No. 16-1067

IN THE

Supreme Court of the United States

CHARLES MURPHY,
Petitioner,
v.
ROBERT SMITH AND GREGORY FULK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES, HUMAN RIGHTS DEFENSE CENTER, THE LEGAL AID SOCIETY, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL POLICE ACCOUNTABILITY PROJECT, RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER, SOUTHERN POVERTY LAW CENTER, UPTOWN PEOPLE'S LAW CENTER, AND WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS IN SUPPORT OF PETITIONER

DAVID D. COLE
DAVID C. FATHI*
AMY FETTIG
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street N.W.
Washington, D.C. 20005
* Not admitted in DC; practice limited to federal courts

SEYMOUR W. JAMES, JR.
MARY LYNNE WERLWAS
THE LEGAL AID SOCIETY PRISONERS' RIGHTS PROJECT
199 Water Street
New York NY 10038
(212) 577-3530

DAVID M. SHAPIRO
Counsel of Record
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
375 East Chicago Avenue
Chicago, IL 60611
(315) 503-1271
david.shapiro@law.northwestern.edu

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, non-partisan organization with over 1.6 million members dedicated to the principles of liberty and equality enshrined in the Constitution. Throughout its 97-year history, the ACLU has been deeply involved in protecting the rights of prisoners and, in 1972, created the National Prison Project to further this work. The ACLU of Illinois is the state affiliate of the ACLU. Both the national and Illinois ACLU have appeared before state and federal appellate courts, including this Court, in a wide range of cases involving the rights of people in the criminal justice system. The question presented in this case is of significant concern to both the national ACLU and the ACLU of Illinois because it involves cases brought to vindicate the federal rights of prisoners and pretrial detainees.

The Human Rights Defense Center (HRDC) is a nonprofit charitable corporation that advocates on behalf of the human rights of people held in state and federal prisons, local jails, immigration detention centers, civil commitment facilities, Bureau of Indian Affairs jails, juvenile facilities, and military prisons. HRDC's advocacy efforts include publishing *Prison*

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[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court.

Legal News, a monthly publication that covers criminal justice-related news and litigation nationwide, publishing and distributing self-help reference books for prisoners, and engaging in litigation in state and federal courts on issues concerning detainees.

The Legal Aid Society is a private, nonprofit organization that has provided free legal assistance to indigent persons for over 125 years and is the largest provider of criminal defense services in New York City. Its Prisoners' Rights Project (PRP), established in 1971, seeks to ensure the protection of prisoners' constitutional and statutory rights through litigation and advocacy on behalf of people incarcerated in New York State prisons and the New York City jails. PRP has represented numerous prisoners in civil lawsuits and has been involved in litigation concerning the interpretation of the Prison Litigation Reform Act virtually since the statute's enactment, both as counsel and as amicus curiae**.**

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and

private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the United States Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The National Police Accountability Project (NPAP) is a nonprofit organization founded by members of the National Lawyers Guild. Members of NPAP represent plaintiffs in police misconduct and prison condition cases, and NPAP often presents the views of victims of civil rights violations through amicus filings in cases raising issues that transcend the interests of the parties before the Court. NPAP has more than five hundred attorney members throughout the United States.

The Roderick and Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at the Northwestern Pritzker School of Law, at the University of Mississippi School of Law, in New Orleans, in St. Louis, and in Washington, D.C. RSMJC attorneys have led civil rights battles in areas that include police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, and the treatment of incarcerated men and women.

The Southern Poverty Law Center (SPLC) is a nonprofit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society. Since its founding in 1971, the SPLC has won numerous landmark legal victories on behalf of the exploited, the powerless, and the forgotten. SPLC's lawsuits have toppled institutional racism in the South, bankrupted some of the nation's most violent white supremacist groups, and won justice for exploited workers, abused prison inmates, disabled children, and other victims of discrimination.

The Uptown People's Law Center (UPLC) is a not-for-profit legal clinic founded in 1975. In addition to providing legal representation, advocacy, and education for poor and working people in Chicago, the UPLC also provides legal assistance to people housed in Illinois prisons in cases related to their confinement. UPLC has provided direct representation to over 100 prisoners, and currently has nine class action or putative class action cases pending relating to the civil rights of people confined in Illinois prisons.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs (WLC) is a nonprofit civil rights organization established in 1968 to help eradicate discrimination and poverty by enforcing civil rights laws and constitutional provisions through litigation and other means. In furtherance of this mission, the Washington Lawyers' Committee has a dedicated DC Prisoners' Rights Project, established in 2006, which advocates for the

humane treatment and dignity of all persons convicted of or charged with a criminal offense under DC law, and represents prisoners in litigation across the country. WLC has extensive experience in advocating and litigating on behalf of clients under the Prison Litigation Reform Act and has a strong interest in ensuring that it is interpreted correctly by federal courts across the country, and in ensuring that possible litigation by and damage awards to prisoners will help deter prison guard misconduct, and accordingly joins this brief**.**

SUMMARY OF ARGUMENT

Congress enacted 42 U.S.C. § 1983 to provide compensation for violations of federal rights and to deter illegal conduct by government officials. *See Robertson v. Wegmann*, 436 U.S. 584, 590–91 (1978); *Carey v. Piphus,* 435 U.S. 247, 255 (1978). These functions of § 1983—deterrence and compensation—are nowhere more critical than in American prisons and jails.

Incarcerated men and women too often suffer horrific abuses that call out for recompense and deterrence. To cite a few examples from federal cases, prison staff have held prisoners down in boiling water until their skin peeled off, shocked prisoners with cattle prods, left prisoners catatonic and covered in urine in telephone-booth-sized cages, compressed prisoners in restraint chairs to the point of squeezing out their intestines, kneed pregnant female prisoners in the stomach, and allowed prisoners to rot to death from gangrene.

The lower court in this case imposed a rule that every damage award in a case "brought by a prisoner" under 42 U.S.C. § 1997e(d) must be reduced automatically by 25%. That blanket rule not only conflicts with the text and intent of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(d), as the petitioner's brief shows, but it also undermines arbitrarily the deterrent and compensatory purposes of § 1983.

In contrast, reading the phrase "not to exceed 25%" as only a ceiling rather than both a ceiling and a floor is consonant with both § 1997e(d) and the central function of § 1983. Judicial discretion to reduce damages by up to 25% comports with Congress' intent to require at least some reduction in damages to offset attorneys' fees in cases "brought by a prisoner" under § 1997e(d). That discretion also avoids unnecessary harm to the intended functions of § 1983. When the need for deterrence and recompense counsels a smaller reduction, district courts may diminish a damages award by less than one-quarter.

ARGUMENT

I. THE DETERRENT AND COMPENSATORY PURPOSES OF SECTION 1983 REQUIRE DAMAGES WHEN CORRECTIONAL OFFICERS COMMIT VIOLATIONS OF FEDERAL LAW.

Congress enacted 42 U.S.C. § 1983 to effectuate two principal goals—providing compensation to victims of abuse when state officials violate federal law and deterring government misconduct in the future. "The policies underlying § 1983 include

compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Robertson v. Wegmann*, 436 U.S. 584, 590–91 (1978). Indeed, "[t]he principle that damages are designed to compensate persons for injuries caused by the deprivation of rights hardly could have been foreign to the many lawyers in Congress in 1871." *Carey v. Piphus,* 435 U.S. 247, 255 (1978).

Section 1983 serves this deterrent and compensatory function principally by creating a damages remedy for the victim when state actors violate federal rights. "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees." *Owen v. City of Independence*, 445 U.S. 622, 651 (1980). This Court has observed that it is "almost axiomatic" that damages serve as a deterrent to unconstitutional acts by government employees and policymakers. *Carlson v. Green*, 446 U.S. 14, 21 (1980).

The deterrent power of damages "was precisely the proposition upon which § 1983 was enacted." *Imbler v. Pachtman*, 424 U.S. 409, 442 (1976); *see also City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 727 (1999) (Scalia, J., concurring) (stating that § 1983 "is designed to provide compensation for injuries arising from the violation of legal duties, and thereby, of course, to deter future violations" (citation omitted)).

The deterrent effect of monetary penalties works on two different levels: individual officers named in suits for damages are discouraged from engaging in

future misconduct, while local governments (and state governments, when they have adopted policies of indemnifying their employees for damages) are encouraged to make policy changes necessary to prevent constitutional violations. The threat of damages can affect the behavior of individual officers by "creat[ing] an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Owen*, 445 U.S at 651–52.

Monetary penalties can also "encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights." *Id.* at 652. Damages imposed directly or indirectly are "particularly beneficial in preventing those systemic injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials." *Id.* (internal quotation marks omitted).

When Congress enacted 42 U.S.C. § 1997e(d)(2), it evinced no intent to undermine the purposes it sought to serve in 42 U.S.C. § 1983. It did provide that when a prisoner obtains a monetary judgment, "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." But reading that language, as the court below did here, to mandate a 25 percent reduction in all cases effectively reduces all judgments to incarcerated persons by one-quarter, regardless of the culpability of the actor or the extent of injuries suffered by the prisoner. That reading,

contrary to the literal terms of the text, also undermines Congress' intent in providing for—and preserving—an avenue for prisoners to seek judicial redress in damages for constitutional injuries inflicted upon them. Reading the statute as it is written, to afford district courts discretion to reduce the damages award by an amount "not to exceed 25 percent" preserves judicial flexibility to tailor remedies to the constitutional wrongs they have identified. And as we show in the following section, there is every reason to afford courts that flexibility to permit both Sections 1983 and 1997e to serve their purposes.

II. TO EFFECTUATE THE DETERRENT AND COMPENSATORY PURPOSES OF SECTION 1983, DISTRICT COURTS MUST HAVE DISCRETION TO REDUCE DAMAGES AWARDS BY LESS THAN 25% IN THE FACE OF EGREGIOUS VIOLATIONS OF FEDERAL LAW.

Abuse by staff in American prisons and jails calls out for the deterrent and compensatory functions of damages envisioned by the legislators who enacted § 1983. Such abuse is commonplace, and often horrifying. A blanket rule requiring district courts to reduce damages awards by 25% in every case brought by a prisoner would weaken the function of damages, both as a measure of recompense when prisoners suffer needlessly and as a check against future misconduct.

Correctional staff frequently assault incarcerated men and women. A study funded by the Office of Justice Programs and the National Institute of

Mental Health found that 6,964 general population male prisoners surveyed reported 1,466 incidents of staff-on-prisoner physical assault over a six-month period—meaning that approximately one of every five prisoners reported suffering such abuse. Nancy Wolff & Jing Shi, *Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath*, 15 CORRECTIONAL HEALTH CARE 58, 62, 64, 76 (2009). While some prisoners may have exaggerated their claims, and others may have denied abuse out of fear of retaliation, this statistic does suggest that assault remains an ever-present danger to the 2.2 million persons imprisoned in the United States.

Statistics on reported sexual violence committed by staff are similarly grim. The Bureau of Justice Statistics found "an estimated 1.2% of former [state] prisoners reported that they unwillingly had sex or sexual contact with facility staff." Alan J. Beck & Candace Johnson, U.S. Dep't of Justice, *Sexual Victimization Reported by Former State Prisoners, 2008*, at 8 (2011). Extrapolated to 2.2 million incarcerated prisoners, that amounts to more than 26,000 incidents of reported staff sexual abuse of prisoners.

The number of sexual abuse incidents in state prisons substantiated by internal investigation is lower, but also quite significant. The Bureau of Justice Statistics found that "[s]tate prison administrators reported 537 substantiated incidents of sexual victimization in 2011 . . . . About 52% of substantiated incidents of sexual victimization in

2011 involved only inmates, while 48% of substantiated incidents involved staff with inmates." Alan J. Beck et al., U.S. Dep't of Justice, *Special Report: Sexual Victimization Reported by Adult Correctional Authorities, 2009–2011*, at 1 (2014).

The famous Stanford Prison Experiment randomly assigned some participants to be guards and others to be prisoners in a laboratory "prison." All of the participants were college students. The results were chilling and may help to explain why prisoners face such frequent and wide-ranging abuses:

> The most hostile guards on each shift moved spontaneously into the leadership roles of giving orders and deciding on punishments. They became role models whose behavior was emulated by other members of the shift. Despite minimal contact between the three separate guard shifts and nearly 16 hours a day spent away from the prison, the absolute level of aggression as well as more subtle and "creative" forms of aggression manifested, increased in a spiraling fashion. Not to be tough and arrogant was to be seen as a sign of weakness by the guards and even those "good" guards who did not get as drawn into the power syndrome as the others respected the implicit norm of *never* contradicting or even interfering with an action of a more hostile guard on their shift.

Craig Haney et al., *Interpersonal Dynamics in a Simulated Prison*, 1 INT'L J. CRIM. & PENOLOGY 69, 94 (1973). Thus, there are factors inherent in the coercive

setting of prisons that encourage the abuse of prisoners, and call for countervailing incentives in the legal system.

The following cases exemplify some of the horrors that occur in American prisons and jails. When a victim experiences abuses like these, a district court should not be required to reduce a damages award by a full 25%, because doing so would undermine the deterrent and compensatory functions of § 1983.

A. *T.R. v. South Carolina Department of Corrections*

In *T.R. v. South Carolina Department of Corrections*, a state court described two chilling uses of restraint chairs at a South Carolina prison:

> Inmate Jerod Cook cut himself on his arm. Approximately 90 minutes after being discovered, he was placed in a restraint chair where he remained for four hours. The videotape shows a pool of blood on the floor of Mr. Cook's cell. He is hardly able to stand before being placed in the restraint chair. He continues to bleed while in the restraint chair and pleads with correctional officers for medical help. As Dr. Patterson testified, the decision by security staff—rather than by medical staff—to keep Mr. Cook in a restraint chair for four hours under those conditions was an "outrageous, horrific response."
>
> Inmate Baxter Vinson underwent a similar experience . . . [after] cutting himself in the abdomen while in his cell. Approximately three

> hours and twenty minutes after his wound was discovered, security staff placed him in a restraint chair where he remained for approximately two hours before being transported to a hospital. The videotape shows that while in the restraint chair, Mr. Vinson is eviscerating, with his intestine coming out of the abdominal wall. The tape shows correctional officers tightening the restraints, thereby putting additional pressure on his abdomen.

Order Granting Judgment in Favor of Plaintiffs, *T.R. v. South Carolina Dep't of Corrs.*, No. 2005-CP-40-2925, at 19 (S.C. Ct. of Com. Pl. filed Jan. 8, 2014), https://www.clearinghouse.net/chDocs/public/PC-SC-0006-0006.pdf.

B. *Borum v. Swisher County*

The plaintiff in *Borum v. Swisher County* had once tried to commit suicide with a shotgun, which "destroyed significant portions of [his] face." No. 2:14-CV-127-J, 2015 WL 327508, at *1 (N.D. Tex. Jan. 26, 2015). As a result, Borum "could not speak clearly, had difficulty breathing, and was blind in one eye. He also could not eat solid food and instead required a liquid diet, which was administered through a feeding tube sewn inside his stomach." *Id.* During his three days in the Swisher County Jail, Borum "received no medical care of any kind, despite the fact that he began hallucinating, behaved erratically, and was likely suffering from delirium tremens . . . a severe form of alcohol withdrawal that causes tremors and other changes to the nervous system." *Id.* at *2. Jail

officers refused to provide Borum the liquid diet he needed and fed him only "a mixture of honey and orange juice, which was the County's standard method of 'treating' inmates experiencing alcohol withdrawal symptoms." *Id.* As Borum continued to deteriorate, "jail officials placed him in a detox cell, where he spent the night screaming incoherently, talking to invisible friends, and trying to pull an imaginary person out of the toilet." *Id.* And yet no one called a hospital, a doctor, or 911 until much later, when Borum collapsed, hit his head, and fell unconscious. *Id.* He died in the hospital. *Id.*

C. *In re Death of Bradley Ballard*

In December 2014, the New York State Commission of Correction issued a final report on the death of Bradley Ballard, a 39-year-old man who died while incarcerated in the New York Department of Corrections. The Commission of Correction found that Ballard "was keeplocked in his cell for six days prior to his death and was denied access to his life-supporting prescribed medications, denied access to medical and psychiatric care, denied access to essential mandated services such as showers and exercise periods, and denied running water for his cell."[2] Ultimately, Ballard "was discovered in the evening on 9/10/13, to be lying in his cell naked,

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[2] New York State Commission of Correction, *In re Death of Bradley Ballard, an inmate of the Anna M. Kross Center, Final Report of the New York State Commission of Correction*, at 2 (Dec. 2014).

unresponsive, covered with urine and feces, and in critical condition." *Id.*

The Commission of Correction concluded:

> Ballard suffered from diabetes mellitus which required periodic insulin coverage. Ballard went into cardiac arrest shortly after being removed from his cell and was pronounced dead at Elmhurst Hospital. Ballard died from diabetic ketoacidosis . . . due to withholding of his diabetes medications complicated by sepsis due to severe tissue necrosis of his genitals as a result of a self-mutilation . . . . Had Ballard received adequate and appropriate medical and mental health care and supervision and intervention when he became critically ill, his death would have been prevented.

D. *Payne v. Parnell*

In *Payne v. Parnell*, a Texas correctional officer (Parnell) used a cattle prod to shock an unwitting prisoner (Payne) in the back. 246 F. App'x 884, 885 (5th Cir. 2007). This caused Payne to "'jump[ ] and holler[ ],' and left a mark on Payne's back." *Id.* (alterations in original). Parnell then "chased Payne around a nearby office building in an attempt to shock him again. Payne sought refuge in a bathroom, at which point Parnell attempted to shock him through the door of the bathroom by using the door handle to transmit the electricity from the cattle prod." *Id.*

E. *Nunez v. City of New York*

In *Nunez v. City of New York*, No. 1:11-cv-05845 (S.D.N.Y. filed Dec. 7, 2015), the U.S. Department of

Justice issued a findings letter regarding the jails on Rikers Island. The findings letter documented a litany of abuses, including the following episodes:

> In December 2012, after being forcibly extracted from their cells for failure to comply with search procedures, two inmates (mentally ill inmates placed in the punitive segregation unit . . .) were taken to the [medical] clinic and beaten in front of medical staff. The New York City Department of Investigation . . . conducted an investigation and concluded that staff had assaulted both inmates "to punish and/or retaliate against the inmates for throwing urine on them and for their overall refusal to comply with earlier search procedures."
>
> Based on inmate statements and clinic staff accounts, a Captain and multiple officers took turns punching the inmates in the face and body while they were restrained. One clinician reported that she observed one inmate being punched in the head while handcuffed to a gurney for what she believed to be five minutes. Another clinician reported that she observed DOC staff striking the other inmate with closed fists while he screamed for them to stop hurting him. A physician reported that when he asked what was happening, correction officers falsely told him that the inmates were banging their heads against the wall. A Captain later approached a senior [mental health department] official and stated, in substance, that it was good the clinical staff were present

> "so that they could witness and corroborate the inmates banging their own heads into the wall." The correction officers' reports did not refer to any use of force in the clinic, and each report concluded by stating: "The inmate was escorted to the clinic without further incident or force used." The involved Captain did not submit any use of force report at all . . . . One of the inmates told our consultant that he was still spitting up blood due to the incident when interviewed more than a month later.[3]

F. *Castro v. County of Los Angeles*

In *Castro v. County of Los Angeles*, Mr. Castro, a detainee at a West Hollywood police station, spent a full minute banging on his cell door after a drunk and combative inmate, Gonzelez, was placed in the cell with him. 833 F.3d 1060, 1065 (9th Cir. 2016) (en banc). Jail video showed the supervising officer, Solomon, sitting unresponsive at a nearby desk the entire time. *Id.* at 1073. Twenty minutes later, an "unpaid community volunteer" walked by the cell and saw Gonzalez inappropriately touching Castro's thigh. *Id.* at 1065. The volunteer reported this to Solomon, but Solomon waited six minutes to respond. *Id.* By that point, Gonzalez was "stomping on Castro's head," and Castro was "lying unconscious in a pool of

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[3] Letter from Jocelyn Samuels, Acting Assistant Attorney General, U.S. Dep't of Justice Civil Rights Div., to Hon. Bill de Blasio, Mayor (August 4, 2014), at 14, https://www.justice.gov/sites/default/files/usaosdny/legacy/2015/03/25/SDNY%20Rikers%20Report.pdf.

blood." *Id.* Castro spent a month in a hospital and four years in a long-term care facility; he suffered permanent cognitive impairments. *Id.*

G. *Ross v. Blake*

In *Ross v. Blake*, 136 S. Ct. 1850, 1855 (2016), the plaintiff, Shaidon Blake, was an inmate in a Maryland prison when he was assaulted by two guards while being moved from his cell. One of the guards shoved the handcuffed Blake at the top of a flight of stairs, and then shoved him again at the bottom. *Id.* When Blake protested, one guard held "Blake against the wall, [while the other guard] wrapped a key ring around his fingers and then punched Blake at least four times in the face in quick succession. [The guard] paused briefly, then punched Blake in the face again." *Blake v. Ross*, 787 F.3d 693, 695 (4th Cir.), *cert. granted*, 136 S. Ct. 614 (2015), *and vacated*, 136 S. Ct. 1850 (2016). The two guards "then took Blake to the ground by lifting him up and dropping him. [One guard] dropped his knee onto Blake's chest, and he and [the other guard] restrained Blake until other officers arrived." *Id.* Blake suffered nerve damage as a result. *Id.* A jury awarded him $50,000 against one of the guards on these facts.[4]

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[4] *Ross*, 136 S.Ct. at 1855. The claim against the other defendant had been dismissed for failure to exhaust administrative remedies, a decision vacated and remanded by this Court. *Id.* at 1855, 1862.

H. *Madrid v. Gomez*

In *Madrid v. Gomez*, the Northern District of California cataloged a staggering number of abuses at California's Pelican Bay State Prison. 889 F. Supp. 1146, 1162–67 (N.D. Cal. 1995). For instance, a nurse at Pelican Bay observed five to six correctional officers holding a handcuffed African American prisoner in a bathtub filled with boiling water. 889 F. Supp. 1146, 1167 (N.D. Cal. 1995). One of the officers holding the prisoner said, "looks like we're going to have a white boy before this is through . . . his skin is so dirty and so rotten, it's all fallen off." *Id.* at 1167. The nurse observed that "from just below the buttocks down, [the prisoner's] skin had peeled off and was hanging in large clumps around his legs, which had turned white with some redness." *Id.* Even so, the officers did not summon medical help; instead, one of them declared that the prisoner "had been living in his own feces and urine for three months, and if he was going to get infected, he would have been already." *Id.*

In a separate incident at Pelican Bay, guards injured a non-threatening prisoner by firing "two rounds from a 38 millimeter gas gun" into the prisoner's cell; shooting the prisoner in the chest and stomach with a taser gun; and striking the prisoner "on the top of his head with the butt of the gas gun, knocking him unconscious." *Id.* at 1162. When the prisoner "regained consciousness, he was on the floor with his face down. An officer was stepping on his hands and hitting him on his calves with a baton, at which point [the prisoner] passed out a second time." *Id.* The prisoner was then "dragged out of the cell face

down; his head was bleeding, and a piece of his scalp had been detached or peeled back." *Id.* The incident report falsely stated that the prisoner "sustained his head injury when he fell and accidentally hit his head on the toilet . . . ." *Id.*

In yet another Pelican Bay incident, correctional officers dragged a handcuffed prisoner from his cell, threw him against the wall, and, having knocked the prisoner unconscious, kicked him in the "head, face, neck and shoulders . . . ." *Id.* at 1164. The inmate "lost four teeth, received a 1.5 inch laceration to the back of his head, and suffered abrasions to the head, face, back, neck, chest and both legs." *Id.*

I. *Clark-Murphy v. Foreback*

In *Clark-Murphy v. Foreback*, a Michigan prisoner collapsed in the cafeteria line while the prison was on heat alert. 439 F.3d 280, 283 (6th Cir. 2006). The prisoner was taken to an "observation cell," a type of cell that "gives officers an opportunity to observe a prisoner more closely than would be possible if the prisoner were in the general prison population." *Id.* The prisoner then had a series of psychotic episodes, including one in which he barked like a dog. *Id.* at 283–85. Prison staff repeatedly turned off the water to his cell over the course of several days, during which the prisoner asked for water and was observed drinking from the toilet. *Id.* He died of dehydration. *Id.* at 285.

J. *Hadix v. Caruso*

In *Hadix v. Caruso*, T.S., "a psychotic man with apparent delusions" who was "screaming

incoherently[,]" was left by correctional officers "in chains on a concrete bed over an extended period of time with no effective access to medical or psychiatric care and with custody staff telling him that he would be kept in four-point restraints until he was cooperative." 461 F. Supp. 2d 574, 578 (W.D. Mich. 2006). T.S. was restrained in this manner for approximately four days, two of which were "designated 'heat alert' days with heat index readings around 100 degrees." *Id.* at 579.

The court noted that "for many hours of [his] restraint, T.S. was naked and [lay] in his own urine." *Id.* at 577. Staff finally removed T.S. from restraints after a period of "prolonged 'sleeping.'" *Id.* at 579. Later in the day, "he fell face first onto the concrete floor." *Id*. Minutes afterward, T.S. fell off the toilet and could not get up on his own, at which point a nurse checked both of T.S.'s arms and found only a "faint" pulse. *Id.* And yet, "neither custody staff (who checked on T.S. on regular intervals), nor psychological and nursing staff (who all saw T.S. in a state of decline) took any action to summon emergency care when the need to do so was obvious." *Id.* at 580. Staff summoned an ambulance only later, when the same nurse who had checked T.S.'s pulse returned and "found T.S. not breathing." *Id*. T.S. was taken to the hospital and pronounced dead. *Id.*

K. *United States v. Erie County*

Before the start of litigation in *United States v. Erie County*, No. 09-cv-0849 (W.D.N.Y. filed Sept. 30, 2009), the U.S. Department of Justice issued a findings letter stating:

> In August 2007, during the booking process, ECHC deputies struck a pregnant inmate in the face, threw her to the ground, and kneed her in the side of her stomach. When she informed deputies that she was pregnant, the deputies allegedly replied that they thought she was fat, not pregnant. The inmate lost her two front teeth as a result of the assault.[5]

L. *Depriest v. Epps*

In *Depriest v. Epps*, the court concluded that conditions at Walnut Grove, a youth prison, "[f]ar exceeded mere breaches of the United States Constitution." *Depriest v. Epps*, No. 3:10-cv-00663-CWR-FKB, 2012 BL 443032, at *2 (S.D. Miss. Mar. 26, 2012). In one example, "staff of the [prison] and those responsible for overseeing and supervising the youth engaged in sexual relationships with the youth [and] exploited them by selling drugs in the facility . . . ." *Id.* Additionally, the detained youth were "frequently subjected to chemical restraints for the most insignificant of infractions and [were] denied necessary medical care. And although many of the offenders [had] been ordered to finish their education, 'the facility prevent[ed] most youth from accessing even the most basic education services.'" *Id.* at *2–3. The court found "'brazen' staff sexual misconduct and

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[5] Letter from Loretta King, Acting Assistant Attorney General, U.S. Dep't of Justice Civil Rights Div., to Hon. Chris Collins, Erie Cty. Exec. (July 15, 2009), at 18, https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/Erie_findlet_redact_07-15-09.pdf.

brutal youth-on-youth rapes" and concluded that the prison "paints a picture of such horror as should be unrealized anywhere in the civilized world." *Id.* at *4–5.

M. *Jones v. Gusman*

In *Jones v. Gusman*, an officer performed a check of a jail hallway so inattentively that he did not notice a detainee being gang raped by ten to fourteen other detainees. 296 F.R.D. 416, 437 (E.D. La. 2013). The assailants ripped the victim's clothes off and hog tied him; stuck fingers, a tongue, a toothbrush, and toothpaste in the victim's anus; kicked him and struck him in the head with a mop and bucket; carried him to a different location; tied him to a post, punched him repeatedly, and beat him with a mop handle hard enough to strip the skin from his back and buttocks; threw hot water and possibly urine on him; and made him dance while wearing a thong. *Id.* at 437–38. After this attack, the prisoner did not receive medical care for nearly a year. *Id.* at 438.

In a second incident documented in the same decision, a deputy did not investigate when he "heard what he believed to be inmates fighting on a tier, as well as statements like 'stick your finger in his butt and piss on him.'" *Id.* at 432.

N. *Hope v. Pelzer*

On two occasions, Alabama correctional officers handcuffed prisoner Larry Hope to a hitching post. *Hope v. Pelzer*, 536 U.S. 730, 733-34 (2002). In the second instance, officers forced Hope to "take off his shirt, and he remained shirtless all day while the sun

burned his skin." *Id.* at 734–35. Hope was shackled to the hitching post for seven hours, during which "he was given water only once or twice and was given no bathroom breaks." *Id.* at 735. A guard, knowing Hope was thirsty, set out to taunt him: he "first gave water to some dogs, then brought the water cooler closer to [Hope], removed its lid, and kicked the cooler over, spilling the water onto the ground." *Id.* This Court concluded that "Hope was treated in a way antithetical to human dignity—he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous." *Id.* at 745.

O. *Lippert v. Godinez*

In *Lippert v. Godinez*, a court-appointed medical expert documented numerous instances of horrifying medical treatment by the Illinois Department of Corrections and its healthcare contractor staff. Final Report of the Court Appointed Expert, Dkt. 339, *Lippert v. Godinez*, 10-4603 (N.D. Ill. May 19, 2015). At one prison, for example, a patient "presented with classic signs and symptoms of lung cancer from the time he arrived in IDOC, yet these were ignored by healthcare staff for three months. By the time he was finally diagnosed, the only treatment he was eligible for was palliative radiation, which he declined." *Id.* at 7. Nine days later, the patient died. *Id.* The report also found that another patient "had a history of cirrhosis and was admitted to the infirmary with recurrent active GI bleeding. Despite evidence of substantial blood loss, the patient was not sent to the hospital

until the following day; he died at the hospital two days later." *Id.* at 32.

P. *United States v. Cook County*

Before the start of litigation in *United States v. Cook County*, No. 10-cv-02946 (N.D. Ill. filed May 13, 2010), the U.S. Department of Justice issued a letter cataloging prison abuses, including the following example:

> John S. was being strip-searched prior to going to recreation. He was tapping on the wall. An officer ordered him to stop and hit him on top of the head. John continued to tap. After John was searched, the officer said: "You're f------ guilty" and slammed him on top of a cart and against the wall. John was pulled into the hallway where other officers started to beat him. He was hit in the face, dragged by his hair, choked, and beaten.[6]

Q. *Hudson v. McMillian*

In *Hudson v. McMillian*, a correctional officer punched a shackled and handcuffed prisoner "in the mouth, eyes, chest, and stomach." 503 U.S. 1, 4 (1992). Another officer "held the inmate in place and kicked

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[6] Letter from Grace Chung Becker, Acting Assistant Attorney General, and Patrick J. Fitzgerald, U.S. Attorney, U.S. Dep't of Justice Civil Rights Div., to Todd H. Stroger, Cook County Bd. Pres., and Thomas Dart, Cook County Sheriff (July 11, 2008), at 13, https://www.justice.gov/sites/default/files/crt/legacy/2011/04/13/CookCountyJail_findingsletter_7-11-08.pdf.

and punched him from behind." *Id.* Meanwhile, their supervisor, "watched the beating but merely told the officers 'not to have too much fun.'" *Id.*

R. *Riker v. Gibbons*

Prior to the start of litigation in *Riker v. Gibbons*, No. 3:08-cv-0115 (D. Nev. filed Mar. 6, 2008), an expert concluded that medical treatment at a Nevada prison "amounts to the grossest possible medical malpractice, and the most shocking and callous disregard for human life and human suffering, that I have ever encountered in the medical profession in my thirty-five years of practice."[7] For example, Patrick Cavanaugh, a prisoner suffering from gangrene, "received almost no treatment for his illnesses, so his slow, painful death in the [prison's] infirmary was virtually assured. Given the profound and unmistakable smell of putrefying flesh, there can be no question that every medical provider and correctional officer in that infirmary was acutely aware of Patrick Cavanaugh's condition." *Id.* at 2.

S. *Valarie v. Michigan Dep't of Corrections*

Anthony McManus suffered from psychosis, including schizophrenia and bipolar disorder. *Valarie v. Michigan Dep't of Corr.*, No. 2:07-CV-5, 2009 WL 2232684, at *5 (W.D. Mich. July 22, 2009). He was locked in a Michigan prison that had no resources for

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[7] William Noel, *Review of Medical Records from Ely State Prison*, https://www.aclu.org/legal-document/expert-report-dr-noel-medical-care-ely-state-prison?redirect=cpredirect/33009 (last accessed Oct. 1, 2017).

treating psychiatric illnesses, *id.* at *1, where, over the course of four months, "[h]e received so little food and water" that he died in his cell of a combination of starvation and dehydration, *id.* at *18. When a "chemical agent" was applied to McManus in an effort to remove him from his cell, a nurse claimed that McManus was in "[n]o apparent distress," even though, as the court stated,

> video footage of the application of the chemical spray demonstrates a very emaciated, naked individual who appears to be in great discomfort, who is verbalizing in an incoherent manner, and who eventually makes repeated clear requests for water and help. *Mr. McManus' skeletal structure is clearly seen protruding from the skin.* During the taped footage, no one provides Mr. McManus with any water.

Id. at *4 (citations omitted) (emphasis added).

In an affidavit, an expert prison official stated that "[a]nimals in animal shelters are generally given more attention and better care than was afforded to McManus." *Id.* at *8.

T. *Cutter v. Wilkinson*

In *Cutter v. Wilkinson*, this Court noted that numerous violations of prisoners' religious freedoms could be found in the Congressional Record surrounding passage of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1. 544 U.S. 716 n.5 (2005). For example, "prisoners' religious possessions, 'such as the Bible, the Koran,

the Talmud or items needed by Native Americans[,] . . . were frequently treated with contempt and were confiscated, damaged or discarded' by prison officials." *Id.* (alteration in original) (citation omitted).

U. *Brown v. Plata*

In *Brown v. Plata*, this Court summarized cases of horrific medical and mental health abuse in California prisons. 563 U.S. 493, 502–06 (2011). For instance, the Court observed that suicidal prisoners were "held for prolonged periods in telephone-booth-sized cages without toilets[,]" and "[a] psychiatric expert reported observing an inmate who had been held in such a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic." *Id.* at 503–04. According to a correctional officer, "in one prison, up to 50 sick inmates 'may be held together in a 12–by 20–foot cage for up to five hours awaiting treatment.'" *Id.* at 504. The Court also recognized instances in which prisoners had died following egregious delays in medical care, including "[a] prisoner with severe abdominal pain [who] died after a 5-week delay in referral to a specialist;" another prisoner "with 'constant and extreme' chest pain [who] died after an 8–hour delay in evaluation by a doctor;" and "a prisoner [who] died of testicular cancer after a 'failure of MDs to work up for cancer in a young man with 17 months of testicular pain.'" *Id.* at 505.

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Men and women locked up in American prisons and jails too often suffer abominable mistreatment at

the hands of their jailers. Such conduct demands compensation and deterrence. A rule that categorically forbids the victims of such abuse from recovering more than 75% of their damages would weaken arbitrarily the important role of damages under § 1983 as a source of recompense for victims and a check against future misconduct.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

DAVID M. SHAPIRO
Counsel of Record
RODERICK AND SOLANGE MACARTHUR
JUSTICE CENTER
PRITZKER NORTHWESTERN SCHOOL OF LAW
375 E. Chicago Ave.
Chicago, IL 60611
312.503.0711

DAVID D. COLE
DAVID C. FATHI*
AMY FETTIG
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th Street N.W.
Washington, D.C. 20005

* Not admitted in DC; practice limited to federal courts

SEYMOUR W. JAMES, JR.
MARY LYNNE WERLWAS
THE LEGAL AID SOCIETY
PRISONERS' RIGHTS PROJECT
199 Water Street
New York NY 10038
(212) 577-3530

Counsel for Amici Curiae

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