No. _____

In the
Supreme Court of the United States

Peter Allan, Sr.; Russell Hatton; Michael D. Benson; Steven Hawkins; Russell Lynn Norton; Danny Stone; Patrick Otten; Ryan White; David Hamilton; Kenneth Daywitt; Dennis White; Maikijah HaKeem; Daniel A. Wilson; Joseph Thomas,

Petitioners,

v.

Minnesota Department of Human Services; Jodi Harpstead, in her official capacity as Commissioner of Department of Human Services; Marshall Smith, in his official capacity as Chief Executive Director of Direct Care and Treatment for the Minnesota Sex Offender Program; Nancy Johnson, in her official capacity as the Minnesota Sex Offender Program Executive Director; Terry Kneisel, in his official capacity as the Moose Lake Facility Director for the Minnesota Sex Offender Program,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The gravamen of the institutionalized persons' 2021 complaint is that Minnesota Sex Offender Program (MSOP) is choosing not to follow the Religious Land Use and Institutionalized Persons Act "general rule," 42 U.S.C. § 2000cc-1(a), despite taking federal funds in 2020 and 2021 making RLUIPA applicable under § 2000cc-1(b). The Eighth Circuit affirmed dismissal on mootness, after MSOP's policies were amended, because the "issues presented must be properly pled before the court."

1. Whether, in the situation where the government amends legally-challenged policies during the pendency of district court litigation, the Eighth Circuit's legal standard requiring that plaintiff's "issues presented must be properly pled before the court" conflicts with this Court's legal standard during appeal that the governmental amendments may not render a claim moot where the amended policy is sufficiently similar to the original policy so that it is permissible to say that the challenged conduct continues.

2. Whether the Eighth Circuit decision contradicts this Court's *City of Shelby* decision which should be understood as an instruction to lower courts to adjudicate the *correctness* of a factually-supported legal theory pleaded in a complaint, not to adjudicate the *specificity* with which a factually-supported legal theory must be pleaded to avoid dismissal.

PARTIES TO THE PROCEEDINGS

The Petitioners are Peter Allan, Sr., Russell Hatton, Michael D. Benson, Steven Hawkins, Russell Lynn Norton, Danny Stone, Patrick Otten, Ryan White, David Hamilton, Kenneth Daywitt, Dennis White, Maikijah HaKeem, Daniel A. Wilson, and Joseph Thomas. They were the plaintiff-appellants below.

The Respondents are: Minnesota Department of Human Services; Jodi Harpstead, in her official capacity as Commissioner of Department of Human Services; Marshall Smith, in his official capacity as Chief Executive Director of Direct Care and Treatment for the Minnesota Sex Offender Program; Nancy Johnston, in her official capacity as the Minnesota Sex Offender Program Executive Director; Terry Kneisel, in his official capacity as the Moose Lake Facility Director for the Minnesota Sex Offender Program. They were the defendant-appellees below.

CORPORATE DISCLOSURE STATEMENT

All the petitioners are individuals. So, there is no petitioner-entity with a parent public or private corporation owning any interest in them.

RELATED PROCEEDINGS

United States District Court for the District of Minnesota:

Allan v. Minnesota Department of Human Services, 2024 WL 218426 (D.Minn. 2024)

United States Court of Appeals for the Eighth Circuit:

Allan v. Minnesota Department of Human Services, 127 F.4th 717 (8th Circ. 2025)

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PETITION FOR A WRIT OF CERTORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case, *Allan v. Minnesota Department of Human Services*, 127 F.4th 717 (8th Circ. 2025).

OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit opinion is reported at 127 F.4th 717. A-1. The district court's opinion and order is reported at 2024 WL 218426 (D.Minn. 2024). A-11.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 2025. A-9. The jurisdiction of this Court is invoked under 28 U.S. Code § 1254.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000cc-1 is titled "Protection of religious exercise of institutionalized persons." Section (a) provides the general rule requiring reasonable religious accommodations to institutionalized persons:

> (a) General rule
>
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the

> burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.

Section (b) limits the scope of application to a program or activity which receives federal financial assistance or under other limited circumstances:

> (b) Scope of application
>
> This section applies in any case in which—
> (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
> (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

42 U.S. Code § 2000cc-2, titled "Judicial relief," provides a private cause of action to sue the government under RLUIPA:

> (a) Cause of action
>
> A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by

> the general rules of standing under article III of the Constitution.

STATEMENT OF THE CASE

Lawsuits against the government are the most important cases on the federal court dockets. The federal courts, for over two centuries, have deftly handled lawsuits against the government promoting progress and order, while balancing them, at the same time.

This petition focuses on the specific question presented relevant to lawsuits against the government which may be upsetting the balance between plaintiffs and governmental defendants. What is the legal standard to dismiss a complaint on mootness grounds after the government amends the challenged policy during the pendency of district court litigation? The Eighth Circuit's legal standard is that the plaintiff's "issues presented must be properly pled before the court" under Fed. R. Civ. P. 8(a):

> [U]nder the Federal Rules of Civil Procedure, the issues presented must be properly pled before the court. *See* Fed. R. Civ. P. 8(a).

Allan, at 720. App. A-5.

The petitioners disagree. Instead, the same legal standard that applies on appeal to governmental modifications to the challenged policies should apply during the pendency of the district court proceedings. The U.S. Supreme Court's legal standard on appeal is that the governmental amendments "may not render a

[claim] moot where the amended [policy] 'is sufficiently similar' to the original [policy] so 'that it is permissible to say that the challenged conduct continues."

To be sure, Article III of the Constitution limits the federal courts' jurisdiction to "Cases" and "Controversies." *See* U.S. Const. art. III, § 2, cl. 1. Article III requires that for jurisdiction to continue through an appeal, an ongoing dispute capable of judicial resolution must endure throughout all stages of federal judicial proceedings, trial and appellate. A question of whether a dispute is moot, depriving a court of jurisdiction, "is raised by the revision of [a law] that bec[omes] effective while the case [i]s pending in the Court of Appeals." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288 (1982).

This Court has held that where a new statute "is sufficiently similar to the repealed [statute] that it is permissible to say that the challenged conduct continues" the controversy is not mooted by the change, and a federal court continues to have jurisdiction. *Northeastern Fla. Chapter v. City of Jacksonville,* 508 U.S. 656, 662 n. 3 (1993). Under this legal standard, the federal appellate courts determine whether the government's amendment of the challenged policy during the appeal has left the appeal without an ongoing dispute capable of judicial resolution. *Id.* Accordingly, the Court has previously dismissed appeals for mootness where, "a challenged statute ... is ... significantly amended pending review, and the only relief sought is prospective[.]" *Northeastern*, 508 U.S. at 669 (1993) (O'Connor, J., dissenting); *see, e.g.*, *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (dismissing as moot a challenge

to a university's regulations where "the University substantially amended [the] regulations").

Consistently, the Eighth Circuit follows the Court's legal standard as it applies to the government's changes to the challenged policy during an appeal. In *Styczinski v. Arnold*, 46 F.4th 907, 912 (2022), the Eighth Circuit considered a post-appeal amendment to the challenged Minnesota statute regulating bullion transactions. The Eighth Circuit held that the post-appeal amendment did not render moot bullion traders' appeal from partial grant of motion to dismiss for failure to state a claim in traders' § 1983 action seeking declaratory and injunctive relief, which contended that the statute regulating bullion product dealers violated the constitutional ban on extraterritoriality, even though some of statute's language on which the district court based its analysis was altered by amendment. The Eighth Circuit concluded that the conduct which traders originally challenged continued, and traders made the same general argument now as they did before amendment, that statute unconstitutionally prohibited dealers from engaging in transactions wholly outside of Minnesota without registering with of Minnesota Department of Commerce and complying with Minnesota regulations in violation of constitution under doctrine of extraterritoriality. *Id.*

Similarly, in *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1548 (8th Cir. 1996), the Eighth Circuit applied the same legal standard during an appeal. The Eighth Circuit held that candidates' appeal from judgment upholding the constitutionality of state campaign finance statute was not rendered moot by virtue of

amendment to that statute because, of five specific sections attacked, the amendment affected only section involving waiver of expenditure limitations for candidates whose opponent declined to abide by expenditure limitations, and the amendment did not eliminate waiver but merely changed threshold requirements, such that statute still impaired candidates in same manner. *Id.*

Inconsistently, the Eighth Circuit in this case created a contradictory rule for governmental amendments to the challenged policies if they occur during the pendency of district court proceedings. The Eighth Circuit affirmed dismissal on mootness because, under Fed. R. Civ. P. 8(a), "issues presented must be properly pled before the court":

> [U]nder the Federal Rules of Civil Procedure, the issues presented must be properly pled before the court. *See* Fed. R. Civ. P. 8(a).

Allan, at 720. App. A-5.

By its decision, the Eighth Circuit creates new Rule 8(a) requirements for plaintiffs to avoid dismissal after governmental amendments to challenged policies, during the pendency of district court proceedings—making the question presented an issue of nationwide importance. As mentioned, lawsuits against the government are the most important cases on the federal court dockets. The Eighth Circuit's holding creates additional procedural hurdles for plaintiffs suing the government to have their claims adjudicated. The Eighth Circuit's decision is a breach of the federal courts' deft handling of lawsuits against

the government promoting and balancing progress and order over more than two centuries.

1. Importantly, the gravamen of the RLUIPA claim is that the Department, after it took the federal money in 2020 and 2021, has engaged in a stated, steadfast refusal to adopt RLUIPA's general rule, 42 U.S.C § 2000cc–1.

The federal court enforcement of federal statutory civil rights requirements, such as RLUIPA, when contingent on receipt of federal financial assistance, are of nationwide importance. The federal court is the exclusive venue for plaintiffs to sue the government to comply with the federal statutory civil rights requirements after the government has taken the federal financial assistance. Absent federal court jurisdiction and oversight, there would be no deterrent for the government to take the federal financial assistance without complying with the federal civil rights requirements.

The essence of the response of the Minnesota Department of Human Services and other respondents ("Department" or "MSOP" collectively) is based upon the notion that the Appellants' Second-Amended Complaint ("Allan," collectively), failed to give the Department notice of continuing violations protected under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). Basically, the Department asserts that it can avoid RLUIPA altogether—RLUIPA's general rule and the cause of action—because of complaint insufficiencies. But, the gravamen of the RLUIPA claim is that the Department, after it took the federal money in 2020

and 2021, has engaged in a stated, steadfast refusal to comply with RLUIPA's general rule.

In this way, the Department's response conflates RLUIPA's general rule, 42 U.S.C § 2000cc–1, with the RLUIPA's private cause of action, 42 U.S.C § 2000cc–2. These are two very different things.

First, the Department, after it accepts federal money, is legally required under 42 U.S.C § 2000cc–1 to follow the general rule:

> (a) General rule. No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

Second, if the Department violates the general rule, there is a private action for institutionalized persons to sue the government. 42 U.S.C § 2000cc–2.

Based on this distinction, the Department's argument falls apart because the gravamen of the RLUIPA claim is that the Department, after it took the federal money in 2020 and 2021, had to adopt, not steadfastly reject, RLUIPA's general rule.

The Court knows of the Department's stated, steadfast rejection of RLUIPA's general rule throughout the litigation because the Department said so in district court, "MSOP does not receive federal funding such that RLUIPA is applicable." Def. S.J. Memo., R.Doc. 94 at 18.

To the contrary, it is known by publicly-available documents that the Department received federal funding in 2020 and 2021. 8th Cir. App. 211–226, R. Doc. 101–1, at 54–69; *see also,* 8th Cir. App. 227–249, R. Doc. 101–1, at 70–92. This fact of the Department receiving federal funds has never been disputed. Def. S.J. Memo., R.Doc. 94 at 18. Therefore, RLUIPA's general rule unequivocally applies to the Department and MSOP. 42 U.S.C. § 2000cc-1. But, inexplicably, the Department denies federal financial assistance and RLUIPA applicability anyway.

Inexplicably, the Department's response brief in the Eighth Circuit also failed to redact its stated, steadfast refusal to apply the "general rule" of RLUIPA—even though it accepted the federal funding in 2020 and 2021. Def. 8th Cir. Response Brief at 1-28. *See* Def. S.J. Memo., R.Doc. 94 at 18.

Accordingly, the gravamen of the RLUIPA claim continued to be that the Department, after it took the federal money in 2020 and 2021, has engaged in a stated, steadfast refusal to comply with RLUIPA's general rule at MSOP. The complainants' legal claim of continuing governmental misconduct is that the Department is failing to implement and follow RLUIPA's general rule after accepting financial

federal assistance in 2020 and 2021. 42 U.S.C. § 2000cc-1(a, b).

So, after the Department and MSOP received the federal money in 2020, triggering RLUIPA's general rule, 42 U.S.C § 2000cc–1, the petitioners filed their RLIUPA claims in federal court based on insufficient RLUIPA accommodations. The Department's policies throughout the litigation have been continually changing, but not in ways that have complied with RLUIPA's general rule, 42 U.S.C § 2000cc–1.

The Department's policies continue to violate the RLUIPA rights of indefinitely institutionalized individuals, which are within the allegations asserted. Moreover, the very discovery the Department sought regarding the continued violations of the Department, supported RLUIPA allegations asserted in the Second-Amended Complaint.

For example, a paragraph of the Second Amended Complaint, paragraph 18 refers to the Minnesota Legislature rescinding Governor Waltz's peacetime emergency orders effective on July 1, 2021. 8th Cir. App. 20, R. Doc. 63, at 6. Hence, while the catalyst concerned the March 13, 2020 MSOP policy adopted as a Covid-related policy, once the legislature rescinded all state emergency orders, the acts of MSOP were in fact non-Covid-related policies.

Under RLUIPA's general rule, 42 U.S.C § 2000cc–1, the Department is prohibited to impose a substantial burden on the religious exercise of Allan unless it is in furtherance of a compelling

governmental interest *and* is the least restrictive means to further that governmental interest. The RLUIPA violations were continuing, requiring no assertion of a "pre-pandemic" allegation as the Department suggests. Appellee Br. at 21.

Here, the Department had notice that RLUIPA's general rule, 42 U.S.C § 2000cc–1, applied, sought discovery on those issues, all of which arose from the asserted allegations of the Second-Amended Complaint. Yet, the Department never applied RLUIPA's general rule, 42 U.S.C § 2000cc–1, at MSOP after it received the federal moneys causing RLUIPA's general rule, 42 U.S.C § 2000cc–1, to apply to MSOP.

2. Under the circumstances of this case, the district court abused its discretion by not awarding summary judgment to petitioners.

In the summary judgment motion process, it is undisputed that the Department does not require MSOP to follow RLUIPA's general rule, 42 U.S.C § 2000cc–1 since the Department accepted federal money in 2020 and 2021. It is evident that petitioners, as non-moving parties, should have been granted summary judgment based on the Department's stated, steadfast refusal to apply RLUIPA's general rule, 42 U.S.C § 2000cc–1, at MSOP since accepting federal funding in 2020 and 2021.

In fact, MSOP is continuing to refuse livestreaming to all MSOP clients because RLUIPA does not apply—even though such religious accommodations are required under RLUIPA because

the Department accepted federal funding in 2020 and 2021.

The Court should grant the petition, adjudicate the claims in favor of petitioners, and remand with instructions to enter summary judgment because MSOP has performed so poorly in accepting federal financial assistance, while steadfastly refusing to accept the RLUIPA "strings" attached to the federal financial assistance.

The underlying Second-Amended Complaint reflects current on-going policies that violate RLUIPA. Allan's Second-Amended Complaint tells a story. It speaks to how the Department sought to and did in fact deprive Allan of his religious liberties protected under RLUIPA. It speaks to how even after the end of the pandemic, via the Minnesota Legislature's rescission of Governor Waltz's emergency orders in 2021, some of those restrictive means not only continued but became more draconian.

The Department's argument is consistent with a quote from the district court: "There are no bans." Appellee Br. at 16, citing D. App. 328; R. Doc. 111, at 11.[1] There is a problem in Respondents' and district court's approach under RLUIPA. RLUIPA does not

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[1] The Department actually began with its reliance on a non-allegation of the Second-Amended Complaint; the introduction. It is merely that: an introduction. The introduction is meaningless as to the specific allegations of the complaint with the exception of trying to convey some information of some of the allegations, under the rule of law, here, RLUIPA, and the general relief sought.

speak just to a lack of "bans," but to "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc–1(a). The Second-Amended Complaint is replete with references relating to pre-pandemic religious practices, but the issues related to "current policies," as the Department continually changed course during the litigation to avert the already described RLUIPA harms and modified policies except not all reflected the least restrictive means, which are of themselves continual RLUIPA violations.

For example, Allan alleged that "the Department's ban on spiritual practices is not the least restrictive means of furthering a compelling state interest," having previously provided examples of those restrictions on spiritual practices. *See, e.g.,* Sec. Amend. Comp. ¶84, 8th Cir. App.31, R. Doc. 63, at 18; compare with *id.,* ¶¶78-81, 8th Cir. App. 30, R. Doc. 63, at 17. As furtherance of Allan's allegations, in paragraph 87 of the Second-Amended Complaint, he provides additional claims and examples:

> There are other least restrictive ways that would allow the Plaintiffs to exercise their respective religious or spiritual ceremonies, such as live streaming when volunteers are unavailable to physically visit the MSOP facility…. *See also* Exhibit T.

Sec. Amend. Comp. ¶87, 8th Cir. App. 31, R. Doc. 63, at 18.

Exhibit T, attached to the Second-Amended Complaint, reflects an initial proposal inclusive of live streaming, in this respect, and repeated several times for "an outside volunteer *over the web* to facilitate our service." 8th Cir. App. 145–148, R. Doc. 63-1, at 2–5 (emphasis added). *See, e.g., Miller v. Redwood Toxicology Lab., Inc.,* 688 F.3d 928, 931 (8th Cir. 2012) ("courts additionally consider 'matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned'"). *See also,* Sec. Amend. Comp. ¶100–101, 8th Cir. App. 33, R. Doc. 63, at 20.

The Department contends that Allan only challenged "pandemic-related alterations to [the] policy." 8th Cir. Res. Br. at 20. While on its face, during the preliminary injunction hearing, the reinstatement of pre-COVID spiritual practices policy appeared "well," the post-July 1, 2021 rescission of Minnesota emergency orders and the Department's claimed end of the COVID emergency in May of 2023, the Department's subsequent acts, revealed that things were not "well" as it related to livestreaming. *See,* Allan 8th Cir. Princ. Br. at 20. This includes the Department's undisclosed November 7, 2023 policy on livestreaming. 8th Cir. App. 158–159, R. Doc. 101-1 at 1–2. Regardless, Allan is hardly manufacturing claims as the Department asserts. Appellees' Br. at 19. The arguments regarding continuing RLUIPA violations are asserted and as the Department understood.

In support of its argument, the Department cites to a summary judgment proceeding in *Patel v.*

U.S. Bureau of Prisons, 515 F.3d 807 (8th Cir. 2008). *Id.* at 21–22 n.13. In *Patel*, this Court concluded that the prisoner, Patel, had to "first raise a material question of fact regarding whether the BOP has placed a 'substantial burden' on his ability to practice his religion" under RLUIPA. *Id.* at 813. Patel failed to do so. *Id.* The parties were in a summary judgment proceeding and Allan certainly revealed and supported a substantial burden to practice his religion—which the evidence and allegations asserted occurred, vis-à-vis livestreaming. Discovery flushed out the Department's illegalities as suspected and as alleged, regarding current policies post rescission of Minnesota's emergency orders, which also governed state agencies.

If indeed, Allan is the "master[ ] of his complaint,"[2] he did plead as to the examples of how the Department restricted his religious practices, *and* how less restrictive means should have been made available, such as and as specifically alleged, livestreaming. The Department knew it and sought discovery regarding these types of contentions. Indeed, the Department does not deny the issuance of the November 7, 2023 policy (effective December 2023) affecting livestreaming which continues to be a substantial burden on religious practices and affirmed by deposition testimony of MSOP personnel. *See,* 8th Cir. Princ. Br. at 20–21.

The Department asserted that the November 2023 policy (effective December 2023) regarding

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[2] *See* 8th Cir. Resp. Br. at 19, n.11.

livestreaming, as unrelated to pandemic policies and, therefore, moot. The Department also asserted that because Allan could not livestream before the pandemic but can now, it is a further foundational argument to mootness.

But, here lies the issue. The pandemic policies of the Department, which it essentially admits did restrict religious rights of Allan, have had subsequent amendment, but do not cure the continuing RLUIPA violations in total.

What the Department implies, is that before the issuance of the livestreaming policy of November 2023, Allan would be required to obtain a court order for livestreaming. *See* Settlement Agreement, 8th Cir. App. 171–177, R. Doc. 101–1, at 14–19. However, even the issued livestreaming policy, remains violative of RLUIPA, which arose during the existing legal action, within the asserted allegations of "current policy." Again, while livestreaming was offered as a less restrictive means to avert a substantial burden on religious practices, the policy still had to meet RLUIPA standards.[3]

3. On appeal, the Eighth Circuit affirmed the district court's dismissal disregarding that the

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[3] The Department references to "Spiritual Groups" with its off-comment about standing is misplaced. 8th Cir. Resp. Br. at 24. The Department knows that the Second-Amended Complaint did not adopt any definition of "Spiritual Group," but used it for the ease of making the allegations "unless otherwise individually recognized," which occurred throughout the complaint. 8th Cir. App. 17, R. Doc. 63, at 4.

Department continues to fail to adopt and implement RLUIPA's general rule despite taking the federal financial assistance in 2020 and 2021—a continuing Article III controversy:

> Here, Plaintiffs' central claims about the pandemic-era policies are moot because those policies are no longer in effect. Plaintiffs do not dispute that the pandemic-era policies are no longer in effect. Instead, Plaintiffs take issue with MSOP's current practices—requiring spiritual groups to have a minimum of six members, not permitting video visits with spiritual resource volunteers, and not permitting livestreaming.
>
> But MSOP's current policies were not challenged in the operative second amended complaint. From beginning to end, the complaint only takes issue with MSOP's pandemic-era policies. Both Counts I and II mention the "Department's ban on spiritual practices," which seems to refer to the "Department's March 13th directive" that issued the first of the pandemic-related restrictions. The second amended complaint does not mention the minimum size requirement or video visits. Plaintiffs are at their strongest when they assert that their complaint provided notice for their livestreaming argument. But even there, the complaint refers to "the Department's current policy," which, in April 2022, was subject to COVID restrictions. Even if individual passages of the complaint could be "parsed piece by piece"

> to support a claim under MSOP's current policies, when the complaint is "read as a whole," Plaintiffs' arguments fail. *See Warmington*, 998 F.3d at 795.

Allan, 127 F.4th at 721. App. A-6 - A-7.

By doing so, the Eighth Circuit, under Federal Rule of Procedure 8(a), created a new, more difficult legal standard for plaintiffs suing the government when there are governmental amendments to the challenged policy during the pendency of district court proceedings. The Eighth Circuit would have reversed the lower court if the Eighth Circuit had applied the Court's post-appeal test of whether the amended policy "is sufficiently similar to the repealed [policy] that it is permissible to say that the challenged conduct continues" the controversy is not mooted by the change, and a federal court continues to have jurisdiction. *Northeastern,* 508 U.S. at 662 n. 3.

Notably, during the Eighth Circuit proceeding, a limited waiver applied because the Department's Response Brief failed to repudiate the Department's stated, steadfast refusal to enforce RLUIPA's general rule after the Department accepted the federal funds in 2020 and 2021 based on publicly-available documents. Def. 8th Cir. Response Brief at 1-28. *See* Def. S.J. Memo., R.Doc. 94 at 18.

Moreover, the Department's "silence" in its Eighth Circuit appellate response brief waived any objections not obvious to the Court to the specific point raised by the petitioners' Principal Brief (and in the

district court) that the Department is liable because of the Department's stated, steadfast refusal to enforce RLUIPA's general rule, 42 U.S.C § 2000cc–1, after the Department accepted the federal funds in 2020 and 2021. Def. 8th Cir. Response Brief at 1-28. *See* Def. S.J. Memo., R.Doc. 94 at 18.

To be sure, an appellee in the court of appeals does not concede that a judgment should be reversed by failing to respond to an appellant's argument in favor of reversal. *See Singletary v. Continental Illinois Nat'l Bank,* 9 F.3d 1236, 1240 (7th Cir.1993). "However, the appellee 'waives, as a practical matter anyway, any objections not obvious to the court to specific points urged by the [appellant].'" *Beazer East, Inc. v. Mead Corp.,* 412 F.3d 429, 437 (3rd Cir. 2005), quoting *Hardy v. City Optical Inc.,* 39 F.3d 765, 771 (7th Cir.1994) (citations omitted).

The Department's limited waiver applied to the petitioners' claim that the Department is liable for violating RLUIPA by not informing MSOP that RLUIPA's general rule, 42 U.S.C § 2000cc–1, applied after the Department accepted the federal money in 2020 and 2021. The petitioners' appellate brief clearly briefed the claim. The Department's appellate brief completely avoided it—silence. Def. 8th Cir. Response Brief at 1-28. *See* Def. S.J. Memo., R.Doc. 94 at 18.

First, in the district court, the Department's summary judgment motion claimed that MSOP did not have to follow RLUIPA's general rule because the Department has not received any federal funding. Def. S.J. Memo., R.Doc. 94 at 16-18. For example, the Department stated, "MSOP does not receive federal

funding such that RLUIPA is applicable." Def. S.J. Memo., R.Doc. 94 at 18.

Second, the Department in their district court brief showed that publicly-available records proved the Department, which was steadfastly refusing to apply RLUIPA at MSOP, had taken federal money in 2020 and 2021 for MSOP. For example, the petitioners wrote:

> As the plaintiff MSOP spiritual clients viewed the publicly available documents from the federal Coronavirus Relief Fund, the issue was not about the vaccines per se, but about the money for administrating MSOP programs. Sec. Amend. Compl. ¶ 159. The State received federal funding through the Coronavirus Relief Fund. The Department asked and received that federal funding for MSOP employees. *Id.* The Department did not request an additional *state* allocation for funding, but federal funding to carry out the function of the Department and in particular the administration of MSOP programs (Direct Care and Treatment program). *Id.*
>
> To the contrary, the Department not only received federal funding, but sought after it. Publicly-available documents show that MSOP received COVID federal funding for MSOP worker paid leave and sick leave during fiscal years 2020 and 2021. These moneys would have arrived at MSOP prior to September 16, 2020 and continued thereafter through fiscal year 2021.

Plt. S.J. Opp. Memo., R.Doc. 102 at 12.

Unfortunately, the district court's order did not correct the government that the government's position that RLUIPA's general rule, 42 U.S.C § 2000cc–1, did not apply to MSOP because no federal funds were received, contradicting publicly-available information. If it had, the district court would have granted summary judgment because the Department was obligated to adopt RLUIPA's general rule, 42 U.S.C § 2000cc–1, after it accepted the federal funds in 2020 and 2021. That is the gravamen of the complaint—the Department's stated, steadfast refusal to comply with RLUIPA's general rule, 42 U.S.C § 2000cc–1, since the Department accepted the federal money in 2020 and 2021.

Third, the petitioners' Eighth Circuit principal brief clearly made the argument that the Department is liable because of its stated, steadfast refusal to adopt RLUIPA's general rule, 42 U.S.C § 2000cc–1, after the Department accepted the federal money in 2020 and 2021. In fact, the petitioners' Eighth Circuit principal brief at page 27 claimed that the Department had performed "badly" by not complying with RLUIPA's general rule, 42 U.S.C § 2000cc–1, at MSOP after accepting the federal funding in 2020 and 2021:

> Appellants, MSOP clients, as non-moving parties, should have been granted summary judgment based on MSOP's refusal to provide RLUIPA religious accommodations and otherwise after accepting federal funding in 2020 and 2021. MSOP is continuing to refuse

> livestreaming to all MSOP clients even though such religious accommodations are required under RLUIPA. The Court should resolve this appeal in favor of Appellants because MSOP has performed so badly—not providing any RLUIPA religious accommodations despite taking the federal money, which, in turn, subjected them to providing RLUIPA religious accommodations.

Fourth, after the Department was accused of acting "badly" by not applying RLUIPA's general rule, 42 U.S.C § 2000cc–1, a response from the Department was expected[4] to the following question: why didn't the Department require MSOP to adopt RLUIPA's general rule, 42 U.S.C § 2000cc–1, after the Department received the federal money? This question parallels the third question presented in the petitioners' Eighth Circuit principal brief:

> Whether the Court abused its discretion by not granting summary judgment to Appellants because MSOP refuses to provide RLUIPA religious accommodations, including livestreaming, to all MSOP clients after it received federal funding.

The Department has still failed to repudiate its position that RLUIPA's general rule, 42 U.S.C § 2000cc–1, does not apply because it didn't take federal

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[4] A Latin maxim may have some relevance, "qui tacet consentire videtur, ubi loqui debuit ac potuit"; that is, "he who is silent, when he ought to have spoken and was able to, is taken to agree."

financial assistance—even though publicly-available documents show the Department did receive federal financial assistance in 2020 and 2021.

4. This petition for writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 emphasizes that "review on a writ of certiorari is not a matter of right, but of judicial discretion" and that a "petition for a writ of certiorari will be granted only for compelling reasons." And, the court provides a list of "character of the reasons the Court considers" which apply to this petition. Section (c) states that the "United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

Section (c) applies to this petition because the Eighth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

The Eighth Circuit affirmed dismissal, after the COVID-19 polices were amended, because under Fed. R. Civ. P. 8(a), "issues presented must be properly pled before the court." *Allan*, 127 F.4th at 721. App. A-5. But, this Court's legal standard for these circumstances, albeit on appeal, is where a new

statute "is sufficiently similar to the repealed [statute] that it is permissible to say that the challenged conduct continues," the controversy is not mooted by the change, and a federal court continues to have jurisdiction. *Northeastern,* 508 U.S. at 662 n. 3.

The question of nationwide importance upon which the Eighth Circuit and this Court appear to disagree is:

> Whether, in the situation where the government amends legally-challenged policies during the pendency of district court litigation, the Eighth Circuit's legal standard, under Fed. R. Civ. P. 8(a), requiring that plaintiff's "issues presented must be properly pled before the court" under Fed. R. Civ. P. 8(a) conflicts with the Court's legal standard on appeal that the governmental amendments "may not render a [claim] moot where the amended [policy] 'is sufficiently similar' to the original [policy] so 'that it is permissible to say that the challenged conduct continues."

I. The federal court enforcement of federal statutory civil rights requirements, when contingent on receipt of federal financial assistance, is of nationwide importance.

It is axiomatic that federal court enforcement of statutory civil rights requirements is of nationwide importance. And, so is federal court enforcement of federal statutory civil rights commitments, when contingent on receipt of federal financial assistance. If

there weren't such federal court enforcement, the states would be free to accept the financial assistance without complying with the "strings attached"—in this case RLUIPA. Federal court enforcement is necessary to enforce the "strings attached" when the states take the federal financial assistance.

RLUIPA's "general rule" regarding religious accommodation is a "string attached" if the state program or activity "receives Federal financial assistance":

> (b)Scope of application. This section applies in any case in which—(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

42 U.S.C. § 2000cc-1(b).

If the state program or activity "receives Federal financial assistance, then the state program or activity must adopt and adhere to RLUIPA's "general rule" as to institutionalized persons, providing that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution…even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a).

In this case, it is known by publicly-available documents that the Department received federal funding in 2020 and 2021. 8th Cir. App. 211–226, R. Doc. 101–1, at 54–69; *see also,* 8th Cir. App. 227–249, R. Doc. 101–1, at 70–92. This fact of the Department receiving federal funds has never been disputed. Therefore, RLUIPA's general rule unequivocally applies to the Department and MSOP.

But, in the Department's district court briefing and in the Department's appellate court silence, the Department denies ever receiving federal financial assistance—even though it did—and denies RLUIPA applicability anyway.

II. This petition offers the Court an opportunity to harmonize the Eighth Circuit's legal standard and this Court's legal standard for determination of mootness after governmental amendment of the challenged policy during litigation.

The Eighth Circuit decision errs by creating a new, different legal standard for "pendency of district court proceeding" government amendments to challenged policies as opposed to the Court's post-appeal legal standard.

The gravamen of the institutionalized persons' COVID-pandemic-era complaint is the Department is choosing not to follow the RLUIPA's "general rule," 42 U.S. Code § 2000cc-1 (a), despite taking federal COVID-19 funds making RLUIPA applicable under § 2000cc-1 (b). The government denied receiving COVID-19 federal funds (although it had), did not

adopt or adhere to RLUIPA's general rule, even currently, but did eventually repeal its COVID-19 restrictive policies during the district court litigation. The Eighth Circuit affirmed dismissal on mootness, under Fed. R. Civ. P. 8(a), because "issues presented must be properly pled before the court." But, this Court's legal standard, albeit on appeal, is whether the amended policy is sufficiently similar to the original policy "so that it is permissible to say that the challenged conduct continues." *Northeastern,* 508 U.S. at 662 n. 3.

On one hand, in this Court when the government amends legally-challenged policies during the pendency of Supreme Court litigation, the Court's legal standard is that the governmental amendments "may not render a [claim] moot where the amended [policy] 'is sufficiently similar' to the original [policy] so 'that it is permissible to say that the challenged conduct continues."

On the other hand, when the government amends legally-challenged policies during the pendency of district court litigation, the Eighth Circuit's legal standard requires that plaintiff's "issues presented must be properly pled before the court" under Fed. R. Civ. P. 8(a).

This Court's and Eighth Circuit's legal standards are in conflict. There should be no difference in the legal standard because the government's amendments to the challenged policies occurred during the pendency of district court litigation as opposed to the during the pendency of appellate court litigation.

This petition offers the Court an opportunity to harmonize the Eighth Circuit's legal standard and this Court's legal standard when they are different. The petitioners seek an adjudication that the same legal standard should apply for governmental amendments to challenged policies during the pendency of district court proceedings as applied to the governmental amendments to challenged policies during the pendency of district court proceedings.

III. The Eighth Circuit decision contradicts this Court's *City of Shelby* decision which should be understood as an instruction to lower courts to adjudicate the *correctness* of a factually-supported legal theory pleaded in a complaint, not to adjudicate the *specificity* with which a factually-supported legal theory must be pleaded to avoid dismissal.

The Eighth Circuit's decision imposing pleading requirements after the governmental policy amendments has another problem. Under *Johnson v. City of Shelby*, 574 U.S. 10 (2014), the Supreme Court left breathing room after *Iqbal* and *Twombly*, to pursue availing legal theories beyond the face of the complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569-70 (2007) (Plaintiffs must set forth enough factual allegations to "nudge[ ] their

claims across the line from conceivable to plausible," or "their complaint must be dismissed.").

In *City of Shelby*, a group of police officers sued a municipality, alleging that the municipality had violated their rights under the Fourteenth Amendment by firing them without due process. The lower courts had dismissed the complaint because the plaintiffs did not expressly invoke 42 U.S.C. § 1983. The Supreme Court reversed, holding that "no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke § 1983 expressly in order to state a claim." 574 U.S. at 11. After noting *Iqbal*'s and *Twombly*'s requirement that "[a] plaintiff ... must plead facts sufficient to show that her claim has substantive plausibility," the Supreme Court concluded that "[h]aving informed the city of the factual basis for their complaint, [plaintiffs] were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim." *Id.* at 12.

To be sure, petitioners in this case agree, as they must, that a claim may be dismissed if it is "based on an ... unavailing [legal theory]." *Id.* at 327, 109 S.Ct. 1827. If, for example, the plaintiffs in *City of Shelby* had asserted their due-process claim against a private actor instead of a municipality, their complaint could have been dismissed under Rule 12(b)(6) because the Fourteenth Amendment does not apply to private actors. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 837, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982) ("[T]he Fourteenth Amendment, which ... guarantees due process, applies to acts of the states, not to acts of private persons or entities."). This is true even if the

plaintiffs had "informed the city of the factual basis for their complaint." *City of Shelby*, 574 U.S. at 12, 135 S.Ct. 346.

The now-Chief Judge of the U.S. District Court of the District of Minnesota, after interpreting *City of Shelby,* summarized in the context of a motion to dismiss:

> In sum, a complaint may fail to state a claim—and thus be dismissed under Rule 12(b)(6)—*either* because the factual allegations are insufficient *or* because the claim is based on an "unavailing" legal theory. *Neitzke*, 490 U.S. at 327, 109 S.Ct. 1827.

Viewpoint Neutrality Now! v. Regents of University of Minnesota, 516 F.Supp.3d 904, 916 (D.Minn. 2021), *aff'd,* 109 F.4th 1033 (8th Cir. 2024), *cert. denied*, 2025 WL 1151234 (U.S. 2025).

In a good way, then, the *City of Shelby* case stands for the proposition that plaintiff's attorneys are not required to include all their legal theories in a complaint and, therefore, may develop their legal theories after the filing of the complaint. As noted above, to be sure, the plaintiff's complaint under *Iqbal* and *Twombly* must be factually-supported. *Viewpoint,* 516 F.3d 904 at 916. However, under *Shelby,* the specificity of the legal theories themselves is analyzed under an "availing" standard. *Id.* The *City of Shelby* decision should be understood as an instruction to the lower courts to adjudicate the *correctness* of a legal theory pleaded in a complaint, not to adjudicate about

the *specificity* with which a legal theory must be pleaded to avoid dismissal. *Id.*

But, the Eighth Circuit's decision refuses to adjudicate the *correctness* of petitioners' legal theory, instead adjudicating that the *specificity* of the legal theory in the complaint was legally insufficient. *Allan*, at 720, App. A-5. The Eighth Circuit affirmed the lower court's dismissal based on the legal theories of the complaint not being specific enough to support a continuing RLUIPA violation—not on whether the continuing RLUIPA legal theory is "availing." *Id.; Viewpoint,* 516 F.3d 904 at 916.

The lower court even stated, "While MSOP's existing policies concerning spiritual groups may or may not abide by RLUIPA and the Constitution, the Court will not reach the merits of these questions as this is properly the subject of a separate litigation." *Allan*, 2024 WL 218426, at *5 (D.Minn. 2024), App. A-22. This sentence in the district court decision contradicts the *City of Shelby* decision which requires the district court to consider the *correctness* of the continuing, factually-supported legal theory, not the *specificity* of the legal theory pled in the complaint.

Simply put, the Eighth Circuit's legal standard does not provide the *Shelby*-required post-complaint breathing room for plaintiff's attorneys to develop legal theories against the government during district court litigation.

In this way, the Eighth Circuit in its precedent-making, published decision has caved to the government's perennial "we changed the policy, so the

case is over" defense without checking to see if the plaintiffs' continuing factually-supported legal theories have really been mooted out.

Under the *City of Shelby* decision, the Eighth Circuit is required to determine whether the plaintiffs' continuing, factually-supported legal theory is availing. The Eighth Circuit's decision, instead, requires plaintiffs to re-file and re-plead their continuing, factually-supported legal theories regardless of whether the continuing alleged governmental misconduct was completely eliminated by the government's amendments to the challenged policies.

The petitioners believe the federal judiciary, led by this Court, must balance progress and order in lawsuits against the government. The *Shelby*-required breathing room, ignored by the Eighth Circuit, is particularly important to plaintiffs' attorneys suing the government because of the enactment and interpretative tools the government has to manufacture defenses.

In this case, the government manufactured two defenses presented to the Eighth Circuit and district court. The Department first manufactured a defense that it never received the federal financial assistance to avoid judgment. Once that was shown to be false according to publicly-available documents on the internet, the Department manufactured a mootness defense based on its amendments of the challenged policies. The district court, and the Eighth Circuit, agreed and dismissed the case on mootness. But, neither of the manufactured defenses resolve whether

the Department must follow RLUIPA after it took the federal money—the petitioners' continuing, factually-supported, availing legal theory.

Moreover, a federal court after the *City of Shelby* decision is prohibited from dismissing a factually-supported, availing legal theory against the government under Rule 12(b)(6). Essentially, that is what the Eighth Circuit's decision has done to petitioners. The Eighth Circuits' decision deprives petitioners of judicial adjudication of their continuing, factually-supported, availing legal theory.

And, worse, the Eighth Circuit decision sets a precedent to do it to future plaintiffs suing the government too. In the Eighth Circuit, whenever the government amends its challenged policies during district court litigation, the Eighth Circuit's Rule 8(a) pleading requirement leaves no breathing room for plaintiff's continuing, factually-supported, availing legal theories to be adjudicated. The result is the government will win more cases in the Eighth Circuit even when there are still continuing, factually-supported, availing legal theories. The Eighth Circuit's precedent conflicts with the *City of Shelby* decision.

Specifically, under the *City of Shelby* legal standard, the petitioners' continuing, factually-supported, availing RLUIPA legal theory is that the Department, after it took the federal money in 2020 and 2021, has engaged in a stated, steadfast refusal to adopt RLUIPA's general rule, 42 U.S.C § 2000cc–1, violating petitioners' RLUIPA rights. The Eighth Circuit's legal response, prodded on by the

Department's manufactured defenses, is that the plaintiff's "issues presented must be properly pled before the court" under Fed. R. Civ. P. 8(a):

> [U]nder the Federal Rules of Civil Procedure, the issues presented must be properly pled before the court. *See* Fed. R. Civ. P. 8(a).

Allan, at 720, App. A-5. But, the Eighth Circuit's legal standard contradicts *City of Shelby* which requires the lower courts to focus on the *correctness* of a legal theory pleaded in a complaint, not to determine the *specificity* with which a legal theory must be pleaded to avoid dismissal.

If the Eighth Circuit had followed the *City of Shelby* decision, the Eighth Circuit would have adjudicated on the correctness of petitioners' continuing, factually-supported, availing legal theory. If the Eighth Circuit had applied that test, approved by this Court, the petitioners would have prevailed on appeal and prevailed on summary judgment instead of suffering a dismissal.

IV. The Eighth Circuit's legal standard provides a perverse incentive in favor of governmental legislative changes to the challenged policies as a litigation tactic.

As mentioned above, lawsuits against the government are the most important cases on the federal court dockets. The federal courts, for over two centuries, have deftly handled lawsuits against the

government promoting and balancing progress and order at the same time.

The question addressed here is "why does the Eighth Circuit's legal standard, applicable after the government amends the challenged policy during litigation, change the balance between plaintiffs and governmental defendants?" The answer is that the governmental defendants have the power during litigation to directly or indirectly change challenged policies—a power which could be used as a litigation tactic.

At the local level, governmental defendants such as counties, municipalities and school districts can easily amend their challenged policies. Similarly, a state agency can easily amend their challenged policies—as was done in this case. Of course, amending a state law requires state legislative approval subject to the Governor's veto. So, at all levels, governmental changes in the challenged policies or state laws are possible.

The Eighth Circuit's legal standard provides an incentive for governmental amendments to challenged policies as litigation tactics. Since the Eighth Circuit's legal standard appears to require the plaintiffs to re-file and re-plead their claims every time the government changes their challenged policy, the plaintiffs' cost of litigation against the government increases. In turn, because of the higher costs of litigating against the governments, fewer plaintiffs will be able to afford lawsuits against the government. In turn, with fewer lawsuits filed against the

government, the court will be denied its important role in adjudicating lawsuits against the government

So, this case is an excellent vehicle for the Court to reverse the Eighth Circuit's legal standard which incentivizes unproductive governmental litigation tactics. A decision in petitioners' favor would also serve to notify the governments nationwide that amending the challenged policy or state law during the course of litigation will "moot" out the case only if the continuing, factually-supported, alleged misconduct is completely terminated by the policy or state law amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: May 1, 2025 s/ Erick G. Kaardal

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