UVA LAW | Lile Finals 2024

AMY VANDERVEER: Good afternoon, everyone, and thank you for joining us at the final round of the 96th Annual William Minor Lile Moot Court Tournament. My name is Amy Vanderveer and I have the privilege of serving as the President of the Lile Board this year. Before we get started, I wanted to go over a few quick logistical matters. First, at this time, please make sure that all cell phones, watches, and other electronic devices are set on silent. And second, while you are welcome to leave at the conclusion of the argument, we ask that you do not exit the room during the argument so as to not distract our competitors or the judges.

I also have the privilege of introducing our distinguished panel today. Chairing the panel, we have Chief Judge Kevin Ohlson of the US Court of Appeals of the Armed Forces. Judge Ohlson attended Washington and Jefferson College on an Army ROTC scholarship. After graduating from the University of Virginia School of Law, Judge Ohlson was stationed in Fort Bragg, North Carolina, where he served as a prosecutor and as an Article 32 investigating officer.

While assigned to the 18th Airborne Corps, Chief Judge Ohlson parachuted out of a plane into three different foreign countries. Upon leaving military service, Chief Judge Ohlson became a federal prosecutor in Washington, DC he was recalled to active duty and deployed overseas during the Persian Gulf War where he was awarded a Bronze Star. He later returned to his duties at the Justice Department and he served in a variety of leadership positions during a career that spanned more than 25 years.

He was ultimately appointed as Chief of Staff and Counsel to the Attorney General of the United States. He was nominated by President Obama to sit on the US Court of Appeals for the Armed Forces and confirmed by the Senate in 2013 and he has been the Chief Judge since August of 2021. We are also joined by Judge Michael Scudder of the US Court of Appeals for the Seventh Circuit. He joined the court in May 2018 following the retirement of Judge Richard Posner.

Before joining the bench, Judge Scudder was a partner in the Chicago office of Skadden, Arps, Slate, Meagher & Flom LLP. He served in the White House as General Counsel of the National Security Council, as well as the United States Department of Justice on National Security team and of the Department of the Attorney General as an Assistant United States Attorney in the Southern District of New York. He's a former law clerk to Justice Anthony Kennedy of the Supreme Court and Judge Paul Niemeyer of the US Court of Appeals for the Fourth Circuit.

For the last 10 years, he's taught national security law at the University of Chicago and also teaches a course in advanced federal jurisdiction at Northwestern University Pritzker School of Law. Finally, we are joined by Trevor Cox, a litigation partner in the Richmond office of Hunton Andrews Kurth LLP where he is a member of the issues and appeals team. He represents private and public clients in Virginia in federal appellate courts on a wide variety of matters, including issues of state and federal constitutional law.

He also leads Hunton's state attorneys general practice. Before joining Hunton, Trevor served for more than four years in the Solicitor General's Division of the Office of the Attorney General of Virginia as Deputy Solicitor General and Counsel to the Executive Division, Senior Appellate Counsel, and finally, as acting Solicitor General of the Commonwealth. As Chief Appellate Counsel of the Commonwealth of Virginia, he represented the Commonwealth and its agencies and officials in matters concerning the constitutionality of Virginia statutes and regulations, or in matters touching upon sensitive policies of the Commonwealth.

In January 2018, he presented argument on behalf of Virginia in the United States Supreme Court in *Collins v Commonwealth of Virginia.* He maintains a robust pro bono practice and is active in a variety of legal and nonprofit organizations in Virginia and beyond. He's a graduate of Harvard College, Harvard School of Law, and the University of Cambridge. Now, I would like to invite another Lile board member, Mr. Sam Ellis, to come up and provide a brief overview of the problem for this year's final round.

SAM ELLIS: As an inmate at minor correctional facility, Michael Nelson donned a blue armband in protest of a prison policy and inspired other inmates to do the same. To suppress the protest, Warden Davis transferred Nelson to a Level 3 security unit and barred him from speaking with other inmates. In response, Nelson filed a Section 1983 complaint against Warden Davis alleging First Amendment violations. Nelson was subsequently released from prison and filed a supplemental complaint that reflected his new custodial status.

Both parties moved for summary judgment. After finding that Nelson's First Amendment rights had been violated, the District Court turned then to the question of damages. The court concluded that Nelson's claim was subject to the Prison Litigation Reform Act, or PLRA, which requires a showing of a physical injury to recover compensatory damages. Because Nelson had not alleged a physical injury, the court denied him compensatory damages and limited him to nominal damages.

This case presents two questions of statutory interpretation regarding the PLRA's compensatory damages provision. First, is Nelson's suit sale subject to the PLRA despite him no longer being incarcerated? Second, if the PLRA does govern this case, does the statute's physical injury requirement apply in a case alleging a deprivation of constitutional rights? While federal Court of Appeals are split over these questions, both are issues of first impression in the 12th Circuit. Please rise to welcome our panel.

JAKE FLANSBURG: Jake Flansburg, counsel for the plaintiff appellant.

MALIA TAKEI: Malia Takei counsel for the plaintiff appellant.

BEN BALDWIN: Ben Baldwin, counsel for the defendant appellant

NATHANIEL GLASS: Nathaniel Glass for the defendant appellant.

CHIEF JUDGE KEVIN OHLSON: Please, everyone be seated. Well, good afternoon, everyone. Welcome to the court. We have one case today, *Michael Nelson versus Richard Hayes.* Counsel, are both teams prepared to argue?

BEN BALDWIN: Yes, your Honor.

MALIA TAKEI: Yes, your Honor.

CHIEF JUDGE KEVIN OHLSON: Very well.

MALIA TAKEI: We are making time for the appellants prefer two minutes of our time for rebuttal.

CHIEF JUDGE KEVIN OHLSON: Granted.

MALIA TAKEI: That will be [INAUDIBLE]

CHIEF JUDGE KEVIN OHLSON: Please proceed.

MALIA TAKEI: May it please the court, Malia Takei, counsel for the plaintiff appellant. At the heart of today's case is whether a limitation on prisoner recovery applies to a non prisoner. It does not, for three reasons. First, Mr. Nelson filed a supplemental complaint according to rule 15D, informing the District Court that he was no longer incarcerated. Second, nothing in the text of 1997EE displaces rule 15D or standard pleading practice. And finally, this interpretation of the text is in line with the legislative history and congressional intent.

Now, standard pleading practice helps clarify the proper outcome in today's case. Rule 15D establishes that parties are able to inform the court of any new facts or modifications of facts that occur after the timing of the initial filing. And this is permitted even if the initial pleading was defective in stating a claim or defense.

CHIEF JUDGE KEVIN OHLSON: Counsel, I'd like to actually focus on a little different issue today. Now, as you're well aware, Section 1997EE flatly states no federal civil action may be brought. Now, in your brief, you state flat out that should not be read literally.

MALIA TAKEI: No, it should not.

CHIEF JUDGE KEVIN OHLSON: And you cite the Supreme Court case of *Jones versus Bock* for that proposition. But didn't the court in that instance really cabin the reach of that? It was specifically within the context of rejecting an argument that the word "action" should be viewed as allowing for the dismissal of an entire claim, when in fact, it failed to meet the PLRA requirements. Why should we take that same approach in this particular case?

MALIA TAKEI: Yes, your honor. *Jones v Bock* is still applicable even though it was focused on the word "action" in regards to section 1997EA and that is because the Supreme Court and Chief Justice Roberts specifically called out the entire prefatory language of no action shall be brought as being boilerplate language. And they said that this entire prefatory language was commonly used throughout both the PLRA and several other statutes in order to introduce the language for the section.

And here we see that is exactly the case for 1997EE, that prefatory language of no federal civil action may be brought was used just to introduce this limitation on recovery for prisoners in context of the PLRA. So even though *Jones v Bock* was about 1997EA and was about whether or not the standard definition and common law definition of action was going to be used, it still is applicable and provides important foundation for the outcome in this case.

CHIEF JUDGE KEVIN OHLSON: Well, that's all well and good for the United States Supreme Court to say that explicit language, in fact, is merely boilerplate and that it can be ignored, but what about our court, the 12th Circuit? Where as we all know, Justice Kagan said at a dinner on behalf of Justice Scalia, when it comes to us judges, we are all textualists now. Why should we look at such clear, plain language, and without any guidance from the Supreme Court, say that we should ignore that within this context?

MALIA TAKEI: As Justice Scalia stated, textualism doesn't require a literal reading of the text. It simply requires a fair reading of the text. And in this instance, we're not asking this court to rule out the word brought or this prefatory language entirely. We are just stating that it introduces this limitation on recovery and introduces a general prohibition in this specific instance.

JUDGE MICHAEL SCUDDER: The difficulty that I have with your position is I understand the rule 15D argument, but the supplemental or amended complaint was filed in the same action. So when you read the language of the statute where it says, no civil action may be brought, the civil action, yes, there was an amended complaint in it, but the action was brought when Mr. Nelson was incarcerated.

MALIA TAKEI: I have two--

JUDGE MICHAEL SCUDDER: I mean, that's the difficulty that he has.

MALIA TAKEI: Yes, your Honor. I have two points to that. First, the word "brought" could theoretically be read to impose this pre-filing statutory precondition to suit. And in that case, that literal definition of "brought" at the common law does mean the commencement of a lawsuit. We agree with that, but it does not mean that, according to standard pleading practice, you cannot substitute and file a supplemental complaint when there is this pre-filing requirement.

JUDGE MICHAEL SCUDDER: OK. But do you agree that an amended or supplemental complaint, supplemental is the language used in the rule it's still filed in the same action.

MALIA TAKEI: It is still filed in the same action.

JUDGE MICHAEL SCUDDER: And so the way Congress has worded that statute is that no civil action may be brought. It's still all in the same action. So I grant you that he could accept a voluntary dismissal or effect a voluntary dismissal and refile. And if it's a timely refiling, that issue goes away, but the amended complaint, it sure seems to me, was filed in this action.

MALIA TAKEI: For this, we can look entirely to the purpose of the PLRA, which was to promote judicial economy and not to pose an impediment to meritorious litigation. And in this case, requiring a plaintiff like Mr. Nelson to dismiss or withdraw his action and file an entirely new action just impedes meritorious complaints from going forward. We also see that this just requires duplicative actions. The purpose of supplemental pleadings and rule 15D was to ensure that parties were able to get as complete an adjudication on all of the issues between the two parties. We're not supposed to be required to withdraw and file an entirely new action.

TREVOR COX: How about the language, Counsel, that follows? That no civil action may be brought by a prisoner. How does that affect your argument?

MALIA TAKEI: Yes. In this case, we can plainly see that Mr. Nelson, as he is no longer incarcerated, falls outside of the definition of a prisoner as established under 1997EH. And the intention of the PLRA and all of its different sections was specifically to target prisoner litigation. It was not meant to target non-prisoner litigation or litigation by individuals who once were a prisoner and then were released. Mr. Nelson plainly falls outside of the different buckets that the PLRA was meant to target and the types of cases it meant to target.

In this specific instance, we also see that Mr. Nelson raised a meritorious complaint. As the district court said, appellee plainly violated his First Amendment rights. But in this instance, the PLRA serves as a filtration system and it's meant to make sure that frivolous litigation is not allowed to proceed, to prevent the bogging down of federal courts from handling frivolous actions like Eighth Amendment complaints about receiving chunky peanut butter instead of smooth peanut butter, or complaints about receiving a bad haircut. That is not the type of complaint and not the claim that Mr. Nelson brought before you today.

TREVOR COX: Counsel, how about situations where the individual plaintiff's status changes again? Person goes back to prison. What are we to make of that situation? Is the complaint valid or not? Is this on again, off again kind of analysis appropriate?

MALIA TAKEI: That hypothetical was put forth in *Harris v Garner,* but it's important to remember that rule 15D does not grant supplementation at any whim of any party. It is required that the district court judge grant a party permission to file a supplemental pleading. And they're allowed to deny this pleading if they believe it's going to cause undue prejudice, undue delay in pursuing the action, and also if they believe that the action itself is frivolous.

CHIEF JUDGE KEVIN OHLSON: So why doesn't that make this all appear arbitrary? District court judge can simply say yes or no without any reasoning for allowing the supplemental filing to affect the 1997EE filing. Where's the uniformity that we should be looking at in terms of the application?

MALIA TAKEI: I think the uniformity would be in following standard pleading practice, which is where if this text of the statute doesn't expressly displace rule 15D or supplemental pleadings and other procedural practice, then we follow what actual Federal Rules of Civil Procedure established. And in this case, that would allow supplementation and status changes. And it doesn't result in different varying outcomes because, still, the district court judge is constrained in their denial because they have to put forth a reason. They can't just deny in the abstract.

JUDGE MICHAEL SCUDDER: Ms. Takei, a few minutes ago, it seemed like you acknowledged that the best reading of "brought" is not a literal reading, correct?

MALIA TAKEI: Yes, your Honor.

JUDGE MICHAEL SCUDDER: OK. That's usually a tough position to abdicate from, from saying the language doesn't mean what it says. So therefore, how would you articulate in a sentence or two what it is want us to hold with respect to that language?

MALIA TAKEI: Yes, your Honor. We would want you to hold that the word "brought" does not displace the Federal Rules of Civil Procedure and that supplemental pleadings are still allowed to adjust a prisoner status under 1997EE. That would be the holding we would ask for today. I think it's also important to note that--

CHIEF JUDGE KEVIN OHLSON: Counsel, it seems like you're arguing two sides to the issue when it comes to boilerplate language. You said it's boilerplate language consistent with what the Supreme Court said. But by the very nature of boilerplate language, doesn't it have to mean that the terms there are the ordinary meaning of those terms? And what you've just articulated is not the ordinary meaning of the word "brought."

Judge Scudder was just indicating that "brought" means initiating a claim. So how can it be that we should view it as boilerplate language and we shouldn't take it literally at the same time that you're saying it's boilerplate language but we should not view the terms within that section to have to carry their ordinary meaning?

MALIA TAKEI: Either way, reading "brought" as boilerplate language in just an introduction to this limitation on recovery, or to read it literally as imposing this temporal requirement, supplementation under Rule 15D is still going to be permitted. And this is because under *Chisholm v Romer* and *Jones v Bock,* the Supreme Court has stated that if a statute is to deviate from Federal Rules of Civil Procedure and standard pleading practice, it has to be express. And we see no such express displacement of those rules within the text of 1997EE.

So regardless of how you view "brought" and regardless of whether or not see it as imposing this pre-filing requirement, it still is permitted to allow parties like Mr. Nelson to file a supplemental pleading. And to see this, we look to the Supreme Court cases *Matthews v Diaz* and *Missouri v Wolf.* In both of those cases, the statutes had a pre-filing requirement. In *Matthews v Diaz,* this was jurisdictional. It required a plaintiff to file and submit an application to the commissioner of Social Security before initiating a pleading.

In the specific case *Matthews v Diaz,* the plaintiff did not submit an application and had not received a rejection from the commissioner at the time they filed their initial pleading, but that did not mean they could not pursue their case. In that instance, the Supreme Court explicitly said supplemental pleading would allow this case to still move forward even though there was this pre-filing requirement.

TREVOR COX: Counsel, there's a couple other sections of 1997EE that use the word "brought" or the formulation "brought by a prisoner." I think you've mentioned one of them. Another one is 1997ED1 that limits the situations in which attorney's fees are authorized. What is your position as to the impact of your argument on that section? Is it your position that there's now no limitation on attorney's fees because this would not be an action brought by a prisoner?

MALIA TAKEI: I think our position advocates for a consistent definition of the word "brought," either deeming it boilerplate, as the Supreme Court did, or saying that "brought" does not displace the Federal Rules of Civil Procedure. And with regards to 1997ED1, we specifically believe that there could be supplementation of that non-prisoner status, but by the words of that statute, and same with the 1997EG, I believe, that specifically poses this more firmer, more mandatory language than what is present within the section of 1997EE.

So it does make it a little bit harder of a case, and it's not technically what's present before us today, but I do believe that in those circumstances, just based off of the fact that there is no express displacement, as in 1997EE, then there would be permission to file a supplemental pleading.

JUDGE MICHAEL SCUDDER: What do you think Congress would have to say to satisfy this clear statement rule that you're urging us to adopt?

MALIA TAKEI: Yes, your Honor. We see two examples in the PLRA besides 1997EE. And that would be in 1997EG and 1997EC1. Specifically in 1997EG, we see that Congress explicitly and expressly displaced Federal Rule of Civil Procedure 8B. And for those reasons, we ask that this court to reverse the holding of the lower court. Thank you.

CHIEF JUDGE KEVIN OHLSON: Counsel for defendant appellee.

BEN BALDWIN: May it please the court, my name is Ben Baldwin, counsel for the defendant appellee, Warden Richard Hayes. This case is about the appropriate remedy to a prisoner under the Prison Litigation Reform Act, or PLRA, and the PLRA applies in this case. Specifically, the text and statutory purpose of Section 1997EE makes clear that a plaintiff's confinement status at the time of the filing of their initial complaint is determinative of whether the PLRA applies.

In so doing, the text of the PLRA displaces the normal operation of Federal Rule of Civil Procedure 15D. And now, even if rule 15D were to apply here, Mr. Nelson's supplemental complaint cannot cure the initial filing defect he had here because it cannot change the historical fact that he was a prisoner when he filed his initial complaint. Now, turning to the text of the statute first, the relevant part of 1997EE provides that, quote, "no federal civil action may be brought." And the operative word there is "brought."

And as the foregoing discussion just said, "brought" is quite clear. Brought means brought. It refers to the initial filing or commencement of a lawsuit. And we can look to other courts' interpretations of other provisions of the PLRA to confirm that understanding. Take, for example, 28 USC 1915G, which describes the three strikes provision of the PLRA, which determines whether or not a prisoner is able to take advantage of in forma pauperis status when they are filing a complaint.

Here, a number of courts have determined that the informal status and the application of the three strikes rule is determined at the initial filing of when that prisoner makes whatever relevant action, whether it be an initial action or an appeal. Take, for example, 1997E Subsection A. Other courts, including the Sixth Circuit in *Cox versus Mayer* and in *Barger versus Wright,* have also recognized that brought means brought. And the only thing that we need to look at is the plaintiff's confinement status at the time when they are filing their initial complaint.

CHIEF JUDGE KEVIN OHLSON: So can you please address this issue of whether Federal Rule of Civil Procedure 15D applies or not? It seems clear from the Supreme Court that they expect, in these type of cases, that the standard pleading practice will control unless the PLRA specifies that it doesn't. Where would this court find the specification within the language before us that, in fact, 15D is inapplicable?

BEN BALDWIN: So we can take a look at other provisions of the PLRA to see that, yes, in other provisions, there was clear abrogation and clear reference to the Federal Rules of Civil Procedure. You will not find any express reference to rule 15D or amended or supplemental complaints in this provision. However, we can look at the overall statutory framework and take a look at the statutory purpose to understand.

CHIEF JUDGE KEVIN OHLSON: Now it's a situation where, if Congress was aware, as we must assume from the rest of the statute, that they were knowledgeable about the applicability of 15D and what the issue might be there, why wouldn't that cause us to conclude that 15D applies because they didn't specify in 1997EE otherwise?

BEN BALDWIN: Because we can take a look at the phrasing that is used here in this particular provision of the statute and focus solely on that word "brought" to understand that the precondition to suit that is established here cannot be changed by subsequent pleading. Because we are solely focused on that initial filing status, any supplemental complaint referring to some sort of change in status by the plaintiff would make no difference.

And the reason why that kind of makes sense here is the 11th Circuit in *Harris versus Garner* addresses this. Yes, supplemental complaints can add certain facts, but it is the substantive requirement that is set forth in the statute that determines whether or not those facts make any difference. And because they use that "brought" language, the only fact that could ever make a difference is the fact of the plaintiff's confinement status at the time of the initial filing.

JUDGE MICHAEL SCUDDER: Why wouldn't we think about, in a lot of statute of limitations cases where there's an amended complaint filed that relates back, we see that constantly. Why should we think about this as a situation that's any different? The plaintiff left prison, no longer macerated, brings that fact to the court's attention in an amended pleading. Why doesn't that relate back? How is it any different than a statute of limitations situation where some material fact is added?

BEN BALDWIN: So in a lot of statutes of limitations cases, the underlying purpose of the statute of limitations is to ensure that that claim is brought within a timely manner so that certain evidentiary value is not lost. Here the statutory purpose underlying the substantive requirement is the introduction of a disincentive for prisoners filing frivolous lawsuits.

JUDGE MICHAEL SCUDDER: Sure. Sure, but his status changes. So you'd have to acknowledge, if he had waited until November of '23 to file the lawsuit, when he was no longer incarcerated, there's no problem with that.

BEN BALDWIN: No, there is no problem with that.

JUDGE MICHAEL SCUDDER: OK. So how is that substantively different than him getting out of jail and saying, I'm no longer in jail, I'm no longer subject to the limitation, let's go?

BEN BALDWIN: Because the concern is that a prisoner would game the system in some way.

JUDGE MICHAEL SCUDDER: Now, I don't understand that. What are you worried about?

BEN BALDWIN: The concern is that a prisoner would take advantage of the lower barriers to entry of filing a lawsuit while they are a prisoner versus kind of facing that higher opportunity cost differential once they have left prison. And so when Congress enacted the PLRA, their focus was on reducing the number of frivolous filings by prisoners. And to do that, they introduced a number of substantive requirements that would discourage prisoners on the front end from bringing lawsuits. And they recognized that because prisoners have reduced filing fees and availability--

JUDGE MICHAEL SCUDDER: You may be creating a straw man, though, because this is the furthest thing from frivolous litigation. So I don't really see somebody in a situation here, like Mr. Nelson, gaming the system.

BEN BALDWIN: Well, that is correct, but the rule that would be established here would apply more broadly than just to Mr. Nelson's case. And in enacting the PLRA, Congress was trying to balance two different things. First, reducing filings while also improving the quality of prisoner lawsuits. And yes, they established strong substantive requirements with the understanding that certain meritorious claims might be required to be refiled after a prisoner had left prison in a situation similar to Mr. Nelson's here.

JUDGE MICHAEL SCUDDER: Is there any real world, any empirical indication that this abuse is going to occur? It seems very odd to me that I don't know where the incentive would come from to persist with frivolous litigation when released from prison. Where does that incentive come from?

BEN BALDWIN: The incentive would be if the prisoner sought to just muddy up the waters and/or or vindicate their grievance just by continuing the court system against their original jailer, which we could see in certain cases, just given the fact that a number of frivolous filings were made in the past. Counsel referenced the availability of certain different types of peanut butter and many other concerns that were raised by Congress in the legislative history that accompanied the PLRA where prison officials were deeply concerned about these kinds of frivolous lawsuits continuing.

TREVOR COX: But you agree, Counsel, that Congress was not concerned with reducing frivolous litigation by former prisoners.

BEN BALDWIN: That is correct.

TREVOR COX: Those current prisoners.

BEN BALDWIN: Yes. No, the PLRA clearly does not apply to somebody who is no longer a prisoner. And to return to a discussion that was had earlier, in this case, *Jones versus Bock* does not control here. As your Honors mentioned earlier, *Jones versus Bock* was a case that was dealing solely with the question of the meaning of the word "action." And yet this is a case that turns on the meaning of the word "brought." And to take from that kind of the boilerplate language characterization would be, as Justice Thomas recognized in his dissent from certiorari in *Wexford Health versus Garrett,* that dicta taken by courts for far more than what it was worth.

Instead, what *Jones versus Bock* actually recognized in certain circumstances is that the PLRA does depart from the normal operation of the Federal Rules of Civil Procedure in certain circumstances. And here we also--

CHIEF JUDGE KEVIN OHLSON: I don't ask you to concede this point, but let's assume for a moment that this court concludes that Federal Rule of Civil Procedure 15D does apply. Can you prevail?

BEN BALDWIN: Yes.

CHIEF JUDGE KEVIN OHLSON: And how?

BEN BALDWIN: Because it does not cure the original defect in this case, which is that he was a prisoner when he filed the original complaint. Just the fact that he has changed his status somehow does not remove that status that he originally had when he was a prisoner. And here, that would still mean that he is still not alleged a physical injury and, therefore, the substantive bar would apply in this case. And we can take a look at that in other circumstances where a supplemental complaint can cure many things, but it is not a panacea for all kinds of defects.

Take, for example, diversity of citizenship cases. There, the diversity of citizens is determined at the time of filing in order to reduce those concerns about supplemental complaints being used to game the system so that parties could take advantage of favorable court rules or favorable rules in a certain domicile. And there are a number of other cases, too, that plaintiffs have relied on, both in their briefs and in some of their arguments today, where allowing a supplemental complaint to continue a case would defeat the underlying statutory purpose behind a substantive requirement set out in a statute. *Mathews versus Diaz* is one of those examples. Now, *Mathews versus Diaz*--

CHIEF JUDGE KEVIN OHLSON: I'd like to revisit an issue, though, that Judge Scudder raised in terms of you were referring to barriers to entry?

BEN BALDWIN: Yes.

CHIEF JUDGE KEVIN OHLSON: Opportunity costs? How does that really play out, though, in the real world? If you've got, as you've articulated in your brief, you may have prisoners who have a lot of time on their hands and would come up with these claims, but couldn't they hold them in their back pocket until they walked out the door and then just file outside the PLRA otherwise?

BEN BALDWIN: Yes. And that was the purpose that Congress was attempting to effectuate. Because the thinking was that by the prisoner kind of keeping those claims in their back pocket, the increased opportunity cost after they left prison would be a disincentive for filing frivolous lawsuits.

CHIEF JUDGE KEVIN OHLSON: And what exactly are those opportunity costs?

BEN BALDWIN: The opportunity costs would be the associated higher cost with filing the lawsuit in the first place because prisoners have access to a lower filing cost, reduced filing fee. The assumption would be that higher filing fee, at least at the outset, would discourage prisoners from filing accompanied with the other court costs.

CHIEF JUDGE KEVIN OHLSON: Well, it sounds an awful lot like you are asking this court to impose a regimen where people who don't have money are put at a disadvantage-- a distinct disadvantage-- compared to someone who does.

BEN BALDWIN: In this case, we're just attempting to follow the purposes that were outlined by Congress when they were attempting to enact the PLRA. And their primary purpose was in reducing frivolous lawsuits. And so their concern there was just establishing a system of substantive requirements that created these kinds of disincentives for filing.

JUDGE MICHAEL SCUDDER: I mean, you keep coming back to frivolous lawsuits, but I think, don't you have to start, in this case, from the premise that this is the furthest thing from frivolous litigation? It's a meritorious claim. So you're building your argument about how to construe the statute from a premise that's entirely counterfactual here.

BEN BALDWIN: Well, here we're concerned about creating a broader rule that would extend beyond Mr. Nelson's case. So Mr. Nelson here, as the lower court recognized, does have a meritorious claim.

JUDGE MICHAEL SCUDDER: Right, but 1997EE is not meant to foreclose 100% of prisoner related litigation. I mean, Congress would have written that statute in a completely different way.

BEN BALDWIN: That is correct, but it operates in conjunction with the other provisions of the statute to create an overall framework that is intended to reduce prisoner filings. And so returning to an earlier example about *Mathews versus Diaz,* plaintiff's counsel here referenced *Mathews versus Diaz.* It was a case in which a plaintiff had filed a case, or had joined a civil action prior to filing a claim for Social Security benefits, and prior to that, being rejected by The Secretary of Health and Human Services.

There it made sense for the court to allow a supplemental complaint because it did not thwart the statutory purpose of allowing these kinds of claims to be resolved quickly by allowing that case to be continued. We can also take a look at another example, in the PLRA context at least, of *Cox versus Mayer,* which is a 1997EA case.

There the Sixth Circuit recognized that the plaintiff had failed to exhaust any of their administrative remedies prior to bringing the court case and there it would not have made sense to allow for a supplemental complaint to cure that initial filing defect, because there the statutory purpose of 1997EA, in providing notice to prison officials about the kinds of prisoner grievances that were being alleged in the case prior to that entering into federal court, would not have been served. In contrast, a later Sixth Circuit case, *Mattox v Edelman,* did allow a prisoner to supplement their complaint because in that case they had actually exhausted some of their claims prior to a supplemental complaint alleging additional claims.

And therefore, it made sense in that circumstance to allow that case to continue because the statutory purpose would be furthered by allowing that case to proceed. Here, in contrast, Mr. Nelson did not satisfy the physical injury requirement and therefore, allowing his case to proceed would thwart the statutory purpose of reducing prisoner filings and forcing them to meet that substantive requirement.

CHIEF JUDGE KEVIN OHLSON: Not to beat a dead horse, but to go back to what Judge Scudder was talking about, you're relying a lot on what the purpose of Congress was rather than simply staying grounded in the text. If we take that approach, why, based on all the entries from the Congressional record that we have in front of us, isn't it clear that they were really aiming at sifting out frivolous complaints?

And that is not what we are dealing with here. So doesn't focusing on the purpose of the statute really undermine your position?

BEN BALDWIN: No, because I think they were considering, and your Honor, I might run out of time soon, so may I conclude my--

CHIEF JUDGE KEVIN OHLSON: Absolutely.

BEN BALDWIN: --may I answer your question? The focus, in general, was to both reduce frivolous lawsuits and improve the quality of prisoner suits. And there they adopted a general rule of reducing prisoner filings. So here we can take a look at both the text and the purpose of the statute in conjunction to adopt a straightforward rule that section 1997EE should apply in this case. Thank you.

CHIEF JUDGE KEVIN OHLSON: Counsel for plaintiff appellant on issue two.

JAKE FLANSBURG: May it please the court, Jake Flansburg, counsel for the plaintiff appellant. This case presents the question of whether Congress intended to functionally bar an entire class of constitutional injuries without ever using those words. The district court reasoned that it did and we ask that you reverse today for three reasons. One, text, two, precedent, three, purpose. As it was quite popular during the preceding issue, I'll continue our conversation with the text.

Section 1997EE provides that no federal civil action may be brought for mental or emotional injury without a showing of prior physical injury. Now, conspicuously absent from what I just said was any mention of constitutional rights, of liberty interests, or of free speech harms. It necessarily follows that a claim like Mr. Nelson's, a claim for free speech harms, is not encompassed by section 1997EE's plain text and it has long been held that a statute should not be interpreted to cover subject matter that it simply does not cover.

CHIEF JUDGE KEVIN OHLSON: Now, Counsel, in your brief, you referred to this harm done to the plaintiff as being, quote, "intangible." Why, then, wasn't the district court judge correct in his ruling when he said an intangible harm is merely, quote, "a species of emotional or mental harm?"

JAKE FLANSBURG: For two reasons, your Honor. One, the common law meaning of a mental or emotional injury. And two, our conceptual understanding of what that is today and why it excludes intangible free speech harms like Mr. Nelson's. Starting with number one, at common law, mental injury was understood to encompass a particular and, at times, closed universe of claims. It included things like nervous prostration, like anxiety, like pain and suffering, like dignitary harms.

What it did not include, what the pages upon pages of common law treatises that we reviewed in advance of today made no mention of, were constitutional rights or liberty interests akin to those asserted by Mr. Nelson, which bleeds into our conception of what a mental injury is today. For, in plain language, we would hardly say Mr. Nelson is asserting a claim for mental or emotional injury. That is because the record is silent on Mr. Nelson's mental or emotional reaction to the events that unfolded. By way of contrast, it was clear on the ways in which Mr. Hayes deprived Mr. Nelson of his free speech interests. As a result--

CHIEF JUDGE KEVIN OHLSON: On page 19 of your brief, you say that when a plaintiff's free speech rights are impinged, that mirrors a loss of liberty at common law. But it's only in the next page that you try to cite to legal authorities and pull that together. What are you really pointing to that says that a loss of liberty is the same thing as a situation where free speech rights are impinged.

JAKE FLANSBURG: So we are not saying it is the same thing, your Honor. We're saying it's derivative of. And I think that's an important distinction. Because as you point out, they are not the same thing. And because it's derivative of, that's in accord with the court and *Carey's* construction not to woodenly apply or to ossify the common law, but instead to adapt the common law. And on the note of citations for that precise proposition, if that's a concern, in *Dellums v Powell,* the court connected the loss of liberty and the free speech interests, indicating that the compensation principles for one inform the other.

Similarly, in *Palko v State of Connecticut* in 1937, Justice Cardozo, writing for the court, explained this link. He stated, loss of liberty was newly understood to encompass something more than mere freedom from physical exemption. It had expanded outwards to include things like freedom of speech, indicating that this is concretely derivative of a loss of liberty and that perhaps explains the structural analogies between the two claims.

CHIEF JUDGE KEVIN OHLSON: Wasn't the Justice really saying that he was recognizing this as a broader panoply of liberty interests? It doesn't mean that there is necessarily any connection between the two, or as you phrased it in your brief, that one mirrors the other.

JAKE FLANSBURG: I think that one thing that just occurred to me as you posed your question is that a helpful way to think of this could be as a sliding spectrum. On one side, we might have mental or emotional injuries and on the other side, we might have a loss of liberty. And the question then becomes, in light of the court's instruction to adapt the common law, which of those two things free speech harms more closely mirror. And it seems, based off of that opinion, that even though it might not fit like a glove, so to speak, it is the closer adaptation. Mr. Nelson's injury is closer in kind to this common law loss of liberty than a mental or emotional injury.

JUDGE MICHAEL SCUDDER: What your adversary says that I think need to respond to or address is that if we announce the rule that you're urging, every single prisoner is going to come in and recast alleged injury in constitutional terms.

JAKE FLANSBURG: Yes, your Honor. We are not asking this court to recognize the capacious, one size fits all constitutional injury for any prisoner plaintiff to claim in subsequent litigation. Rather, what we are asking is derivative of what the court said in *Carey,* that constitutional rights do not exist in a vacuum. They exist to protect downstream interests. And our conception of the instant case is that the right, on one hand, is a First Amendment right. And the downstream interest, on the other hand, is a free speech harm.

And the narrow holding we are asking for is a finding that free speech harm is compensable and that has important implications for other cases. Take, for example, a due process claim. Indeed, take the facts of Carey, which involved a threadbare procedural due process violation. The court there indicated that the only actual injury that could flow from that would be, quote unquote, "feeling" of unjust treatment.

That's a situation wherein under our reading of the statute, section 1997EE would still require a showing of physical injury, indicating that the inquiry we are asking for is an examination of what the underlying interest is, whether it is uniquely constitutional or whether it is something that is perhaps reducible to mental or emotional injury. And in the latter instance, the physical injury bar would still be operative, thus assuaging opposing counsel's concerns about a flood of litigation. And on the notes about--

CHIEF JUDGE KEVIN OHLSON: How would you see your position as interplaying with the Section 1983 decision of the Supreme Court in *Memphis Community School District versus Stachura* where it said that the subjective perception of the importance of a violation of a constitutional right cannot serve as the basis for compensatory damages? That there has to be proof of actual injury. Do you view the PLRA as being completely separate from 1983? We should not look at what the Supreme Court said there?

JAKE FLANSBURG: We believe you should look at what the Supreme Court said there. And the court in *Stachura,* as concerned with, was with the idea that awarding damages based off of the quote unquote, "abstract value of a constitutional right was not compensatory." So in turn, we have offered you two metrics of damages that we believe are compensatory for this actual free speech injury. Metric number one would be the estimation of damages. Metric number two would be the presumption of damages.

I'll start with the estimation of damages. It is entirely consistent with the common law for a jury to ascribe a pecuniary value to a non-pecuniary thing. Indeed, that's precisely how a loss of liberty was compensated at common law. And as opposing counsel has raised concerns about workability, I'm going to be exceptionally mechanical about how this would unfold. Step number one is that a juror would ask what their individual experience is with this underlying intangible interest.

That, in turn, provides a baseline valuation. Step number two would then involve multiplying that underlying deprivation by time, which indicates that that metric of damages is two steps removed from what was deemed impermissible in the *Stachura* case. Step number one is different in kind and step number two is different in scale. And even if you find that metric of damages unpersuasive, it's worth noting that the court in *Stachura* also greenlit the presumption of damages if two conditions are met. One, a harm is likely to occur. Two, a harm is difficult to establish. I'll start with the first prong. When a first--

SAM ELLIS: Before you do that, Counsel, could you give us any assurance that your argument and your position, if we were to adopt it, would not allow future plaintiffs to smuggle in other kinds of injury through the same kind of analysis that you're proposing?

JAKE FLANSBURG: Of course, your Honor. I think one thing that serves as an important limiting principle is the fact that prisoner litigation unfolds in two parts. Part number one is to ask whether there is a rights violation. We've cleared that hurdle here. But in other cases, that first step might still be at play, indicating that any asserted right that's inconsistent with the penological goals of a prison, as the Supreme Court has recognized, would be unable to advance. So that's one limitation.

And I believe the due process example I raised earlier about an instance wherein this is reducible to mental or emotional injury would be another instance wherein section 1997EE's physical injury bar would still be operative. So of course, there's always going to be room for subsequent playing around in future cases, but there's still these underlying limitations in this actual injury requirement by the court and that first step of the analysis.

SAM ELLIS: So for instance, the dignitary or dignity injury that you cited before, you think that's reducible to emotional or mental injury.

JAKE FLANSBURG: Yes, your honor.

TREVOR COX: OK. Are there other kinds of injuries that you can think of that we should be concerned about that may not neatly fall in one camp or another?

JAKE FLANSBURG: I don't if there are any that do not necessarily neatly fall in one camp or another that I can readily identify, but I can identify that perhaps the inquiry gets a little bit more nuanced with respect to Eighth Amendment cruel and unusual punishment claims. And in his opening remarks in the legislative history, Senator Dole indicated a concern with this. And there's a Seventh Circuit opinion, *Robinson v Page,* wherein a prisoner plaintiff, in essence, stated, I have lead in my drinking water.

And the court grappled with, is this a mental injury? Is this something different? Is this something physical? And so there are going to be those edge cases wherein this doesn't seem to neatly fit in any category, indicating that, yes, a case-by-case analysis does have some of its pitfalls, but at the same time, it's an analysis worth engaging in. Because Congress, when it enacted the PLRA, was repeatedly clear. Yes, it was concerned with reducing frivolous filings, but it was not concerned with indiscriminately reducing filings. Senator Hatch, on the floor--

JUDGE MICHAEL SCUDDER: What seems odd to me about your position is if you take the point that you just articulated, and your adversaries agree with that, Congress is trying to drive down frivolous prisoner litigation and, by extension, believes that that could happen just by driving down the sheer number of filings that way, both sides seem to agree on that. It seems mighty odd, though, for Mr. Nelson to be arguing that the very same Congress that had that objective would be silent in the statute as to constitutional claims. Because what else would Congress have expected from federal prisoners? It's not going to be state law, claims litigated in federal-- so it seems odd, against the backdrop of that very clear objective, that Congress would choose to be silent on constitutional injury.

JAKE FLANSBURG: Yes, your Honor. It's our position that Congress was concerned with the underlying injury in the sense that it was concerned with claims that are reducible for mental or emotional injury. So we agree that this is not exclusive to the common law and that the statute wouldn't only be operative in these kind of state law claims that you've expressed a concern with, but rather that it would be operative in cases involving due process, in cases involving the Eighth Amendment cruel and unusual punishment. And if there are any reservations about why I'm raising those precise examples, it's because Congress did.

Senator Dole, in his opening remarks, indicated that the uptick in prisoner litigation arose out of claims over, one, cruel and unusual punishment claims and, two, due process claims. That rationale, however, does not extend to the First Amendment because First Amendment harms are plainly unlikely to be accompanied by a physical injury, which means that subjecting them to a physical injury bar is tantamount to ruling them out altogether.

TREVOR COX: What about like an excessive force claim? You mentioned it before, but that could have both a physical component but also more of an abstract constitutional injury. What is your position about whether you can disaggregate them for purposes of your analysis?

JAKE FLANSBURG: If I may have leave to answer your question, I think that an excessive force claim would inherently involve physical injury in most, if not all cases, indicating that those types of claims do not arise very frequently in this context for the precise reason that they already meet section 1997EE's hurdle. If there are no further questions, it is for the above mentioned.

CHIEF JUDGE KEVIN OHLSON: Thank you, Counsel.

JAKE FLANSBURG: Thank you.

CHIEF JUDGE KEVIN OHLSON: Counsel for defendant.

NATHANIEL GLASS: Thank you, your Honors, and may it please the court. My name is Nathaniel Glass appearing on behalf of the defendant appellee Warden Richard Hayes. It's clear from that discussion that the outcome of this case is going to turn on how we characterize the harms that Mr. Nelson suffered. The parties are in agreement that if this is a non-mental or non-emotional injury, he would not be barred by the physical injury agreement requirement. We also agree that if they are mental or emotional, he would be subject to that bar. And on those grounds, the lower court correctly held that the only actual injury that can serve as the basis of his recovery here is mental or emotional in nature, in the form of a dignitary harm that he experienced when his First Amendment rights were deprived.

CHIEF JUDGE KEVIN OHLSON: Now, you referenced the ruling from the district court. There's something that's very striking in that written ruling from the district court judge, where he wrote that applying 1997EE in the manner that you are urging us to, where there's a physical injury requirement to constitutional harms, he says that, quote, "it will no doubt restrict recovery for some meritorious claims, not just frivolous ones."

So you are urging this court to take ambiguous language in a federal statute and knowingly interpret it in such a manner where we would be restricting meritorious constitutional claims?

NATHANIEL GLASS: I would respond to that with two points, your Honor. The first is that 1997EE, by its very nature, will never apply to frivolous claims. That's because it's a bar on recovery. So that means if a plaintiff is subject to the statutory scheme, they have already won on the merits. So Congress intended this to cover meritorious claims. And Congress did so through clear language. It said no federal civil action. It didn't say no federal civil action except for constitutional violations. It was clear that this would apply across the board when the basis of damages would be a mental or emotional injury, which is what we have here. And I'm going to focus on three main reasons why the plaintiff's position should not win out.

The first is that loss of liberty is not truly distinct from mental or emotional harm in the sense that they paint it as. The second is that even assuming there was some element of loss of liberty that was distinct, stretching it to cover free speech harms would eradicate the actual injury requirement. The Supreme Court has outlined in *Carey* and *Stachura.* And finally, the idea that, as they describe, mental injury at common law had a common understanding, but this statute reads mental or emotional injury.

And mental or emotional injury indicates a broader category, such as the dignitary harms that Mr. Nelson suffered. Now beginning with loss of liberty, when courts are awarding damages based on a loss of liberty, they're not awarding the abstract interest inherent in the deprivation. They are saying that every time someone is deprived of their liberty, two harms are so bound up in that deprivation that they are presumed to flow from that. And the first was a purely mental or emotional harm of loss of enjoyment of life.

And that is a psychic harm that is best described as mental or emotional. The second would be loss of time, which the better reading of that is that this refers to economic damages of someone's value of wages in the workplace. And so every time that someone was deprived of their liberty, courts were saying, it's so likely that these two harms would follow that we're not going to require actual proof of those injuries. But if you break those down, one of those is mental or emotional and the other is kind of pecuniary in nature. And here, the plaintiff has not made out any such grounding. And to the extent that he did, one of those would be barred by the physical injury requirement.

JUDGE MICHAEL SCUDDER: I mean, as I read his allegations, what Mr. Nelson-- correct me if I'm wrong here-- is alleging is that during the three week period that he was in the higher level of security, that he basically lost all communication ability. The warden insists that that is mental or emotional harm. And in responding to Mr. Nelson's arguments to the contrary, you just say, well, to the extent he's trying to differentiate anything, what he's talking about is just something that has an abstract value. What's abstract about that?

NATHANIEL GLASS: It's abstract in the sense that if you ask a jury to compensate the deprivation of the right, they would have to take into account the society's valuation of that right. It's the idea that a jury cannot rationally determine what the value of that is. They would have to ask two questions. One could be, what did Mr. Nelson think of this right? How much did he value it? That would be getting at his head.

JUDGE MICHAEL SCUDDER: So suppose, hypothetically, of course, that the warden says, for the next three weeks, all Christians are prohibited from praying categorically. And our hypothetical plaintiff is Christian. Would that injury be abstract in your view?

NATHANIEL GLASS: It would be mental or emotional in the sense that it would manifest in the minds of those plaintiffs. They would experience distress at the inability--

JUDGE MICHAEL SCUDDER: But that according to who? The defendant or the plaintiff?

NATHANIEL GLASS: I'm sorry, I don't follow.

JUDGE MICHAEL SCUDDER: So when you say that, you're arguing that on behalf of a warden defendant, right?

NATHANIEL GLASS: Yes.

JUDGE MICHAEL SCUDDER: But why can't a plaintiff come in and say it was a complete deprivation of liberty. We lost our prayer hour. We lost this. We lost that. It's a freedom protected by the First Amendment that we lost.

NATHANIEL GLASS: Because the Supreme Court has been explicit that the mere constitutional deprivation itself cannot be the base of damages. In those instances when the only actual injury that they can prove is the constitutional violation itself, then nominal damages are appropriate, which is exactly what the lower court awarded here. But I think what you're getting at is that it seems like an actual injury still flows from that in the sense that they were deprived--

JUDGE MICHAEL SCUDDER: It's definitely injury for Article III purposes.

NATHANIEL GLASS: Yes, it's an actual injury for standing purposes, but the PLRA imposes a bar. I think a lot of the cases that they cite, particularly *Dellums* or *Brooks,* these are pre PLRA cases. Those are instances where the court has said that if a person is deprived of their free speech rights, that is an actual injury that is compensable. But what those courts don't do is take the second step and say, what kind of injury is that? Because these are pre PLRA cases. They weren't forced to spell out whether that was an emotional harm or a non-emotional harm. And we're of the position that the only basis that a jury could rationally conclude the value of the damages for--

JUDGE MICHAEL SCUDDER: Mr. Nelson here, during that three week period that he was locked down, he could have lost all contact with his family, right? And perhaps in a deposition, he would testify, no, it didn't cause me an emotional breakdown or any mental harm, but, you know, I sure miss talking to my kids. I sure miss talking to my spouse. And that's a freedom that I had that was taken away from me. But no, I didn't have a mental breakdown. Why isn't that compensable?

NATHANIEL GLASS: Because that is still a mental or emotional injury. The term mental or emotional injury is not synonymous with mental or emotional distress. Congress didn't use the word "distress." It opened the universe of mental and emotional harms to be broader than that. And in certain common law treatises, harm to primary family or relationships were considered a compensable type of harm, but over time, as mental or emotional injury became a broader category, it was subsumed within that. And so Mr. Nelson would still be alleging a mental or emotional harm. I think you'd be hard pressed to characterize the missing that you feel from not talking to your family as something outside your own mind or your own emotions. It's, at its base, trying to reflect the value that you place on the ability to talk to your family in an emotional sense.

TREVOR COX: So I--

CHIEF JUDGE KEVIN OHLSON: Please. No.

TREVOR COX: Counsel, do you have any evidence that Congress intended for plaintiffs not to be able to allege constitutional-- well, let's say First Amendment injuries-- in this context, I mean, given that they so rarely would manifest with physical injury? Is there anything you can point to that would lead to that conclusion?

NATHANIEL GLASS: I would point to the fact that they're not prohibited from raising these claims. They're not prohibited from receiving relief on these claims. They're prohibited from receiving compensatory damages on these complaints. And that is very different. They still have a forum for the resolution of their meritorious claims. They have the ability to receive an injunction, to receive the vindication through nominal damages of saying your constitutional rights were violated, and if they do it again, we're probably going to award punitive damages. So they still have that recourse through the federal courts.

I would also say that Congress shouldn't have to be more explicit than the statutory language it chooses. And plaintiff points out that there's no legislative history backing up that the plain text means what it says, but it doesn't have to. The plain text means what it says, and it says no federal civil action may be brought for mental or emotional injury without proving a prior physical injury. Congress chose expansive language to accomplish its goals without specifying that this didn't apply to constitutional harms. And I want to turn kind of the line drawing problems that--

CHIEF JUDGE KEVIN OHLSON: How does the DC Circuit's opinion in *Aref* fit into this, where the court said it's difficult to believe that Congress would afford immunity to prison officials even when they commit blatant constitutional violations as long as there was no type of physical blow, is the way that that DC Circuit wrote that. What is your reaction to the *Aref* decision?

NATHANIEL GLASS: I would say that blatant constitutional violations will largely be basis for punitive damages. If they are so egregious and so blatant as to reach that bar.

CHIEF JUDGE KEVIN OHLSON: So if we use that word blatant, where does that leave us?

NATHANIEL GLASS: That leaves us with the fact that Congress-- I think the DC Circuit might not have wanted Congress to have done this, but that doesn't change the fact that they used the language that they did. And the DC Circuit is concerned that without compensatory damages, deterrence won't be achieved. But frankly, that is a judgment call that is left to Congress. And Congress, I think you can't escape the plain language of the statute. And it says no federal civil action may be brought.

And that indicates that Congress may have struck a balance when it was writing this. And it said, it's OK if maybe some people don't receive compensatory damages even for their meritorious claims. That's a balance that we are striking. And if a court has a problem with that, I think it's best to resist the temptation to change it through judicial opinion, but rather leave it to the legislative branch to correct. Now I want to turn to the kind of line-- I'm sorry.

JUDGE MICHAEL SCUDDER: Can I ask you one question?

NATHANIEL GLASS: Of course.

JUDGE MICHAEL SCUDDER: One point you make in your brief, you give up quite a bit in your brief, it surprised me a little bit, where you carve out property damage. Now you may do that because of the statute, but you have to acknowledge, then, in a hypothetical where an inmate had property arbitrarily destroyed by the prison staff because, say, they were upset with him wearing a blue armband or what have you, that that claim can go forward.

NATHANIEL GLASS: Absolutely. And that's in line with our reading of the text. This doesn't say that no action may be brought without a physical injury. It says no action for mental or emotional damages. And so maybe a hypothetical would be helpful. I think if we're talking about a free exercise claim where someone is trying to exercise their religion and they have their religious text seized and destroyed by the prison warden, under our theory, they would be able to recover for the value of that property that was destroyed because that is not a mental or emotional injury. The jury would not have to get inside the mind of the plaintiff to say how much do they value their religious exercise.

They would be saying, what is the value of this religious object? How can we make them whole? Which is the absolute goal of compensatory damages. Under their approach, that plaintiff could merely reframe that and say, I suffered a loss of liberty to my religion, which I think we would all agree is no less fundamental in our society than speech is. And they would say that this is a fundamental right that is analogous to loss of liberty at common law. And therefore, I can reframe this and say, I was suffered a loss of liberty to my religion. It's distinct from my mental or emotional harms. Voila, it's compensable. And so that's the difference between our approaches, that we would look to verifiable facts that can be proved or disproved that could serve as the basis of damages.

TREVOR COX: Counsel, you spoke earlier, I think, about the deterrence value. I mean, do we think that the warden is going to be deterred from future unconstitutional activity by the awarding of $2.50 in total, including Attorney's fees?

NATHANIEL GLASS: Yes. The attention that was brought to this incident through the judicial involvement, the fact that if he were to do this again, he would stand very close to punitive damages as a matter of law because he's a repeat player, this is the idea that if he does this again, the courts are going to be on notice that this is a repeat action and, therefore, that deterrence is achieved. He has a judicial order saying you violated this person's rights and he's, as a result of that, less likely to do that again.

CHIEF JUDGE KEVIN OHLSON: Why shouldn't other prison officials be emboldened if we were to take the approach that you wish us to take?

NATHANIEL GLASS: Because--

CHIEF JUDGE KEVIN OHLSON: That you can violate constitutional rights of prisoners and you're likely to get away with it.

NATHANIEL GLASS: Because there are circumstances where the deprivation of constitutional harms in the prison setting will give rise to compensable damages. For instance, the most egregious ones are when the prisoners receive beatings by the prison guards. That would not be barred.

CHIEF JUDGE KEVIN OHLSON: But you just don't beat the prisoners. You violate their other constitutional rights.

NATHANIEL GLASS: No, because--

CHIEF JUDGE KEVIN OHLSON: The other intangible.

NATHANIEL GLASS: --those people are still subject to the injunctive relief, to nominal damages, and to punitive damages. And so those options of remedy still exist. And to the extent that you are worried that this isn't the optimal level of deterrence, that remedy lies with Congress rather than the courts to amend a rather clear statute. And I want to talk about what a jury would have to do to reach a damages here. They mentioned that merely having a per diem calculation would help, but multiplying an error over a course of days doesn't make the error go away. And the error that I'm talking about is they would have to get some valuation of the deprivation itself and there's no way to rationally do that. And if you look at the common law analog--

CHIEF JUDGE KEVIN OHLSON: We ask juries to do rational things all the time in terms of making all sorts of calculations where they are pulling these things out of the air. If you talk to jurors, they go back there and they deliberate and they typically rarely really understand what they're doing. They're just coming up with numbers. So why is there a distinction here where you're viewing this as a grave impediment to recovery here as compared to what we ask of jurors all the time?

NATHANIEL GLASS: Because here we have an additional bar, that we'd have to police juries on two accounts. We'd have to police them, one, and make sure they're not basing this on mental or emotional damages and, two, make sure they're not basing this on the abstract value of the right itself. So that combined with the fact that Congress was concerned about judicial economy and not burdening the federal courts means that we should be hesitant to impose a rule that would reopen jury verdicts and require constant policing, with your concerns about general jury awards notwithstanding. I think that problem is not unique to this statute, but it shouldn't be a reason to avoid a straightforward rule, that intangible injuries should not be divorced from the actual injuries that they create.

CHIEF JUDGE KEVIN OHLSON: I see your time has expired.

NATHANIEL GLASS: Yes. Thank you,

CHIEF JUDGE KEVIN OHLSON: Thank you. Rebuttal.

JAKE FLANSBURG: May it please the court. I have two points I'd like to make on rebuttal, one for each issue. As it's top of mind for all of us, I'll continue with the second issue and then move on to the first. Opposing counsel casts the availability of punitive damages or injunctive relief as a limitation on wardens like Mr. Hayes. But as footnote 17 of the *Aref* case makes clear, those remedies might be available as a matter of form, but they are infrequently available as a matter of function.

Indeed, the instant case is illustrative of that point, particularly with regard to punitive damages. Mr. Hayes siloed Mr. Nelson for weeks on end in Level 3 confinement to quote unquote, "shut him up." The district court still found this did not meet this high bar of punitive damages. If it's not met in this case, it is difficult to environ what cases it is going to be met in.

Moving on to the first issue, opposing counsel largely casts section 1997EE as a kind of substantive requirement and in some respects that's true. A limitation on recovery is substantive in nature, but how that limitation on recovery is imposed is also procedural, indicating that the time at which a particular action is brought is a procedural component of all of this and it is one that rule 15D supplementation can still affect. If there are no further questions, it is for the above mentioned reasons that we ask that you reverse the court below today. I thank you all for your time on this evening.

CHIEF JUDGE KEVIN OHLSON: Thank you. The case is now submitted. The court thanks counsel from both sides and the court will stand in recess for deliberations.

AMY VANDERVEER: Our judges have left to deliberate. I ask that you join me in giving a big round of applause to our finalists.

[APPLAUSE]

CHIEF JUDGE KEVIN OHLSON: Court is back in session. On behalf of my colleagues, I would like to thank you for your stellar performance here today and we now believe it would be constructive if each judge provides his own views on the actual oral argument. Mr. Cox.

TREVOR COX: Thank you, your Honor. So my perspective is a little different from my colleagues here being an advocate myself and not a judge. So maybe it makes it more meaningful to you all. Maybe not. But I can say I was very impressed, as I know all of us were, with the level of advocacy delivered here. And particularly, nobody seemed really that nervous. And it occurred to me, I remember reading a lot about preparation for oral argument and how people arguing that the US Supreme Court would understandably feel nervous.

And in previous arguments in the Courts of Appeals, people, obviously, know the material, but at the US Supreme Court, it's a different level. And so I remember one advocate saying that their argument at the US Supreme Court was the least nervous they had been. And the reason why was because they were so prepared, they knew the subject so well, that they had no reason to be nervous.

And I got that sense from all of you. You clearly were very conversant with the material, which came across in a variety of different ways, and so you're all to be commended for displaying that. It can be difficult in a case that has so many different issues with a lot of different nuances to demonstrate that command of the nuance and recall the case that stands for the proposition that you want to cite, but all of you did it, and you did it very well.

The other thing that I want to compliment everyone on is your demeanor. I mean, demeanor can capture a lot of different things. When you're an oral advocate, it's, in some ways, a very calculated performance, but you don't want it to come across either as calculated or a performance. Ideally, it should be a conversation at a very elevated level, of course, but still a conversation in which you're trying to educate, you're responding to questions, and I thought all of you achieved that standard, as well. So kudos to everyone.

CHIEF JUDGE KEVIN OHLSON: Thank you, Mr. Cox. Judge Scudder.

JUDGE MICHAEL SCUDDER: Thank you very much. Thanks to the law school for the invitation to be here. I had a daughter that graduated last May, undergrad here, but it's my first time to the law school and I had a terrific day. You have a wonderful law school here and you're all very blessed to be a part of it, so thank you for the invitation. You did a terrific job, each of you. You're very well prepared, articulate, knew the material very well, and just kind of rolled with the argument.

I can tell you from Chief Judge Ohlson doing this every day, you would each be very welcomed in the Seventh Circuit and would be in very good standing right now if you did nothing else to improve. So you are way, way along the way in becoming very effective oral advocates. So congratulations.

I've got three tips for you, or three suggestions. Oral argument. One, I think kind of shortcoming that you see in preparation really wasn't on display today, but think about it when you're preparing, is it's very easy to focus on your strongest arguments. And I don't even think have to do much work to get ready, because if I asked any of you tell me why you should win, you would it right off the top of your head and you would do fine with it.

I would really concentrate your oral argument prep on the weakest card in your hand and what the hardest formulations of the questions are you can get about the weak links in your case because that's what you want to prepare around and that's what you want to be ready for. Judges that are prepared are going to pick up on that and that's where they're going to press you. And so that's my suggestion there.

Second tip about oral argument, may seem a little bit odd to you, and that is don't forget your brief. The first impression that appellate judges form of cases is based upon reading the briefs that way. And that impression is one that stays with us as we do it. And so it's very difficult to overstate the importance of your written work.

The briefs that we received coming into this were terrific, really, really good, and just double down on your writing. There's no world where being a good brief writer is going to hurt you as a lawyer, and certainly not as an appellate advocate. That doesn't exist that way. And the one thing that we will see from time to time is people that are not good brief writers, or they just don't devote the time and effort to it, somehow persuade themselves of a narrative that they can save the case in oral argument.

I think that's a risky proposition and I would just really focus on your brief writing because you're so far along on the oral advocacy side of things. And third, is find a way to practice. And let me suggest that a very good way is, as you start your legal career, is to really commit to pro bono work. There's a lot of people out there, there's a lot of causes out there, that could really use good advocates.

That's a terrific way to help clients in need, or issues in need, and it's a great way for each of you to get on your feet and get in front of courts. Thank you again for the opportunity to be here.

CHIEF JUDGE KEVIN OHLSON: I would certainly echo the comments of my colleagues here today. I just thought that your performances were truly and sincerely exemplary in every regard. Superb preparation, that was clearly obvious, in each and every sentence that came out of your mouth. You had an exemplary command of the law and the facts. Even with the questions that we posed, you could always tie it into the law, the specific cases, the facts that supported your position.

You were very deft at handling the questions that we did pose to you, even when we tried to throw you off a little bit. I think it's also very telling about how comfortable and in command each of you was when you got up there. The comments were made about nerves. It's tough not to have nerves in a situation like this, but I can tell you, you all really handled it extraordinarily well.

In terms of a broader phrase, when I have advocates ask for guidance from me, the one thing I say to them is never take the phrase "oral argument" too literally. Because when it comes to the concept of argument, who are you arguing with? The strictures of the actual appellate advocacy. You're not really arguing against the opposing side. And it would be a misstep to argue with the judge who is in the position to decide your case.

So what I say to them is, instead, really view this as a moment for oral persuasion rather than oral argument. The approach you should take, which each and every one of you did, is to take the approach of come, let us reason together, and I will show you why my side should prevail. And I just thought you were straight on target in the way that you handled that.

In fact, being an alum of the law school here, it did me proud, it made me feel good, made me feel great to be back here on grounds, and I couldn't help but think of the words that I think are now in Clay Hall, if I'm not mistaken, where each and every one of you exemplifies those words in terms of the performance you put forward here, where it says that those alone may be servants of the law who labor with learning, courage, and devotion to preserve liberty and promote justice.

To have such fine attorneys as the four of you, and I'm sure the other soon-to-be attorneys out there, the legal profession is going to be all the better for it, so I thank you. It was a privilege to have participated in this Moot court competition here today. Now, it is my privilege to announce the winner of today's argument as well as to announce the best oralist.

As my fellow judges would tell you, it was a difficult decision. It was a close decision and I hope that you will keep that in mind if your names are not about to be announced. But the winner of the 2024 William Minor Lile Moot Court Competition are Malia Takei and Jake Flansburg. Our heartiest congratulations.

[APPLAUSE]

Well deserved. And the winner of the 2024 Best Oralist Award here at UVA Law School is Nathaniel Glass.

[APPLAUSE]

And on behalf of all the judges, we just want to wish you the very best in what we will be exceptional legal careers. So the court will stand adjourned until further order of the court.