DEFINING "APPROPRIATE RELIEF" UNDER THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT: THE AVAILABILITY OF DAMAGES AND INJUNCTIVE RELIEF WITH RLUIPA

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INTRODUCTION

In 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act, commonly referred to as "RLUIPA," to level the playing field between local governments and religious entities in the context of land use and zoning, and between local and state governments and prisoners in the context of prison reform.[1] The Religious Land Use and Institutionalized Persons Act (hereinafter referred to as "RLUIPA" or "the Act") creates a private cause of action and its section 2(a) provides for "appropriate relief" against governments that violate the statute.[2] RLUIPA's provision authorizing a cause of action states: "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."[3] However, the Act defines "government" to include:

> (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 . . . .[4]

While no court disputes that "appropriate relief" allows for injunctive and declaratory relief, there remains a question among some courts of whether the phrase encompasses a right to nominal, compensatory, and punitive damages. There should be no argument as the text, context, and legislative history of the Act all indicate that "appropriate relief" includes, among other things, relief in the form of money damages, and I opine that such a reading of the statute is in accord with Congress's intent when it originally drafted the statute. Congress's anticipated scope of relief includes nominal, punitive, and compensatory damages against municipalities, but also all of these damage types are recoverable against governmental officials in both their official and individual capacities.

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[1] Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-2000cc-5 (2000).

[2] 42 U.S.C. § 2000cc-2(a) (2000).

[3] *Id.*

[4] 42 U.S.C. § 2000cc-5(4)(A) (2000).

I. THE GREAT DIVIDE

It is a familiar canon of statutory construction that "[i]n the absence of contrary indication, we assume that when a statute uses . . . a term [of art], Congress intended it to have its established meaning."[5] However, courts have had trouble agreeing upon the established meaning of "appropriate relief" within the context of RLUIPA, as one court put mildly, "'there is a division of authority'" on whether "'appropriate relief'" encompasses monetary damages.[6] The federal district courts are currently split: some courts conclude that "RLUIPA does not encompass money damages,"[7] while others have found the opposite, concluding that the phrase "'appropriate relief' is sufficiently broad to include some forms of monetary relief."[8] Meanwhile, a third category of interpretation has developed in some district courts, which assumes monetary relief is available without resolving the disputed definition of "appropriate relief."[9]

This current conflict among district courts regarding the availability of money damages stems from the issues inherently involved in claimants suing governmental officials in their individual capacities—a sphere which federal courts appear to be hesitant to let claimants near, let alone expand. Likewise, claims of punitive damages against municipalities under RLUIPA are questioned given that the United States Supreme Court has concluded that punitive damages are not available against

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[5] McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 342 (1991) (internal citations omitted)

[6] Smith v. Allen, 502 F.3d 1255, 1270 (11th Cir. 2007) (internal citations omitted).

[7] *Id.*

[8] *Id.*

[9] *See* Bess v. Alameida, 2007 WL 2481682, at *20 (E.D. Cal. 2007) ("No federal courts of appeal have ruled on whether RLUIPA allows damages against state officials sued in their individual capacities, and federal district courts are split on the question."). *Compare* Shidler v. Moore, 409 F. Supp. 2d 1060, 1071 (N.D. Ind. 2006) (recognizing RLUIPA claim for monetary relief); Charles v. Verhagen, 220 F. Supp. 2d 937, 953 (W.D. Wis. 2002) (shielding defendants from plaintiff's demand for money damages under RLUIPA through qualified immunity defense); *and* Guru Nanak Sikh Soc'y of Yuba City v. Sutter, 326 F. Supp. 2d 1128, 1136 (E.D. Cal. 2003) ("'government'" in RLUIPA includes 'individual government officials,' so actions are permitted against them at least in their official capacities"); *with* Boles v. Neet, 402 F. Supp. 2d 1237, 1241 (D. Colo. 2005) (noting that "[t]here is substantial uncertainty, however, as to whether [RLUIPA] even provides a right to money damages.").

municipalities and officials sued in their official capacity in section 1983 cases.[10]

Where there is an additional overlay of immunities from damages against a state government[11] and under the Prisoner Litigation Reform Act (PLRA),[12] damages do not "appear" to be available at all under RLUIPA.[13] Even though *Boles* noted that RLUIPA permits cases against a governmental entity and individual officers in their *official* capacities, the court decided that it did not appear that the statute permitted a claim for damages, but rather for declaratory and injunctive relief.[14] The court could not move past the "substantial uncertainty" seemingly based upon divergent federal district court views, and thus found that to the extent plaintiff sought compensatory damages under RLUIPA, such claims were barred.[15] *Boles* was decided in 2005, at a time when very little case law regarding the availability of monetary damages was on hand. Fortunately, this limited viewpoint on the scope of "appropriate relief" was about to be challenged by the United States Supreme Court.

II. FRANKLIN AND ITS PROGENY

The term "appropriate relief" has a well-established meaning summed up in the U.S. Supreme Court's seminal decision of *Franklin v. Gwinnett County Public Schools*.[16] There, the Court defined "appropriate relief" under Title IX to include monetary damages,[17] based on the federal courts' traditional authority to fashion broad remedies for violations of federally guaranteed rights.[18] Guided by this tradition, the Court in *Franklin* concluded that, "[t]he general rule, therefore, is 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."[19]

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[10] City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981).
[11] *Boles*, 402 F. Supp. 2d at 1246.
[12] *Id.* at 1245; 42 U.S.C. §1997e.
[13] *Id.* at 1241.
[14] *Id.* at 1240-41.
[15] *Id.* at 1241.
[16] Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 70-71 (1992).
[17] *Id.* at 76.
[18] *Id.* at 66 (citing Bell v. Hood, 327 U.S. 678, 684 (1946)).
[19] *Id.* at 70-71; Sch. Comm. of Burlington, Mass. v. Dept. of Educ. of Mass., 471 U.S. 359, 369 (1996) (defining "appropriate" relief to include compensatory damages); Reich v. Cambridgeport Air Sys., Inc., 26 F.3d 1187, 1191 (1st Cir. 1994) (construing "all appropriate relief" to include monetary damages and

In *Franklin,* the issue before the Court was what types of remedies were available to a claimant in a private action for sex discrimination under Title IX of the Education Amendments of 1972.[20] The Court attempted to put to rest the argument that a damages award "unduly expands the federal courts' power" in violation of separation of powers principles; this argument "misconceive[s] the difference between a cause of action and a remedy."[21] In further explanation, the Court noted:

> Unlike the finding of a cause of action, which authorizes a court to hear a case or controversy, the discretion to award appropriate relief involves no such increase in judicial power . . . [and, in fact,] historically has been thought necessary to provide an important safeguard against abuses of legislative and executive power . . . as well as to ensure an independent Judiciary. Moreover, selective adjudication of the sort advocated here would harm separation of powers principles . . . by giving judges the power to render inutile causes of action authorized by Congress through a decision that *no* remedy is available.[22]

In its attempts to put to rest the theory that a court's ability to award appropriate relief does extend into the Legislative and Executive branches' powers, the decision in *Franklin* – an instruction that, absent any intent to the contrary reflected in a statute, the presumption should be in favor of all available relief (both injunctive and monetary) – should have carried quite a punch amongst lower courts when analyzing RLUIPA. However, although this should have occurred *in theory*, such was not the case *practically*, as federal district courts still are in flux over what *Franklin* means for the future of RLUIPA's available relief.

A. Agrawal v. Briley[23]

In 2006, an Illinois district court relied on *Franklin* to answer the questions of first, whether RLUIPA intends monetary damages as available relief, and second, whether a plaintiff can recover monetary damages against a government worker, in both his official and individual capacity. The court in *Agrawal v. Briley* answered "yes" to both.[24] To reach this conclusion, "*Agrawal* examined the rationale of the various district court

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other forms of relief).

[20] *Franklin*, 503 U.S. at 62-63.

[21] *Id.* at 73-74.

[22] *Id.* (internal citations omitted).

[23] Agrawal v. Briley, No. 02 C 6807, 2006 WL 3523750 (N.D.Ill. Dec. 6, 2006).

[24] *Id.* at 17.

opinions, detailed the chronology of RLUIPA's development, and analyzed its similarities to the Act's essential predecessor, the Religious Freedom Restoration Act of 1993 ('RFRA'), and section 1983 law . . . ."[25]

Agrawal took a pragmatic approach to determine Congress' intent regarding damages when it enacted RLUIPA, and realized that without such relief "in cases where a prisoner is no longer in the custody of the prison officials he has sued, claims for injunctive and declaratory relief would be moot."[26] Thus, it found that damages can be the only form of relief in such situations. Although *Agrawal* noted that "*Franklin* [did] not directly apply here because Congress was not silent as to remedies under RLUIPA, it is unlikely that Congress intended, in light of the broad protections afforded by RLUIPA, that free-exercise plaintiffs be left remediless."[27] This is so because RLUIPA was enacted by Congress "to provide greater protection for religious freedom than was available under the First Amendment," due to the heightened level of scrutiny required in reviewing alleged "substantial burdens" placed upon a plaintiff's religious freedoms.[28]

Therefore, *Agrawal* surmised that it would be illogical for RLUIPA to prohibit a plaintiff from bringing individual-capacity claims when such is permitted under section 1983 for First Amendment free-exercise violations.[29] Further, the court considered that the third prong of the definition of "government" under RLUIPA, "(iii) any other person acting under color of State law," would be considered "mere surplusage" if the Act authorized only official-capacity claims, as this is already clearly stated in the second prong: "(ii) any branch, department, agency, instrumentality, or official of [any State, county, municipality, or

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[25] Dupree v. Laster, No. 02-cv-1059-DRH, 2007 WL 2746852, at *4 (S.D. Ill. Sept. 19, 2007) (citing *Agrawal*, 2006 WL 3523750, at *11).

[26] *Agrawal*, 2006 WL 3523750, at *11 n.11 (citing Higgason v. Farley, 83 F.3d 807, 811 (7th Cir. 1996); *Franklin*, 503 U.S. at 76 ("holding that federal courts have the power to award any appropriate relief, including damages, where Congress is silent as to what remedies are available under a cognizable cause of action, and observing that equitable remedies would be inadequate for a student who sued a teacher for sexual harassment pursuant to the implied private right of action in Title IX, 20 U.S.C. §§ 1681-1686, because the teacher no longer taught at the school and the plaintiff was no longer a student")).

[27] *Agrawal*, 2006 WL 3523750, at *11 n.11.

[28] *Id.* at 11.

[29] *Dupree*, 2007 WL 2746852, at *4 (citing *Agrawal*, 2006 WL 3523750, at *11 n.11).

other governmental entity]."[30] Lastly, *Agrawal* relied on RFRA's provision with substantially similar language which the Seventh Circuit interpreted as allowing individual-capacity suits.[31] Based on *Agrawal's* insightful and practical reasoning, many federal district courts have adopted the holding that a prisoner plaintiff may bring individual-capacity claims under RLUIPA against municipal defendants.

B. Smith v. Allen[32]

In 2007, the Eleventh Circuit Court of Appeals revisited *Franklin* to determine that the phrase "'appropriate relief' in RLUIPA encompasses monetary as well as injunctive relief."[33] Smith, a prisoner, "alleged violations of RLUIPA due to the burden placed upon his religious exercise, but no physical harm."[34] Smith sought nominal, compensatory, and punitive damages against prison officials in both their official and individual capacities.[35] Therefore, *Smith* attempted to resolve what remedies a claimant is entitled to when bringing cause of action under RLUIPA and against government workers in their individual capacities, and further, whether qualified immunity shields them from suit. The court reasoned that "where Congress had not given any guidance or clear indication of its purpose with respect to remedies, federal courts should presume the availability of all appropriate remedies."[36] In analyzing the aftermath of *Franklin,* the Eleventh Circuit surmised that federal courts, now when faced with a statute lacking express guidance on the question of remedies, have generally adhered to the presumptions of *Franklin*.[37]

The court in *Smith* found that Congress expressed no contrary intent to the idea that "appropriate relief" in RLUIPA is broad

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[30] *Agrawal*, 2006 WL 3523750, at *11 (citing 42 U.S.C. § 2000cc-5(4)(a)(iii) (2000)).

[31] *Id.* at 10 (citing Mack v. O'Leary, 80 F.3d 1175, 1177 (7th Cir. 1996), *vacated on other grounds sub nom.* O'Leary v. Mack, 522 U.S. 801 (1997)); RFRA 42 U.S.C. §§ 2000bb-2000bb-4 (2000).

[32] Smith v. Allen, 502 F.3d 1255 (11th Cir. 2007).

[33] *Id.* at 1271.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 1270.

[37] *Smith*, 502 F.3d at 1270 (concluding that "the general phrase 'all appropriate relief,' as used in section 11(c) of the Occupational Safety and Health Act . . . 'embrace[d] monetary damages as well as other relevant forms of relief normally available.'") (internal citations omitted).

enough to encompass the right to monetary damages in the event a plaintiff establishes a violation of the statute, even though it could have expressly done so.[38] Assuming that when Congress enacted the statute, "it was aware of *Franklin's* presumption in favor of making all appropriate remedies available to the prevailing party," the court concluded that "absent an intent to the contrary, the phrase 'appropriate relief' in RLUIPA encompasses monetary as well as injunctive relief."[39] Although this holding – that RLUIPA provides for monetary damages – appears to be a positive one for the proponents of RLUIPA, the Eleventh Circuit still managed to severely limit its broad conclusion.

Because Smith was a "prisoner plaintiff," his right to monetary relief was severely restricted by the terms of the PLRA, which "provides that a prisoner may not bring a federal civil action 'for mental or emotional injury suffered while in custody without a prior showing of physical injury.'"[40] Thus, compensatory and punitive damages are precluded under the PLRA, and since Smith did not allege physical harm, he was found only to be entitled to nominal damages. In addition to limiting Smith to nominal relief, the court in *Smith* also "conclude[d] that section 3 of RLUIPA – a provision that derives from Congress' Spending Power – cannot be construed as creating a private action against individual defendants for monetary damages."[41] Thus, in a departure from *Agrawal's* line of thinking, the Eleventh Circuit set a precedent that money damages are not available against an individual in his individual capacity.[42]

Since its publication in October of 2007, *Smith* has been frequently cited for its holding that RLUIPA's "appropriate relief" includes monetary damages.[43] However, it has also been cited

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[38] *Id.*

[39] *Id.* at 1271 (citing *Franklin,* 503 U.S. at 73).

[40] *Id.* (citing PLRA, 42 U.S.C. § 1997e (1996)); Napier v. Preslicka, 314 F.3d 528, 532 (11th Cir. 2002) (construing §1997e as barring a prisoner from obtaining compensatory damages for solely mental or emotional harm while in custody).

[41] *Id.* at 1275.

[42] *Id.*

[43] *See, e.g.,* Malik v. Ozmint, No. 8:07-387-RBH-BHH, 2008 WL 701517, at *13 (D.S.C. Feb. 13, 2008) (noting "[t]he phrase 'appropriate relief' in the RLUIPA 'encompasses monetary as well as injunctive relief.'"). It should be noted that many cases listed as "negative references" and concluding that "appropriate relief" does not include monetary damages do not actually disagree with *Smith.* For instance, while *Bock v. Gold* holds that "appropriate relief" against a government does not include money damages against the state or its

numerous times for its limitation on prisoner plaintiffs' right to only nominal damages absent physical harm, as well as for its prohibition on recovering monetary damages against government workers in their individual capacities.[44]

C. Sisney v. Reisch[45]

In 2008, the South Dakota district court in *Sisney* analyzed the recent history of RLUIPA's "appropriate relief" and relied on *Smith* to reach the same conclusion - RLUIPA allows an award of monetary damages.[46] The court in *Sisney* reasoned that the Eleventh Circuit in *Smith* explicitly stated that the phrase "appropriate relief" encompasses the right to monetary damages, and that both the Fourth Circuit and the District of Columbia Circuit have made rulings that could be interpreted to include an award of monetary damages as inherent in "appropriate relief."[47] Predictably, the court in *Sisney* ruled that a prisoner plaintiff could not pursue money damages against a government official in his individual capacity, but also that ". . . a State's Eleventh Amendment immunity to an official capacity claim for monetary damages is not waived by unmistakably clear language in the text of RLUIPA,"[48] thus concluding "the State is not immune from monetary damages by operation of the Eleventh Amendment[.]"[49]

Most importantly, and most helpful to proponents of the

officials, it does so because of its conclusion that the Eleventh Amendment immunity is not waived by RLUIPA. Bock v. Gold, No. 1:05-CV-151, 2008 WL 345890, at *5 (D. Vt. Feb. 7, 2008).

[44] *See, e.g.,* Hathcock v. Cohen, 2008 WL 2816072, at *4 (11th Cir. July 23, 2008) (relying on *Smith* to decide that Hathcock may not bring a claim for monetary damages against two prison officials in their individual capacities); Sharp v. Johnson, 2008 WL 941686 (W.D. Pa. 2008) (ruling RLUIPA does not support damage claims against state officials in their individual capacity), *and* Brown v. Dep't of Corr., 2007 WL 4322980, at *16 (W.D. Pa. 2007) (prison official "is not liable for damages in his individual capacity because RLUIPA does not authorize money damages against individuals").

[45] Sisney v. Reisch, 533 F. Supp. 2d 952 (D.S.D. 2008).

[46] *Id.* at 972.

[47] *Id.* ("The Fourth and District of Columbia Circuits also recognized that the phrase 'appropriate relief' could be interpreted to include an award of monetary damages.") (internal citations omitted); Webman v. Fed. Bureau of Prisons, 441 F.3d 1022, 1026 (D.C. Cir. 2006) (finding that the phrase "'appropriate relief' . . . is susceptible to more than one interpretation" and that in some contexts it could include monetary damages).

[48] *Sisney*, 533 F. Supp. 2d at 971 (agreeing with Agrawal v. Briley, No. 02 C 6807, 2006 WL 3523750, at *9 (N.D.Ill. Dec. 6, 2006), *and* Madison v. Virginia, 474 F.3d 118, 131 (4th Cir. 2006)).

[49] *Id.* at 972.

argument that RLUIPA plaintiffs have a right to pursue all types of monetary relief, the court in *Sisney* recognized that not only are money damages available, but that RLUIPA authorizes the recovery of compensatory damages.[50] *Sisney* reached this conclusion based upon the fact that RLUIPA was enacted under Congress' Spending Power and Supreme Court precedent discussing Spending Clause legislation shows that "[a] funding recipient is generally on notice that it is subject to those remedies traditionally available in suits for breach of contract."[51] Therefore, "the State of South Dakota would have been on notice that it is subject to that remedy because an award of compensatory damages is a form of relief traditionally available in suits for breach of contract."[52]

D. Guru Nanak Sikh Society[53] *and Other Religious Land Use Cases*

Every case discussed so far has dealt with prisoner plaintiffs and the extent of relief available within RLUIPA's prisoner context.[54] The other part of RLUIPA that is of equal importance is religious land use plaintiffs and their entitlement to monetary relief for violations of their religious rights by municipalities' and zoning officers' land use regulations.[55] In 2003, as redress for defendants' violation of RLUIPA, the Church plaintiff in *Guru Nanak Sikh Society of Yuba City v. County of Sutter* sought declaratory, injunctive and compensatory relief against the County for land use regulations that infringed upon the Church's religious rights.[56] The County was trying to prevent the Church from assembling at its property to worship.[57] As the majority of courts agree, the court in *Guru Nanak Sikh Society* found it readily apparent that declaratory and injunctive relief are "appropriate relief" under RLUIPA, and accordingly, the court declared the challenged land use decision as invalid and enjoined

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[50] *Id.* at 973 (citing Barnes v. Gorman, 536 U.S. 181, 187 (2002)).

[51] *Id.*

[52] *Id.*

[53] Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter, 326 F. Supp. 2d 1140 (E.D. Cal. 2003).

[54] *See* discussion *infra* Sec. II.

[55] The provisions on land use prohibit government from imposing land use regulations "in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution." 42 USC § 2000cc(a)(1) (2000).

[56] *Guru Nanak Sikh Soc'y* , 326 F. Supp. 2d at 1141, 1161.

[57] *Id.*

the County defendants from enforcing it.[58] However, in deciding the Church's rights to monetary relief, the district court in *Guru Nanak Sikh Society* only allowed a claim for nominal damages.[59] The court denied a claim for compensatory damages, but that claim was limited only to the land use permit application deposit of $1,938.93. The court did not find that such a modest cost actually added to the burden on the Church's religious exercise (compensable on a "substantial burden" theory), or find that those costs were applied differentially (compensable on an "equal terms" theory) or unreasonably (compensable on an "unreasonableness" theory).[60] The Third Circuit also followed *Smith* in its interpretation of pursuing money claims against individuals in their individual capacities, and decided that "government" in RLUIPA includes officials, so actions are permitted against them at least in their official capacities.[61]

Almost four years later, in *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*,[62] the Third Circuit did not go into a lengthy discussion as to whether monetary damages were available to the Church under RLUIPA, but rather assumed so. The Church sued the City for its zoning ordinance placing religious organizations on less than equal terms with nonreligious assemblies.[63] The City changed its zoning plan, so injunctive relief no longer was available or necessary because "where a regulation is challenged as invalid on its face, 'if an amendment removes those features . . . being challenged by the claim, any claim for injunctive relief becomes moot as to those features.'"[64] The court continued that "[s]ince the Plan superseded the Ordinance in all relevant respects, its enactment mooted Lighthouse's claims for injunctive relief based on the facial invalidity of the Ordinance."[65] However, the court noted that Lighthouse's claims for compensatory damages and attorney fees

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[58] *Id.* at 1161-62 (citing Elrod v. Burns, 427 U.S. 347, 373-74 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *and* Bell v. Hood, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution.")).

[59] *Id.* at 1162.

[60] *Id.*

[61] Scott v. Beard, No. 06-4439, 2007 WL 3194039 (3d Cir. Oct.30, 2007).

[62] Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253 (3d Cir. 2007).

[63] *Id.* at 256.

[64] *Id.* at 260 (citing Nextel West Corp. v. Unity Twp., 282 F.3d 257, 262 (3d Cir. 2002)).

[65] *Id.*

remained viable.[66] The Third Circuit thus "allow[ed] Lighthouse's claims . . . only insofar as they [were] claims for compensatory damages and attorney fees."[67]

It appears religious land use plaintiffs have had a better history when it comes to pursuing money damages, even compensatory, against governments and government officials. This may be due to the fact that there is no PLRA limiting a plaintiff's relief like there is in prisoner suits. In many religious land use cases, the issue of damages does not arise like it does in prisoner suits, almost indicating a pattern of presumption of monetary damages.

III. CONGRESSIONAL INTENT

Because there is such a great conflict among federal district courts regarding the availability of nominal, punitive, and compensatory damages in a RLUIPA action, the only truly reliable reasoning as to their respective propriety can be found in Congress' legislative history when it enacted the controversial statute in 2000. Congress' use of the term of art "appropriate relief" in RLUIPA, [68] enacted against the backdrop of *Franklin* and *Burlington*,[69] can only mean that Congress intended monetary damages to be one of the remedies available to successful RLUIPA plaintiffs. Indeed, it would be especially ironic if Congress' use of a term of art that underscores the *breadth* of available relief prompted the courts instead to *narrow* the scope of that relief.

Such a narrow interpretation of "appropriate relief" would be still less appropriate in light of other statutory provisions of RLUIPA. Section 2(f) grants the United States authority to enforce the provisions of the Act by "an action for injunction relief."[70] Congress knew how to limit available relief only to declaration and injunction, and even did so in another part of the Act, preferring instead broader language to describe the relief available to private plaintiffs.[71] Moreover, section 5(g) expressly

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[66] *Id*. at 260-61 (citing Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211, 218 (3d. Cir. 2003) ("holding that although plaintiff's claim for declaratory and injunctive relief was moot, her 'damages and attorney fees claims continue[d] to present a live controversy.'")).

[67] Lighthouse Inst. for Evangelism, Inc., 510 F.3d 253 at 261 (3d Cir. 2007).

[68] 42 U.S.C. § 2000cc-2(a) (2000).

[69] *See* discussion *infra* Part II.

[70] § 2000cc-2(f).

[71] Agrawal v. Briley, No. 02 C 6807, 2006 WL 3523750, at *10 (N.D. Ill., Dec.

calls for the construction of the Act that is most protective of religious exercise.[72] Construing "appropriate relief" to encompass damages serves that purpose in various ways. To pick just one example, the land-use process, and the subsequent litigation process, often take so long to complete that religious institutions face a high risk of either losing their lease or being forced to resell the property at issue. This would moot injunctive relief and, if damages were unavailable, the entire case. Thus, the absence of damages would create a perverse incentive for municipalities to drag out the conditional use permit ("CUP") and litigation process for as long as possible, with the hope that an appellant will eventually lose the land, and with it, their entire cause of action.

Although Congress's use of a term of art that encompasses damages, particularly in the context of other reinforcing statutory provisions, provides sufficient clarity about Congress's intent to allow for damages, RLUIPA's legislative history provides additional confirmation. The detailed analysis of RLUIPA's provisions included in the Congressional Record states that the remedy provisions "[track] RFRA, creating a private cause of action for *damages*, injunction, and declaratory judgment, and a defense to liability . . ." and provides for "a successful plaintiff['s] . . . recover[y of] attorneys' fees."[73] Legal analysis presented to both the House and Senate committees that passed RLUIPA confirms this construction: "[a]ppropriate relief includes declaratory judgments, injunctions, and *damages* . . . ."[74] Reading "appropriate relief" *not* to include damages would contravene this Congressional intent.

These various indications of legislative intent have served as the basis for the two most comprehensive discussions of damages under RLUIPA to date, *Daker v. Ferrero*,[75] and, as discussed

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6, 2006) ("Had Congress intended in § 2000cc-2(a) to limit relief available to individuals to injunctive or declaratory relief, Congress could have used the same language it used in § 2000cc-2(f)."). For specific language see 42 U.S.C. § 2000cc-2(a) (2000) and § 2000cc-2(f) (2000).

[72] 42 U.S.C. § 2000cc-3(g) (2000) ("This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.").

[73] 146 CONG. REC. E1563 (2000) (emphasis added).

[74] *Hearing on H.R. 1691, The "Religious Liberty Protection Act of 1999": Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 72, 91 (1999) (statement of Douglas Laycock, University of Texas Law School).

[75] Daker v. Ferrero, No. 1:03-CV-02481-RWS, 2006 WL 346640, at *8 - *10 (N.D. Ga., Feb. 13, 2006).

above, *Agrawal v. Briley*.[76] In *Daker*, the court concluded that

> [h]ad Congress intended the relief available under the RLUIPA to be limited to that of an equitable or declaratory character, it could have easily have said so. But instead Congress chose to provide for 'appropriate relief,' and [this] Court discerns no basis in the statute to declare all monetary awards categorically 'inappropriate' . . . .[77]

In *Agrawal*, the court similarly rejected the argument "that Congress's failure to explicitly provide for money damages meant that damages were unavailable," concluding instead that "there is no sound reason why 'appropriate relief' should, on its face, exclude damages."[78] Several other courts have allowed RLUIPA damages claims with less detailed discussion, including in the land-use context.[79]

Finally, the availability of damages is in keeping not only with RFRA, but with claims under 42 U.S.C. § 1983 for analogous constitutional violations.[80] Particularly in light of this broader context, RLUIPA should be read to provide the same remedies as available under Section 1983, including damages.[81] One reason that there simply is no terror effect based on availability of damages along the lines of many opponents' speculations is that RLUIPA prisoner and land-use plaintiffs can already obtain damages under Section 1983 for conduct by prison and zoning officials that is similar, if not exactly the same. RLUIPA largely restates, and to a limited extent expands, existing constitutional protections under the Free Exercise, Establishment, Free Speech,

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[76] *Agrawal*, 2006 WL 3523750, at *3.

[77] *Daker*, 2006 WL 346440, at *9.

[78] *Agrawal*, 2006 WL 3523750, at *10.

[79] *See, e.g.,* Chase v. City of Portsmouth, 428 F. Supp. 2d 487, 490 (E.D. Va. 2006); Maranatha High Sch. v. City of Sierra Madre, No. CV 03-00082 DDP, 2003 WL 25338413, at *3 (C.D. Cal., Mar. 12, 2003); Gainer v. Cooper, No. CIV A CV505-044, 2006 WL 2946061, at *5 (S.D. Ga., Oct. 13, 2006) (permitting First Amendment and RLUIPA claims for monetary damages to go forward); Ghashiyah v. Wisconsin Dept. of Corrections, No. 01-C-10, 2006 WL 2845701, at *12 (E.D. Wis., Sept. 29, 2006) (suggesting punitive damages are available under RLUIPA); Price v. Caruso, 451 F. Supp. 2d 889, 894-95 (E.D. Mich. 2006) (dismissing injunctive and declaratory claims as moot, but allowing damages claim under RLUIPA to go forward).

[80] *See* Senate Hearing, *supra* note 74 ("This section should be read against a large body of federal law on remedies and immunities under other civil rights legislation.").

[81] *See Agrawal*, 2006 WL 3523750, at *11 (finding it "unlikely that Congress, in attempting to provide greater protection for religious freedom than was available under the First Amendment, would simultaneously subject regulations to stricter scrutiny but deny relief that had traditionally been available."); *see also* Jama v. INS, 343 F. Supp. 2d 338, 374-75 (D.N.J. 2004) (similar regarding RFRA).

and Equal Protection Clauses of the First and Fourteenth Amendments.[82] Any suggestion that zoning officials will begin doling out unwarranted favors to religious institutions out of fear – simply because RLUIPA makes damages available for the small increment of zoning conduct that RLUIPA prohibits but the constitution does not – is as implausible as it is unsupported and should simply be rejected.

In any event, such deterrence would not even threaten to violate the Establishment Clause. Even if the damages increment did somehow tend to deter zoning officials from treading as closely to the constitutional line in denying permits to assemble for worship and religious instruction, the RLUIPA will have done its job under the Enforcement Clause, not failed in it under the Establishment Clause.[83] The Establishment Clause should not be read so aggressively that people and groups cannot benefit from the deterrence of Enforcement Clause legislation simply because they are religious, or because the rights they assert involve religious exercise.[84] In sum, there is not only no Establishment Clause violation, there is not even an Establishment Clause issue.[85]

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[82] *See* Freedom Baptist Church v. Twp. of Middletown, 204 F. Supp. 2d 857, 870-71 (E.D. Pa. 2002) (discussing parallel constitutional protections restated or approximated in various provisions of RLUIPA Section 2); *see also* Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001) (noting that "Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence," but may also prohibit "a somewhat broader swath of conduct . . .").

[83] *See* City of Boerne v. Flores, 521 U.S. 507, 518 (1997) (concluding that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional . . .").

[84] *See* Cutter v. Wilkinson, 544 U.S. 709, 724 (2005) (rejecting the proposition that "giving greater protection to religious rights than to other constitutionally protected rights" violates the Establishment Clause); *see also* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990) (noting "[t]he government may not . . . impose special disabilities on the basis of religious views or religious status . . . ").

[85] Any suggestion that RLUIPA's land-use provisions are unconstitutional should also be rejected as the Ninth Circuit has either rejected those challenges directly, or rejected challenges to the indistinguishable prisoner provisions of RLUIPA. *See* Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter, 456 F.3d 978, 995 (9th Cir. 2006) (rejecting Enforcement Clause challenge to RLUIPA Section 2(a)); Mayweathers v. Newland, 314 F.3d 1062, 1068-70 (9th Cir. 2002), *cert. denied*, 540 U.S. 815 (2003) (rejecting Spending and Establishment Clause, Tenth and Eleventh Amendment, and Separation of Powers challenges to RLUIPA Section 3); *and* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1219 (11th Cir. 2004) (rejecting constitutional challenge to RLUIPA Section 2(b)).

Even if the availability of damages under RLUIPA would generate constitutional issues under the Establishment Clause – and it does not at all – courts must address (and reject) those constitutional issues, rather than simply avoid them. Under *NLRB v. Catholic Bishop*,[86] when a court finds that a certain statutory interpretation would generate a constitutional issue, that does not end the analysis, but instead calls for a second inquiry: whether Congress's intent nonetheless mandates the interpretation that generates the constitutional issue.[87] Here, the answer to that question is yes. Congress has made clear that it intends for courts to construe RLUIPA "in favor of a broad protection of religious exercise, *to the maximum extent permitted* by the terms of this [Act] and the Constitution," leaving no room for constitutional avoidance.[88] If the Constitution allows an interpretation that favors "a broad protection of religious exercise,"[89] then the interpretation must be allowed, even if it might generate constitutional *issues*; of course, if the interpretation results in a constitutional *violation*, then it is forbidden. But in light of section 5(g), Congress's intent is clear that nothing short of an *actual* constitutional violation can defeat a protective interpretation. Accordingly, if allowing damages did generate constitutional issues, courts should address, rather than avoid those issues, and reject them as meritless.

Finally, not only is it clear that Congress intended to allow a plaintiff to recover monetary damages against a government under RLUIPA, but Congress also intended to allow a plaintiff to recover against individual government workers in their official and individual capacities. Indeed,

> [a]s several courts have recognized in unpublished opinions, if Congress had not added subsection (iii), RLUIPA would only contemplate claims against officials in their official capacity. However, by including language that tracks that found in 42 U.S.C. § 1983, Congress appears to have intended RLUIPA to authorize claims against all persons amenable to suit under § 1983.[90]

Therefore, although the RLUIPA provision does not expressly state that monetary damages are available, it also does not preclude them. Accordingly, it is logical and statutorily proven

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[86] NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

[87] *Id.* at 504.

[88] 42 U.S.C. § 2000cc-3 (2000) (emphasis added).

[89] Bess v. Alameida, No. CIV S-03-2498 GEB DAD P., 2007 WL 2481682, at *20 (E.D. Cal., Aug. 29, 2007).

[90] *Id.* at *21.

that a plaintiff may proceed on his RLUIPA claims for monetary damages against defendants in both their official and individual capacities.

IV. MEASURING DAMAGES

By mere virtue of a plaintiff succeeding on his or her RLUIPA claim against a government or a governmental worker, a person's religious freedoms have been found to be violated by a court of law. Such a violation against a person's First Amendment freedom of religion is a serious injury and deserves the highest form of compensation. Therefore, to make a plaintiff whole, in the truest sense of the word "whole," he or she must be entitled to compensatory, punitive, and nominal damages.

As the case law outlined above makes apparent, numerous courts liken the RLUIPA statute to the 42 U.S.C. § 1983 statute, and "[i]n a section 1983 action, both compensatory and punitive damages are available upon proper proof."[91] Just as the United States Supreme Court has repeatedly observed that section 1983 was intended to "create[ ] 'a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution,'" such is true for a deprivation of religious rights under RLUIPA.[92] Thus, when a Section 1983 plaintiff "seeks damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts."[93] Under traditional tort theory, compensatory damages are available in order "to place the plaintiff in a position similar to the one she or he would have been in had the violation not occurred."[94] All of this reasoning - and intention to make a plaintiff whole for constitutional deprivations - holds true in a successful RLUIPA action, and prisoner and religious land use plaintiffs should have the opportunity to be made whole. This completion comes in the form of compensatory, nominal, and punitive damages.

If someone's religious freedoms are being so trampled upon that he or she feels the only way to get some form of justice is

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[91] Cunningham v. City of Overland, 804 F.2d 1066, 1069 (8th Cir. 1986).

[92] Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 305-06 (1986) (internal citations omitted). *See also* Smith v. Wade, 461 U.S. 30, 34 (1983); Newport v. Fact Concerts, Inc., 453 U.S. 247, 258-59 (1981).

[93] *Stachura*, 477 U.S. at 306.

[94] *Cunningham*, 804 F.2d at 1069.

through a long, exhausting, and tolling litigation, then all "appropriate relief" should most definitely include monetary compensation. Many of these causes of action under RLUIPA, especially in the land-use context, derive from one or many individuals who have abused their positions of power. A state may only act through its duly elected and appointed officials. Consequently, it is the state officials, acting in their official capacities, that are obligated to conduct themselves in accordance with the Constitution. Unlike compensatory damages, "[t]he purpose of punitive damages is to punish the defendant for his willful or malicious conduct and to deter others from similar behavior."[95] Unfortunately, many local communities and their officials oppose the efforts of religious organizations who desire to build or expand their property for religious purposes. These challengers usually are operating on political or financial concerns from the communities themselves. Thus, when state or local officials go "off the reservation" and target and infringe upon an individual's or a religious entity's religious rights, punitive damages should be an available form of relief.

CONCLUSION

Many of the apologists for communities in land use disputes with religious institutions suggest that even though Congress enacted the Religious Land Use and Institutionalized Persons Act to level the playing field between local governments and religious entities in the context of land use and zoning, damages should not be awarded as it is "good government" to deny a religious use in favor of a secular use. This is precisely what Congress sought to remedy when presented with massive evidence of religious discrimination in land use disputes. More often than not, a community will bully a religious entity out of its jurisdiction because of the financial, insurance and legal resources it has over the organization. Congress correctly concluded that the only effective way to prevent this is to include an element of damages when a RLUIPA violation occurs. This is the appropriate relief intended by Congress. Congress's anticipated scope of relief includes nominal, punitive and compensatory damages against a municipality, but also that all of these damage types are recoverable against governmental officials in both their official and individual capacities.

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[95] *Stachura*, 477 U.S. at 307 n.9.