No. 22-2342

United States Court of Appeals for the Seventh Circuit

THOMAS WALKER,
Plaintiff-Appellant.

v.

JOHN BALDWIN, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois, Western Division
No. 3:19-cv-50233
Hon. Iain D. Johnston

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

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RULE 26.1 DISCLOSURE STATEMENT

There is no new or revised information in this statement.

1. **The full name of every party represented by us in this case.**

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2. **The names of all law firms whose partners or associates appeared for the party in this case:**

   Harvard Law School Religious Freedom Clinic

3. **If the party is a corporation:**

   a. **Parent Corporations, if any:** N/A

   b. **Publicly held companies that own more than 10% of the party's stock, if any:** N/A

4. **Information required by FRAP 26.1(b) — Organizational Victims in Criminal Cases**

   N/A

5. **Debtor information required by FRAP 26.1(c)(1) and (2):**

   N/A

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INTRODUCTION

In passing RLUIPA, Congress sought to ensure "appropriate relief" for state and local government officials' religious freedom violations in the land use and prison contexts. The question before the Court is whether "appropriate relief" can include damages. The answer is the same as it is under RFRA: In both statutes, "appropriate relief" means the remedies available under 42 U.S.C. § 1983, including damages against officials in their individual capacity. *See Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020).

In *Tanzin*, the Supreme Court considered this question under RFRA. Looking at the statute's text from every angle, the Court held that RFRA provides a clear answer. The term "appropriate relief" is broad and open-ended, and Congress chose to allow relief not only against the Government but against individual officials and other persons acting under color of state law—a choice that would serve no purpose if the statute allowed only equitable relief. In doing so, Congress signaled its intent to track § 1983, under which "damages claims have always been available" for religious freedom violations. *Id.* at 492.

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

Without the benefit of *Tanzin*'s guidance, this Court construed RLUIPA narrowly to avoid concerns that allowing individual-capacity damages claims under the Act might exceed Congress's powers under the Spending Clause. *Nelson v. Miller*, 570 F.3d 868, 886–89 (7th Cir. 2009). But the Court's concerns were misplaced. Congress directed that RLUIPA must be construed to provide the maximum relief permitted by the Constitution, and the Supreme Court has made clear that Congress may use its broad Spending Clause powers to impose liability on nonrecipients of federal funds. *See, e.g.*, *Sabri v. United States*, 541 U.S. 600, 608 (2004). More to the point, the Supreme Court's intervening decision in *Tanzin* makes clear that "appropriate relief" can and does include damages against government officials.

Ultimately, this case isn't just about whether claimants like Mr. Walker can recover damages. It's about whether they can receive any

relief at all. As with RFRA, RLUIPA's text, purpose, and history confirm that Congress intended to provide them a remedy.

INTEREST OF AMICUS CURIAE[1]

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 helped lead the effort to enact RLUIPA into law.

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting this brief; and no person other than amicus curiae or his counsel contributed money intended to fund preparing or submitting this brief.

ARGUMENT

I. By providing for all "appropriate relief" against officials who violate prisoners' religious rights, RLUIPA ensures that violations can be remedied with damages.

A. RLUIPA's text provides a damages remedy.

Congress passed RLUIPA to expand prisoners' access to remedies for state actions burdening their free exercise of religion. In appropriate cases, those remedies include personal-capacity damages. Indeed, in many cases, damages would be the only relief available.

To begin with, the Court should start with the presumption that RLUIPA's remedial language carries the same meaning it does in RFRA. *See Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 863 (7th Cir. 2018) ("[W]hen Congress uses the same language in two statutes having similar purposes . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." (quoting *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005))).

Just like RFRA, RLUIPA allows plaintiffs to seek all "appropriate relief" against the "government," including any state "official." 42 U.S.C. §§ 2000cc-2(a), 2000cc-5(4)(A). That language is "clear." *Tanzin*, 141 S. Ct. at 490. 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—reaching not only any state or local "official" but "any *other* person acting under color of State law." § 2000cc-5(4)(A)(ii)–(iii) (emphasis added).

Were "appropriate relief" not to include damages against individual officials, 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—relief they could have simply obtained against the government itself, binding the government as sovereign but providing no compensation for past violations. Congress would have had no need to go out of its way to define "government" to include both official and nonofficial state actors. Those provisions make sense only if RLUIPA permits individual-capacity damages claims.

The term "appropriate relief" also confirms this reading. As the Supreme Court has explained, that term "is 'open-ended' on its face." *Tanzin*, 141 S. Ct. at 491. While the word "appropriate" is not a sufficiently clear statement to overcome the traditional bar against imposing damages on the government as sovereign, *see Sossamon v.*

Texas, 563 U.S. 277, 286 (2011), the legal tradition here is completely different. Imposing damages against individual actors is not only suitable ("appropriate"), but in line with decades of civil rights law. *See Tanzin*, 141 S. Ct. at 491.

This interpretation of "appropriate relief" is buoyed by the presumption that all types of remedies are available unless Congress specifies something else. *Franklin v. Gwinnett Cnty. Pub. Schools*, 503 U.S. 60, 66 (1992) (courts should "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise"). There is no indication in RLUIPA's text that Congress wished to exclude damages.

To the contrary, RLUIPA's legislative history confirms the opposite. 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. *See* H.R. Rep. No. 106-219, at 29 (1999) ("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 . . . ."). Because RLUIPA's remedies provision was "based on the corresponding

provision of RFRA," it too provides for damages against government officials. *Religious Liberty Protection Act of 1999: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 111 (1999) (statement of Douglas Laycock, Then-Professor, University of Texas Law School).

What's more, courts have also harmonized the two statutes in the other direction 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 not to override the sovereign immunity of the federal government. *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 Hawaii, Inc. v. Holder*, 676 F.3d 829, 841 (9th Cir. 2012) (same). This further confirms that "appropriate relief" in RLUIPA and "appropriate relief" in RFRA mean the same thing.

By contrast, reading the same language to mean different things would lead to arbitrary results. A prisoner's ability to recover damages for clearly established religious freedom violations would come down to

whether the prisoner happens to be held at a federal or a state or local facility. Nothing in RLUIPA's text or surrounding history suggests Congress would have wanted that result.

B. Damages are "appropriate relief" under RLUIPA.

In determining what "appropriate relief" includes, *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*." *Id.* at 492 (discussing *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872 (1990)).

Looking to that context, the Court noted that damages against government officials had "long been awarded as appropriate relief." *Id.* at 491. From the early Republic, damages were awarded against government officials at common law. *Id.* And even when statutes displaced the common law, Congress carried the damages remedy forward. *Id.* at 491–92.

As *Tanzin* explained, damages were "also commonly available against state and local government officials." *Id.* at 491. Most notably,

§ 1983 has for decades allowed plaintiffs to recover damages for religious freedom violations. *Id.* (citing cases in which plaintiffs were allowed to seek damages against state officials under § 1983).

Like RFRA, RLUIPA also reinstated (and strengthened) pre-*Smith* protections and rights in the zoning and prison contexts. Thus, the same logic that applied in *Tanzin* applies here: Prisoners suing under RLUIPA must have at least the same avenues for relief against prison officials that they would have had before *Smith*.

Those avenues were broad. Under § 1983, prisoners can seek "remedies comparable to all civil litigants," including damages. *Williams v. Lane*, 851 F.2d 867, 885 (7th Cir. 1988). And they have long recovered damages against prison officials for violating their free exercise rights. *See Bryant v. McGinnis*, 463 F. Supp. 373, 384–88 (W.D.N.Y. 1978) (awarding damages against state officials for refusing to recognize Muslim inmates' religion and preventing them from accessing their minister, wearing religious articles, or observing a religious diet); *see also, e.g.*, *Vanscoy v. Hicks*, 691 F. Supp. 1336, 1337 (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) (awarding damages against leaders of a state-sponsored halfway house who forced religious views on residents); *Stovall v. Bennett*, 471 F. Supp. 1286, 1289–92 (M.D. Ala. 1979) (awarding damages against prison official who threated to discipline prisoners seeking regular worship services); *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 C 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).

This context confirms that damages were commonly awarded against prison officials long before Congress passed RLUIPA. Damages are thus an "appropriate" remedy under RLUIPA, just as they are under RFRA. *See Tanzin*, 141 S. Ct. at 492.

C. *Tanzin* abrogated this Court's decision in *Nelson*.

Before *Tanzin* clarified the meaning of "appropriate relief" in RFRA (and by extension, RLUIPA), this Court interpreted the same term to exclude damages of any kind. *Nelson*, 570 F.3d at 889. Under *Tanzin*,

however, that conclusion is now untenable. *Nelson* should be revisited and overruled for at least three reasons.

First, *Nelson* erred from the start by applying the canon of constitutional avoidance to RLUIPA. *See id.* at 889 & n.13. Although that canon normally permits courts to choose between two permissible readings of a statute by avoiding the one that raises "serious constitutional doubts," *id.* at 889 n.13 (internal quotation marks omitted), RLUIPA eliminated that choice. Instead, Congress flipped the presumption, directing courts to choose the reading that provides relief "to the maximum extent permitted by the . . . Constitution." 42 U.S.C. § 2000cc-3(g); *see also* H.R. Rep. No. 106-219, at 29 (RLUIPA's broad-construction provision intended to apply to "all [of RLUIPA's] other provisions"). *Nelson* did not address that provision, and its analysis cannot be squared with it.

Second, *Tanzin* makes clear that *Nelson*'s interpretation of "appropriate relief" was mistaken. Indeed, because *Nelson* relied on the constitutional avoidance canon, it sidestepped a proper analysis of the various textual and contextual cues that "provide[] a clear answer" here. *Tanzin*, 141 S. Ct. at 490. Not only that, the Court adopted a reading that would render some of the Act's provisions useless and would deprive

many claimants of effective relief. *See id.* at 492 (declining to interpret RFRA's "appropriate relief" language to exclude "the *only* form of relief that can remedy some RFRA violations").

Third, *Nelson*'s concern that reading RLUIPA to allow individual-capacity damages might raise Spending Clause concerns was misplaced.[2] That Clause (bolstered by the Necessary and Proper Clause) gives Congress "broad discretion to . . . spend for the 'general Welfare'" and "impose limits on the use of such funds to ensure they are used in the manner Congress intends." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013); *see also New York v. United States*, 505 U.S. 144, 158 (1992) (noting that the Court has given the Spending Clause a "broad construction").

Looking to out-of-circuit decisions, *Nelson* reasoned that "Spending Clause legislation can only generate liability for funding grant recipients." *Nelson*, 570 F.3d at 888. But by the time *Nelson* was decided, the Supreme Court had made clear that those other circuits were wrong. As Plaintiff's Opening Brief shows (at 32–37), the Spending Clause can

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[2] Because *Nelson* (incorrectly) relied on the constitutional-avoidance canon, it did not in fact decide the Spending Clause question. 570 F.3d at 889 & n.13.

"bring federal power to bear directly on individuals" who are not the recipients of federal funds. *Sabri v. United States*, 541 U.S. 600, 608 (2004); *see* Opening Br. 37–38 (citing additional cases).

This Court need not follow *Nelson* if there are "compelling reasons" not to. *Fed. Trade Comm'n v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 775–76 (7th Cir. 2019). And "an opinion that contains no discussion of a powerful ground later advanced against it is more vulnerable to being overruled than an opinion which demonstrates that the court considered [that] ground." *United States v. Hill*, 48 F.3d 228, 232 (7th Cir. 1995). This is such a case. *Nelson* did not consider Supreme Court precedents that rejected the Spending Clause interpretation on which it relied.

For support, *Nelson* also looked to *Smith v. Metropolitan School District Perry Township*, 128 F.3d 1014 (7th Cir. 1997), and other decisions limiting Title IX liability to the recipients of federal funds. But it was Title IX itself that led *Metropolitan School District* to that conclusion. *Id.* at 1019 (relying on Title IX's "purpose," "legislative history," and "statutory provisions"). Unlike RLUIPA, Title IX does not give plaintiffs an express right to sue, let alone the right to sue individuals or seek all

"appropriate relief." *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 683 (1979). And not only has the Supreme Court "repeatedly stated that the purpose of Title IX is to prevent discrimination by grant recipients," but its "legislative history . . . supports limiting the statute to the practices of grant recipients." *Metro. Sch. Dist.*, 128 F.3d at 1019 (citations omitted). Here, by contrast, RLUIPA's text, purpose, and legislative history all point toward holding prison officials personally accountable for free exercise violations.

Finally, *Nelson* worried that imposing individual-capacity damages on state and local prison officials would raise "federalism and accountability concerns." 570 F.3d at 889. But those concerns have posed no obstacle to other valid Spending Clause laws that similarly imposed liability on nonrecipients of federal funds. *See, e.g.*, *Sabri*, 541 U.S. at 608. And in any event, "this exact remedy has coexisted with our constitutional system since the dawn of the Republic." *Tanzin*, 141 S. Ct. at 493.

Nelson should be revisited and overruled.

II. RLUIPA's remedial aims require damages.

RLUIPA is the culmination of Congress's repeated efforts to ensure that states do not impinge free exercise rights. Holding that RLUIPA

denies state inmates damages for violations of those rights would frustrate Congress's decades-long efforts to protect religious freedom.

If damages were unavailable, many plaintiffs, particularly institutionalized persons, would be left without any relief at all. Inmates often cannot vindicate their rights until the 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, it is often damages or nothing for victims of past harms. *Higgason v. Farley*, 83 F.3d 807, 811 (7th Cir. 1996); *see also Tanzin*, 141 S. Ct. at 492 (explaining that a "damages remedy is not just 'appropriate' relief" but is often also "the *only* form of relief that can remedy" a religious claimant's injury (emphasis in original)). Reading a damages exclusion into RLUIPA would conflict with the statute's text and core purpose.

Many inmates spend only a short time in the correctional system and move among facilities within it. Inmates released in 2018 had spent an average of only 2.7 years in prison and just 26 days in jail. U.S. Bureau of Justice Statistics, NCJ 255662, *Time Served in State Prison,*

2018 at 1 (2021); 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 for those who are transferred from the facility where their rights were violated. State correctional systems are often transitory, with inmates spending time in multiple jails, prisons, and other detention facilities. Jailers transfer inmates due to overcrowding, to provide healthcare, and for sundry administrative reasons. And each time they do, the transfer renders any request for injunctive relief against an earlier prison moot. *Moore v. Thieret*, 862 F.2d 148, 150 (7th Cir. 1988). Sometimes jailers transfer prisoners for the very purpose of mooting their claims.

These inmates often lack the time to secure judicial relief from violations of their free exercise rights while incarcerated. Before inmates can even sue, the Prison Litigation Reform Act requires them to first file a grievance and exhaust all available levels of prison administrative review. 42 U.S.C. § 1997e(a); *see Ross v. Blake*, 578 U.S. 632, 639 (2016) (holding that prisoners must exhaust all available grievance

procedures—"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, receive the necessary cooperation from officials, 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 inmate's rights will be vindicated before their injunctive claims become moot.

In addition, at any point during litigation, prison officials could seek to avoid liability by changing their policies or granting the plaintiff's requested accommodation. Without damages, that would give states another way (in addition to transfers) to strategically moot claims before courts could award relief, nullifying RLUIPA's protections of religious freedom.

Even more strangely, denying damages under RLUIPA would result in unequal treatment between federal and state prisoners, despite

RLUIPA's and RFRA's same language and purpose. Given the identical language used in both statutes and the background of RLUIPA as a re-affirmation of RFRA's application to the states, damages should be available under RLUIPA as they are under RFRA. *See Tanzin*, 141 S. Ct. at 489.

In short, Congress passed RLUIPA for cases like this one. If Mr. Walker were a federal prisoner, he would have a right to money damages under RFRA. *Tanzin*, 141 S. Ct. at 489. No one doubts that if he were still in prison being denied his free exercise rights, he could bring suit. *See Koger v. Bryan*, 523 F.3d 789, 804 (7th Cir. 2008). Under *Nelson*'s strained construction of RLUIPA, however, Mr. Walker has no claim. That is the opposite of "appropriate relief."

CONCLUSION

Reading a prohibition on money damages in individual-capacity suits into RLUIPA would ignore its context, history, and text and would reject Congress's clear and lawful exercise of its legislative authority to guarantee prisoners the ability to vindicate their most sacred

rights. *Nelson* should be overruled, and the decision below should be reversed.[3]

Respectfully submitted,

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[3] Amicus thanks John Heo, Nicolas Wilson, and Mazzen Shalaby, students in the Harvard Law School Religious Freedom Clinic, for helping to prepare this brief.

CERTIFICATE OF COMPLIANCE

This brief complies with 7th Cir. R. 29 because it contains 3,534 words.

This brief complies with the typeface and type-style requirements of Fed. R. App. P. Rule 32(a) and 7th Cir. R. 32 because it has been prepared in a proportionally spaced, 14-point Century Schoolbook font.

Dated: October 26, 2022

/s/ *Joshua C. McDaniel*
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CERTIFICATE OF SERVICE

I certify that on October 26, 2022, I served this document on all parties or their counsel of record via CM/ECF.

Dated: October 26, 2022

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