No. 24-229

In the Supreme Court of the United States

SANJAY TRIPATHY, PETITIONER

v.

JEFF MCKOY, DEPUTY COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, ET AL.

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

REPLY BRIEF FOR PETITIONER

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Respondents admit (Opp. 8) that this case presents the "exact issue" presented in *Landor* v. *Louisiana Department of Corrections and Public Safety*, petition for cert. pending, No. 23-1197 (filed May 3, 2024), in which this Court has called for the views of the Solicitor General. The Solicitor General has now answered that call, urging that the petition in *Landor* "should be granted." U.S. Amicus Br. 1, *Landor*, No. 23-1197 ("U.S. *Landor* Br."). The Solicitor General correctly explains that the issue is "undeniably important" and "[t]he denial of a damages remedy to vindicate RLUIPA's substantive protections … undermine[s]" Congress's purpose of restoring pre-*Smith* protections for religious exercise.

U.S. *Landor* Br. 21. This Court accordingly should follow its ordinary practice and hold this petition pending the outcome of *Landor*.

Respondents agree (Opp. 2) as an "[a]lternative[]" that this Court "should hold the petition pending a decision on the *Landor* petition." They agree that, "if the Court grants the *Landor* petition and answers the question presented in the affirmative," then "the Court should grant, vacate, and remand in this case so as to permit the lower court to apply the *Landor* decision in the first instance." Opp. 2.

That is exactly right. And the only way to provide that relief is to hold this petition pending the outcome of *Landor*. Indeed, respondents admit that a GVR is this Court's ordinary practice. See Opp. 22 (citing *Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163 (1996)).

Respondents nonetheless devote much of their brief to arguing (Opp. 22) that "the Court should deny the petition now, regardless of what it decides to do with the Landor petition." But the alternative arguments they raise are properly considered by the Second Circuit on remand in the first instance, following a GVR. See *Lawrence*, 516 U.S at 166-67. Respondents do not dispute that the sole basis for the Second Circuit's decision in this case was its answer to the RLUIPA damages question. See Pet. App. 12a. The question is therefore squarely presented and outcome dispositive. There is accordingly no basis for this Court to wade into respondents' alternative arguments in the first instance, without any guidance from the lower courts. See *ibid.* This is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Respondents' alternative arguments further provide no basis for this Court to deny review because respondents knowingly waived those arguments in the Second Circuit. Respondents advanced one—and only one—argument regarding the RLUIPA claim in their appellee brief: "[m]oney [d]amages [a]re [u]navailable [u]nder RLUIPA." C.A.2 Appellees Br. 21. Although they argued qualified immunity and various defenses to *other* claims brought in this case, they conspicuously chose not to make those arguments for the RLUIPA claim. See *id.* at 3, 14-20, 28-41. Respondents thus made a knowing and deliberate decision to defend the district court's dismissal of Tripathy's RLUIPA claims *solely* on the basis of the RLUIPA damages issue, deliberatively waiving any alternative arguments to affirm the dismissal of Tripathy's RLUIPA claim.

Respondents' alternative arguments therefore have not "been preserved throughout this litigation." Opp. 10. Quite the opposite. "Issues not sufficiently argued in" an appellee's brief "are considered waived and normally will not be addressed on appeal." *Norton* v. *Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998). Those principles apply even more forcefully here, where there is a deliberate waiver and estoppel. Having "steered" the court of appeals "away from" these alternative defenses and "towards the merits" of the question presented—despite its clear awareness of the availability of alternative arguments—respondents "intentional[ly] relinquish[ed] or abandon[ed]" its right to assert those arguments now. *Wood* v. *Milyard*, 566 U.S. 463, 474 (2012) (citations omitted). In any event, the Second Circuit can address waiver and estoppel following a GVR.

The remainder of respondents' brief (Opp. 14-23) rehashes arguments that RLUIPA does not provide for individual-capacity damages and that the Second Circuit's decision does not rest on constitutional grounds. But those arguments provide no basis to refuse to hold this case for *Landor*, and regardless lack merit. As the United States recently explained in its *Landor* invitation brief, this Court's decision in *Tanzin* v. *Tanvir*, 592 U.S. 43 (2020), "makes clear that RLUIPA—which has the same operative text as RFRA—authorizes suits for money damages against governmental officials in their individual capacities." U.S. *Landor* Br. 12. The United States correctly highlighted the Second Circuit's decision in this case as resting on constitutional grounds. *See id.* at 20. And the United States correctly explained that the Second Circuit's decision "itself implicates a circuit conflict that warrants this Court's review." *Id.* at 11 (citing *Haight* v. *Thompson*, 763 F.3d 554 (2014)). Quite simply, the petition in *Landor* should be granted, and this case should be held pending the outcome of *Landor*.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the Court should grant certiorari in *Landor* and dispose of this petition in accordance with the decision in that case. If the Court does

not grant the petition in *Landor*, it should grant the petition in this case.

Respectfully submitted.

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