No. 23-1066

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DEWEY AUSTIN BARNETT, II,
Plaintiff/Appellant,

v.

BRENDA SHORT, et al.
Defendants/Appellees.

PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION AND RULE 35(B) STATEMENT

Dewey Austin Barnett, II, is a devout Christian. Even when he was incarcerated at the Jefferson County Jail, he maintained his faith, receiving pastoral visits and praying regularly. R. Doc. 6 at 4; R. Doc. 6-1 at 5. But when he was thrown in disciplinary segregation for a full month, he was not allowed a copy of the Holy Bible, depriving him of his ability to remain "faithful and obedient" to his God. R. Doc. 6 at 3-4; R. Doc. 6-1 at 3, 5. And when he complained to jail officials, he was told, "You can have nothing more . . . Feel free to quote the constitution all you want to." R. Doc. 6-1 at 5.

Mr. Barnett filed suit against Jefferson County and against the jail administrator who rejected his grievance, raising, as relevant here, a claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA) for the deprivation of his Bible. R. Doc. 6 at 3-4; *see also* 42 U.S.C. § 2000cc-1. Without giving Mr. Barnett a chance to make any argument on the matter the district court held that the claim was foreclosed because RLUIPA did not authorize money damages against Jefferson County or against the jail administrator in her individual capacity. R. Doc. 7 at 4. On direct appeal, again without giving Mr.

Barnett a chance to make any argument, this Court summarily affirmed. But the district court was wrong on both questions.

First, the district court erred in holding that money damages are not available against municipalities under RLUIPA. Two of this Court's sister circuits have held the opposite. *See Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 289-90 (5th Cir. 2012); *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1168-69 (9th Cir. 2011); *see also Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 261, 273 (3d Cir. 2007); *Tree of Life Christian Sch. v. City of Upper Arlington*, 905 F.3d 357, 365-66 (6th Cir. 2018). The question whether RLUIPA authorizes money damages against municipalities is thus a "question of exceptional importance" because it "involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." Fed. R. App. P. 35(b)(1)(B).

Second, the district court erred in holding that Mr. Barnett could not raise his RLUIPA claim against a jail administrator in her individual capacity. The Supreme Court's recent decision in *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020), interpreted language in the Religious Freedom

Restoration Act (RFRA) that is nearly identical to that in RLUIPA and found that RFRA authorized damages against federal officials in their individual capacities. *Id.* at 493. The question whether RLUIPA authorizes money damages against officials in their individual capacities thus warrants rehearing because the panel decision "conflicts with a decision of the United States Supreme Court." Fed. R. App. P. 35(b)(1)(A).

The panel or this Court sitting en banc should vacate the one-line summary affirmance and set a briefing schedule to allow Mr. Barnett to submit argument on the important questions presented in this case. Mr. Barnett does not seek a panel opinion ruling in his favor at this junction. Nor does he seek hearing by this Court sitting en banc. He simply asks that either the panel or the whole court intervene to vacate the summary affirmance to allow him to submit briefing to a merits panel on the important legal questions at issue before resolving this case.

RLUIPA is meant to "secure redress for inmates who encounter[] undo barriers to their religious observances" by jails or prisons, "[w]hether from indifference, ignorance, bigotry, or lack of resources." *Cutter v. Wilkinson*, 544 U.S. 709, 716-17 (2005). And for people like Mr. Barnett who spend time in county jail, damages under RLUIPA may be

their only chance to vindicate their rights—injunctive relief will be impossible, given the comparatively short stints that most people spend in jails before being transferred. The panel or this Court sitting en banc should vacate the summary affirmance and order full briefing.

STATEMENT OF THE CASE

Taking the allegations in the complaint as true, according them the liberal construction afforded pro se litigants, and drawing all inferences in Mr. Barnett's favor, the facts are as follows:

Mr. Barnett is a devout Christian who was a prisoner at the Jefferson County Jail. R. Doc. 6 at 3-4; R. Doc. 6-1 at 5. Even while he was incarcerated, he attempted to continue to practice his faith, receiving pastoral visits and reading the Holy Bible. *Id*. But that changed when he was thrown in disciplinary segregation for a full month. R. Doc. 6 at 3; R. Doc. 6-1 at 3, 5. During that entire time, he was not allowed to have his Bible. R. Doc. 6 at 3-4; R. Doc. 6-1 at 5. Being deprived of his Bible caused Mr. Barnett anxiety, stress, and depression because he was forced "to sin and be a sinner." R. Doc. 6 at 4. When he filed a grievance requesting to have his Bible while in segregation, Brenda Short, a jail administrator, told him: "You can have nothing more than what you have. Your behavior

has taken away all privileges. Feel free to quote the constitution all you want to—I don't mind at all." R. Doc. 6-1 at 3, 5; *see also* R. Doc. 6 at 6-7; *compare also* R. Doc. 6-1 at 5 *with* R. Doc. 1-10 (showing jail administrator Short responds to grievances). Shortly after being released from disciplinary segregation, Mr. Barnett was transferred to another prison. R. Doc. 7 at 4.

Mr. Barnett then filed suit, raising, as relevant here, a claim under RLUIPA and a claim under 42 U.S.C. § 1983 for a violation of the First Amendment's Free Exercise Clause against both Jefferson County and Brenda Short, in her individual and official capacities. R. Doc. 6 at 1-3. Because Mr. Barnett is a prisoner, the district court screened the complaint before serving defendants. *See* 28 U.S.C. § 1915A. It concluded that Mr. Barnett could not raise a RLUIPA claim because he could not seek money damages against either Jefferson County or defendant Short.[1] R. Doc. 7 at 3-4. It also dismissed his Free Exercise Clause claim, finding that he could not sue defendants on a respondeat superior theory

[1] The district court also found that Mr. Barnett could not seek injunctive relief under RLUIPA because he had been transferred from the jail in question. R. Doc. 7 at 4. Mr. Barnett does not challenge that holding on appeal.

of liability and that his allegations did not amount to a "substantial burden" as required for a Free Exercise Clause violation. *Id.* at 7, 11-12. Mr. Barnett did not have an opportunity to respond to the district court's holdings.

On appeal, Mr. Barnett retained the pro bono services of the MacArthur Justice Center, a prominent civil rights firm that litigates important prisoners' rights issues in the courts of appeals. *See, e.g.*, *McAdoo v. Martin*, 899 F.3d 521 (8th Cir. 2018); *Townsend v. Murphy*, 898 F.3d 780 (8th Cir. 2018). Counsel paid the filing fee and entered appearances. Counsel also spoke with the clerk's office on several occasions regarding when a briefing schedule would be set and was told to await a court order. Without setting a briefing schedule, this Court summarily affirmed the district court. App. Dkt. 9, Order & Judgment.

This petition marks the first time that Mr. Barnett has been able to point out errors in the district court's holdings.

ARGUMENT

I. Panel Rehearing Or Rehearing En Banc Is Warranted Because The District Court Wrongly Dismissed Mr. Barnett's RLUIPA Claim.

RLUIPA prohibits a government from substantially burdening religious exercise unless the policy or action in question is the least restrictive means of achieving a compelling interest. *Holt v. Hobbs*, 574 U.S. 352, 362 (2015). Congress enacted RLUIPA to extend broad protections to "institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter*, 544 U.S. at 721.

The district court dismissed Mr. Barnett's RLUIPA claim, not because of any defect on the merits, but because it believed that he could not seek money damages against either Jefferson County or the jail administrator he sued in her individual capacity. The district court was wrong.

A. This Court's Sister Circuits Have Held That Money Damages Are Available Under RLUIPA Against Municipalities.

The district court's conclusion that RLUIPA did not authorize money damages against Jefferson County contradicts the weight of

authority from other circuits: The consensus view is that damages are available against municipalities under RLUIPA. *See Opulent Life Church*, 697 F.3d at 289-90; *Centro Familiar*, 651 F.3d at 1168-69; *see also Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 261-73; *Tree of Life Christian Sch.*, 905 F.3d at 365-66.

The Ninth Circuit's reasoning in *Centro Familiar* is representative. First, the court analyzed RLUIPA's text. The statute authorizes claims against a "government" and explicitly defines "government" to include a "municipality." 651 F.3d at 1168 (quoting 42 U.S.C. § 2000cc-5(4)(A)(i)). Then, the Ninth Circuit looked to *Franklin v. Gwinett County Public Schools*, 503 U.S. 60 (1992), which interpreted the phrase "appropriate relief" under Title IX and concluded that the phrase encompassed money damages against municipal entities unless there is "clear direction" in the statute to the contrary. *Centro Familiar*, 651 F.3d at 1168. Because RLUIPA, too, uses the phrase "appropriate relief," and there is no "clear direction" to exclude money damages, the Ninth Circuit concluded that "under *Franklin*, municipalities are liable for monetary damages for violations of RLUIPA." *Id.*

For its contrary conclusion, the district court cited this Court's opinion in *Van Wyhe v. Reisch*, 581 F.3d 639 (8th Cir. 2009). R. Doc. 7 at 4. But *Van Wyhe* was about monetary damages against *States*, who may invoke Eleventh Amendment sovereign immunity. Municipalities have no such shield. *See Centro Familiar*, 651 F.3d at 1168-69.

Because summary affirmance on this point has put this Circuit out of step with its sister circuits, this Court should vacate the summary affirmance and allow full briefing on the question of whether RLUIPA authorizes money damages against municipalities.

B. The Supreme Court Has Signaled That Money Damages Are Available Under RLUIPA Against Officials In Their Individual Capacities.

The district court's conclusion that RLUIPA did not authorize money damages against defendant Short is contrary to the Supreme Court's decision in *Tanzin*.

In *Tanzin*, the Supreme Court considered whether the Religious Freedom Restoration Act (RFRA) authorized damages against officials in their individual capacities. 141 S. Ct. at 489. The Court analyzed RFRA's plain text, its legislative history, and this country's longstanding history of awarding damages as appropriate relief in suits against government

officials and concluded that RFRA authorized individual capacity suits for money damages. *Id.* at 490-92. It also rejected the argument that *Sossamon v. Texas*—the case finding money damages unavailable under RLUIPA in actions against States—affected the analysis: "The obvious difference is that this case features a suit against individuals, who do not enjoy sovereign immunity." *Id.* at 492-93.

The relevant text, legislative history, and history of RLUIPA are nearly identical to that of RFRA. *Compare* 42 U.S.C. § 2000bb-2 (RFRA), *with* 42 U.S.C. § 2000cc-5 (RLUIPA). Indeed, RFRA is simply the federal counterpart to RLUIPA's liability for State and local officials. *Compare* 42 U.S.C. § 2000bb-2(1) *with* 42 U.S.C. § 2000cc-5(4)(A)(i)-(ii). And, as the *Tanzin* court noted, individuals like defendant Short do not enjoy sovereign immunity. 141 S. Ct. at 492-93. For the same reasons as the Supreme Court concluded in *Tanzin* that money damages were available under RFRA against officials in their individual capacities, then, they should be available under RLUIPA against officials in their individual capacities.

The district court held Mr. Barnett could not seek damages against defendant Short in her individual capacity based on an unpublished

opinion of this Court, which in turn cited a number of sister circuits who had concluded that RLUIPA did not authorize damages against officials in their individual capacities. R. Doc. 7 at 4 (citing *Scott v. Lewis*, 827 F. App'x 613, 613 (8th Cir. 2020)). But those cases predate *Tanzin*. *See Haight v. Thompson*, 763 F.3d 554, 570 (6th Cir. 2014) (collecting cases). And in any event, those cases were wrongly decided. Most assume that because RLUIPA was passed under the Spending Clause, it cannot impose liability against a party in an individual capacity. *See, e.g.*, *Wood v. Yordy*, 753 F.3d 899, 903 (9th Cir. 2014). But the Supreme Court has held that Spending Clause legislation can even impose *criminal* liability—a far greater incursion than individual capacity damages. *Sabri v. United States*, 541 U.S. 600, 602 (2004). And in any event, Congress relied on provisions of the Constitution other than the Spending Clause to pass RLUIPA. *See, e.g.*, 42 U.S.C. § 2000cc-1(b)(2) (Commerce Clause).

Because summary affirmance on this point has put this Circuit out of step with a decision of the Supreme Court, this Court should vacate the panel's summary affirmance and allow full briefing on the question

whether RLUIPA authorizes money damages against officials in their individual capacities.

C. The Reasons For Dismissing Mr. Barnett's Free Exercise Clause Claim Do Not Apply To His RLUIPA Claim.

The district court rejected Mr. Barnett's RLUIPA claim solely because it believed money damages were not available against the defendants in this case. It rejected his Free Exercise Clause claim for two separate reasons, neither of which apply to his RLUIPA claim.[2]

1. First, the district court held that Mr. Barnett could not proceed against Jefferson County on his First Amendment claim because respondeat superior liability is not available for § 1983 claims. R. Doc. 7 at 7. But respondeat superior liability *is* available for RLUIPA claims. As one court put the point: "RLUIPA is violated when a 'government' 'impose[s] a substantial burden on the religious exercise of a person.' . . . In speaking of liable parties as 'governments,' rather than 'persons,' RLUIPA appears implicitly to authorize respondeat superior liability."

[2] If this Court grants this petition and allows briefing, Mr. Barnett also intends to argue that the dismissal of his Free Exercise Clause claim was wrong and that, at the very least, he should have been given leave to amend that claim.

Agrawal v. Briley, No. 02-6807, 2004 WL 1977581, at *14 (N.D. Ill. Aug. 25, 2004).[3] And to the extent there is any ambiguity, RLUIPA contains a statutory provision that the statute should be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted." 42 U.S.C. § 2000cc-3(g).

The district court also believed Mr. Barnett's Free Exercise Clause claim could not proceed against defendant Short because he failed to allege personal involvement. R. Doc. 7 at 9. As was just explained, RLUIPA allows respondeat superior liability: Even if defendant Short had not been directly involved, she would have been liable for the misconduct of her subordinates. In any event, the district court was simply wrong to find a lack of personal involvement. As Mr. Barnett explained in an exhibit to his amended complaint, Short was the one who received and rejected Mr. Barnett's grievance regarding the Bible, and

[3] *See also Knight v. Shults*, No. 3:18-CV-34, 2020 WL 1282497, at *3 (S.D. Miss. Feb. 7, 2020), *report and recommendation adopted*, 2020 WL 1277211 (S.D. Miss. Mar. 16, 2020); *Alderson v. Burnett*, No. 1:07-CV-1003, 2008 WL 4185945, at *3 (W.D. Mich. Sept. 8, 2008); *Layman Lessons, Inc. v. City of Millersville*, 636 F. Supp. 2d 620, 643 (M.D. Tenn. 2008); *Moro v. Winsor*, No. 1:05-CV-452, 2008 WL 4371289, at *8 (S.D. Ill. Aug. 5, 2008), *report and recommendation adopted in part, rejected in part*, 2008 WL 4371288 (S.D. Ill. Sept. 22, 2008).

"[e]verything goes through Brenda Short" in the Jefferson County Jail. R. Doc. 6-1 at 3, 5; *see also* R. Doc. 6 at 7; R. Doc. 7 at 10 n.3.

2. Second, the district court found that Mr. Barnett's allegations did not state a claim under the Free Exercise Clause because it believed Mr. Barnett did not "assert that a defendant's action placed a substantial burden on his ability to practice his religion." R. Doc. 7 at 11. But the substantial burden test for purposes of the Free Exercise Clause is far more stringent than the substantial burden test for purposes of RLUIPA. *See Holt*, 574 U.S. at 361-62 (reversing the lower courts for incorrectly imposing the First Amendment's higher substantial burden standard on RLUIPA claim). That the district court found Mr. Barnett's allegations failed to clear the Free Exercise Clause does not mean they cannot clear RLUIPA's far lower threshold.

Indeed, Mr. Barnett's allegations more than cleared RLUIPA's substantial burden threshold. He alleged that he was denied his Bible while in segregation—where he remained for a month—and that this "deprivation of religion" caused him "anxiety, stress, [and] depression" because it forced him "to sin and be a sinner, causing guilt and shame to [his] person." R. Doc. 6 at 3-4. Those allegations amount to a more-than-

substantial burden. *See Lovelace v. Lee*, 472 F.3d 174, 187-88 (4th Cir. 2006) (concluding prisoner met RLUIPA's substantial burden threshold by alleging he was unable to participate in congregate prayer for 24 days); *see also Sutton v. Rasheed*, 323 F.3d 236, 253-57 (3d Cir. 2003) (explaining prisoners must be allowed to keep sacred books that their religion encourages them to read). Even if Mr. Barnett was deprived of his Bible for just one day—as the district court inexplicably concluded, R. Doc. 7 at 12[4]—he still would have stated a claim under RLUIPA. *Blankenship v. Setzer*, 681 F. App'x 274, 276-77 (4th Cir. 2017) (holding a 10-day Bible deprivation substantially burdened prisoner's religious liberty because "deprivation of a Bible for longer than a period of 24 hours forced him to modify his behavior and violate his religious beliefs").

The district court's opinion thus gives no reason to believe that, but for its mistake regarding the availability of damages against the defendants in this case, it would have dismissed Mr. Barnett's RLUIPA claim.

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[4] Mr. Barnett's complaint makes clear that he was deprived of his Bible for a full month: He was placed in segregation on March 12; remained in segregation until April 11; and was told that he could not have a Bible while in segregation because his "behavior has taken away all privileges." R. Doc. 6-1 at 2-3, 5.

* * *

There are thousands of county jails around the country, holding hundreds of thousands of inmates.[5] The average inmate spends less than a month in a county jail before he is transferred.[6] For those hundreds of thousands of inmates, RLUIPA's promise of injunctive relief for violations of their religious rights is a dead letter—the average stay means that any request for such relief will inevitably be mooted out by transfer to another facility. This Court should vacate its summary affirmance and allow briefing on the question whether RLUIPA's promise of money damages, too, is a dead letter for those inmates.

II. The Panel's Summary Affirmance Should Be Vacated Because Mr. Barnett Has Never Had An Opportunity To Explain Why The District Court's Screening-Stage Dismissal Was Wrong.

The district court dismissed Mr. Barnett's complaint sua sponte, meaning that he never had the opportunity to brief the important questions his case raises or to object to the district court's holding. Nor did this Court afford Mr. Barnett, now represented by counsel, an

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[5] Todd D. Minton and Zhen Zeng, *Jail Inmates in 2020 – Statistical Tables*, U.S. DEP'T OF JUSTICE, Dec. 2021, at 2, https://bjs.ojp.gov/content/pub/pdf/ji20st.pdf.

[6] *Id.* at 4.

opportunity to explain on appeal why the district court's dismissal was wrong. Appellate counsel appeared and paid the filing fee; when a briefing schedule was not entered, counsel called the clerk's office several times and was told to await a briefing schedule. Then, this Court summarily affirmed the district court's dismissal without giving counsel an opportunity to submit any briefing or argument or even draw this Court's attention to errors in the district court's opinion. App. Dkt. 9. In any other circuit, Mr. Barnett would have been afforded notice and an opportunity to respond before the district court's opinion was affirmed.[7]

This Court's summary affirmance represents an outlier legal conclusion (that RLUIPA does not authorize money damages against a county or against a prison official in her individual capacity) using an outlier procedure (summary affirmance without an opportunity to be heard). The panel or this Court en banc should vacate the summary

[7] *See* 2d Cir. L. R. (no summary affirmance rule); 5th Cir. L. R. (same); 6th Cir. L. R. (same); 7th Cir. L. R. (same); 1st Cir. L. R. 27.0(c) (summary affirmance only where party has been given notice and opportunity to object); 3d Cir. L. R. 27.4(a) (same); 3d Cir. I.O.P. 10.6 (same); 9th Cir. R. 3-6(a) (same); 10th Cir. R. 27.3(B) (same); 11th Cir. R. 31-1(c) (same); D.C. Cir. R. 27(b)(4)(c) (same); 4th Cir. R. 27(f)(2) (summary affirmance only for jurisdictional or procedural defect).

affirmance and allow Mr. Barnett the opportunity to submit briefing on this case before rendering a decision.

CONCLUSION

For the foregoing reasons, this Court should grant rehearing or rehearing en banc to vacate the summary affirmance and allow briefing on the important issues presented by this case.

Date: May 2, 2023

Respectfully submitted,

/s/ Rosalind E. Dillon

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 35(b)(2)

1. This Petition complies with type-volume limitation of Rule 35(b)(2) of the Federal Rules of Appellate Procedure because, according to the word count function of Microsoft Word 2019, the Petition contains 3,560 words excluding the parts of the petition exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

2. This Brief complies with the typeface and type style requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Century Schoolbook font.

Date: May 2, 2023 */s/ Rosalind E. Dillon*

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2023, I electronically filed the foregoing document through the court's electronic filing system, and that it has been served on all counsel of record through the court's electronic filing system.

/s/ Rosalind E. Dillon