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NOTES

Religious Expression and the Penal Institution: The Role of Damages in RLUIPA Enforcement

*Sisney v. Reich*¹

I. INTRODUCTION

The First Amendment protects, among other things, the free exercise of religion. In order to further protect religious exercise by institutionalized persons,² Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).³ RLUIPA “allows institutionalized persons to exercise their religion to the extent that it does not undermine the security, discipline, and order of their institutions.”⁴ Given the variety of religions practiced by institutionalized persons, no one single fact pattern emerges as the “typical” RLUIPA case. Sometimes, for example, institutionalized persons seek recognition of their religion by the prison and request group worship accommodation.⁵ In other cases, offenders sue under RLUIPA because the prison does not provide them food that accommodates their religious dietary restrictions.⁶ While these examples indicate that injunctive relief could force prisons to allow offenders to practice their religion more freely, the law is unsettled as to whether the prisoners can receive compensatory damages as well: “[t]o put it mildly, there is a division of authority on this question.”⁷

1. 533 F. Supp. 2d 952 (D.S.D. 2008).

2. An institutionalized person is, *inter alia*, a person who resides in a state operated jail, prison, or other correctional facility. See 42 U.S.C. § 2000cc-1 (2000) (adopting the definitions of “person” and “institution” from 42 U.S.C. § 1997 (2000)). This Summary uses “offender,” “inmate” and “prisoner” synonymously with “institutionalized person.”

3. 42 U.S.C. §§ 2000cc to 2000cc-5 (2000).

4. 146 CONG. REC. S6687 (daily ed. July 13, 2000) (statement of Sen. Hatch).

5. See *Murphy v. Mo. Dep’t of Corr.*, 372 F.3d 979, 981-82 (8th Cir. 2004).

6. See *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 809-12 (8th Cir. 2008).

7. *Smith v. Allen*, 502 F.3d 1255, 1270 (11th Cir. 2007) (quotation marks omitted).

This Summary focuses on RLUIPA's institutionalized persons provision and whether, under its remedial provision, an inmate plaintiff can receive compensatory damages. First, this Summary looks at key decisions dealing with the availability of compensatory damages in individual and official capacity claims under RLUIPA. The second component of the Summary analyzes a recent Eighth Circuit decision on the issue of damages as it relates to RLUIPA. This Summary then evaluates the case law on this issue, discussing the policy reasons for and against allowing compensatory damages. Lastly, the discussion concludes that the Eighth Circuit should prohibit institutionalized persons from obtaining compensatory relief.

II. LEGAL BACKGROUND

A. Case Law and Legislation Before RLUIPA

In *Employment Division, Department of Human Resources of Oregon v. Smith*,⁸ the United States Supreme Court held that the First Amendment's Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability'" that incidentally burdens religious conduct.⁹ The Supreme Court did, however, recognize that Congress could shield religious exercise through legislative action.¹⁰ In response to *Smith*, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA).¹¹ RFRA prohibited the government from substantially burdening a person's exercise of religion, even if the burden resulted from a rule of general applicability.¹² The only exception to this prohibition occurred when the government demonstrated that the burden furthered a compelling governmental interest¹³ and was the least restrictive

8. 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2000)).

9. *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)). In *Smith*, the Supreme Court upheld an Oregon law that banned peyote possession with no allowance for sacramental use of the drug. *Id.* at 874, 890. As a result, Oregon could freely deny unemployment benefits to persons who lost their job due to their religiously inspired peyote use. *Id.* at 890.

10. *See id.*

11. Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2000)); *see also* *Cutter v. Wilkinson*, 544 U.S. 709, 714-15 (2005) (describing RFRA as Congress' response to the holding in *Smith*).

12. 42 U.S.C. § 2000bb-1(a).

13. For example, courts have recognized compelling interests in maintaining public health and well-being and prison safety and security. *See, e.g.,* *Goehring v. Brophy*, 94 F.3d 1294, 1300 (9th Cir. 1996) (State university has a compelling interest in the health and well-being of its students.); *Hamilton v. Schriro*, 74 F.3d 1545, 1554 (8th Cir. 1996) ("Prison safety and security are penological concerns of the highest order.").

means to accomplish that interest.¹⁴ Although the Supreme Court recognized the legislature's right to shield religious exercise, in *City of Boerne v. Flores*, the Supreme Court struck down RFRA as applied to states and their subdivisions as beyond Congress's remedial power under the Fourteenth Amendment.¹⁵ RFRA, passed pursuant to Congress's Fourteenth Amendment enforcement power,¹⁶ "notably lacked a Commerce Clause underpinning or a Spending Clause limitation to recipients of federal funds."¹⁷

Congress responded to the Supreme Court's ruling by passing the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).¹⁸ In an attempt to avoid the same fate as occurred with RFRA, Congress invoked federal authority under both the Spending and Commerce Clauses of the Constitution in passing RLUIPA.¹⁹

14. 42 U.S.C. § 2000bb-1(b). The government does not have "to refute every conceivable option in order to satisfy the least restrictive means prong of RFRA." *Hamilton*, 74 F.3d at 1556. In *Hamilton*, the government satisfied the least restrictive prong where the plaintiff refused to accept any type of modification to his religious ceremony. *Id.* (holding that plaintiff's all or nothing position supports the notion that outright prohibition of religious ceremony is the least restrictive means of achieving safety and security).

15. See *City of Boerne v. Flores*, 521 U.S. 507, 532-36 (1997).

16. See *City of Boerne*, 521 U.S. at 516 ("Congress relied on its Fourteenth Amendment enforcement power in enacting the most far-reaching and substantial of RFRA's provisions, those which impose its requirements on the States."); see also S. REP. NO. 103-111, at 14 (1993), as reprinted in 1993 U.S.C.C.A.N. 1892, 1903 ("[RFRA] falls squarely within Congress' section 5 enforcement power.").

17. *Cutter*, 544 U.S. at 715.

18. Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5 (2000)); see also *Cutter*, 544 U.S. at 715 (describing RLUIPA as Congress' response to the holding in *City of Boerne*).

19. *Id.*; see also 146 CONG. REC. S6689 (daily ed. July 13, 2000) (statement of Sen. Kennedy) (noting that the institutionalized persons section "is based upon . . . the Commerce and Spending powers of Congress.") The import of the institutionalized persons section having no Fourteenth Amendment underpinning is seen in a court's analysis of whether a state waived its or Congress abrogated a state's Eleventh Amendment immunity. Because Congress passed RLUIPA pursuant to the Spending Clause, a court must determine if a state waived its Eleventh Amendment immunity by accepting federal funds. See *infra* notes 64-89, 118-35 and accompanying text. By contrast, since the institutionalized persons section of RLUIPA has no Fourteenth Amendment underpinning, a court can forego the more difficult analysis of whether Congress abrogated a state's Eleventh Amendment immunity. Congress abrogates a state's Eleventh Amendment immunity by unequivocally intending to do so in the statute and acting pursuant to a valid exercise of its Fourteenth Amendment enforcement power. See *United States v. Georgia*, 546 U.S. 151, 158-59 (2006); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001). To determine whether a federal statute is a valid exercise of Congress's power to enforce the Fourteenth Amendment, consequently abrogating the states' Eleventh Amendment immunity,

B. The Provisions of RLUIPA

RLUIPA prohibits the government²⁰ from “impos[ing] a substantial burden” on the religious exercise of institutionalized persons.²¹ Substantial burdens include:

significantly inhibit[ing] or constrain[ing] conduct or expression that manifests some central tenet of a person’s individual religious beliefs; . . . meaningfully curtail[ing] a person’s ability to express adherence to his or her faith; or . . . den[ying] a person reasonable opportunities to engage in those activities . . . fundamental to a person’s religion.²²

In the event an offender believes a substantial burden on his or her religious rights exists, the offender may “assert a violation of [RLUIPA] as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.”²³ The government has not violated RLUIPA if it proves the

“(1) [t]he statute must contain an unequivocal statement of the congressional intent to abrogate; (2) Congress must have identified the history and pattern of unconstitutional action by the states; and (3) the rights and remedies created by the statute must be congruent and proportional to the constitutional violation[] [that] Congress sought to remedy or prevent.” *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 277 (5th Cir. 2005). Note that the *Boerne* court did not find congruence and proportionality in RFRA. *City of Boerne*, 521 U.S. at 533, 536 (“The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved.”).

20. Government is defined as

- (i) a State, county, municipality, or other governmental entity created under the authority of a State;
- (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and
- (iii) any other person acting under color of State law;” and in certain circumstances “includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

42 U.S.C. § 2000cc-5(4).

21. 42 U.S.C. § 2000cc-1.

22. *Murphy v. Mo. Dep’t of Corr.*, 372 F.3d 979, 988 (8th Cir. 2004).

23. 42 U.S.C. § 2000cc-2(a) (2000). In addition, RLUIPA protects land use as a religious exercise by preventing the government from “implement[ing] a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution” except when the government demonstrates that the burden is the least restrictive means and furthers a compelling government interest. 42 U.S.C. § 2000cc(a)(1) (2000). Please note that this section of RLUIPA is outside the scope of this Law Summary.

burden is the least restrictive means to further a compelling government interest.²⁴

To determine if prison officials use the least restrictive means to further a compelling government interest, the court looks at the facts and context of each situation.²⁵ Courts acknowledge that prisons have compelling interests in maintaining institutional security and disciplining offenders;²⁶ nevertheless, prison officials “‘must do more than offer conclusory statements and post hoc rationalizations’” for security concerns to qualify as a compelling interest.²⁷ Prison officials have to provide “‘some basis’ for their stated concerns that the prisoner’s requested accommodation will result in the adverse consequences predicted.”²⁸ Additionally, prison officials must exhibit “‘some evidence’ that their decision represents the least restrictive means necessary to preserve the compelling interest.”²⁹ At a minimum, this requires prison officials to consider alternative courses of action.³⁰

C. Compensatory Damages Under RLUIPA

As stated in Part II.B., if the government violates RLUIPA by imposing a substantial burden on the religious exercise of an institutionalized person without narrowly tailoring its action to further a compelling interest, that person may “‘obtain appropriate relief’” against the government.³¹ Courts have not reached one unified interpretation of RLUIPA’s remedial provision, but

24. 42 U.S.C. § 2000cc-1(a) (2000). The institutionalized persons section of RLUIPA applies when:

- (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.

Id. § 2000cc-1(b).

25. *Murphy*, 372 F.3d at 987.

26. *Cutter v. Wilkinson*, 544 U.S. 709, 722-23 (2005).

27. *Murphy*, 372 F.3d at 988-89 (quoting *Hamilton v. Schriro*, 74 F.3d 1545, 1554 (8th Cir. 1996)).

28. *Schnitzler v. Reisch*, 518 F. Supp. 2d 1098, 1121 (D.S.D. 2007) (quoting *Murphy*, 372 F.3d at 989).

29. *Id.* (quoting *Murphy*, 372 F.3d at 989); *see, e.g.*, *Van Wyhe v. Reisch*, 536 F. Supp. 2d 1110, 1125 (D.S.D. 2008) (“Requiring inmates to continue to violate their religious beliefs for a period of 30 to 90 days, however, is clearly not the least restrictive means of furthering that compelling governmental interest.”).

30. *See Murphy*, 372 F.3d at 989 (“It is not clear that [Missouri Department of Corrections] seriously considered any other alternatives”); *Schnitzler*, 518 F. Supp. 2d at 1121 (finding no basis for conclusion that alternative sex offender treatment program would be ineffective in preventing recidivism and no evidence that alternative programs were considered).

31. 42 U.S.C. § 2000cc-2(a) (2000).

do examine the provision through similar analytical frameworks. Generally courts address three questions to determine whether RLUIPA allows compensatory damages where the state unjustifiably inhibited an institutionalized person's exercise of religion.³² First, does RLUIPA authorize compensatory damages, as well as equitable relief? If the answer to the first question is yes, only then do courts proceed to the next two issues: whether RLUIPA authorizes monetary compensatory damages in individual capacity suits and whether the Eleventh Amendment bars official capacity suits under RLUIPA.

1. Access to Damages Under RLUIPA

The Eleventh Circuit, in *Smith v. Allen*,³³ addressed the issue of whether plaintiff inmate Smith³⁴ could obtain monetary relief if he established that the defendants, members of the Religious Activities Review Committee of the Alabama Department of Corrections, violated RLUIPA.³⁵ In analyzing Smith's claim, the court addressed whether RLUIPA permitted a plaintiff to recover monetary damages at all.³⁶ The court determined the answer turned on what RLUIPA meant by "appropriate relief."³⁷ Surveying the case law on the issue, the court noted that some district courts held that the phrase "appropriate relief" limited a plaintiff's remedy to injunctive and declaratory relief,³⁸ while other district courts held that monetary damages fall within the category of "appropriate relief."³⁹ Further, some district courts presumed that RLUIPA permits monetary relief without specifically deciding the question.⁴⁰

The *Allen* court used the Supreme Court's standard in *Franklin v. Gwinnett County Public Schools*⁴¹ as the initial foundation for its analysis.⁴² The Eleventh Circuit interpreted *Franklin* as standing for the proposition that "where Congress had not given any guidance or clear indication of its purpose with respect to remedies, federal courts should presume the

32. *Sisney v. Reisch*, 533 F. Supp. 2d 952, 966 (D.S.D. 2008).

33. 502 F.3d 1255 (11th Cir. 2007).

34. Smith is a practitioner of Odinism. *Id.* at 1261. Odinism is a pre-Christian faith ground in ancient Icelandic sagas and runic mysticism. *Id.* For more information regarding the tenets of Odinism, see *Rust v. Clarke*, 883 F. Supp. 1293, 1297-98 (D. Neb. 1995).

35. *Allen*, 502 F.3d at 1269. Smith sought approval from the Religious Review Committee to observe certain practices of Odinism. *Id.* at 1261. The Religious Review Committee denied some and approved some of his requests. *Id.* at 1261-62.

36. *Id.* at 1269.

37. *Id.*

38. See *id.* at 1270 for relevant case law.

39. See *id.* for relevant case law.

40. See *id.* for relevant case law.

41. 503 U.S. 60 (1992).

42. *Allen*, 502 F.3d at 1270.

availability of all appropriate remedies.”⁴³ The Supreme Court’s ruling in *Franklin* thus creates a presumption in favor of the availability of both injunctive and monetary relief.⁴⁴ In light of the *Franklin* decision, the Eleventh Circuit concluded that absent a contrary intent, “appropriate relief” encompasses both monetary and injunctive relief; therefore, plaintiffs under RLUIPA can recover damages.⁴⁵

The *Allen* decision examined the availability of monetary damages under RLUIPA in greater depth than any other court of appeals decision. In most cases, the plaintiff prayed for compensatory damages, but the courts reached their holding without addressing the issue of whether RLUIPA even permitted compensatory damages.⁴⁶ For example, the Third Circuit in *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*⁴⁷ remanded to the district court the plaintiff religious organization’s RLUIPA claim for the court to enter summary judgment in favor of the plaintiff and to determine the amount of the plaintiff’s compensatory damages.⁴⁸ As such, the Third

43. *Id.* In *Cannon v. University of Chicago*, the Supreme Court construed Title IX to have an implied cause of action although no express cause of action existed within the act. 441 U.S. 677, 717 (1979). In *Franklin*, the Supreme Court faced the issue of whether “the implied right of action under Title IX . . . support[ed] a claim for monetary damages.” 503 U.S. at 62-63. RLUIPA, in contrast, contains an express cause of action. 42 U.S.C. § 2000cc-2(a) (2000). Given this difference, another court may find that *Franklin*’s presumption of all available remedies does not govern interpretation of RLUIPA’s remedial provision.

44. *Allen*, 502 F.3d at 1270.

45. *Id.* at 1271.

46. *See, e.g.*, *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807 (8th Cir. 2008) (Plaintiff offender prayed for compensatory damages, but the district court dismissed his claims and Eighth Circuit affirmed.); *Kay v. Bemis*, 500 F.3d 1214 (10th Cir. 2007) (Plaintiff offender prayed for compensatory damages, and Tenth Circuit remanded RLUIPA claim to district court without discussing the propriety of compensatory damages.); *Vision Church v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006) (Plaintiff religious organization prayed for compensatory damages, and district court dismissed the organization’s claims and the Seventh Circuit affirmed.); *Asad v. Bush*, 170 F. App’x 668 (11th Cir. 2006) (*per curiam*) (Plaintiff offender prayed for compensatory damages, but the district court dismissed his claims and Eleventh Circuit affirmed.); *Figel v. Overton*, 121 F. App’x 642 (6th Cir. 2005) (Plaintiff offender prayed for compensatory damages, and Sixth Circuit reversed and remanded RLUIPA claim to district court without discussing the propriety of compensatory damages.); *Konikov v. Orange County, Fla.*, 410 F.3d 1317 (11th Cir. 2005) (*per curiam*) (Plaintiff religious organization prayed for compensatory damages, and Eleventh Circuit reversed and remanded RLUIPA claim to district court without discussing propriety of compensatory damages.).

47. 510 F.3d 253 (3d Cir. 2007).

48. *Id.* at 272-73.

Circuit allowed the plaintiff to obtain compensatory damages without discussing its reason for doing so.⁴⁹

2. Distinction Between Individual Capacity and Official Capacity Suits

Under RLUIPA, the way a plaintiff pleads a case directly impacts a court's analysis of the claim. In an individual capacity suit, a plaintiff seeks damages directly from the agent of the government.⁵⁰ In other words, the plaintiff alleges that government officials should be personally liable for their actions during the course of their duties.⁵¹ Also in an individual capacity suit, the government official may have the option of asserting personal immunity defenses, such as qualified immunity.⁵²

In an official capacity suit, on the other hand, the plaintiff seeks damages from the governmental body itself.⁵³ Official capacity claims "require proof that a policy or custom of the [governmental body] violated the plaintiff's rights."⁵⁴ In official capacity suits, the government may have the option of asserting sovereign immunity defenses.⁵⁵

3. Monetary Damages in Individual Capacity Suits

After deciding that RLUIPA permits a complaining party to recover monetary damages, the *Allen* court turned to the question of whether an offender could bring a suit for damages against a defendant in his or her individual capacity.⁵⁶ The court noted that Congress passed RLUIPA pursuant to a valid exercise of its Spending Power.⁵⁷ Congress's Spending Power allows it to "'attach conditions on the receipt of federal funds . . . upon compliance by the recipient with federal statutory and administrative directives.'"⁵⁸ Put another way, Congress "grants federal funds to state

49. *Id.* at 273. Although this is not directly on point because *Lighthouse* dealt with remedies for a state violating RLUIPA's land use section, both the land use and institutionalized persons sections of RLUIPA have the same remedial provision. See 42 U.S.C. § 2000cc-2 (2000).

50. *Smith v. Allen*, 502 F.3d 1255, 1271 (11th Cir. 2007).

51. *Gorman v. Bartch*, 152 F.3d 907, 914 (8th Cir. 1998).

52. *Allen*, 502 F.3d at 1272.

53. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985).

54. *Gorman*, 152 F.3d at 914.

55. *Allen*, 502 F.3d at 1272.

56. *Id.*

57. *Id.* See *Madison v. Virginia*, 474 F.3d 118, 124-29 (4th Cir. 2006), for a detailed analysis of why RLUIPA is a valid exercise of Congress's spending power. See also *Allen*, 502 F.3d at 1274 n.9 ("[T]he majority of courts . . . have . . . construed [RLUIPA] as emanating from Congress' Spending Power.").

58. *Allen*, 502 F.3d at 1273 (quoting *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)).

institutions in exchange for the state's compliance with certain conditions."⁵⁹ In this instance, the condition is an agreement not to impose unjustified substantial burdens on its prisoners' religious exercise.

Case law dealing with other legislation passed pursuant to the Spending Clause demonstrates that the contracting party is the government entity, which here, is the state prison institution.⁶⁰ The state prison institution, as a condition to the receipt of federal funds, "agrees[s] to be amenable to suit."⁶¹ The individual employees of the state prison institution, by contrast, are not recipients of the funding and, therefore, no contract arises between the federal government and the prison employees.⁶² As a result, the *Allen* court held that the institutionalized persons provision of RLUIPA does not give rise to a private cause of action against individual defendants for monetary damages.⁶³

4. The Eleventh Amendment and Official Capacity Suits

*Madison v. Virginia*⁶⁴ outlined the legal principles relevant to determining whether a state waives its Eleventh Amendment sovereign immunity in a RLUIPA action.⁶⁵ The court noted that for waiver to occur, Congress must clearly intend to condition a state's receipt of federal funding of a program on that state's consent to waive its constitutional immunity.⁶⁶ The federal government, however, cannot gain a state's consent to waive its sovereign immunity through consent by implication or the "use of ambiguous language."⁶⁷ Thus, "[a] waiver must be 'unequivocally expressed in statutory text'" so that "general participation in a federal program or the receipt of federal funds is insufficient to waive sovereign immunity."⁶⁸

The *Madison* court went on to hold that the definition of "government," which includes, *inter alia*, states and state agencies, clearly puts a state on notice that by accepting federal funds for correctional facilities, "it consented to federal jurisdiction for at least some form of relief."⁶⁹ Accordingly, whether the state waived its sovereign immunity with respect to monetary damages turns on whether "appropriate relief" was sufficient language to put

59. *Id.*

60. *Id.* at 1274-75.

61. *Id.* at 1275.

62. *See id.*

63. *Id.*

64. 474 F.3d 118 (4th Cir. 2006).

65. *Id.* at 129. *See supra* note 19 for why a court does not also have to ascertain if Congress abrogated a state's Eleventh Amendment immunity in passing RLUIPA.

66. *Madison*, 474 F.3d at 129 (citing *Litman v. George Mason Univ.*, 186 F.3d 544, 550 (4th Cir. 1999)).

67. *Id.* at 130 (quoting *Library of Cong. v. Shaw*, 478 U.S. 310, 318 (1986)).

68. *Id.* (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)).

69. *Id.*

the state on notice they would be liable for monetary damages upon violation of the statute.⁷⁰ The *Madison* court emphasized that “appropriate relief” could, depending on the context, be read either to allow for or to preclude monetary damages.⁷¹ As a result, the court held that “RLUIPA’s ‘appropriate relief against a government’ language falls short of the unequivocal textual expression necessary to waive State immunity from suits for damages.”⁷²

In addition, *Madison* examined whether the Civil Rights Remedies and Equalization Act (CRREA),⁷³ read in conjunction with RLUIPA, waives a state’s sovereign immunity.⁷⁴ CRREA provides that “[a] state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of [several specific statutory provisions⁷⁵] or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.”⁷⁶ The court, assuming *arguendo* that CRREA would suffice as an unequivocal textual waiver of the Eleventh Amendment, held that because CRREA does not explicitly mention RLUIPA, RLUIPA does not fall within its scope.⁷⁷ Additionally, all the statutes listed in CRREA specifically prohibit discrimination, while RLUIPA only prohibits a state from imposing a substantial and unjustified burden on a prisoner’s religious exercise.⁷⁸ The court believed then that CRREA does not provide a “clear, unambiguous, and unequivocal waiver” of a state’s sovereign immunity.⁷⁹

The Eleventh Circuit, in contrast, reached the opposite conclusion on the issue of Eleventh Amendment waiver in *Smith v. Allen*.⁸⁰ The court noted that RLUIPA allows a plaintiff to seek relief if the “government” violates RLUIPA.⁸¹ The court reasoned that RLUIPA defines government as, *inter alia*, any “person acting under color of state law.”⁸² As a result, nothing in RLUIPA prohibits an action for damages against the defendants in their official capacities as officers acting under color of state law.⁸³

70. *See id.* at 131.

71. *Id.* at 131-32.

72. *Id.* at 131.

73. 42 U.S.C. § 2000d-7 (2000).

74. *Madison*, 474 F.3d at 132.

75. The specific provisions listed in CRREA are section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964. 42 U.S.C. § 2000d-7(a)(1).

76. *Id.*

77. *Madison*, 474 F.3d at 132.

78. *Id.* at 132-33.

79. *Id.* at 133.

80. 502 F.3d 1255 (11th Cir. 2007).

81. *Id.* at 1275.

82. *Id.*

83. *Id.* at 1275-76.

The district court in *Allen* found that “an official capacity claim for damages under RLUIPA would be ‘barred by the Eleventh Amendment.’”⁸⁴ The Eleventh Circuit disagreed with this finding.⁸⁵ The court, citing *Benning v. Georgia*,⁸⁶ noted that “by entering into a funding contract with the federal government and accepting federal funding, state prison institutions voluntarily agreed to waive their sovereign immunity and make themselves amenable to actions under RLUIPA.”⁸⁷ Moreover, the Eleventh Circuit understood *Benning* as expressly holding that the institutionalized persons section of RLUIPA “effectuated a clear waiver of the state’s sovereign immunity under the Eleventh Amendment.”⁸⁸ In other words, a prison waives its sovereign immunity when it accepts federal funds on the condition that a plaintiff may seek appropriate relief if the prison or its agents violates RLUIPA.⁸⁹

5. Prisoner Litigation Reform Act

The court in *Smith v. Allen*, despite concluding that monetary damages are available in certain circumstances, noted that the Prisoner Litigation Reform Act (PLRA)⁹⁰ “severely circumscribes” a prisoner plaintiff’s right to monetary relief.⁹¹ The PLRA precludes a prisoner from bringing a federal civil action for mental or emotional injury suffered “without a prior showing of physical injury.”⁹² Prisoners demonstrating a constitutional violation of their rights can nevertheless recover nominal damages, even under the PLRA.⁹³ Because *Smith* suffered no physical injuries, he was limited to nominal damages upon a showing that the defendants violated his constitutional rights.⁹⁴

D. The Eighth Circuit and RLUIPA

Despite vigorous debate in other circuits on whether RLUIPA allows claimants to seek monetary damages, the Eighth Circuit has not definitively addressed the matter. In *Murphy v. Missouri Department of Corrections*,⁹⁵

84. *Id.* at 1276 n.12 (quoting *Smith v. Haley*, 401 F. Supp. 2d 1240, 1244 (M.D. Ala. 2005)).

85. *Id.*

86. 391 F.3d 1299 (11th Cir. 2004).

87. *Allen*, 502 F.3d at 1276 n.12.

88. *Id.*

89. *Id.*

90. 42 U.S.C. § 1997e (2000).

91. *Allen*, 502 F.3d at 1271.

92. 42 U.S.C. § 1997e(e).

93. *Allen*, 502 F.3d at 1271.

94. *Id.*

95. 372 F.3d 979 (8th Cir. 2004).

the prisoner plaintiff sought monetary damages, as well as injunctive relief, for being denied privileges that other separatist groups had received.⁹⁶ In *Murphy*, however, the court reversed the district court's grant of summary judgment in favor of the prison officials⁹⁷ without addressing the availability of monetary damages, individual versus official capacity claims, or Eleventh Amendment immunity under RLUIPA.⁹⁸

III. RECENT DEVELOPMENTS

One of the most recent courts within the Eighth Circuit to examine the issue of whether RLUIPA allows claimants to receive monetary damages is the United States District Court for the District of South Dakota.⁹⁹ In *Sisney v. Reisch*, the plaintiff Sisney, a convert to the Jewish faith, alleged that the defendants¹⁰⁰ violated RLUIPA by inhibiting the practice of his faith in seven different ways.¹⁰¹

The court's analysis of whether RLUIPA permitted monetary damages centered around three issues: (1) "whether RLUIPA authorizes an award of monetary damages, in addition to equitable relief;" (2) "whether individual capacity suits for monetary damages are allowed under RLUIPA;" and (3)

96. *Id.* at 982.

97. *Id.* at 988-89. The Eighth Circuit directed the district court to make findings of fact to determine if prison officials substantially burdened the plaintiff inmate's exercise of religion and that the limitations placed on the plaintiff's religious practices "constituted the least restrictive means necessary to ensure the prevention of racial violence within the prison." *Id.* at 989.

98. See *Sisney v. Reisch*, 533 F. Supp. 2d 952, 966 (D.S.D. 2008) ("[I]n *Murphy* . . . the panel did not address the availability of [monetary relief]. . . . [Also] [t]he issue of individual versus official capacity claims was not discussed . . . and Eleventh Amendment immunity was not discussed.").

99. See *Sisney*, 533 F. Supp. 2d 952.

100. *Sisney* sued multiple defendants all who have some connection to either the South Dakota State Penitentiary or the South Dakota Department of Corrections. *Id.* at 962.

101. *Id.* Those ways include:

- (1) their refusal to allow *Sisney* to erect and use a succah or Sukkot Booth during the Festival of Sukkot;
- (2) their refusal to establish a permanent Jewish chapel;
- (3) their denial of additional service time for group Torah, Kabalistic and language studies;
- (4) their refusal to use the Benevolence Fund to assist the Jewish group in obtaining a Rabbi to visit the inmates;
- (5) their interference with a visit by rabbinical students;
- (6) their refusal to allow *Sisney* to possess certain personal property for the exercise of his religion; and
- (7) refusal of *Sisney's* request to review what he refers to as the "Jewish curriculum" maintained by the Cultural Activities Coordinator.

Id.

“whether official capacity suits under RLUIPA for monetary damages are barred by the Eleventh Amendment.”¹⁰²

A. Damages Under RLUIPA

The District of South Dakota held that a statute can authorize the recovery of compensatory damages even absent unequivocal language to that effect.¹⁰³ The court agreed with the Eleventh Circuit in *Smith v. Allen* that RLUIPA “is broad enough to encompass the right to monetary damages” in that “Congress expressed no intent to the contrary within RLUIPA, even though it could have.”¹⁰⁴ The trial court also noted that there exists a presumption in favor of making all appropriate remedies available to the prevailing party and nothing in RLUIPA contradicts that presumption.¹⁰⁵ In addition, the *Sisney* court used other Spending Clause precedent to support the proposition that RLUIPA claimants can recover compensatory damages.¹⁰⁶ In reference to Spending Clause legislation, the Supreme Court in *Barnes v. Gorman*¹⁰⁷ held that “[a] funding recipient is generally on notice that it is subject . . . to those remedies traditionally available in suits of breach of contract.”¹⁰⁸ The *Sisney* court concluded that because Congress did not specifically preclude monetary damages in RLUIPA and the State of South Dakota is on notice that such damages are a traditional remedy available in a suit of breach of contract, a RLUIPA plaintiff may recover compensatory damages.¹⁰⁹

Despite finding that RLUIPA permits a plaintiff to receive compensatory damages, the *Sisney* court held that the PLRA can limit those damages if the plaintiff does not establish physical injury.¹¹⁰ In fact, RLUIPA itself states that “[n]othing in [RLUIPA] shall be construed to amend or repeal the Prison Litigation Reform Act of 1995.”¹¹¹ Because *Sisney* did not allege any physical injuries, he could, at most, recover nominal damages.¹¹²

102. *Id.* at 966.

103. *Id.* at 972.

104. *Id.*

105. *Id.*

106. *Id.* at 973.

107. 536 U.S. 181 (2002).

108. *Id.* at 187. *Barnes* dealt with determining the appropriate remedies under Title VI. *Id.* at 183. Title VI, like Title IX fails to mention a private cause of action or any remedies available to an aggrieved party. *Id.* at 187. For possible limitations on relying on Title IX as supporting compensatory remedies under RLUIPA, see *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 71 (1992).

109. *Sisney*, 533 F. Supp. 2d at 973.

110. *Id.* at 973-74.

111. 42 U.S.C. § 2000cc-2(e) (2000).

112. *Sisney*, 533 F. Supp. 2d at 973-74.

B. Individual Capacity Claim for Monetary Damages Under RLUIPA

In *Sisney*, the court highlighted the existing split of authority regarding whether RLUIPA permits individual capacity claims.¹¹³ The court recognized that although the Eighth Circuit has not addressed this issue specifically, it has addressed whether there is individual capacity liability under Title IX.¹¹⁴ Congress enacted both RLUIPA and Title IX under the Spending Clause, and as a consequence, the court considered Title IX jurisprudence instructive in determining the issue at hand.¹¹⁵ The court believed that “Congress cannot use its Spending Power to subject a non-recipient of federal funds, including a state official acting [in] his or her individual capacity, to private liability for monetary damages.”¹¹⁶ Accordingly, the court held that the institutionalized persons section of RLUIPA does not permit individual capacity liability for monetary damages.¹¹⁷

C. Official Capacity Claim for Monetary Damages and Eleventh Amendment Immunity Under RLUIPA

The *Sisney* court also examined whether South Dakota can receive Eleventh Amendment immunity from monetary damages.¹¹⁸ To frame its analysis, the court recognized that a state waives its sovereign immunity only where the express language of a statute or the “overwhelming implications” from the statute “leave no room for any other reasonable construction.”¹¹⁹ The court again highlighted the split in authority of whether the Eleventh Amendment does or does not bar recovery of monetary damages against a prison official in his or her official capacity.¹²⁰

Unlike the issue of whether RLUIPA permits individual capacity claims, on the issue of whether South Dakota can receive Eleventh Amendment immunity from monetary damages, the *Sisney* court did not agree with the Eleventh Circuit.¹²¹ The instant court stated that the mere fact the state has accepted federal prison funds, and thus entered into a funding contract with the federal government, does not ipso facto waive the state’s Eleventh

113. *Id.* at 967.

114. *Id.* at 968.

115. *Id.*

116. *Id.* (alteration in original) (quoting *Smith v. Allen*, 502 F.3d 1255, 1273 (11th Cir. 2007)).

117. *Id.*

118. *Id.*

119. *Id.* (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 678 (1999)).

120. *Id.* at 969-70; see *supra* Part II.C.5.

121. *Sisney*, 533 F. Supp. 2d at 970.

Amendment immunity for damages under RLUIPA.¹²² The court asserted that the “unmistakably clear language” that Congress must utilize to effectuate a waiver did not exist.¹²³ In fact, “general participation in a federal program or the receipt of federal funds is insufficient to waive sovereign immunity.”¹²⁴

The court also examined case law under the Religious Freedom Restoration Act (RFRA) to reach the same conclusion.¹²⁵ RFRA and RLUIPA have nearly identical remedial provisions¹²⁶ and in *Webman v. Federal Bureau of Prisons*¹²⁷ the District of Columbia Circuit stated that the language “appropriate relief” supports both compensatory damages and equitable relief.¹²⁸ The court held that such ambiguous language in the statute could not give rise to the unambiguous waiver required by law.¹²⁹ Although *Webman* dealt with the United States’ sovereign immunity, as opposed to a state’s sovereign immunity, the United States Supreme Court equated “federal sovereign immunity to State’s sovereign immunity in discussing the unequivocal language Congress must use if it intends that States must waive their immunity if they take certain actions.”¹³⁰

Finally, *Sisney* argued that even if the language was ambiguous, the Civil Rights Remedies Equalization Act of 1986 “contain[ed] the required unequivocal waiver of state sovereign immunity.”¹³¹ On this argument, the court parted with *Madison v. Virginia’s* reasoning.¹³² The *Sisney* court held

122. *Id.*

123. *Id.*

124. *Id.* (quoting *Madison v. Virginia*, 474 F.3d 118, 130 (4th Cir. 2006)).

125. *Id.*

126. Compare RLUIPA, 42 U.S.C. § 2000cc-2(a) (2000) (“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.”), with RFRA, 42 U.S.C. § 2000bb-1(c) (2000) (“A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.”).

127. 441 F.3d 1022 (D.C. Cir. 2006).

128. *Id.* at 1026 (in reference to RFRA).

129. *Sisney*, 533 F. Supp. 2d at 971.

130. *Id.*

131. *Id.* The pertinent part of the Civil Rights Remedies Equalization Act states:

A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . . , title IX of the Education Amendments of 1972 . . . , the Age Discrimination Act of 1975 . . . , title VI of the Civil Rights Act of 1964 . . . , or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. § 2000d-7 (2000).

132. *Sisney*, 533 F. Supp. 2d at 971-72.

that Congress enacted RLUIPA to prohibit discrimination¹³³ by prison officials against prisoners exercising their religious beliefs and the court asserted that exercise of religious beliefs is a fundamental freedom.¹³⁴ The court believed that RLUIPA fell within the scope of the Civil Rights Remedies Equalization Act as a “Federal statute prohibiting discrimination by recipients of Federal financial assistance,” and accordingly found that South Dakota waived its sovereign immunity for monetary damages on official capacity claims by accepting federal prison funding.¹³⁵

IV. DISCUSSION

A. Availability of Damages

When the Eighth Circuit Court of Appeals addresses the issue of whether RLUIPA permits plaintiff inmates to recover compensatory damages, it will have the benefit of drawing upon the precedent in numerous cases both inside and outside of the Eighth Circuit. Although the cases discussed in this Law Summary thoroughly examined the appropriateness of compensatory damages under RLUIPA, these cases fail to discuss the policy justifications in favor of and against allowing compensatory damages.

If the Eighth Circuit decides that no plaintiff can recover damages under RLUIPA, this ends its analysis on the issue. If the court permits an institutionalized person to recover damages, its analysis continues to determine whether to allow the plaintiff inmate to recover from prison officials in their individual capacity or from prison officials in their official capacity.

B. Policy Arguments in Favor of Allowing Damages

Because damages may act as a deterrent against the state imposing substantial and unjustified burdens on institutionalized persons' free exercise of religion, some policy considerations weigh in favor of allowing damages under RLUIPA for offenders. Without compensatory damages, prison officials lack an incentive to protect the free exercise of religion within a penal institution. A prison has limited resources, and by ignoring offenders' rights to freely exercise their religion, a prison can avoid any costs associated with developing and/or implementing the least restrictive means to allow

133. Compare *id.* (looking at the broad aim of RLUIPA and concluding that RLUIPA sought to “eradicate discrimination”), with *Madison v. Virginia*, 474 F.3d 118, 133 (4th Cir. 2006) (looking at the literal terms of RLUIPA and concluding that RLUIPA does not prohibit discrimination, but rather “forbids a state from imposing substantial and unjustified religious burdens on prisoners.”).

134. *Sisney*, 533 F. Supp. 2d at 972.

135. *Id.* (quoting 42 U.S.C. § 2000d-7(a)(1) (2000)).

offenders to practice their religion. For example, without damages, a prison has no incentive to allow an inmate's exercise of religion that requires the prison to take additional security measures. Even if an offender files a lawsuit under RLUIPA and succeeds, the prison has put off any additional administrative costs as long as possible, possibly for years.¹³⁶ Moreover, the court order still does not offer any protection for other inmates who may sue over the same prohibitions on religious practices.¹³⁷ As such, without compensatory damages, prison officials can more easily under-protect religious exercise.

C. Policy Arguments Against Allowing Damages

RLUIPA promotes the exercise of one's faith free from unjustified discrimination. Because of this, it seems appropriate that the remedy directly address this purpose. The only remedy that directly promotes the purpose of the statute, however, is injunctive relief. Injunctive relief gives institutionalized persons the right to exercise whatever religious practice they could not exercise before they brought suit.

Additional policy rationales for prohibiting damages also exist. Several courts have held that the PLRA restricts any emotional or mental damages a prisoner receives pursuant to a violation of RLUIPA to nominal damages, absent physical injury as a result of the violation. The burdening of religious exercise, however, usually does not coincide with physical injury. In most instances, then, institutionalized persons could at most recover nominal damages. For this reason, damages fail to serve as an effective deterrent. Furthermore, if offenders actually suffered a physical injury due to their inability to practice their religion, they most likely could sue under another cause of action.¹³⁸ Consequently, damages need not be available to offer redress for any physical harms that may occur.

If RLUIPA permitted offenders to receive compensatory damages, former offenders would have an incentive to bring a RLUIPA suit alleging a violation of their religious rights during their time of incarceration. In this circumstance, arguably the PLRA no longer applies and no limit on damages exists. But the individuals no more desire injunctive relief as they are no longer subject to the restrictions of prison. In this scenario the former offenders seek to utilize RLUIPA solely as a means of collecting money, contrary to RLUIPA's intent of protecting religious practice, and this

136. This assertion is based off of the time it takes for a case to go to trial and then exhaust all appellate courts. At that point in time, the offender could have transferred prisons or finished his or her sentence.

137. Allowing damages does not assist other offenders or ensure other offenders receive the same religious rights, but if a prison fears additional monetary loss in the future, the prison would be more likely to allow other offenders the same access that the court ordered for the first offender that sued on the issue.

138. For example, the offender could sue under cruel and unusual punishment.

demonstrates further that damages are an inappropriate remedy under RLUIPA.

Finally, to some extent, prisons have legitimate reasons to under-protect religious exercise. Institutionalized persons surrender numerous rights once convicted and incarcerated.¹³⁹ While this does not entitle prison officials to disregard all rights of offenders, safety and security concerns of the institution have primacy over those rights.¹⁴⁰ At times, restrictions on religious practice are not only appropriate but also necessary to maintain the prison's security. The religious freedoms to which one is entitled in prison, therefore, are subject to many limitations, and prison officials should not be punished for failing to provide offenders with every accommodation they desire.

D. Liability Assessment: Individual or State

The strongest argument for allowing a RLUIPA plaintiff to seek damages from a prison official in his or her individual capacity is that the prison official is the cause-in-fact of the harm. The prison official took steps to inhibit the plaintiff's exercise of religion and should be responsible for the consequences of those actions. If damages are permissible, the courts do not want to create a system that allows prison officials to abuse their power without providing legal recourse for offenders.¹⁴¹

Nevertheless, the state is in the better position to redress the grievance because prison officials are merely agents of the state acting on behalf of the state. While it is true that the prison official might be the cause-in-fact of harm, the prison official acts on the state's behest. In this principal/agent relationship, the principal should accept the responsibility for the agent's conduct and bear the loss. The state has ultimate responsibility for each inmate; therefore, ultimate responsibility to redress grievances against each inmate should fall upon the state.

139. See *Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 982 (8th Cir. 2004) ("Although prisoners retain their constitutional rights, limitations may be placed on the exercise of those rights in light of the needs of the penal system.").

140. See *id.* at 987 ("Congress did not intend to overly burden prison operations, but rather intended to provide as much protection as possible to prisoners' religious rights without undermining the security, discipline, and order of those institutions.").

141. A fear that prison officials faced with no legal recourse will abuse their power, however, probably is unfounded. While true that the officials will not face any legal recourse if a court does not allow personal liability, the officials still could face sanctions from their employer, including suspension or discharge from employment. These practical, non-legal punishments, thus, provide checks upon prison officials' actions toward offenders.

E. Legal Holdings v. Policy Rationales

As discussed above, policy rationales favor a system that prohibits compensatory damages. Conversely, there exist valid legal arguments in favor of allowing compensatory damages. Both the *Allen* and *Sisney* courts, which are among the few courts that provide an in-depth discussion of the validity of compensatory damages under RLUIPA, state that RLUIPA allows compensatory damages.¹⁴² Additionally, although in a different context, the Supreme Court clearly articulated that “absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.”¹⁴³ Courts have relied upon this Supreme Court holding as demonstrating the availability of both equitable and monetary relief under RLUIPA. A unique tension exists within the legal holdings and policy rationales as to the intent of Congress and the appropriate application of RLUIPA within this context.

V. CONCLUSION

Congress, rather than the court system, is in the best position to resolve the tension between the legal holdings and the policy rationales for and against compensatory damages under RLUIPA. A statutory amendment elucidating RLUIPA’s remedial provision would resolve this tension and save the courts from having to discern congressional intent. That said, in the absence of congressional action, the courts must decide the issue. Due to the aforementioned policy considerations, when the Eighth Circuit Court of Appeals addresses the issue of whether RLUIPA allows for monetary damages, it should find that Congress intended RLUIPA only to allow institutionalized persons to practice their religion free from unjustified substantial burdens. As a result, injunctive relief that removes any unjustified substantial burdens, not monetary relief, is the best and most appropriate form of relief. Allowing offenders to receive compensatory damages only encourages litigious behavior and encourages offenders to find mechanisms that bypass the PLRA.

If the Eighth Circuit Court of Appeals holds that institutionalized persons can receive compensatory damages in a RLUIPA claim, the Eighth Circuit should additionally hold that RLUIPA permits only official capacity suits and that the state waives its Eleventh Amendment immunity by accepting federal prison funds. It would be incongruous for the Eighth Circuit to hold that RLUIPA permits damages, yet hold that both the individual prison officials and the state are immune from suit under qualified and sovereign

142. Note that this is just to the question of compensatory damages in the abstract. This sentence is not meant to get at whether compensatory damages are allowed in individual suits or official capacity suits.

143. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 70-71 (1992).

immunity, respectively. In a situation where the court must apportion damages to some actor, the state, rather than the individual, is in the best position to bear that burden.

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