United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

December 05, 2023

Mr. Joshua C. McDaniel
HARVARD LAW SCHOOL
Election Law Clinic
Suite 5110
6 Everett Street
Cambridge, MA 02138

RE: 23-1066 Dewey Barnett, II v. Brenda Short, et al

Dear Mr. Joshua C. McDaniel:

The amicus curiae brief of the amicus Professor Douglas Laycock in support of the appellant has been filed. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

Michael E. Gans
Clerk of Court

BNW

Enclosure(s)

cc: Mr. Gadeir Ibrahim Abbas
Mr. Braden Allman
Ms. Easha Anand
Mr. Dewey Austin Barnett II
Ms. Rachel Bates
Mr. Jacob Isaac Chefitz
Mr. Gregory Cui
Mr. Noel J. Francisco
Ms. Alexa Gervasi
Mr. William A. Hellmich
Mr. Parker W. Knight, III

Ms. Jalesia F.M. Kuenzel
Mr. Adeel Abdullah Mangi
Ms. Lena F. Masri
Mr. George Mills
Mr. David M. Morrell
Mr. Matthew Myatt
Mr. Ryan M. Proctor
Mr. Eric C. Rassbach
Ms. Michelle Reed
Mr. Justin Mark Sadowsky
Ms. Mehwish Aslam Shaukat

District Court/Agency Case Number(s): 4:22-cv-00708-SEP

No. 23-1066

United States Court of Appeals for the Eighth Circuit

DEWEY AUSTIN BARNETT, II,
Plaintiff-Appellant,
v.
BRENDA SHORT, ET. AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Missouri, Hon. Sarah E. Pitlyk
No. 4:22-cv-00708

BRIEF OF PROFESSOR DOUGLAS LAYCOCK AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND SUPPORTING REVERSAL

MICHELLE REED
BRADEN ALLMAN
MATTHEW E. MYATT
AKIN GUMP STRAUSS HAUER & FELD LLP
2300 N. Field St. # 1800
Dallas, TX 75201
(214) 969-2713
mreed@akingump.com

JOSHUA C. MCDANIEL
Counsel of Record
PARKER W. KNIGHT III
HARVARD LAW SCHOOL
RELIGIOUS FREEDOM CLINIC
6 Everett Street, Suite 5110
Cambridge, MA 02138
(617) 496-4383
jmcdaniel@law.harvard.edu

Counsel for Amicus Curiae

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INTRODUCTION

RLUIPA promises "appropriate relief" for religious freedom violations committed by state and local officials in the land-use and prison contexts. The primary question for this Court to resolve is whether "appropriate relief" encompasses damages in the context of Mr. Barnett's suit against Jefferson County and jail official Brenda Short in her individual capacity, where any claim for injunctive relief is now moot. As to both defendants, RLUIPA can and does allow for damages.

Mr. Barnett is the type of plaintiff RLUIPA was meant to protect. He is a devout believer who was forced to violate a core tenet of his faith when he was deprived of access to his Bible for a month. Yet before he could seek any remedy, Jefferson County and Brenda Short—the very actors who deprived him of his Bible in the first place—transferred him to another facility, thereby mooting any injunctive or declaratory relief. This Court must decide whether jails and officers can make "appropriate relief" mean "no relief" with a simple transfer. The answer is no.

First, "appropriate relief" clearly includes damages against municipalities like Jefferson County. As every circuit to consider the question has agreed, municipalities aren't entitled to sovereign immunity, so

RLUIPA's open-ended remedy provision naturally encompasses such a remedy. And damages have traditionally been available against municipalities in analogous contexts, like 42 U.S.C. § 1983. In keeping with historical practice and other circuits' conclusions, this Court should hold that RLUIPA authorizes damage remedies against municipalities.

Second, "appropriate relief" encompasses individual-capacity damages, just like it does under its predecessor and sister statute RFRA. In both statutes, "appropriate relief" means the remedies available under § 1983, including damages against officials in their individual capacities. *See Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020) (holding that "appropriate relief" under RFRA can include individual-capacity damages).

In *Tanzin*, the Supreme Court considered this issue under RFRA. Looking at the statute's text from every angle, the Court held that RFRA provides a clear answer. The term "appropriate relief," the Court reasoned, is broad and "open-ended." *Id.* at 491 (quoting *Sossamon v. Texas*, 563 U.S. 277, 286 (2011)). Moreover, Congress chose to include definitions in the text that would allow this "relief" not only against government entities but also against individual officials and other persons acting under color of state law—a choice that would serve no

purpose if individual-capacity damages were precluded. *See id.* at 490 (citing 42 U.S.C. § 2000bb-2(1)). In doing so, Congress sought to track § 1983, under which "damages claims have always been available" for religious freedom violations. *Id.*

Every point the Supreme Court highlighted in favor of reading "appropriate relief" to permit individual-capacity damages under RFRA applies with at least equal force to RLUIPA. The identical language in each statute should carry the same meaning.

Without the benefit of *Tanzin*'s guidance, some circuits have reached the opposite conclusion—narrowly construing RLUIPA's remedy provision to avoid constitutional questions over the scope of Congress's Spending Clause powers. Not only were those circuits mistaken to rely on avoidance, but their Spending Clause concerns were misplaced. Congress intended RLUIPA to provide the "maximum" relief permitted by the Constitution. 42 U.S.C. § 2000cc-3(g). What's more, the Supreme Court has made clear that Congress may use its broad Spending Clause powers to impose liability on individuals, *see Sabri v. United States*, 541 U.S. 600, 608 (2004), and on municipal governments, *see Franklin v. Gwinnett Cnty. Pub. Schs.,* 503 U.S. 60, 76 (1992).

Ultimately, this case isn't just about whether claimants like Mr. Barnett can recover damages. It's about whether they can receive any relief at all. As with its sister statute RFRA, RLUIPA's text, history, and purpose confirm that Congress intended to provide them a remedy.

INTEREST OF AMICUS CURIAE

Professor Douglas Laycock is a leading expert on both remedies and religious liberty. He has authored influential volumes and dozens of law review articles in those fields. *See, e.g.*, Douglas Laycock, *Religious Liberty* (Wm. B. Eerdmans Publishing 2010–18) (5 volumes); Douglas Laycock & Richard L. Hasen, *Modern American Remedies: Cases and Materials* (Aspen 5th ed. 2019). He has appeared before the Supreme Court to argue some of the most important religious freedom cases of the last few decades, has testified before Congress on proposed religious liberty legislation, and has helped lead the effort to enact RLUIPA into law. He files this brief in his individual capacity as a scholar; neither the University of Virginia nor the University of Texas, the two schools with which he is affiliated, takes any position on the issues in this case.

ARGUMENT

I. By providing for all "appropriate relief," RLUIPA ensures that violations can be remedied with damages.

As RLUIPA's text and history make clear, Congress passed RLUIPA to expand prisoners' access to remedies for state actions burdening their free exercise of religion. Those remedies include damages.

Start with the text. RLUIPA allows plaintiffs to recover all "appropriate relief." 42 U.S.C. § 2000cc-2(a). That term's plain meaning includes damages. Indeed, as the Supreme Court observed in *Tanzin*, "appropriate" is "'open-ended' on its face." 141 S. Ct. 486, 491 (2020) (quoting *Sossamon*, 563 U.S. at 286). That means "what relief is 'appropriate' is 'inherently context dependent.'" *Id.* (same). And as *Tanzin* confirms, in at least some contexts, damages are exactly what "appropriate relief" requires. *Id.* at 493 (holding that damages are "appropriate relief" against government officials in their individual capacities).

This interpretation of "appropriate relief" follows the presumption that all typical remedies are available unless Congress specifies otherwise. *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 66 (1992) (courts should "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise"). And the damages

remedy isn't just typical—courts often say that damages are generally preferred to equitable remedies. *Id.* at 75–76 (admonishing courts to first ask whether monetary damages are appropriate and only if not to consider equitable remedies); *see also Mumid v. Abraham Lincoln High Sch.*, 618 F.3d 789, 798 (8th Cir. 2010) (discussing the "ordinary convention" that "a court should determine the adequacy of a remedy in law before resorting to equitable relief" (quoting *Franklin*, 503 U.S. at 75–76)). Nothing in RLUIPA's text suggests Congress wished to exclude damages.

On the contrary, RLUIPA's legislative history confirms that "appropriate relief" includes damages. In the House Report for RLUIPA's unenacted predecessor, which had the same "appropriate relief" language, Congress explained that it sought to "track" RFRA by providing for damages: "This section provides remedies for violations. Sections 4(a) and (b) track RFRA, creating a private cause of action for damages, injunction, and declaratory judgment . . . ." H.R. Rep. No. 106-219, at 29 (1999). In other words, because RLUIPA's remedies provision was "based on the corresponding provision of RFRA" and RFRA's remedy provision was designed to include damages, RLUIPA too provides for

damages. *Religious Liberty Protection Act of 1999: Hearing on H.R. 1691 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 106th Cong. 111 (1999) (statement of Douglas Laycock, Then-Professor, University of Texas Law School).

RLUIPA's remedies provision and legislative backdrop are unambiguous—damages are among the "appropriate relief" RLUIPA affords.

II. Damages are "appropriate relief" against a municipality.

To begin with, "appropriate relief" includes damages against municiplalities like Jefferson County. As every other circuit to consider the issue has recognized, "money damages are available under RLUIPA against . . . municipalities." *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 290 (5th Cir. 2012); *see also Tree of Life Christian Sch. v. City of Upper Arlington*, 905 F.3d 357, 365–66 (6th Cir. 2018); *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1168 (9th Cir. 2011).[1]

That makes good sense. History guides the inquiry into whether damages are "appropriate relief," and history shows that damages have

[1] As Mr. Barnett's opening brief notes, other circuits have assumed that "appropriate relief" under RLUIPA includes damages against municipalities. *See* Opening Br. at 19–20 n.2.

long been available against municipalities for violations of federal rights. *See Tanzin*, 141 S. Ct. at 491–92. Before Congress passed RLUIPA, it was well settled that § 1983 authorized damages against municipalities. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978) (holding that municipalities can be sued under § 1983 for violations of constitutional and federal statutory rights, including for damages); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 485 (1986) (holding that a § 1983 plaintiff should be permitted to proceed with a damages action against a county for violation of constitutional rights).

Damages have long been a remedy available to prisoners and non-prisoners alike for violations of constitutional rights, including for violations of religious rights. *See, e.g.*, *Owens v. Kelley*, 681 F.2d 1362, 1370 (11th Cir. 1982) (holding that a "county can . . . be held liable for damages [under § 1983] should [its programming] be held to violate [plaintiff's] First Amendment rights"); *Tanner v. Heise*, 879 F.2d 572, 581–83 (9th Cir. 1989) (reversing dismissal of § 1983 damages claims against county); *Blackburn v. Snow*, 771 F.2d 556, 571 (1st Cir. 1985) (holding that because a county violated plainiff's constitutional rights it "must respond in damages").

To be sure, RLUIPA doesn't allow for damages against a state. *See Sossamon*, 563 U.S. 277. But that's because states are entitled to sovereign immunity—a bar to recovery that doesn't apply to municipalities. *Id.* at 285–86. So Jefferson County, a municipality, can't look to immunity to rescue it from liability here.

In sum, damages are an "appropriate" remedy against a municipality. Every other circuit to confront the issue has agreed that RLUIPA authorizes damages against municipalities. And history confirms the propriety of such a remedy. Without sovereign immunity available to block that relief, Mr. Barnett should be able to recover damages against Jefferson County.

III. Damages are "appropriate relief" against officials in their individual capacities.

Similarly, "appropriate relief" includes damages against officials in their individual capacities. As explained below, the text of RLUIPA, like that of RFRA, makes sense only if individual-capacity damages are available. And history and context confirm that individual-capacity damages are not only "appropriate" but crucial to RLUIPA's remedial scheme.

A. RLUIPA's text provides such a damages remedy.

To resolve this issue, this Court should start with the presumption that RLUIPA's remedial language carries the same meaning it does in RFRA. Both statutes allow plaintiffs to seek all "appropriate relief" against "a government," including any "official" or "other person acting under color of . . . law." 42 U.S.C. §§ 2000cc-2(a), 2000cc-5(4)(A); *see also* 42 U.S.C. §§ 2000bb-1(c), 2000bb-(2)(1). Where, as here, "Congress uses the same language in two statutes having similar purposes," courts should "presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005). That is especially true here, because Congress used RFRA as a model when drafting RLUIPA.

Just like RFRA, RLUIPA's language is "clear." *Tanzin*, 141 S. Ct. at 490. Consider the term "government." Rather than limit claims against officials to their official capacities, Congress "supplanted the ordinary meaning of 'government'" by defining it to include officials *as persons*. *Id.* And it did so twice—expanding the term to reach not only state or local "official[s]" but "any other person acting under color of State law." 42 U.S.C. § 2000cc-5(4)(A)(ii)–(iii); *see also Tanzin*, 141 S. Ct. at 190.

The correct interpretation of RLUIPA must not render this clear language pointless. *Cf. Williams v. Taylor*, 529 U.S. 362, 404 (2000) ("giv[ing] effect, if possible, to every clause and word of a statute" is "a cardinal principle of statutory construction").

Were individual-capacity damages unavailable, there would be little point in Congress deviating from the ordinary meaning of "government." That reading of "appropriate relief" would leave plaintiffs with only injunctive or declaratory relief against officials. But that precise remedy is available via injunctive or declaratory relief against officials in their *official* capacity. Congress would have had no need to go out of its way to "supplant[] the ordinary meaning of 'government'" to include both official and nonofficial state and local actors. *See Tanzin*, 141 S. Ct. at 490. Those provisions make sense only if RLUIPA permits individual-capacity damages claims.

What's more, courts have harmonized RFRA with RLUIPA when addressing official-capacity damages claims. Just as *Sossamon* held that "appropriate relief" in RLUIPA doesn't override a state's sovereign immunity from damages claims, 563 U.S. at 285–88, courts have read the same language in RFRA to preserve the federal government's

sovereign immunity from such claims. *See, e.g.*, *Davila v. Gladden*, 777 F.3d 1198, 1210 (11th Cir. 2015) (holding that *Sossamon*'s reading of "appropriate relief" in RLUIPA "applies equally" in RFRA cases); *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 841 (9th Cir. 2012) (same).[2] In short, RFRA's and RLUIPA's shared text indicates a shared meaning.

B. RLUIPA's context confirms individual-capacity damages are "appropriate relief."

To determine whether individual-capacity damages are "appropriate relief," *Tanzin* looked not only to RFRA's text but to the broader "context of suits against Government officials." *Tanzin*, 141 S. Ct. at 491. Because "RFRA reinstated pre-*Smith* protections and rights," the Court explained, "parties suing under RFRA must have at least the same avenues for relief against officials that they would have had before *Smith*."

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[2] Courts routinely construe RLUIPA and RFRA together. *See, e.g.*, *Koger v. Bryan*, 523 F.3d 789, 802 (7th Cir. 2008) ("RLUIPA did not announce a new standard, but shored up protections Congress had been attempting to provide . . . by means of the RFRA"); *Madison v. Riter,* 355 F.3d 310, 315 (4th Cir. 2003) (RLUIPA "reinstate[d] RFRA's protection against government burdens" and "mirror[s]" its provisions); *Mack v. Warden Loretto FCI*, 839 F.3d 286, 304 n.103 (3d Cir. 2016) ("[T]he two statutes are analogous for purposes of the substantial burden test."); *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008) (same).

Id. at 492 (discussing *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872 (1990)). The same applies here.

As *Tanzin* noted, damages against government officials have "long been awarded as appropriate relief." *Id.* at 491. From the early Republic, damages were awarded against government officials at common law. *Id.* And when statutes later displaced the common law, Congress carried the damages remedy forward. *Id.*

Of particular importance here, damages were "also commonly available against state and local government officials." *Id.* Most notably, § 1983 has long allowed plaintiffs to recover damages for religious freedom violations. *Id.* (citing cases allowing plaintiffs to seek damages against officials under § 1983).

Like RFRA, RLUIPA also reinstated (and strengthened) pre-*Smith* protections and rights in the zoning and prison contexts. In fact, RLUIPA's remedial language mirrors the language used in § 1983. Congress's use of the "same terminology as § 1983 in the very same field of civil rights law" renders it "reasonable to believe that the terminology bears a consistent meaning." *Id.* at 490–91 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 323

(2012)). Thus, the same logic that applied in *Tanzin* applies here: prisoners suing under RLUIPA should have at least the same avenues for relief against prison officials that they would have had before *Smith* under § 1983.

Those avenues were broad. Under § 1983, prisoners could (and still can) seek remedies available to all civil litigants, including damages. *See, e.g.*, *Williams v. Marinelli*, 987 F.3d 188, 191–92, 200 (2d Cir. 2021). And just as they have against municipalities, prisoners have long recovered damages against prison officials for violating their free exercise rights. *See, e.g.*, *Bryant v. McGinnis*, 463 F. Supp. 373, 388 (W.D.N.Y. 1978) (awarding damages against officials for refusing to recognize Muslim inmates' religion and preventing them from accessing their minister, wearing religious articles, or observing a religious diet); *Vanscoy v. Hicks*, 691 F. Supp. 1336, 1337–38 (M.D. Ala. 1988) (awarding damages against prison official who denied inmate access to prison chapel); *Campbell v. Thornton*, 644 F. Supp. 103, 104–05 (W.D. Mo. 1986) (discussing damages award against leaders of a state-sponsored halfway house who forced religious views on residents); *Masjid Muhammad-D.C.C. v. Keve*, 479 F. Supp. 1311, 1327–28 (D. Del.

1979) (awarding damages against officials who refused to deliver mail to Muslim inmates); *Young v. Lane*, No. 85-CV-20019, 1989 WL 57810, at *3, *7 (N.D. Ill. Feb. 21, 1989) (awarding damages against prison officials who prohibited Jewish prisoners from wearing religious articles).

As myriad cases show, damages were commonly awarded against prison officials long before Congress passed RLUIPA. Individual-capacity damages are thus a perfectly "appropriate" remedy under RLUIPA, just as they are under RFRA. *See Tanzin*, 141 S. Ct. at 492.

C. Limitations on Spending Clause statutes do not preclude individual-capacity damages under RLUIPA.

To be sure, some courts who considered the issue before *Tanzin* held that individual-capacity damages are not available under RLUIPA. *See, e.g.*, *Haight v. Thompson*, 763 F.3d 554, 568–70 (6th Cir. 2014); *Washington v. Gonyea*, 731 F.3d 143, 145–46 (2d Cir. 2013); *Sharp v. Johnson*, 669 F.3d 144, 154–55 (3d Cir. 2012); *Stewart v. Beach*, 701 F.3d 1322, 1334–35 (10th Cir. 2012); *Rendelman v. Rouse*, 569 F.3d 182, 188–89 (4th Cir. 2009); *Nelson v. Miller*, 570 F.3d 868, 886–88 (7th Cir. 2009); *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 328–89 (5th Cir. 2009); *Smith v. Allen*, 502 F.3d 1255, 1272–73 (11th Cir. 2007).

Those courts largely overlooked the parallels between RFRA and RLUIPA and relied on the fact that RLUIPA was enacted under the Spending Clause to impose additional limits on its applicability. But those limits are unwarranted, especially after the Supreme Court's intervening decision in *Tanzin*.[3]

Although some courts have noted that Spending Clause statutes must speak "unambiguously" when imposing liability, *see South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)); *see also, e.g.*, *Haight*, 763 F.3d at 568–70, RLUIPA easily shoulders the clear-statement burden. As discussed above, RLUIPA's text clearly contemplates an individual-capacity-damages remedy. The fact that Congress drafted RLUIPA's remedial provision broadly to provide context-dependent relief does not render the text ambiguous. *See Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212

[3] Only two courts have confronted this issue since *Tanzin*. But both resolved the issue without reaching the merits: One held that the issue was waived. *Walker v. Baldwin*, 74 F.4th 878, 881 (7th Cir. 2023). The other was bound by pre-*Tanzin* circuit precedent, and an en banc petition is pending. *Landor v. La. Dep't of Corr.*, 82 F.4th 337, 341–42 (5th Cir. 2023). Since the Eighth Circuit has not yet ruled on this question, this Court is free to interpret RLUIPA's clear language for the first time with the benefit of *Tanzin*'s analysis and is the only circuit that has been presented with the opportunity to do so.

(1998) ("breadth" alone "does not demonstrate ambiguity" in a statute (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985)). And if there were any doubt before *Tanzin*, that decision confirms that RLUIPA's and RFRA's shared text is "clear" that the statutes provide for individual-capacity damages. *Tanzin*, 141 S. Ct. at 490. If anything, Congress's intent to include an individual-capacity-damages remedy comes through even more clearly in RLUIPA, where Congress expressly directed the text to be "construed in favor of a broad protection of religious exercise." 42 U.S.C. § 2000cc-(3)(g).

Other courts have precluded individual-capacity damages in this context based on the misconception that Spending Clause legislation "operates like a contract," barring all liability except state- and local-government liability. *See Sossamon*, 560 F.3d at 328. Although courts have sometimes analogized to contract law to explain the clear-statement rule, the Supreme Court has warned courts against thinking that "suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise." *Barnes v. Gorman*, 536 U.S. 181, 188 n.2 (2002). And the Supreme Court has made clear that Congress can use its Spending Clause power to "bring

federal power to bear directly on individuals" who don't receive federal funds. *Sabri v. United States*, 541 U.S. 600, 608 (2004).

The contract analogy is particularly inapt here, where the statutory language mirrors § 1983. The cause of action created by § 1983 "is, and was always regarded as, a tort claim." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 727 (1999) (Scalia, J., concurring in part and concurring in judgment). The extension of contract-law principles to bar all government-employee liability under RLUIPA is thus unwarranted.

Finally, some courts have analogized RLUIPA to Title IX, another Spending Clause statute. *See, e.g.*, *Gonyea*, 731 F.3d at 145–46; *see also Jones v. Hobbs*, No. 09-cv-00157, 2010 WL 3909979 at *5 (E.D. Ark. Sept. 13, 2010); *Sisney v. Reisch*, 533 F. Supp. 2d 952, 968 (D.S.D. 2008). But Title IX is a very different piece of Spending Clause legislation that the Supreme Court has said can be enforced only against the institutional recipients of federal funds. *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640–41 (1999); *see also Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607, 610–11 (8th Cir. 1999). It was Title IX itself—not its constitutional underpinning—that led to

that conclusion. Unlike RLUIPA, Title IX does not give plaintiffs an express right to sue, let alone the right to sue individuals acting under color of law or to seek all "appropriate relief." *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 683 (1979). To the contrary, Title IX's text, structure, and legislative history make clear Congress wasn't creating a broad private right of action, but rather a targeted "mechanism for terminating federal financial support for institutions engaged in prohibited discrimination." *See id.* at 695–96. Here, by contrast, RLUIPA's text, purpose, and legislative history all point toward holding officials personally accountable for their violations. In short, the reasons for limiting Title IX liability to institutions all cut the other way in RLUIPA.

IV. RLUIPA's remedial aims require damages.

RLUIPA's purpose reinforces the conclusion that its text provides a damages remedy against both municipalities and officers in their individual capacities. RLUIPA is the culmination of Congress's repeated efforts to ensure that states and localities respect free exercise rights, and providing a damages remedy was a critical part of Congress's goal. As *Tanzin* explained, damages are "not just 'appropriate'" in the religious freedom context; they are often "the *only* form of relief that can remedy"

a religious claimant's harm. 141 S. Ct. at 492 (emphasis in original). Reading both forms of damages out of RLUIPA would leave many victims with no relief at all and would frustrate Congress's repeated efforts to protect religious freedom.

Prisoners especially would suffer from that reading. Given their unique circumstances, inmates often cannot vindicate their rights until a violation is long past. Their suits are delayed by administrative barriers. They are moved among prisons as violations of their rights begin and end and begin again. And, of course, they eventually complete their sentences. Because injunctions cannot redress violations that have abated following an inmate's transfer or release, damages often represent prisoners' only option. *See id.* Removing any damages remedy from RLUIPA would thus be antithetical to the statute's aims.

The transient nature of many inmates' time in the correctional system underscores this point. Those released in 2018, for example, had spent an average of only 2.7 years in prison. Danielle Kaeble, U.S. Dep't of Just., Bureau of Just. Stat., Pub. No. NCJ255662, *Time Served in State Prison, 2018* at 1 (2021), https://perma.cc/3BWC-CBLP. And in 2017, the average length of stay for all jails was just 26 days. Jake

Horowitz & Tracy Velazquez, *Why Hasn't the Number of People in U.S. Jails Dropped?*, Pew Trusts (March 3, 2020), https://perma.cc/922N-CBX5.

Damages are essential not just for inmates who complete their sentences, but also for those who are transferred from the facility where their rights were violated. Inmates often spend time in multiple jails, prisons, and other detention facilities. Jailers will transfer inmates to reduce overcrowding, to provide healthcare, and for administrative reasons. And each time they do, the transfer renders any request for injunctive relief against the earlier prison moot. *See, e.g.*, *Gladson v. Iowa Dep't of Corr.*, 551 F.3d 825, 835 (8th Cir. 2009). Not surprisingly, jailers sometimes transfer prisoners for the very purpose of mooting their claims.

Even if prisoners do stay in one prison long enough to sue, the law slows them down. Before they can sue, the Prison Litigation Reform Act requires prisoners to first exhaust all available grievance procedures. 42 U.S.C. § 1997e(a); *see Ross v. Blake*, 578 U.S. 632, 639 (2016) (holding that prisoners must exhaust their claims "irrespective of any 'special circumstances'"). That process alone can take months.

Practical matters also slow inmate claims. Over 90 percent of prisoner petitions are filed pro se, meaning inexperienced inmates must learn the necessary information to file their complaint, draft it, and then engage in the legal process, all while serving their sentence. *Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019*, U.S. Courts (Feb. 11, 2021), https://perma.cc/KK5R-4V4B. Together, PLRA requirements and practical obstacles make it less likely that inmates' rights will be vindicated before their injunctive claims become moot.

Apart from those hurdles, prison officials can—at any point in litigation—seek to avoid liability by changing their policies or granting the plaintiff's requested accommodation. Without damages, this would give states another way (apart from transfers) to strategically moot claims before courts could award relief, thwarting RLUIPA's protections of religious freedom.

What's more, denying damages under RLUIPA would lead to strange results: a prisoner's ability to recover damages would turn on whether the prisoner happens to be held at a federal prison or a state or local facility. Given the identical language used in both statutes and RLUIPA's intent to reapply RFRA's protection to state and local

facilities, damages should be available under RLUIPA as they are under RFRA. *See Tanzin*, 141 S. Ct. at 489; *see also Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 987 (8th Cir. 2004) (reading the two statutes in tandem because "Congress resurrected RFRA's langage" in RLUIPA); *Koger v. Bryan*, 523 F.3d 789, 802 (7th Cir. 2008); *Redd v. Wright*, 597 F.3d 532, 535 n.2 (2d Cir. 2010) (recognizing that RFRA and RLUIPA should be read in harmony).

In short, Congress passed RLUIPA for cases like this one. Congress did not pass RLUIPA to force prisoners like Mr. Barnett into unwinnable wars. But that is the natural consequence of disallowing damages. That is the opposite of "appropriate relief."

CONCLUSION

Reading a prohibition on money damages into RLUIPA in individual-capacity suits and suits against municipalities would ignore RLUIPA's text, history, and purpose. Doing so would frustrate Congress's clear and lawful exercise of its legislative authority to guarantee

prisoners the ability to vindicate their most sacred rights. This Court should hold that damages are permitted in both cases.[4]

Respectfully submitted,

/s/ *Joshua C. McDaniel*

JOSHUA C. MCDANIEL
Counsel of Record
PARKER W. KNIGHT III
RELIGIOUS FREEDOM CLINIC
6 Everett Street, Suite 5110
Cambridge, MA 02138
(617) 496-4383
jmcdaniel@law.harvard.edu

MICHELLE REED
BRADEN ALLMAN
MATTHEW E. MYATT
AKIN GUMP STRAUSS HAUER & FELD LLP
2300 N. Field St. # 1800
Dallas, TX 75201
mreed@akingump.com

Counsel for Amicus Curiae

[4] Amicus thanks Saeed Ahmad and Mary Catherine Jenkins, students in the Harvard Law School Religious Freedom Clinic, for helping to prepare this brief.

CERTIFICATE OF COMPLIANCE

This brief complies with Fed. R. App. P. 29(a)(5) because it contains 4,549 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This brief also complies with the typeface and type-style requirements of Fed. R. App. P. 32(a) because it has been prepared in a proportionally spaced, 14-point Century Schoolbook font.

Under Circuit Rule 28A(h), I also certify that the electronic file of this brief has been submitted to the Clerk via the Court's CM/ECF system. The file has been scanned for viruses and is virus-free.

Dated: November 20, 2023

/s/ *Joshua C. McDaniel*
Joshua C. McDaniel

CERTIFICATE OF SERVICE

I certify that on November 20, 2023, I served this document on all parties or their counsel of record via CM/ECF.

Dated: November 20, 2023

/s/ *Joshua C. McDaniel*
Joshua C. McDaniel