. Opening Br. at 13, 23-26. Second, the statements of the PLRA's original sponsors in the Senate leave little doubt that Section 1346(b)(2) was meant to curtail only those suits stemming from the discomforts of prison that lack a physical injury component. Opening Br. at 27-29 (quoting statements by Senators Dole and Kyl). To be sure, Congress

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[5] The only prisoners who can bring Eighth Amendment excessive force claims without being subjected to the PLRA are those who both suffer excessive force while imprisoned and are released before filing their claims. 28 U.S.C. § 1997e(e); *Harris*, 190 F.3d at 1284 (explaining that Section 1997e(e) "does not apply to former prisoners, or those who have been released from a correctional facility").

intended Section 1346(b)(2) to curtail *some* claims. Those claims, however, are the same ones Senator Dole spoke of when introducing the PLRA to the Senate Floor: "Prisoners have filed lawsuits claiming such grievances as insufficient storage locker space, being prohibited from attending a wedding anniversary party, and yes, being served creamy peanut butter instead of the chunky variety they had ordered." 141 Cong. Rec. 14,570 (1995). Grievances like those inflict no physical injury and lend themselves to frivolous allegations of emotional or mental injury. Those are the insubstantial claims—claims arising solely from the discomforts of prison—that Congress justifiably chose to exclude when it curbed the FTCA's broad applicability through Section 1346(b)(2). Claims based on physical injury are of a different sort. And barring such physical injury claims, no matter how small, would directly contravene the statute. For all of these reasons, this Court should reverse and remand for consideration of Mr. Carter's claim on the merits.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3425 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I, Erica Hashimoto, certify that on February 16, 2017, a copy of Appellant's Reply Brief was served via the Court's ECF system on:

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