23-131

United States Court of Appeals

for the

Second Circuit

FRANKLIN LOVING,

Plaintiff-Appellant,

– v. –

ROBERT MORTON, Acting Superintendent of Downstate Corr. Facility,

Defendant-Appellee,

SUPERINTENDENT, DOWNSTATE CORRECTIONAL FACILITY, M.D. JOHN OR JANE DOE, NORIEL DEGUZMAN, Physician Assistant, Downstate Corr. Facility,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK (Docket No. 20-cv-11135)

BRIEF FOR APPELLANT FRANKLIN LOVING

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STATEMENT REGARDING ORAL ARGUMENT

Appellant Franklin Loving respectfully requests oral argument. This appeal raises an important and recurring question regarding the interpretation of a federal statute. Oral argument would aid the Court's decisional process.

INTRODUCTION

This case raises the question of whether the Religious Land Use and Institutionalized Persons Act ("RLUIPA") authorizes a cause of action for money damages against state officials acting in their individual capacities. The answer is yes. The Supreme Court's recent decision in *Tanzin v. Tanvir* (*Tanzin II*), 141 S. Ct. 486 (2020), confirms that such a cause of action exists and that damages are available in such a suit, thereby abrogating this Court's prior precedent in *Washington v. Gonyea*, 731 F.3d 143, 146 (2d Cir. 2013).

In *Tanzin II*, the Supreme Court construed RLUIPA's sister statute, the Religious Freedom Restoration Act ("RFRA"), and held that its clear text authorizes individual-capacity suits against officers for money damages. 141 S. Ct. at 490-91, 493. A cause of action for money damages must be available under RLUIPA as well. Both RFRA and RLUIPA contain the same cause of action and the same language providing for "appropriate relief" against government officials. Moreover, both statutes reflect Congress's intent to protect religious liberties by restoring the "compelling interest" test and remedial regime that existed prior to the Supreme Court's

decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

RFRA and RLUIPA's shared history further confirms *Tanzin II*'s application. Critical to the Supreme Court's statutory analysis in *Tanzin II* was RFRA's relationship to 42 U.S.C. § 1983. Prior to *Smith*, state prisoners could bring an individual-capacity suit under Section 1983 against state officials and obtain damages. Both RFRA and RLUIPA share Section 1983's operative language, permitting suits against "persons acting under color of law." 42 U.S.C. § 2000cc-5(4)(A)(ii)-(iii); *id.* § 2000bb-2(1). Because it "necessarily follows" from RFRA and RLUIPA's use of the "same phrase" that the statutes be "given the same broad meaning," *Tanzin II* authorizes individual-capacity suits under RLUIPA for money damages. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696 n.5 (2014). It would be incongruous to interpret theses sister statutes differently.

Indeed, in many instances—including this case—RLUIPA's protections would be rendered meaningless in the absence of damages. Here, the plaintiff, Franklin Loving, is a practicing Muslim whose religious tenets forbid the exposure of his body. However, on multiple occasions, Loving

was forced to undress for a mandatory physical examination. Before, during, and after the examination, prison medical professionals refused to close the exam room curtain, despite Loving's repeated pleas for privacy. Nor did the medical professionals provide Loving with a gown or inform him of his right to refuse the examination, in violation of prison policy. As a result, Loving's body was visible to passersby, in contravention of his religious beliefs.

Like many incarcerated individuals, Loving has since been transferred to a different facility, mooting any request for injunctive relief. For Loving and many others who are similarly situated, it is damages or nothing. RLUIPA's plain text and the Supreme Court's statutory analysis in *Tanzin II* foreclose that result. Because *Tanzin II* casts significant doubt on *Gonyea*, this Court should reconsider its holding and overrule *Gonyea* so that RFRA and RLUIPA are interpreted the same way.

STATEMENT OF ISSUES

1. Whether RLUIPA contains an express private right of action against state officials in their individual capacities.

2. Whether a prisoner whose religious freedoms have been violated may recover monetary damages from state officials in their individual capacities under RLUIPA's "appropriate relief" remedial provision.

STATEMENT OF THE CASE

A. Factual Background

Appellant Franklin Loving is a devout Muslim whose religious tenets forbid exposure of his body. JA-52-53. On more than one occasion, including in January 2019, Loving was incarcerated at Downstate Correctional Facility ("Downstate") for the "sole purpose" of his reception and admission into the custody of the New York State Department of Corrections and Community Supervision ("DOCCS"). JA-52. As part of the intake process at Downstate, Loving was required to undergo a medical and health review, whereby medical professionals obtained vitals, took urine and blood samples, and conducted a physical examination. *Id.* DOCCS policy provides that an inmate shall not be required to undress in front of anyone other than a medical professional during the examination. JA-53. It further mandates that, while in the examination room, inmates are to be visible *only* to the examining professional. *Id.*

Contrary to this policy, Loving was called into a door-less examination room and directed to take off all clothing, leaving only his underwear. JA-52. Despite Loving's repeated protests, the Downstate medical professionals did not close the curtain to protect his privacy, nor did they offer Loving a gown, per DOCCS policy. JA-52-53. This left Loving's body exposed to passersby, in violation of his religious practices. *Id.* Defendant Robert Morton, Acting Superintendent at Downstate, never informed Loving of his right to refuse any or all of the examination. JA-52.

Following the Downstate medical professionals' repeated exposure of Loving's body, he was transferred out of Downstate. *See* JA-48-49, 69.

B. Procedural History

In late 2020, while incarcerated at Bare Hill Correctional Facility, Loving filed a *pro se* complaint in the U.S. District Court for the Southern District of New York, *see* JA-10-14, which he subsequently amended three times, *see* JA-15-29, 30-47, 48-58. The operative complaint, as filed in July 2021, asserts violations of his rights under the U.S. Constitution and RLUIPA, *see* JA-48-53, and seeks monetary relief against Defendants in their official and individual capacities, JA-54.

In September 2021, Defendant Robert Morton filed a motion to dismiss all of Loving's claims. JA-59. Citing *Gonyea*, Morton argued that since "RLUIPA does not authorize claims for monetary damages against state officers in either their official or individual capacities," the district court should dismiss Loving's RLUIPA claim. *Def.'s Mem. of Law in Supp. of Dismissal*, Dkt. 29, at 9. Loving was subsequently transferred from Bare Hill Correctional Facility to Franklin Correctional Facility. *See Ltr. from Franklin Loving dated Feb. 22, 2022*, Dkt. 32.

On July 27, 2022, the district court dismissed Loving's claims. JA-60-61. With respect to Loving's RLUIPA claim, the district court held that "a plaintiff may only seek injunctive relief to redress a RLUIPA violation, irrespective of whether an individual is sued in his official or individual capacity." JA-81-82. Because Loving did not seek injunctive relief, and because his transfer from Downstate would have rendered any form of injunctive relief moot had he sought it, the court dismissed the RLUIPA claim. JA-81. The court also dismissed his claims under the Eighth, Fourteenth, and First Amendments. JA-72-81.

The district court entered final judgment on January 26, 2023. JA 85. Loving timely appealed. JA-86.

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 because Loving raised federal claims under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and RLUIPA, 42 U.S.C. § 2000cc *et seq*. JA-48-54. The district court dismissed all of Loving's claims and entered final judgment on January 26, 2023. JA-85. Loving timely filed a notice of appeal on January 31, 2023. JA-86. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STANDARD OF REVIEW

This Court "review[s] a district court's grant of a motion to dismiss *de novo*, accepting as true all factual claims in the complaint and drawing all reasonable inferences" in favor of the non-movant. *LaJolla Auto Tech, Inc. v. Am. Express Travel Related Servs. Co.* (*In re Am. Express Anti-Steering Rules Antitrust Litig.*), 19 F.4th 127, 137 (2d Cir. 2021) (quoting *Henry v. County of Nassau*, 6 F.4th 324, 328 (2d Cir. 2021)).

SUMMARY OF THE ARGUMENT

The Supreme Court's decision in *Tanzin II* confirms that RLUIPA authorizes a private right of action against state officials acting in their individual capacities and permits the award of money damages in such suits.

Tanzin II therefore abrogates this Court's precedent in *Gonyea* and requires reversal here.

In *Tanzin II*, the Supreme Court analyzed RFRA's text, context, history, and purpose, and held that RFRA provides a private right of action against officers in their individual capacities and authorizes the recovery of damages. First, the Court held that RFRA's remedial provision provides for individual capacity officer suits in the first instance because: (1) the text statutorily defines "government" to include "officer" *and* "other person acting under color of law"; and (2) RFRA draws on Section 1983's same language, which permits individual-capacity officer suits in the same field of civil rights. *Tanzin II*, 141 S. Ct. at 490-91.

Next, the Court concluded that RFRA's private right of action authorizes money damages as "appropriate relief" in individual-capacity suits because: (1) Congress enacted RFRA to restore the pre-*Smith* landscape, which included a right to damages in individual-capacity suits under Section 1983; (2) damages might be the "*only* form of relief" available to remedy violations of RFRA; and (3) Congress—which knew how to write statutes to limit available remedies—deliberately chose to not do so in RFRA. *Id.* at 491-93.

The Supreme Court's reasoning as to RFRA applies with equal, if not greater, force to RLUIPA. The text of RLUIPA's cause of action is materially identical to RFRA's, and the statutes share the same context, purpose, and history. In fact, Congress was even more explicit in RLUIPA than in RFRA. In a provision of RLUIPA authorizing suits brought by the federal government, Congress *did* limit available remedies to exclude damages, but did not impose that same limitation in the private right of action provision. *Compare* 42 U.S.C. § 2000cc-2(f), *with id.* § 2000cc-2(a). And Congress enacted within RLUIPA a requirement that the statute be construed "to the maximum extent" permitted by the Constitution, in favor of the "broad protection of religious exercise." *Id.* § 2000cc-3(g). Particularly given the well-established practice of construing RFRA and RLUIPA coterminously, *see Hobby Lobby*, 573 U.S. at 696 n.5, this Court should apply *Tanzin II*'s reasoning to RLUIPA as well.

Tanzin II abrogates this Court's contrary decision in *Gonyea*. In *Gonyea*, as a means of constitutional avoidance and without itself scrutinizing RLUIPA's text, this Court adopted the holdings of a handful of sister circuits to decide that RLUIPA does not authorize suits against state officials in their individual capacities. 731 F.3d at 145. In particular, this

Court did so amid concerns that RLUIPA, by imposing liability on non-recipients of federal funds, would run afoul of Congress's authority under the Spending Clause. *Id.* Yet even if Congress did have the constitutional authority to do so, this Court reasoned, RLUIPA's text did not clearly indicate an intent to hold individual officers liable. *Id.* at 146.

But a court may not resort to constitutional avoidance where the statute is unambiguous. *See Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1833 (2022). Because the Supreme Court found RFRA's text to clearly authorize individual-capacity officer suits, and because RLUIPA's text is materially identical, constitutional avoidance plays no role here. In any event, RLUIPA is constitutionally sound. Congress can, and has, imposed liability on both non-recipients of federal funds and agents of fund recipients under the Spending Clause and Necessary and Proper Clause. *See, e.g.*, *Sabri v. United States*, 541 U.S. 600, 602-08 (2004). Otherwise, Congress's express condition attached to the receipt of federal funds would be rendered largely toothless, as officers and agents of a grant recipient could simply ignore Congress's command and, as here, avoid liability.

This Court should therefore apply *Tanzin II* to RLUIPA and overrule *Gonyea*, rightfully permitting individual-capacity suits against state officers for damages.

ARGUMENT

I. RLUIPA Authorizes Individual-Capacity Suits Against State Officials For Monetary Damages

The district court erred in following this Court's precedent to hold that a plaintiff may "only seek injunctive relief to redress a RLUIPA violation," and that RLUIPA does not "authorize claims for monetary damages against state officers" in their individual capacities. JA-81. In *Gonyea*, this Court held that "RLUIPA does not create a private right of action against state officials in their individual capacities." 731 F.3d at 146.

This Court must "reconsider a prior panel's holding that would otherwise be binding precedent" when an intervening Supreme Court decision "casts doubt" on controlling precedent. *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 274 (2d Cir. 2005) (quoting *Union of Needletrades, Indus. & Textile Emps. v. INS*, 336 F.3d 200, 210 (2d Cir. 2003)). Even where the Supreme Court's decision involves a different statute, that decision abrogates circuit precedent where there are "compelling reasons to interpret the two

statutes together," such as "substantially similar language." *Rich v. Maranville*, 369 F.3d 83, 89 (2d Cir. 2004) (citation omitted).

Here, *Tanzin II* is such a change in law. The Supreme Court in *Tanzin II* held that RFRA's clear text authorized the award of monetary damages in individual-capacity suits. *Tanzin II*, 141 S. Ct. at 490-93. RFRA and RLUIPA are sister statutes that do not merely contain similar statutory language; they share materially *identical* remedial provisions. Because the Supreme Court held that same language in the same context to authorize money damages against officers in their individual capacities, *Tanzin II* abrogates *Gonyea*.

A. The Supreme Court's Decision In *Tanzin II* Applies With Equal Force To RLUIPA's Identical Statutory Relief Provision To Permit Individual-Capacity Suits For Damages

1. Congress Enacted Both RFRA And RLUIPA To Restore The Remedial Landscape That Existed Before *Employment Division v. Smith*

Congress enacted RFRA and RLUIPA to restore the level of protection afforded to religious practices before the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. at 885-90. Before *Smith*, courts applied a balancing test to free exercise claims, asking whether "a challenged government action that substantially burdened the exercise of religion was necessary to further a compelling state interest." *Holt v. Hobbs*,

574 U.S. 352, 357 (2015) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972)). But in *Smith*, the Supreme Court drastically curtailed the protection afforded to religious freedom claims by discarding the "compelling interest" test, instead holding "that neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause of the First Amendment." *Id.* at 356-57.

In response, Congress enacted RFRA (and later RLUIPA) to restore the more protective "compelling interest" test by enacting the pre-*Smith* standard directly into federal law. *Tanzin II*, 141 S. Ct. at 489. Specifically, through RFRA, Congress "provide[d] a claim" to persons "whose religious exercise is substantially burdened." 42 U.S.C. § 2000bb(b)(2); *see also id.* § 2000bb-1(a)-(b) ("Government shall not substantially burden a person's exercise of religion even" through a rule of general applicability "except" where the "burden . . . is in furtherance of a compelling" interest). Congress also afforded aggrieved individuals a private right of action to "obtain appropriate relief against a government." *Id.* § 2000bb-1(c).

As originally enacted, RFRA applied to both state and federal officials. But in *City of Boerne v. Flores*, the Supreme Court struck down RFRA as unconstitutional under Section 5 of the Fourteenth Amendment

insofar as it applied to state governments. 521 U.S. 507, 532 (1997). Congress responded by enacting RLUIPA, pursuant to the Spending and Commerce Clauses, as a "second attempt" to restore the pre-*Smith* "heightened statutory protection to religious exercise." *Sossamon v. Texas*, 563 U.S. 277, 281 (2011); 42 U.S.C. § 2000cc-1; *Holt*, 574 U.S. at 357. Intended to mirror RFRA, RLUIPA applies to land-use regulation and religious exercise by institutionalized persons, setting forth the identical "compelling interest" standard enacted in RFRA. 42 U.S.C. § 2000cc-1(a).

Crucially, RLUIPA's remedial provision is materially identical to RFRA's, permitting an aggrieved person to "obtain appropriate relief against the government." *Id.* § 2000cc-2(a). In both RFRA and RLUIPA, "government" is defined to include an "official" and any "other person acting under color of . . . law." *Id.* § 2000cc-5(4)(A)(ii)-(iii); *id.* § 2000bb-2(1); *compare* 42 U.S.C. § 1983. RLUIPA's rights-creating language "mirrors RFRA" in all relevant respects, *Holt*, 574 U.S. at 357-58, and the substantive provisions of the two statutes have always been "given the same broad meaning," *Hobby Lobby*, 573 U.S. at 696 n.5. Like RFRA, this language authorizes damages in individual-capacity suits under RLUIPA.

2. *Tanzin II* Held That RFRA Authorizes Individual-Capacity Suits For Money Damages

The Supreme Court has twice construed the "appropriate relief" provision in RFRA and RLUIPA with respect to officer suits: first, in *Sossamon*, where it held that the provision does not authorize monetary relief against officers in their *official* capacities under RLUIPA, 563 U.S. at 288; and then in *Tanzin II*, where it held that "appropriate relief" in RFRA authorizes a cause of action against state officials in their *individual* capacities for money damages, 141 S. Ct. at 489.

To reach its conclusion, the Supreme Court in *Tanzin II* first resolved whether RFRA's remedial provision provides a cause of action against "Government officials in their personal capacities." *Id.* at 490. The Court turned to RFRA's "clear" text and concluded that RFRA's statutory definition of "government," which includes *both* an "official" and "other person[s] acting under color of law," necessarily provides for individual-capacity relief. *Id.* The inclusion of both terms foreclosed "the Government's reading that relief must always run against the United States." *Id.* Next, the Court analyzed RFRA's "legal backdrop." *Id.* Particularly persuasive to the Court was Congress's use of the phrase "persons acting under color of law" in RFRA, which "draws on one of the most well-known civil rights statutes:

42 U.S.C. § 1983." *Id.* Congress's use of the "same terminology as § 1983 in the very same field of civil rights law" rendered 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)).

Having confirmed the presence of a private right of action against officers in their individual capacities, the Court then turned to what remedies could be obtained in such suits—specifically, whether damages constitute "appropriate relief" in light of "the phrase's plain meaning at the time of enactment." *Id.* at 491. Because "what relief is 'appropriate' is 'inherently context-dependent,'" the Court looked to the history of relief in suits against Government officials. *Id.* Its reasoning on each of these points applies equally to RLUIPA.

First, the Supreme Court emphasized that "damages have long been awarded as appropriate relief" "[i]n the context of suits against Government officials," including "state and local government officials." *Id.* That is, prior to *Smith*, a plaintiff whose religious exercise was substantially burdened could sue state and local officials for damages under Section 1983. *See id.* at 491-92 ("By the time Congress enacted RFRA, this

Court had interpreted the modern version of § 1983 to permit monetary recovery against officials who violated 'clearly established' federal law."). And "[g]iven that RFRA reinstated pre-*Smith* protections and rights, 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. As such, "[t]hat means RFRA provides, as one avenue for relief, a right to seek damages against Government employees." *Id.*

Second, the Supreme Court emphasized that damages must be "appropriate" because they are "the *only* form of relief that can remedy some RFRA violations." *Id.* (emphasis in original). To illustrate the problem, the Court cited *Yang v. Sturner*, in which an autopsy was performed on a Hmong man without notice to his family and in violation of Hmong religious beliefs. 728 F. Supp. 845, 846, 856 (D.R.I. 1990). Because injunctive relief could provide no remedy—the harm was already done—the family sued for damages. *Id.* at 847, 850-51. The district court first held, under pre-*Smith* standards, that the family's damages case could proceed. *Id.* at 855-57. However, the district court reversed itself after the Supreme Court

decided *Smith* because the statute authorizing the autopsy was a generally applicable law. *Yang v. Sturner*, 750 F. Supp. 558, 559-60 (D.R.I. 1990).

Congress enacted RFRA specifically in response to cases like *Yang*, where plaintiffs were left without a remedy for their free-exercise claims. *See City of Boerne*, 521 U.S. at 530-31 ("Much of the discussion" about the need for RFRA "centered upon anecdotal evidence of autopsies performed on Jewish individuals and Hmong immigrants in violation of their religious beliefs."). In such cases, "effective relief consists of damages, not an injunction." *Tanzin II*, 141 S. Ct. at 492. The Supreme Court therefore concluded that "it would be odd" to construe "appropriate relief" in RFRA in a manner that prohibits *any* relief. *Id.*

Third, the Supreme Court explained that "[h]ad Congress wished to limit" the remedies available for plaintiffs like the Yangs and Loving to injunctive or declaratory relief, "it knew how to do so." *Id.* The Court cited many other statutes where Congress expressly limited relief to foreclose damages. *See, e.g.*, *id.* (citing 29 U.S.C. § 1132(a)(3) (permitting "appropriate *equitable* relief") (emphasis added); 15 U.S.C. § 78u(d)(5) (providing "any *equitable* relief that may be appropriate or necessary) (emphasis

added); 42 U.S.C. § 2000e-5(g)(1) (authorizing "*equitable* relief as the court deems appropriate) (emphasis added)). But Congress deliberately chose not to limit the relief available under RFRA. Instead, it opted for "appropriate relief"—a broader formulation—with the express aim of restoring the pre-*Smith* remedial scheme, which included damages. *Id.* at 491-93.

Thus, *Tanzin II* is a straightforward case of statutory interpretation: A unanimous Supreme Court concluded that RFRA's "plain meaning at the time of enactment" authorized individual-capacity suits for money damages. *Id.* at 491-92.

3. *Tanzin II* Confirms That RLUIPA Authorizes Individual-Capacity Suits For Money Damages

This Court should interpret RLUIPA the same way as RFRA: (i) to create a private right of action against state officials in their individual capacities; and (ii) to authorize the award of money damages in those suits. Well-established principles of statutory interpretation command that "when 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." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005); *Mader v. Experian Info. Sols., Inc.*, 56 F.4th 264, 267 n.1 (2d Cir. 2023) ("Because the language of" two statutes "is substantially

similar," they "'must be construed in the same way.'" (quoting *Scott v. Real Est. Fin. Grp.* 183 F.3d 97, 100 (2d Cir. 1999))). For that reason, this Court, like the Supreme Court, has construed RFRA and RLUIPA coextensively. *See Redd v. Wright*, 597 F.3d 532, 535 n.2 (2d Cir. 2010) ("This court has previously applied case law decided under RFRA to issues that arise under RLUIPA."); *Hobby Lobby*, 573 U.S. at 696 n.5 (given the statutes' identical language, it "necessarily follows" that a statutory provision "under RFRA must be given the same broad meaning that applies under RLUIPA"). It must continue to do so here. If individual-capacity suits for damages constitute "appropriate relief" under RFRA, the same must be true of RLUIPA's *identical* remedial provision.

Indeed, each of *Tanzin II*'s textual arguments, coupled with RLUIPA's own text and history, apply with equal—if not greater—weight to RLUIPA.

First, as discussed above, the Supreme Court afforded significant weight to RFRA's relationship to Section 1983. Because RFRA borrowed Section 1983's "persons acting under color of law" language, the Court reasoned that RFRA must also create a private right of action against officers in their personal capacities. *Tanzin II*, 141 S. Ct. at 490-91. So too for

RLUIPA, which employs the same "under color of law" language as *both* Section 1983 and RFRA. 42 U.S.C. § 2000cc-5(4)(A)(iii). That language, which the Supreme Court deemed to clearly create an individual-capacity right of action, has the same effect in RLUIPA.

Moreover, RFRA, which was initially applicable to federal *and* state governments, was enacted to "reinstate[] the pre-*Smith* protections and rights" available to plaintiffs under Section 1983. *Tanzin II*, 141 S. Ct. at 492. This reasoning applies with even greater force to RLUIPA. To address the gap left by *City of Boerne*, Congress passed RLUIPA to restore rights specifically and exclusively against state and local officials who substantially burden religion—in parallel to the protections Section 1983 would have provided in a pre-*Smith* world. *See* 146 Cong. Rec. S7774, S7777 (daily ed. July 14, 2000) (Letter from Melissa Rogers, General Counsel of Baptist Joint Committee on Public Affairs) (noting that RLUIPA addresses "two critical areas that are continuing sources of free exercise problems in the wake of the U.S. Supreme Court's decision in *Employment Division v. Smith*"). RLUIPA thus shares an even stronger relationship with Section 1983 than RFRA. If the connection between Section 1983 and

"appropriate relief" establishes a damages remedy against federal officers, so too does RLUIPA's identical language vis-à-vis state officers.

Second, damages must be "appropriate" relief under RLUIPA because they are often the "*only* form of relief that can remedy" RLUIPA violations. *Tanzin II*, 141 S. Ct. at 492. To conclude otherwise would impermissibly nullify, in many cases, RLUIPA's express private right of action and purpose. *See Trichilo v. Sec'y of Health & Hum. Servs.*, 823 F.2d 702, 706 (2d Cir. 1987) ("[W]e will not interpret a statute so that some of its terms are rendered a nullity."). "Institutional residents' right to practice their faith is at the mercy of those running the institution." 146 Cong. Rec. S7774, S7775 (joint statement of Sen. Orrin G. Hatch & Sen. Edward M. Kennedy). Institutionalized persons are also subject to transfers, release from incarceration, or death—all occurrences that moot claims for injunctive relief under RLUIPA. *See Booker v. Graham*, 974 F.3d 101, 107 (2d Cir. 2020) ("In this circuit, an inmate's transfer from a prison facility generally moots claims for declaratory and injunctive relief against officials of that facility."). Faced with that reality, if damages are barred under RLUIPA, "appropriate relief" means "no relief."

This very case is illustrative. Loving was housed in Downstate for the "sole purpose" of being processed into the New York State Department of Corrections. *See* JA-34. While temporarily housed at Downstate, Loving was forced to strip down to his underwear, and despite his repeated pleas for privacy, a curtain was left open, exposing Loving in violation of both Downstate's policy and Loving's religious tenets. *See* JA-34-35. However, because Loving was transferred from Downstate, any claims for injunctive relief would be moot. *See* JA-82 ("[T]he only remedy available to [Loving] under RLUIPA . . . was nullified upon his transfer.").

This result cannot be squared with RLUIPA's purpose, affording broad protection to religious freedoms by reinstating the pre-*Smith* landscape. *See Tanzin II*, 141 S. Ct. at 492. Indeed, Congress expressly attached those pre-*Smith* protections to RLUIPA as a condition of receiving federal funding. It would therefore be inapposite for officers and agents of a state or local prison that accepts those funds to easily evade RLUIPA's central tenet of religious accommodation without fear of being held accountable for damages. *See* Scalia & Garner, *Reading Law*, at 64 (explaining constructions that would "render[] the law in a great measure nugatory, and enable offenders to elude its provisions in the most easy manner"

are disfavored (quoting *The Emily & the Caroline*, 22 U.S. 381, 389 (1824)). Instead, where, as here, prospective relief is inadequate and would provide an aggrieved person "no remedy at all," damages *must* be available. *See Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 76 (1992) (finding equitable relief ineffective where student who was sexually harassed no longer attended the school where the incident occurred).

Third, had Congress wanted to foreclose damages under RLUIPA, it "knew how to do so." *Tanzin II*, 141 S. Ct. at 492 (citing 29 U.S.C. § 1132(a)(3) ("appropriate equitable relief"); 42 U.S.C. § 2000e–5(g)(1) ("equitable relief as the court deems appropriate"); 15 U.S.C. § 78u(d)(5) ("any equitable relief that may be appropriate or necessary")). Indeed, Congress limited available remedies *elsewhere* in RLUIPA when authorizing suit by the United States only for "injunctive or declaratory relief." 42 U.S.C. § 2000cc-2(f). This decision to limit the relief available to the United States—but not to private plaintiffs—must be read as deliberate. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) ("Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally."); *Eve-*

rytown for Gun Safety Support Fund v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 984 F.3d 30, 44 (2d Cir. 2020) ("When Congress uses certain language in one part of the statute and different language in another . . . [we] assume[ ] different meanings were intended." (internal quotation marks omitted)).

Moreover, Congress knew that "appropriate relief" presumes damages. Just one year before Congress enacted RFRA, the Supreme Court construed the available remedies under a Spending Clause statute to encompass "all appropriate relief"—including monetary damages—absent "clear direction by Congress to the contrary." *See Franklin*, 503 U.S. at 71, 75-76.

As this Court recognized, at the time Congress enacted RFRA (applicable to both the federal and state governments), it did so "in the wake of *Franklin*" and with knowledge of its "appropriate relief" presumption. *See Tanvir v. Tanzin* (*Tanzin I*), 894 F.3d 449, 463 (2d Cir. 2018), *aff'd*, 141 S. Ct. 486 (2020); *see also Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (when "judicial interpretations have settled the meaning of" statutory language, use of the same language in a later statute indicates Congress's intent to "incorporate" those judicial interpretations). Given the proximity

of RFRA's enactment to the *Franklin* decision, and "because Congress used the very same 'appropriate relief' language in RFRA that was discussed in *Franklin*," this Court held that RFRA authorizes individual-capacity suits for money damages. *Tanzin I*, 894 F.3d at 463. So too for RLUIPA, which (like in *Franklin*) is Spending Clause legislation.

Fourth, rather than limiting available remedies, Congress enacted RLUIPA with even clearer protective cues than in RFRA. *Holt*, 574 U.S. at 358 ("Several provisions of RLUIPA underscore its expansive protection for religious liberty."). For example, Congress embedded within RLUIPA a requirement that the statute be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g). Furthermore, Congress removed RFRA's reference to the First Amendment within the statutory definition of "religious exercise." *See id.* § 2000bb-2(4). Instead, it broadly defined "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A); *see also Hobby Lobby*, 573 U.S. at 694-96.

Those measures accord with the stated intention of the House Committee on the Judiciary that RLUIPA's protection be expansive and

"creat[e] a private cause of action for damages" in "suits against state officials and employees" without also "abrograt[ing] the Eleventh Amendment immunity of states." H.R. Rep. 106-219, at 2, 29 (1999); s*ee also* 146 Cong. Rec. S7774, S7776 (Letter from Robert Raben, Assistant Att'y Gen.) ("[RLUIPA] contemplates both private and Federal government enforcement."); 146 Cong. Rec. 19123 (Sept. 22, 2000) (statement of Rep. Charles T. Canady) (RLUIPA "tracks RFRA, creating a private cause of action for damages, injunction, and declaratory judgment"). Moreover, Professor Douglas Laycock, a leading scholar on both remedies and religious liberty, testified to Congress that "[a]ppropriate relief [in RLUIPA] includes declaratory judgments, injunctions, *and damages*" against officials in their individual capacities. *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, Professor, Univ. of Tex. Law Sch.) (emphasis added).

* * *

In sum, the Supreme Court held in *Tanzin II* that RFRA's identically worded remedial provision authorizes individual-capacity suits for money damages. All of the Supreme Court's reasoning applies with equal, if not

greater, force to RLUIPA. Even more, RLUIPA's additional textual protections and legislative history provide further evidence that RLUIPA authorizes individual-capacity suits for money damages.

B. The Supreme Court's Decision In *Tanzin II* Abrogates This Court's Precedent In *Gonyea*

In *Gonyea*, this Court held that RLUIPA does not create a private right of action against state officials in their individual capacities. 731 F.3d at 146. Without performing its own statutory analysis, this Court adopted decisions of its sister circuits and held, as a matter of "constitutional avoidance," that RLUIPA should not be interpreted to create such a cause of action because it "was enacted pursuant to Congress'[s] spending power" and that would raise "serious constitutional questions." *Id.* (citing *Nelson v. Miller*, 570 F.3d 868, 889 (7th Cir. 2009)). But neither this Court, nor its sister circuits, had the benefit of the Supreme Court's textual analysis of RFRA and RLUIPA's "appropriate relief" language in *Tanzin II*.

As set forth above, *Tanzin II* compels a contrary result with respect to both the availability of a cause of action against officers in their personal capacities, and a damages remedy in such suits. *Tanzin II* thus does far more than merely "cast[] doubt" on *Gonyea*. *Sullivan*, 424 F.3d at 274.

Tanzin II "broke[] the link . . . on which" this Court premised its prior decision and "undermine[d] [an] assumption" in *Gonyea*. *Doscher v. Sea Port Grp. Secs.*, 832 F.3d 372, 378 (2d Cir. 2016). Accordingly, this Court must reconsider its prior precedent barring individual-capacity suits under RLUIPA.

1. *Tanzin II* Confirms That *Gonyea* Construed RLUIPA Incorrectly

In *Gonyea*, despite not itself scrutinizing RLUIPA's text, this Court held "as a matter of statutory interpretation and following the principle of constitutional avoidance" that RLUIPA did not authorize individual capacity suits for money damages. 731 F.3d at 146. But the canon of constitutional avoidance "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Johnson*, 142 S. Ct. at 1833 (quoting *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018)); *see also Clark v. Martinez*, 543 U.S. 371, 381 (2005) (constitutional avoidance "is a tool for choosing between competing *plausible* interpretations of a statutory text." (emphasis added)). *Gonyea*'s reliance on avoidance cannot withstand the Supreme Court's reasoning in *Tanzin II*, which contains *Gonyea*'s missing statutory analy-

sis. Instead, *Tanzin II* confirms that there is only one "plausible interpretation" of RLUIPA: that it provides a private right of action for monetary damages against officers in their individual capacities.

According to the Supreme Court, the text "provides a clear answer" in light of the statutorily defined term "government," which includes *both* an official and "other person acting under color of law." *Tanzin II*, 141 S. Ct. at 490; 42 U.S.C. § 2000bb-1(c); *see supra* Section I.A.2. That conclusion with respect to RFRA, which applies equally to RLUIPA's identical language, ousts *Gonyea*'s contrary holding that "RLUIPA does not create a private right of action against state officials in their individual capacities." *Gonyea*, 731 F.3d at 146.

That alone is enough to abrogate *Gonyea*. Yet *Tanzin II* also confirms that the statute's "plain meaning at the time of enactment" permits money damages as "appropriate relief," quelling any doubt about the availability of damages. 141 S. Ct. at 491-93. Unable to ignore the numerous "textual cues" supporting damages in RFRA—and never once suggesting any alternative construction—the Supreme Court recognized that it would be quite "odd" to construe RFRA to foreclose the only meaningful form of re-

lief, particularly when it was commonly available at the time of the statute's enactment. *Id.* at 492. This clear textual analysis, coupled with Congress's instruction that RLUIPA "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted" by the Constitution, 42 U.S.C. § 2000cc-3(g), leaves no room for constitutional avoidance.

In the course of its discussion of avoidance, this Court in *Gonyea* stated that Spending Clause legislation "allows the imposition of conditions, such as individual liability, only on those parties actually receiving the state funds." 731 F.3d at 145 (citing *Smith v. Allen*, 502 F.3d 1255, 1272-75 (11th Cir. 2007), *abrograted on other grounds by Sossamon v. Texas*, 563 U.S. 277 (2011)). And, citing *Rendelman v. Rouse*, 569 F.3d 182, 188-89 (4th Cir. 2009), this Court noted Congress "did not signal with sufficient clarity [an] intent" within RLUIPA to permit individual-capacity suits and give notice of such actions. *Id.* (internal quotation marks omitted). But the context makes clear that those statements are not themselves constitutional holdings, but rather support for this Court's application of constitutional avoidance, which is inapplicable for the reasons discussed above. Were this not the case, the Court would have decided (not

avoided) the constitutional question. And as discussed more fully below, the unexamined statement that Congress can impose liability "only" on recipients of federal funds, *Gonyea*, 731 F.3d at 145, cannot withstand scrutiny, as it conflicts with the Supreme Court's decision in *Sabri* upholding imposition of criminal liability on non-recipients, 541 U.S. 600, 602-03 (2004). Moreover, *Tanzin II* establishes that the plain text is "clear," 141 S. Ct. at 490, and thus provides sufficient notice. This Court accordingly should follow *Tanzin II* and read RFRA the same way as RLUIPA.

In short, *Tanzin II*'s textual analysis forecloses *Gonyea*'s holding with respect to a private right of action against officers in their individual capacities. *See Doscher*, 832 F.3d at 378. It should be overruled.

2. Individual-Capacity Suits Under RLUIPA Do Not Violate The Spending Clause

Because the text of RLUIPA is clear, this Court need not reach the constitutional concerns raised in *Gonyea*. *See Jennings*, 138 S. Ct. at 843-47 (resolving statutory question despite constitutional-avoidance questions); *Johnson*, 142 S. Ct. at 1832-33 (same). But even if it did, RLUIPA would be constitutional. Congress has authority under the Spending Clause in conjunction with the Necessary and Proper Clause to impose liability on officials who work for a state entity that has accepted federal

funding, in order to ensure Congress's conditions on the receipt of that funding are followed. *See Sabri*, 541 U.S. at 604-08.

The Constitution authorizes Congress to spend for the general welfare. U.S. Const. art. I, § 8, cl. 1; *United States v. Butler*, 297 U.S. 1, 64-67 (1936). And Congress's spending power allows Congress to "attach conditions on the receipt of federal funds" in order "to further broad policy objectives." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). Congress also has the power to "make all Laws which shall be necessary and proper for carrying into execution" the spending power. U.S. Const. art. I, § 8, cl. 18.[1]

Congress often employs these constitutional sources of power in tandem to effectuate its laws. As the Supreme Court has explained, "Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare, and it has corresponding authority under

[1] Under longstanding precedents, the Necessary and Proper Clause endows Congress with "broad power to enact laws that are 'convenient, or useful' or 'conducive' to the [principal] authority's 'beneficial exercise.'" *United States v. Comstock*, 560 U.S. 126, 133-34 (2010) (quoting *M'Culloch v. Maryland*, 17 U.S. 316, 413, 418 (1819)). Put another way, Congress can enact a law so long as it is "rationally related to the implementation of a constitutionally enumerated power." *Id.* at 134.

the Necessary and Proper Clause to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare." *Sabri*, 541 U.S. at 605 (citations omitted).

Pursuant to these authorities, Congress can, and has, subjected private individuals to liability under Spending Clause legislation. In *Sabri*, for example, the Supreme Court upheld a criminal law that imposed "federal criminal penalties" on "anyone" who bribed any official of a state or local government that received more than $10,000 annually in federal funds. *Id.* at 602-03 (upholding 18 U.S.C. § 666(a)(2)).[2] Like RLUIPA, the law at issue in *Sabri* reaches *beyond* the recipients of the federal spending and "bring[s] federal power to bear directly on individuals" who do not receive federal funds. *Id.* at 608. In other words, the federal law in *Sabri* imposes individual criminal liability on "anyone," including non-recipients

[2] More specifically, the statute in *Sabri* "impose[d] federal criminal penalties on anyone who 'corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more.'" 541 U.S. at 603 (quoting 18 U.S.C. § 666(a)(2)). Liability attached if "the organization, government, or agency receiv[es], in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." *Id.* (quoting 18 U.S.C. § 666(b)).

of federal funds. *Id.* In *Sabri*, that individual was a real estate developer. *Id.* at 602.

The Supreme Court upheld that exercise of Congressional authority under the Spending Clause and Necessary and Proper Clause, explaining that third-party culpability was a rational means of promoting a legitimate Congressional objective. Specifically, the Court reasoned that such liability "addresses the problem at the sources of bribes, by rational means, to safeguard the integrity of the state, local, and tribal recipients of federal dollars." *Id.* at 605. The Court explained that Congress, acting under the Spending Clause, could utilize "necessary and proper legislation" to "fill[] [in] the regulatory gaps" left by prior federal anti-bribery law, to "extend" anti-bribery law to "bribes directed at state and local officials." *Id.* at 606-07. That the statute in *Sabri*, like RLUIPA, came "after other legislation had failed to protect federal interests" further confirmed that Congress was "acting within the ambit of the Necessary and Proper Clause." *Id.* at 607.

Sabri thus teaches that Congress has the power to impose individual liability on non-recipients, so long as that liability is a "rational means" to

promote Congress's valid purposes under the Spending Clause, which includes "safeguard[ing] the integrity of the state, local, and tribal recipients of federal dollars." *Id.* at 605.

Like the statute in *Sabri,* RLUIPA's private right of action and relief provision satisfies the Necessary and Proper Clause's instruction that Congress may enact laws "rationally related to the implementation of a constitutionally enumerated power." *Comstock*, 560 U.S. at 134. As this Court's sister circuits have recognized with respect to RLUIPA, "Congress has an interest in allocating federal funds to institutions that do not engage in discriminatory behavior or in conduct that infringes impermissibly upon individual liberties." *Charles v. Verhagen*, 348 F.3d 601, 608 (7th Cir. 2003). In particular, Congress has an interest in subsidizing the employment of prison officials who honor religious diversity—and, on the flipside, in not subsidizing those who run roughshod on the free exercise of religion. *See Madison v. Virginia*, 474 F.3d 118, 126 (4th Cir. 2006) ("Prisoner rehabilitation and protection of religious liberties are legitimate congressional aims related to federal funding of state prisons.").

Accordingly, it is reasonable for Congress to require, as a condition of federal funding, that a prison's agents be held personally liable for their

misconduct. *See Barbour v. Wash. Metro. Area Transit Auth.*, 374 F.3d 1161, 1168-69 (D.C. Cir. 2004) (upholding the Rehabilitation Act on the theory that Congress "did not want any federal funds to be used to facilitate disability discrimination" and the "threat of federal damage actions was an effective deterrent"). After all, state entities like prisons "can act only through agents." *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 688 (1949); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 114 n.25 (1984) ("[A] State can act only through its officials."). And "[i]nstitutional residents' right to practice their faith is at the mercy of those running the institution." 146 Cong. Rec. S7774, S7775 (joint statement of Sen. Orrin G. Hatch & Sen. Edward M. Kennedy).

Individual-capacity damages suits provide one of the most effective, if not the only, means to ensure that prison officials actually respect prisoners' religious freedom and exercise. *See Carlson v. Green*, 446 U.S. 14, 21 (1980) ("It is almost axiomatic that the threat of damages has a deterrent effect . . . *particularly so when the individual official faces personal financial liability*." (emphasis added) (citation omitted)). With this understanding, Congress contemplated the availability of suits for damages

against individual officers. *See* H.R. Rep. 106-219, at 2, 29 (1999) (explaining that RLUIPA would "creat[e] a private cause of action for damages" in "suits against state officials and employees," without also "abrogat[ing] the Eleventh Amendment immunity of states."). In the context of civil suits and especially prison civil rights suits, damages are often the "only form of relief" that can provide any remedy and thus are a critical means for ensuring that Congress's conditions are actually followed by the officers and agents of the grant recipient. *Tanzin II*, 141 S. Ct. at 492. For RLUIPA to have any teeth, "appropriate relief" *must* include damages.

Other Spending Clause statutes similarly impose liability on the employees or agents of a grant recipient in order to ensure that congressional funds are in fact spent for the general welfare. The Emergency Medical Treatment and Active Labor Act, for example, imposes civil penalties of up to $50,000 against "any physician . . . in a participating hospital . . . who negligently violates" provisions related to adequate patient treatment. 42 U.S.C. § 1395dd(d)(1). Title X levies criminal fines on an "employee of any . . . entity, which administers . . . any program receiving Federal financial assistance . . . who coerces or endeavors to coerce any person

to undergo an abortion." 42 U.S.C. § 300a-8. And, as a condition of continued funding, the Hatch Act mandates the removal of state and local government employees who violate the Act's electioneering prohibitions. 5 U.S.C. §§ 1505-06.[3]

In lieu of conducting its own analysis of RLUIPA's remedial provision or statutory backdrop, this Court in *Gonyea* relied on a handful of opinions from its sister circuits to conclude that Congress, through its spending power, may impose conditions only on the recipient of federal funds. *Gonyea*, 731 F.3d at 145. By that logic, this Court held that because states, rather than officers in their individual capacities, are the recipients of federal funding, RLUIPA does not permit individual-capacity suits, regardless of the relief sought. *See id.* at 145-46; *cf. Tanzin I*, 894 F.3d at 465 (explaining in dicta that Spending Clause legislation is akin to a contract, and so "applying restrictions created pursuant to the Spending Clause to persons or entities other than the recipients of the federal funds at issue" would impermissibly bind non-parties to a spending contract).

[3] *See Oklahoma v. U.S. Civ. Serv. Comm'n*, 330 U.S. 127, 143 (1947) (upholding the Hatch Act's removal provision under the Spending Clause).

However, neither *Gonyea* nor the cases it relied on address *Sabri*, which establishes that Congress has the authority under the Spending Clause and in conjunction with the Necessary and Proper Clause to impose liability on non-recipients of federal funds. *See Sabri*, 541 U.S. at 605-07. In fact, the Supreme Court in *Sabri* upheld an even broader reach of congressional power: *Sabri* imposed liability on a private real estate developer. Here, RLUIPA imposes liability on officers that are employed by, and agents of, grant recipients. And RLUIPA serves the precise gap-filling purpose—with respect to the protection of religious rights—that the statute in *Sabri* did for anti-bribery law. *See* 146 Cong. Rec. S7774, S7777 (Letter from Melissa Rogers, General Counsel of Baptist Joint Committee on Public Affairs) (RLUIPA addresses "two critical areas that are continuing sources of free exercise problems" after *Smith*).

Moreover, *Sabri* is not alone: the Supreme Court has elsewhere upheld Spending Clause legislation that imposes constraints on non-recipients. *See Grove City Coll. v. Bell*, 465 U.S. 555, 575 (1984) (holding Congress could impose obligations under Title IX on schools that were only *indirect* recipients of federal assistance that was granted directly to students); *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S.

256, 260-70 (1985) (holding states could not restrict how local governments spend federal funds received under the Payments in Lieu of Taxes Act, 31 U.S.C. § 6901).

RLUIPA's cause of action and remedial provision is therefore constitutional under the Spending Clause and the Necessary and Proper Clause because it helps to safeguard Congress's effort to ensure that federally funded state prisons—and the agents through which they operate—actually respect religious freedom. *See Sabri*, 541 U.S. at 605-08. Thus, even if this Court looks beyond *Tanzin II*'s holding on RLUIPA's statutory text to reach constitutional questions, it should hold RLUIPA a valid exercise of Congress's Article I powers.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record certifies pursuant to Fed. R. App. P. 32(g) that the Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f), this document contains 8,078 words.

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2023, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which will send notification of such filing to all ECF participants.

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