No. 23-1197

In the Supreme Court of the United States

DAMON LANDOR, PETITIONER

v.

LOUISIANA DEPARTMENT OF CORRECTIONS AND PUBLIC SAFETY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

CASEY DENSON
CASEY DENSON LAW LLC
8131 Oak Street, Suite 100
New Orleans, LA 70118

ZACHARY D. TRIPP
Counsel of Record
WEIL, GOTSHAL & MANGES LLP
2001 M Street NW
Washington, DC 20036
(202) 682-7000
zack.tripp@weil.com

SARAH STERNLIEB
WEIL, GOTSHAL & MANGES LLP
1395 Brickell Avenue, Suite 1200
Miami, FL 33131

SHAI BERMAN
NATALIE HOWARD
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Miscellaneous

In the Supreme Court of the United States

NO. 23-1197

DAMON LANDOR, PETITIONER

v.

LOUISIANA DEPARTMENT OF CORRECTIONS AND PUBLIC SAFETY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Respondents ostensibly oppose certiorari, but their concessions confirm that this Court's review is warranted. Respondents concede that the Fifth Circuit—and now the Second Circuit and other courts across the country, Opp. 1, 20—refuse to provide individual-capacity damages under RLUIPA because they hold that such a remedy is unconstitutional. Respondents even emphasize (Opp. i) that this case "almost entirely depends" on the constitutional question, and rewrite the question presented to address it expressly rather than implicitly. *Ibid.* But the fact that the courts of appeals hold RLUIPA's damages remedy unconstitutional is reason alone to take this case: This Court routinely grants review when a circuit court has invalidated a federal statute. It should do the same here.

Respondents do not dispute that this Court granted review of the damages question under RFRA without a circuit split—and without courts invalidating the statute on constitutional grounds. Respondents largely ignore that fifteen judges on the Fifth Circuit joined opinions calling for this Court's review. Respondents do not address the numerous amici, including dozens of religious groups, that implore this Court to step in. And they do not address the Solicitor General's brief, urging in 2010 that the Fifth Circuit's constitutional ruling was "incorrect." U.S. Amicus Br. 10-11, *Sossamon* v. *Texas*, 563 U.S. 277 (2011) (No. 08-1438), 2010 WL 990561 (U.S. *Sossamon* Br.). Respondents do not dispute that, at this point, "percolation" would be pointless. And respondents do not dispute this is a perfect vehicle.

Respondents' hollow response to the "stark and egregious" facts, Pet. App. 23a (Clement, J., concurring), further confirms the need for this Court's intervention. They "condemn" Landor's assault and claim that they recently changed their grooming policy "to ensure that nothing like Petitioner's alleged experience can occur." Opp. 1. But the policy is not in the record, and regardless neither the State's words nor a new policy would provide Landor any relief. No relief is not "appropriate relief." 42 U.S.C. 2000cc-2(a). And without damages, a new policy is an empty promise. Respondents could perpetrate a similar assault tomorrow—throwing the new policy in the trash and flagrantly violating the rights of yet another person—and the victim *still* could not obtain any effective relief.

Congress did not enact two laws—first RFRA and then RLUIPA—so that officials could pay lip service to protecting religious liberty. It enacted those laws to "reinstat[e] both the pre-*Smith* substantive protections of

the First Amendment *and the right to vindicate those protections by a claim*." *Tanzin* v. *Tanvir*, 592 U.S. 43, 50 (2020) (emphasis added). Like Section 1983 and RFRA, RLUIPA therefore "must" provide for individual-capacity damages. *Ibid.* This Court should grant certiorari and reverse.

A. The Question Presented Warrants Review

Respondents emphasize that circuit courts unanimously hold that individual-capacity damages are not available under RLUIPA. But the brief in opposition confirms that the availability of that remedy warrants this Court's review.

1. Respondents double down on the Fifth Circuit's holding that a damages remedy is unconstitutional. They urge that the outcome "almost entirely depends" on constitutionality and expressly add constitutionality to the question presented (though it is "fairly subsumed" in the original). Opp. (i). Respondents also emphasize that the Second, Third, Ninth, and Eleventh Circuits similarly hold that individual-capacity damages are unconstitutional. See Opp. 20-21 (collecting cases); *e.g.*, *Tripathy* v. *McKoy*, 103 F.4th 106, 114-115 (2d Cir. 2024).

That is reason alone to grant review. This Court regularly grants—with or without a circuit conflict—when a circuit court has held a federal statute unconstitutional. See, *e.g.*, *Iancu* v. *Brunetti*, 588 U.S. 388, 392 (2019) ("As usual when a lower court has invalidated a federal statute, we granted certiorari."); Pet. 19 (collecting cases). After all, judging the constitutionality of a federal statute is "the gravest and most delicate duty that th[e] Court is called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)). Respondents do not even address that practice.

2. The issue is also exceptionally important. Respondents do not dispute that Congress enacted RFRA and RLUIPA to "reinstat[e] both the pre-*Smith* substantive protections of the First Amendment and the right to vindicate those protections by a claim." *Tanzin*, 592 U.S. at 50. Nor do they dispute that the basic question is whether Congress has succeeded. Does RLUIPA, within its scope, provide the same rights and remedies that Section 1983 made available before *Smith*? That is a recurring question of federal law that warrants this Court's review, just as the parallel RFRA question warranted this Court's review without a circuit conflict. Indeed, after *Tanzin*, it is further important to determine whether RLUIPA and RFRA differ so fundamentally when their language is "*in haec verba*." Pet. App. 28a (Oldham, J., dissenting).

Respondents have no answer to the many Fifth Circuit judges who called for this Court's review. See Pet. App. 23a-24a (Clement, J., concurring); *id.* at 25a-34a (Oldham, J., dissenting); *id.* at 35a-36a (Ho, J., dissenting). And they have no answer to the dozens of amici, who underscore the importance of damages to the protection of religious liberty, the importance of religious exercise to rehabilitation, and that Landor's mistreatment is far from isolated. *E.g.*, Agudath Br. 17-19; Christian Legal Society Br. 13-16; Prof. Johnson Br. 8-16. More than 1 million individuals are held in state prisons and local jails. See Pet. 5. In case after case, serious allegations of deprivations of religious liberty are dismissed at the threshold based on the no-damages rule, without state officials ever having to answer for their actions. See, *e.g.*, Tayba Br. 4-10; 33 Religious Organizations Br. 10-16; Bruderhof Br. 9-22.

Respondents assert (Opp. 2, 12) that Congress has "remained silent" in the face of lower court decisions rejecting a damages remedy. But "vindication by congressional inaction is a canard," especially in the absence of a decision from this Court. *Johnson* v. *Transp. Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting); see Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317, 331 (2005). Congress also cannot correct the rule that individual damages are unconstitutional. Only this Court can.

Respondents observe (Opp. 12) that Congress could abrogate state sovereign immunity and impose "official-capacity damages." But that would involve a markedly different policy choice. In designing RLUIPA, Congress declined to strip States of their "sovereign dignity." *Alden* v. *Maine*, 527 U.S. 706, 715 (1999). Instead, Congress adopted a remedy used since "the early Republic" and that has worked for over 150 years under Section 1983: individual-capacity damages. *Tanzin*, 592 U.S. at 48-50. The constitutionality of that familiar remedy warrants this Court's review.

3. Respondents trumpet (Opp. 1, 13) that they changed their grooming policy "to ensure that nothing like Petitioner's alleged experience can occur." Any updated policy is neither in the record nor publicly available, and provides Landor no relief whatsoever. In any event, the claimed shift underscores the need for review because it shows the powerful deterrent effect of putting damages on the table.

Respondents have represented to petitioner's counsel that they changed their policy on August 1, 2024, shortly before the twice-extended deadline for their brief in opposition. Yet respondents have known about Landor's allegations of gross mistreatment for years. See

D. Ct. Doc. 1 (Dec. 27, 2021). The timing indicates that what prompted the change was the threat that this Court might step in and make damages available. That shift shows the deterrent effect at work.

Respondents also fail to explain how, unless damages are available, their new policy will actually prevent this kind of assault from recurring: This assault occurred even though *Ware* v. *Louisiana Department of Corrections*, 866 F.3d 263 (5th Cir. 2017), *already required* respondents to respect Rastafarian religious exercise. Without damages, respondents could flout their new policy, shave another man bald—stripping him of the fruits of decades of religious practice and a defining part of his identity—and still the victim could not obtain any effective relief. Damages are the "*only* form of relief that can remedy" this kind of wrong. *Tanzin*, 592 U.S. at 51.

4. Respondents' remaining arguments about importance simply disagree with Congress's policy choices. For example, they assert (Opp. 13-15) that damages under RLUIPA are unnecessary because prisoners can sue under state religious freedom laws. But Congress thought a uniform federal remedy was necessary: It enacted RFRA and RLUIPA to restore pre-*Smith* rights and remedies on a nationwide basis. See *Tanzin*, 592 U.S. at 50; *Holt* v. *Hobbs*, 574 U.S. 352, 356 (2015).

A patchwork of state laws is no substitute. Nearly half the States have no RFRA parallel. See *Federal & State RFRA Map*, Becket Fund for Religious Liberty.[1] A review of such laws found they "have almost negligible effects." Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRA*s, 55 S.D. L. Rev. 466, 469 (2010). And Louisiana's Preservation of Religious

[1] https://www.becketlaw.org/research-central/rfra-info-central/map/ (last visited August 20, 2024)

Freedom Act (PRFA), La. Stat. Ann. § 13:5231, *et seq.*, shows why. For example, PRFA adopts a bright-line rule that "*any* penological regulation or rule" established "to protect … safety and security … or to maintain order or discipline" satisfies the "standards of a compelling governmental interest." *Id.* § 13:5235(B) (emphasis added). PRFA thus stacks the deck in favor of prison administrators—and against religious exercise—confirming the need for this Court's review.

Respondents contend (Opp. 23) that damages would make it harder to maintain "staffing levels." But as Section 1983, RFRA, and Louisiana's own PRFA all show, it is perfectly sensible to prioritize protecting civil rights over protecting the hiring of government officials who violate those rights. Respondents' concern is also addressed elsewhere. Qualified immunity protects officials by limiting liability to violations of clearly established rights. See *Tanzin*, 592 U.S. at 51 n.*. Louisiana can indemnify state officers. And if Louisiana does not like the balance Congress struck, it has an easy alternative: it can just say no. Nothing requires Louisiana to accept federal funds for prison administration.

In any event, respondents' contentions about state laws and staffing are pure policy arguments. They provide no basis to deny review of the constitutionality of Congress's policy choice.

B. The Decision Below Is Wrong

This Court should resolve respondents' merits arguments on plenary review, not at the cert stage. Regardless, RLUIPA provides for individual-capacity damages, and that remedy is constitutional.

1. Respondents do not dispute that the best reading of RLUIPA is that it provides for damages. See *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2266 (2024)

("In the business of statutory interpretation, if it is not the best, it is not permissible."). Respondents also do not dispute that constitutional avoidance is inapplicable. See 42 U.S.C. 2000cc-3(g). Respondents only contention on the statute (Opp. 16-18) is that RLUIPA fails to provide the requisite clear notice under the Spending Clause.

Respondents assert (Opp. 17) that "appropriate relief" is ambiguous in isolation. But under this Court's decisions, Congress provides clear notice when its intent "is 'clearly discernible' from the sum total of its work." *Dep't of Agric. Rural Dev. Rural Hous. Serv.* v. *Kirtz*, 601 U.S. 42, 54 (2024) (citation omitted).

As Judge Oldham explained, *Tanzin* "obviates any argument" that notice is insufficient. Pet. App. 33a. Respondents ignore that portion of Judge Oldham's dissent, and they rely (Opp. 16) on pre-*Tanzin* opinions without grappling with *Tanzin*. *Tanzin* closely analyzed RFRA's text and context—which RLUIPA shares—concluding (1) the text is "clear" plaintiffs may bring individual-capacity suits; and (2) the "plain meaning" of "appropriate relief" in such a suit against an "official" or "other person acting under color of … law" includes damages. 592 U.S. at 47-51. This Court emphasized that damages "must" be available because Congress "made clear" it was restoring pre-*Smith* protections "and the right to vindicate those protections by a claim," which included individual damages under Section 1983—and Congress borrowed the "under color of law" phrase from Section 1983. *Ibid.* The "clear" and "plain" meaning that Congress "must" have meant, *ibid.*, is "clearly discernable," *Kirtz*, 601 U.S. at 54.

Respondents contend that *Sossamon* v. *Texas*, 563 U.S. 277 (2011), controls because it involved "a clear-

statement rule." Opp. 17. But *Tanzin* found the distinction "obvious": *Sossamon* "does not change the analysis" because this case involves "suit[s] against individuals, who do not enjoy sovereign immunity." *Tanzin*, 592 U.S. at 51-52; see Pet. App. 36a (Ho, J., dissenting). An "obvious" distinction is "clearly discernable."

Furthermore, "[t]here would have been no point in Congress" defining "government" to include an individual "official" unless "RLUIPA permits individual-capacity-damages claims." Religious Scholars Br. 4-5. If Congress had intended only injunctive or declaratory relief, the ordinary meaning of "government" would have sufficed: injunctive or declaratory relief is already available against officials acting in their official capacities. See *Ex parte Young*, 209 U.S. 123, 161 (1908). Congress's unusual definition of "government" to include an "official" thus must mean that damages are available, because otherwise that language would be superfluous.

2. As Judge Oldham and the Solicitor General have explained, RLUIPA's individual-capacity damages remedy is constitutional under *South Dakota* v. *Dole*, 483 U.S. 203 (1987), and *Sabri* v. *United States*, 541 U.S. 600 (2004). Respondents contend that they are "non-recipients" of federal funds and that RLUIPA's damages remedy violates a contract-law analogy. *E.g.*, Opp. 22. But the premise is wrong and the conclusion does not follow.

First, respondents overlook that they are state officials: They are *agents of the grant recipient* who administer a federally-funded program, and are indirect recipients of federal funding through their wages. See Pet. 21. This Court has found "no support" for a "perceived distinction between direct and indirect aid." *Grove City Coll.* v. *Bell*, 465 U.S. 555, 564 (1984). Congress thus could impose individual-capacity damages even if a

strict contract analogy were required: damages are analogous to requiring respondents' contracts with the state to incorporate RLUIPA's protections and making individual prisoners third-party beneficiaries. See Pet. 21-22. Respondents have no answer. They simply ignore that they are agents of the grant recipient.

Second, *Sabri* forecloses respondents' strict contract analogy. They assert that, "unlike RLUIPA, the federal funds bribery provision does not impose the *conditions* of the federal funds on nonrecipients." Opp 22 (quoting *Tripathy*, 103 F.4th at 115). But RLUIPA is closely analogous to the federal-funds bribery provision that a state official or agent of a grant recipient is individually liable if they accept a bribe. See 18 U.S.C. 666(a)(1). In both laws, Congress attached a condition to federal spending to support the general welfare (not to undermine public projects by accepting bribes or disrespecting religious liberty). The state's agents and officials are bound to follow that condition as agents of the recipient. See *Ex parte Young*, 209 U.S. at 161. And in both laws, Congress added the additional remedy of holding the state's agents individually liable if they violate the condition.

As the Solicitor General has explained, the additional remedy of money damages is "plainly adapted" to the goal of ensuring that individual agents and officials obey—and do not interfere with—conditions that Congress has validly imposed on the administration of federally-funded programs. U.S. *Sossamon* Br. 13 (quoting *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)). Indeed, in *Salinas* v. *United States*, 522 U.S. 52, 60-61 (1997), this Court found "no serious doubt about the constitutionality" of Section 666(a)(1) as applied to a state official in a "jail managed pursuant to a series of agreements with the Federal Government."

Sabri upheld 18 U.S.C. 666(a)(2), a different provision that goes a step farther: It imposes criminal liability on a private citizen who is not the agent or official of a grant recipient, but who bribes or offers to bribe such a person. See 541 U.S. at 602. RLUIPA is narrower: It does not similarly impose liability on a private citizen who solicits a state official to violate an inmate's religious liberty. Individual liability attaches only to the state's own agents: "official[s]" and others "acting under color of State law." 42 U.S.C. 2000cc-5(4)(A). RLUIPA's constitutionality thus follows *a fortiori* from *Sabri*.

Third, respondents overlook that "RLUIPA's religious liberty protections" play "an important part" in advancing Congress's underlying interest in "prisoner rehabilitation." *Madison* v. *Virginia*, 474 F.3d 118, 126 (4th Cir. 2006); 146 Cong. Rec. S6678-02, S6689 (daily ed. July 13, 2000) (statement of Sen. Kennedy) ("Sincere faith and worship can be an indispensable part of rehabilitation."). Multiple amici emphasize well-documented links between religious exercise, rehabilitation, and reduced recidivism. See Prof. Johnson Br. 4-18; Dr. Autrey Br. 13-15. Holding state prison officials accountable if they interfere with prisoners' religious exercise thus further advances Congress's goals in funding prison administration in the first place. See U.S. *Sossamon* Br. 13.

Respondents' claims about the dangers of upholding RLUIPA's damages remedy in turn fall flat. Respondents are state officials and agents. Congress has ample authority to hold them liable if they interfere with conditions Congress has validly imposed on the administration of federally-funded programs. *E.g.*, *Sabri*, 541 U.S. at 605-08; *Salinas*, 522 U.S. at 60-61.

Upholding RLUIPA would have no impact on Title IX. See Opp. 24. Unlike RLUIPA, Title IX lacks an express private cause of action providing for individual-capacity claims. See *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 683 (1979).

C. This Is An Ideal Vehicle

Respondents do not dispute that this is an ideal vehicle: The question is squarely presented and outcome-dispositive. It has been fourteen years since the Solicitor General explained that RLUIPA constitutionally provides individual-capacity damages. U.S. *Sossamon* Br. 9-10. Now, the entrenched rule is the opposite. As the "stark and egregious" facts demonstrate, Pet. App. 23a (Clement, J., concurring), the no-damages rule means that State officials can trample on religious liberties and victims like Landor receive no relief. This Court should grant certiorari and reverse.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

CASEY DENSON
CASEY DENSON LAW LLC
8131 Oak Street, Suite 100
New Orleans, LA 70118

SARAH STERNLIEB
WEIL, GOTSHAL & MANGES LLP
1395 Brickell Avenue, Suite 1200
Miami, FL 33131

ZACHARY D. TRIPP
Counsel of Record
WEIL, GOTSHAL & MANGES LLP
2001 M Street NW
Washington, DC 20036
(202) 682-7000
zack.tripp@weil.com

SHAI BERMAN
NATALIE HOWARD
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153

AUGUST 2024