COMMENTS

Achieving Appropriate Relief for Religious Freedom Violations in Prisons After *Tanzin*

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In the 1990s, Congress passed the Prisoner Litigation Reform Act (PLRA) to decrease frivolous prisoner litigation. One PLRA provision that was aimed at accomplishing that goal is § 1997e(e), which states that no prisoner can bring a federal civil action for mental or emotional injury without a showing of an accompanying physical injury. This provision has created a circuit split over whether prisoners who suffer a violation of their Free Exercise rights under the First Amendment can recover compensatory damages. If the split is left unresolved, it will lead to a troubling lack of uniformity in the law for federal prisoners, who are a group of uniquely vulnerable litigants given their lack of access to resources.

This Comment argues that to achieve uniformity and avoid the complications of the First Amendment circuit split, federal prisoners should bring their claims under the Religious Freedom Restoration Act (RFRA) instead. In Tanzin v. Tanvir*, the Supreme Court explicitly ruled that monetary damages are available as a form of "appropriate relief" under RFRA. This Comment asserts that "appropriate relief" should include compensatory damages for prisoners for a number of reasons. These reasons include RFRA's "super statute" status, the imperfect fit of other noncompensatory remedies such as injunctive relief and nominal damages when religious freedom rights are violated, the failure to serve PLRA's stated purpose of decreasing frivolous prisoner litigation by barring recovery of compensatory damages, and consistency with the Supreme Court's separation of powers doctrine. Therefore, federal prisoners should be able to recover compensatory damages under RFRA when their religious freedom rights are violated.*

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INTRODUCTION

In October 2014, corrections officers approached prisoner Rafiq Sabir in the prison auditorium at Danbury Federal Correctional Institution after he had just performed *salah*, a group prayer that Muslims are required to complete daily.[1] The officers told Sabir that congregational prayer was only permitted in the prison chapel.[2] They warned Sabir that if he continued to pray, he could be disciplined.[3] Sabir explained that he needed to perform *salah* five times a day "and that the chapel was frequently unavailable during those times."[4] But the officers reiterated that

1 Sabir v. Williams, 52 F.4th 51, 55 (2d Cir. 2022).
2 *Id.*
3 *Id.*
4 *Id.*

they would enforce the policy.[5] As a result, Sabir and other Muslim prisoners stopped engaging in congregational prayer because of the officers' statements—fearing punishment through prison sanctions or other disciplinary methods.[6] The policy effectively forced Sabir "to choose between acting in accordance with [his] sincere religious beliefs and facing discipline at the prison, including possible solitary confinement and loss of other privileges."[7] In May 2017, Sabir filed a suit against Warden D.K. Williams and the director of the Federal Bureau of Prisons (FBOP), seeking damages for violations of the First Amendment's Free Exercise Clause[8] and the Religious Freedom Restoration Act[9] (RFRA).[10]

Under current law, it is difficult for prisoners like Sabir to recover compensatory damages under the First Amendment when they suffer religious freedom violations. When prisoners bring civil claims against their correctional institutes, § 1997e(e) of the Prison Litigation Reform Act[11] (PLRA) prohibits them from receiving compensatory damages for mental or emotional injuries unless they can also show that they experienced a physical injury.[12] But federal circuits are split on whether prisoners must show a physical injury, as required by § 1997e(e), when alleging a constitutional violation. Most circuits have imposed the physical-injury requirement for all constitutional violations of a non-physical nature,[13] including religious freedom violations.[14] These

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5 *Id.* at 56.

6 *Sabir*, 52 F. 4th at 56.

7 *Id.*

8 U.S. CONST. amend. I, § 1, cl. 1.

9 42 U.S.C. §§ 2000bb–2000bb-4 (1993).

10 *Sabir*, 52 F.4th at 56–57.

11 42 U.S.C. § 1997e(e) (1996).

12 The relevant provision states that "[n]o [f]ederal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act." 42 U.S.C. § 1997e(e).

13 *See* Aref v. Lynch, 833 F.3d 242, 262–63 (D.C. Cir. 2016) (noting the circuit split); *infra* notes 57–58. The courts that follow the majority approach include the Second, Third, Fifth, Eighth, Tenth, Eleventh, and D.C. Circuits. *See* Molly R. Schimmels, Comment, *First Amendment Suits and the Prison Litigation Reform Act's "Physical Injury Requirement": The Availability of Damage Awards for Inmate Claimants*, 51 U. KAN. L. REV. 935, 946–48 (2003); *see also, e.g.*, Geiger v. Jowers, 404 F.3d 371, 374–75 (5th Cir. 2005) (per curiam); Royal v. Kautzky, 375 F.3d 720, 723 (8th Cir. 2004); Al-Amin v. Smith, 637 F.3d 1192, 1196 (11th Cir. 2011), *overruled in part by* Hoever v. Marks, 993 F.3d 1353 (11th Cir. 2021).

14 *See, e.g.*, Boxer X v. Donald, 169 F. App'x 555, 558 (11th Cir. 2006) (per curiam) (holding that a plaintiff alleging that officers unreasonably restrained his religious rights was not entitled to compensatory relief because "he did not allege physical injury"); *Royal*, 375 F.3d at 723 (8th Cir. 2004) (observing that "[t]he majority of courts hold section

courts have held that such violations are mental or emotional injuries without the accompanying physical injury required for compensatory damages.[15] On the other side of the split, circuits that do award compensatory damages for constitutional violations without an accompanying physical injury have determined that constitutional violations are not mental or emotional injuries, and therefore fall outside the scope of § 1997e(e) entirely.[16] In other words, these circuits have created a new category of injuries—constitutional ones. This circuit split has resulted in drastically disparate outcomes for prisoners alleging religious freedom violations in different jurisdictions, and the split has not yet been resolved by the Supreme Court.

This Comment argues that federal prisoners can avoid the complications of the existing First Amendment circuit split and take a more direct path to compensatory damages for religious freedom violations that are constitutional violations under RFRA,[17] which provides broader protection of religious freedom rights.[18] Prisoners can choose whether to bring a claim under the

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1997e(e)'s limitation on damages applies to *all* federal prisoner lawsuits" (emphasis added)); Thompson v. Carter, 284 F.3d 411, 416 (2d Cir. 2002) (concluding that § 1997e(e) "applies to all federal civil actions"); Godbey v. Wilson, 2014 WL 794274, at *7 (E.D. Va. Feb. 26, 2014) (ruling that the "plaintiff's attempt to recover monetary damages under RFRA . . . fail[s] because he is an incarcerated felon and has not alleged that he suffered any physical injury as the result of the conduct he challenges").

15 *See* Corbett H. Williams, Comment, *Evisceration of the First Amendment: The Prison Litigation Reform Act and Interpretation of 42 U.S.C. § 1997e(e) in Prisoner First Amendment Claims*, 39 LOY. L.A. L. REV. 859, 865 (2006).

16 *See* King v. Zamiara, 788 F.3d 207, 212 (6th Cir. 2015) (stating that "deprivations of First Amendment rights are themselves injuries, apart from any mental, emotional, or physical injury . . . and that § 1997e(e) does not bar all relief for injuries to First Amendment rights"); Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998) (ruling that a plaintiff who experienced the deprivation of his First Amendment rights is entitled "to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred"); *Aref*, 833 F.3d at 265 (concluding that "there exists a universe of injuries that are neither mental nor emotional and for which plaintiffs can recover compensatory damages under the PLRA").

17 For cases where federal prisoners brought both First Amendment and RFRA claims, see generally Hayford v. Federal Bureau of Prisons, 2023 WL 1927267 (D. Kan. Feb. 10, 2023) (concerning a case in which the plaintiff claimed that prison officials violated his First Amendment and RFRA rights by preventing him from wearing religious clothing, participating in weekly religious communal services, and meeting with clergy and religious volunteers); Biron v. Upton, 2022 WL 17691622 (5th Cir. Dec 14, 2022) (concerning a case in which the plaintiff alleged that prison officials violated the First Amendment and RFRA by confiscating her manuscript about "Christian morality of sexual conduct").

18 *See generally* CONG. RSCH. SERV., IF11490, THE RELIGIOUS FREEDOM RESTORATION ACT: A PRIMER (2020) (explaining that RFRA provides broader protection of First Amendment rights because it imposes a heightened standard of review for

Free Exercise Clause of the First Amendment or RFRA; many do both. For years, it was unclear what kind of relief was available under RFRA.[19] In 2020, the Supreme Court held that plaintiffs can recover monetary damages under RFRA against federal officials in their individual capacities, opening the door for prisoners to bring claims of religious freedom violations against prison officials for damages under the statute.[20]

While the Court's decision in *Tanzin v. Tanvir*[21] sets up a potential conflict with PLRA's § 1997e(e) limitation, there are several reasons why § 1997e(e) should not apply to RFRA claims in the same way it does—in most circuits—to religious freedom violations brought under the First Amendment. First, Congress intended RFRA to be more powerful than other statutes because it protects a fundamental constitutional right. The Supreme Court has referred to this type of quasi-constitutional statute as a "super statute."[22] Courts often interpret super statutes as superseding other federal statutes when they conflict.[23] Sometimes this idea is written directly into a super statute. For example, RFRA requires other statutes to explicitly reference a RFRA provision to gain exemption. PLRA did not explicitly limit relief under RFRA, so courts should interpret RFRA as superseding PLRA and allow prisoners to recover compensatory damages under RFRA's broad authorization of "appropriate relief."[24]

Second, there are cases where noncompensatory remedies—injunctive relief, nominal damages, and punitive damages—do not provide "appropriate relief" under RFRA. Injunctive relief does not help prisoners whose personal possessions of a religious nature have already been destroyed by prison officials. Nominal damages are usually only $1, which fail to deter officials' bad behavior and right the wrongs experienced by prisoner plaintiffs. Finally, punitive damages are awarded at the discretion of a jury.

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government actions, including rules of general applicability, that substantially burdens a person's religious exercise).

19 *See* Hardy v. Bureau of Prisons, 2019 WL 3085963, at *4 (D. Minn. June 10, 2019) (noting the split among district courts—of whether individual defendants may be liable for damages under RFRA—before the Supreme Court addressed the question).

20 *See* Tanzin v. Tanvir, 141 S. Ct. 486, 493 (2020).

21 141 S. Ct. 486 (2020).

22 Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020).

23 *See* William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1235 (2001) (describing, for example, how the Supreme Court has strongly disfavored implied exceptions in super statutes such as the Sherman Act of 1890, 15 U.S.C. §§ 1–38 (1890), even when the statute conflicting with the Sherman Act was newer).

24 42 U.S.C. § 2000bb-1(c).

Compensatory damages are often the most appropriate—or even the only appropriate—form of relief for a RFRA violation, and therefore should be recoverable.

Third, barring compensatory damages for prisoners who bring a RFRA claim does not serve the stated purpose of PLRA, which is to decrease and eliminate frivolous prisoner lawsuits. Legislative history shows that lawmakers wanted to provide tools for federal courts to clear frivolous prisoner lawsuits from their dockets in a more efficient manner.[25] But when dealing with potential religious freedom violations, judges have other doctrines that they can use to dispense with meritless lawsuits, such as qualified immunity.[26] PLRA was not meant to keep compensatory damage awards away from prisoners who have suffered civil rights violations.

Lastly, allowing federal courts to award compensatory damages to prisoners when appropriate does not violate separation of powers principles because RFRA directly authorizes courts to determine what "appropriate relief" is for each case, involving no increase in judicial power.[27] The Supreme Court has previously expanded relief to include monetary damages after finding that injunctive relief was insufficient to correct the harm.[28] According to the Court, this expansion does not violate separation of powers principles because "[f]ederal courts cannot reach out to award remedies when the Constitution or laws of the United States do not support a cause of action."[29] When courts award damages in RFRA cases, they are not "reach[ing] out"[30] to award remedies, but rather following Congress's explicit direction to award "appropriate relief."[31]

Barring prisoners from the most appropriate form of relief when they suffer a religious rights violation is a serious problem. Prisoners are particularly vulnerable because violations to their civil rights are often not visible to the public, putting those who

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[25] *See* Kiira J. Johal, Comment, *Judges Behind Bars: The Intrusiveness Requirement's Restriction on the Implementation of Relief Under the Prison Litigation Reform Act*, 114 COLUM. L. REV. 715, 723 (2014).

[26] Thomas E. O'Brien, *The Paradox of Qualified Immunity: How a Mechanical Application of the Objective Legal Reasonableness Test Can Undermine the Goal of Qualified Immunity*, 82 TEX. L. REV. 767, 773 (2004).

[27] 42 U.S.C. § 2000bb-1(c).

[28] *See* Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 74 (1992) (making such a finding in the Title IX context).

[29] *Id.*

[30] *Id.*

[31] 42 U.S.C. § 2000bb-1(c).

are incarcerated at particular risk of being subjected to abuses of power.[32] Therefore, uniformity and predictability of the law across circuits are crucial to achieving justice, especially because "litigation remains one of the few avenues for prisoners to seek redress for adverse conditions or other affronts to their rights."[33] It is vital for the federal judiciary to protect prisoners' rights by implementing remedies, such as recovery of compensatory damages, that are effective at deterring wrongful conduct. Ensuring that there are effective deterrence mechanisms for federal actors complements Congress's recent statutory efforts to provide a greater level of protection for prisoners' civil rights, such as establishing a prison ombudsman to report to the Attorney General on any conditions that affect the health, welfare, and rights of prisoners.[34]

This Comment presents RFRA as a pathway for federal prisoners to recover compensatory damages when they suffer religious freedom violations, and discusses why PLRA should not limit that recovery. Part I of this Comment introduces PLRA and the current circuit split that has led to a lack of uniformity in how religious freedom violations brought by prisoners under the First Amendment are handled. Part II explains the legislative history of RFRA, describes *Tanzin*, and argues that "appropriate relief" must include compensatory damages for prisoners. Part III discusses why federal circuits do not have to replicate the split for RFRA claims given RFRA's status as a "super statute." Finally, Part IV analyzes how PLRA's goals of eliminating frivolous prisoner lawsuits are already achieved through qualified immunity and why allowing courts to determine what is "appropriate relief" in RFRA cases is consistent with the separation of powers principle.

I. AN INTRODUCTION TO PLRA AND THE PROBLEM OF THE FIRST AMENDMENT CIRCUIT SPLIT

PLRA has had a significant impact on prisoner litigation by limiting compensatory damages through § 1997e(e). This provision has been interpreted in two different ways by federal circuits,

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[32] *See* MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 19 (2006).

[33] Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 155 (2015) [hereinafter Schlanger, Trends in Prison Litigation].

[34] *See* Michael R. Sisak, *Biden Signs Bill Forcing Federal Bureau of Prisons to Fix Outdated Cameras*, PBS NEWSHOUR (Dec. 27, 2022), https://perma.cc/YGR8-MJ64; Michael R. Sisak & Michael Balsamo, *Senators Push for New Oversight to Combat Federal Prison Crises*, L.A. TIMES (Sept. 28, 2022), https://perma.cc/882T-V367.

leading to a split over whether it applies to claims brought under the First Amendment. Prisoners who bring First Amendment claims for religious freedom violations are thus treated dissimilarly depending on which jurisdiction they are in, causing uncertainty and inconsistency in the law. Part I.A introduces PLRA and the reasons for its passage. Part I.B discusses the split in greater detail.

A. The Legislative Background of PLRA

In 1996, Congress passed PLRA following complaints from federal courts "that they were being inundated by civil rights lawsuits brought by incarcerated plaintiffs."[35] Federal prisoner civil rights filings totaled 3,620 in 1972, but increased to approximately 39,000 by 1995,[36] comprising 19% of the federal civil docket.[37] This increase was mainly associated with a simultaneously growing incarcerated population in nearly every state.[38]

To address this, PLRA was introduced with the aim of improving judicial efficiency.[39] In addition to limiting compensatory damages for nonphysical injuries, PLRA also requires that a complaint be administratively exhausted before a prisoner can bring suit[40] and the limiting of attorney's fees.[41]

Lawmakers who supported PLRA argued that the bulk of prisoners' civil rights cases lacked sufficient merit, pointing to the high rates of dismissal.[42] They emphasized how the number of frivolous prisoner lawsuits, defined as ones "without arguable merit,"[43] "tie up the courts, waste valuable legal resources, and

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35 Easha Anand, Emily Clark & Daniel Greenfield, *How the Prison Litigation Reform Act Has Failed for 25 Years*, THE APPEAL (Apr. 26, 2021), https://perma.cc/94SS-P6BX.

36 *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1583 (2003) [hereinafter Schlanger, Inmate Litigation].

37 *Id.* at 1558.

38 *Id.* at 1586–87. In 1972, there were 21,713 prisoners in federal institutions. PATRICK A. LANGAN, JOHN V. FUNDIS, LAWRENCE A. GREENFIELD & VICTORIA W. SCHNEIDER, U.S. DEP'T OF JUST., HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAREND 1925-86, at 14 (1988). In 1995, that number had increased to 100,250. DARRELL K. GILLIARD & ALLEN J. BECK, U.S. DEP'T OF JUST., PRISON AND JAIL INMATES, 1995, at 1 (1996).

39 *See* Adam Slutsky, *Totally Exhausted: Why a Strict Interpretation of 42 U.S.C. § 1997e(a) Unduly Burdens Courts and Prisoners*, 73 FORDHAM L. REV. 2289, 2297 (2005).

40 42 U.S.C. § 1997e(a).

41 42 U.S.C. § 1997e(d)(2).

42 *See* Melissa Benerofe, Comment, *Collaterally Attacking the Prison Litigation Reform Act's Application to Meritorious Prisoner Civil Litigation*, 90 FORDHAM L. REV. 141, 151 (2021).

43 Sun v. Forrester, 939 F.2d 924, 925 (11th Cir. 1991) (per curiam).

affect the quality of justice enjoyed by law-abiding citizens."[44] During Senate floor debate, Senator Bob Dole described PLRA as a reaction to "the litigation explosion now plaguing our country," and said that the statute "will help put an end to the inmate litigation fun-and-games."[45] He gave examples of frivolous lawsuits that included grievances over insufficient storage locker space, a defective haircut, and, famously, being served chunky instead of creamy peanut butter.[46]

Congress's stated purpose for PLRA was "to discourage frivolous and abusive prison lawsuits" and "[t]o provide for appropriate remedies for prison condition lawsuits" in response to these concerns.[47] To assuage concerns that the statute would be overbroad, prominent supporters of the statute claimed that PLRA did not target meritorious prisoner litigation, despite there being no protections for such litigation in the text of the statute. Then–Senator Joe Biden worried that, "in an effort to curb frivolous prisoner lawsuits," the statute would "place[ ] too many roadblocks to meritorious prison lawsuits."[48] He urged the other senators to "not lose sight of the fact that some of these lawsuits have merit—some prisoners' rights are violated."[49] Despite Senator Biden's opposition, Congress passed PLRA with bipartisan support.[50]

As part of its goal to decrease the volume of prisoner litigation, § 1997e(e) of the statute states that "[n]o [f]ederal civil action may be brought by a prisoner confined in a jail, prison, or correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act."[51] There is little recorded debate about this particular provision of the statute, but it "reflects the common law treatment of the mental or emotional distress tort, which traditionally has required a showing of physical injury for the defendant to be liable for emotional harm."[52]

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44 141 CONG. REC. 27,042 (1995) (statement of Sen. Bob Dole).

45 *Id.*

46 *Id.*

47 141 CONG. REC. 27,041 (1995).

48 141 CONG. REC. 27,044 (1995) (statement of Sen. Joe Biden).

49 *Id.*

50 *See* David Fathi, *No Equal Justice: The Prison Litigation Reform Act in the United States*, HUM. RIGHTS. WATCH (June 16, 2009), https://perma.cc/PH5Y-J2BD.

51 42 U.S.C. § 1997e(e).

52 Schimmels, *supra* note 13, at 942; *see also* RESTATEMENT (SECOND) OF TORTS § 436A (1977) (stating that the negligent infliction of mental or emotional injury must also cause physical harm for there to be a cause of action).

Section 1997e(e) has had an enormous impact on both the filing and the resolution of cases. The provision's requirement of a physical injury allows judges to dismiss more cases and led to a sharp decrease in prisoner suits almost immediately after its passage. Between 1995 and 2001, the number of prisoner filings decreased by 43%, even though the total incarcerated prison population increased by 23%.[53] Critics of § 1997e(e) have since called the provision overbroad, saying that it reaches beyond preventing frivolous suits, barring many meritorious civil rights claimants from recovering compensatory damages.[54]

B. Circuit Split over the First Amendment and § 1997e(e)

After Congress passed PLRA, federal circuits split over whether § 1997e(e) bars compensatory damages for First Amendment violations that did not result in a physical injury. Scholars have attributed the split—which has now existed for over fifteen years[55]—to the ambiguity in § 1997e(e)'s language and the lack of legislative history.[56]

The Second, Third, Fifth, Eighth, Tenth, and Eleventh Circuits currently categorize First Amendment violations as a "mental or emotional injury" under § 1997e(e),[57] while the Fourth, Sixth, Seventh, Ninth, and D.C. Circuits view them as outside the scope of § 1997e(e).[58] The circuits that categorize First

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[53] Schlanger, Inmate Litigation, *supra* note 36, at 1559–60.

[54] Jennifer Winslow, Comment, *The Prison Litigation Reform Act's Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant To?*, 49 UCLA L. REV. 1655, 1685–86 (2002).

[55] Jonathan Michael D'Andrea, Student Article, *The Prison Litigation Reform Act: A Legislatively-Enacted and Judicially-Ratified Barrier Separating Prisoners from the Protections of the First Amendment*, 43 OHIO N.U. L. REV. 489, 496 (2019).

[56] *See* Williams, *supra* note 15, at 866; *see also* Eleanor M. Levine, Note, *Compensatory Damages Are Not for Everyone: Section 1997e(e) of the Prison Litigation Reform Act and the Overlooked Amendment*, 92 NOTRE DAME L. REV. 2203, 2211–13 (2017) (describing how the First Amendment–restrictive side of the split used plain meaning to justify its interpretation, while the circuits on the other side applied other canons of statutory interpretation to determine that constitutional violations were outside the scope of § 1997e(e)); Jeff B. Allison, Comment, *First Amendment Claims Under the Prison Litigation Reform Act: A Mental or Emotional Injury?*, 74 U. CIN. L. REV. 1067, 1072–73 (2006) (discussing how courts focus on different portions of § 1997e(e)'s text to explain their interpretations).

[57] *See, e.g.*, Thompson v. Carter, 284 F.3d 411, 417–18 (2d Cir. 2002); Al-Amin v. Smith, 637 F.3d 1192, 1197 (11th Cir. 2011), *overruled in part by* Hoever v. Marks, 993 F.3d 1353 (11th Cir. 2021); Geiger v. Jowers, 404 F.3d 371, 373 (5th Cir. 2005) (per curiam); Royal v. Kautzky, 375 F.3d 720, 723 (8th Cir. 2004); Searles v. Van Bebber, 251 F.3d 869, 875–76 (10th Cir. 2001); Allah v. Al-Hafeez, 226 F.3d 247, 250–51 (3d Cir. 2000).

[58] *See, e.g.*, Wilcox v. Brown, 877 F.3d 161, 169–70 (4th Cir. 2017); Aref v. Lynch, 833 F.3d 242, 265 (D.C. Cir. 2016); King v. Zamiara, 788 F.3d 207, 213 (6th Cir. 2015); Rowe

Amendment violations as "mental or emotional injur[ies]" view compensatory damages as unavailable to plaintiffs; the circuits that see them as constitutional injuries that fall outside the scope of § 1997e(e) have ruled that compensatory damages are available. This split has serious implications for prisoners who suffer First Amendment violations because it makes venue a substantive factor in the question of whether compensatory damages are available.

Part I.B.1 provides some background on religious freedom in prisons. Part I.B.2 summarizes the reasoning used by the majority side of the split—the circuits that require an accompanying physical injury for any First Amendment violations to award compensatory damages—while Part I.B.3 analyzes the arguments on the minority side—circuits that view First Amendment violations as constitutional injuries outside the scope of § 1997e(e), and therefore eligible for compensatory damages without an accompanying physical injury.

1. Free Exercise in federal prisons.

The First Amendment's Free Exercise Clause prevents Congress from enacting laws that prohibit the free exercise of religion.[59] The Fourteenth Amendment incorporates the Free Exercise Clause to the states[60] and broadly prevents all government officials from creating policies that infringe on freedom of religion.[61] This extends to prison policies.[62]

Much of the existing law on how the Free Exercise Clause interacts with prisoners' rights developed during the second half of the twentieth century.[63] During the 1950s, incarcerated members of the Nation of Islam organized to contest prison policies.[64] They fought for changes in the prison diet to accommodate their religious needs, transfers to east-facing cells to facilitate prayer

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v. Shake, 196 F.3d 778, 781–82 (7th Cir. 1999); Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998).

59 U.S. CONST. amend. I.

60 *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (applying the Free Exercise Clause to states).

61 *See* Reynolds v. United States, 98 U.S. 145 (1879) (holding that the Free Exercise Clause forbids the federal government from regulating belief).

62 *See* Turner v. Safley, 482 U.S. 78, 84 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.").

63 Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 527 (2021).

64 *Id.* at 527–28.

toward Mecca, and recognition as a religious group.[65] While the prisoners did not bring these claims under the First Amendment, their main allegation was that prison officials were preventing them from practicing their Muslim faith.[66] These cases culminated in *Cooper v. Pate*,[67] in which the Supreme Court ruled that a prisoner stated a claim under § 1983 by alleging that his access to religious services and "materials disseminated by the Black Muslim Movement" had been restricted,[68] paving the way for a broader understanding of prisoners' religious rights.[69]

Religious exercise in prisons continues to play an important role in prisoners' well-being. Prisoners often use religion to cope with stressors in prisons, so infringements on religious practices can be extremely distressing.[70] The right to religious freedom is intimately tied to human dignity, so restrictions on religious exercise can "effectively attack a person's core identity."[71] Scholars have found significant evidence of religion's contributions to stress reduction and feelings of well-being—both of which lead to better overall health.[72] Prisoners also use religion to form healthy connections with each other, and a religious group may be one of the only places where prisoners "can interact with other inmates in a positive manner and have a sense of psychological well-being."[73]

However, prisons struggle to balance this important right against security concerns.[74] While prisons are often simply unable to meet the demand for religious services, a 2021 Department of Justice audit of the FBOP found that prison staff also stated that allowing prisoners to lead services presented safety and security risks because they might "obtain power and influence" among the

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65 *Id.* at 528.

66 *Id.*

67 378 U.S. 546 (1964).

68 Cooper v. Pate, 324 F.2d 165, 166 (7th Cir. 1963), *rev'd*, *Cooper*, 378 U.S. at 546.

69 Driver & Kaufman, *supra* note 63, at 531. In *Cruz v. Beto*, 405 U.S. 319 (1972) (per curiam), the Burger Court ruled that Texas prison officials had violated the First Amendment when they punished the plaintiff for distributing Buddhist materials. *Id.* at 322.

70 *See* Leah Drakeford, *Mental Health and the Role of Religious Context Among Inmates in State and Federal Prisons: Results from a Multilevel Analysis*, 9 SOC. & MENTAL HEALTH 51, 52 (2019).

71 Nicole B. Godfrey, *Holding Federal Prison Officials Accountable: The Case for Recognizing a Damages Remedy for Federal Prisoners' Free Exercise Claims*, 96 NEB. L. REV. 924, 971 (2018).

72 Jim Thomas & Barbara H. Zaitzow, *Conning or Conversion? The Role of Religion in Prison Coping*, 86 PRISON J. 242, 254 (2006).

73 *Id.*

74 *See* DEP'T OF JUST., AUDIT OF THE FEDERAL BUREAU OF PRISONS' MANAGEMENT AND OVERSIGHT OF ITS CHAPLAINCY SERVICES PROGRAM, at ii (2021).

prisoner population.[75] This has led to inconsistent application of rules restricting religious practices across prisons, sometimes resulting in First Amendment violations.

2. Circuits interpreting First Amendment violations as falling *within* the scope of § 1997e(e).

Section 1997e(e) establishes a distinction between a physical injury and a mental or emotional injury. The section provides no definition of physical injury, but courts have held that a physical injury must be more than de minimis.[76] All circuits agree that when a prisoner experiences a physical injury, compensatory damages are available for any mental or emotional injuries that are related to the physical injury in addition to injunctive relief that stops the injury-causing behavior.

Most First Amendment violations in prison do not meet the de minimis physical injury requirement of § 1997e(e) because they involve prohibitions on religious practices or destruction of religious materials instead of physical harm to a prisoner.[77] As a result, some circuits have ruled that First Amendment violations only result in mental or emotional injuries.[78] They reason that for compensatory damages to be awarded, the prisoner must prove that they have a de minimis physical injury, which First Amendment claims usually lack. The Tenth Circuit took this approach in *Searles v. Van Bebber*[79] when it ruled that a prisoner who was denied access to a kosher diet could not recover compensatory damages because the jury did not find that the defendant had caused physical injury to the prisoner.[80]

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75 *Id.*

76 *See* Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997) (interpreting de minimis injury to include "uses of physical force . . . not of a sort 'repugnant to the conscience of mankind,'" such as a sore or bruised ear (quoting Hudson v. McMillian, 503 U.S. 1, 10 (1992))).

77 Notably, at least one circuit has held that substantial weight loss stemming from the denial of a diet that complies with the prisoner's religion satisfies the physical injury requirement in § 1997e(e). *See* Pratt v. Corr. Corp. of Am., 124 F. App'x 465, 467 (8th Cir. 2005) (per curiam).

78 *See Searles*, 251 F.3d at 876; *Allah*, 226 F.3d at 250 (noting that "the only actual injury that could form the basis for the award [the plaintiff] seeks would be mental and/or emotional injury").

79 251 F.3d 869 (10th Cir. 2001).

80 *Id.* at 876–77.

This view is consistent with common law tort principles.[81] If there is no physical injury alleged, the circuits find that the only "compensable" injury resulting from the deprivation of a prisoner litigant's First Amendment rights is "necessarily a claim 'for mental or emotional injury.'"[82]

Importantly, no circuit views § 1997e(e) as a complete bar to monetary relief. The circuits agree that nominal damages are available if a prisoner litigant shows that their First Amendment rights have been violated, and most circuits have held that punitive damages are available as well.[83] For example, the Third Circuit held in *Allah v. Al-Hafeez*[84] that claims seeking nominal and punitive damages were not barred by § 1997e(e) because they were not for mental or emotional injury, but "to vindicate a constitutional right or to punish for violation of that right."[85] In *Allah*, a prisoner filed a complaint alleging that his First Amendment right to free exercise of religion was violated because Humza Al-Hafeez, the appointed outside minister, engaged in teachings that contradicted those of the Nation of Islam.[86] In response to the claim, the Third Circuit stated that "the only actual injury that could form the basis for the award [sought by the prisoner] would be mental and/or emotional injury." Even if there was a violation of a constitutional right, the Third Circuit nodded to the Supreme Court,[87] which has stated that "the abstract value of a constitutional right may not form the basis for . . . damages."[88]

3. Circuits interpreting First Amendment violations as falling *outside* the scope of § 1997e(e).

On the other side of the split, several circuits have ruled that First Amendment violations are constitutional injuries and thus fall outside the scope of § 1997e(e). These courts reason that because constitutional injuries are wholly different from physical, mental, or emotional injuries, the § 1997e(e) physical-injury

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81 Allison Cohn, Comment, *Can $1 Buy Constitutionality?: The Effect of Nominal and Punitive Damages on the Prison Litigation Reform Act's Physical Injury Requirement*, 8 U. PA. J. CONST. L. 299, 308 (2006).

82 Schimmels, *supra* note 13, at 947.

83 Cohn, *supra* note 81, at 308–09.

84 226 F.3d 247 (3d Cir. 2000).

85 *Id.* at 252.

86 *Id.* at 248.

87 *Id.* at 250.

88 Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 308 (1986).

requirement does not apply.[89] Therefore, compensatory damages are available to prisoners who allege First Amendment violations in these courts.

The D.C. Circuit illustrated the difference between the majority and minority approaches to § 1997e(e) in *Aref v. Lynch*.[90] The court pointed out that both approaches involve "some degree of slicing-and-dicing claims: one by injury pled and one by relief requested."[91] In a case where a prisoner has alleged a credible violation of his First Amendment right to Free Exercise but made no showing of physical harm, "the minority view . . . would look to the type of injury alleged—if, say, the prisoner claimed mental anguish in addition to the substantive constitutional violation, then the first claim would be barred while the second would be eligible for compensatory damages."[92] However, the majority view "would bar his claim for compensatory damages," while permitting his claims for nominal and punitive damages to continue, reflecting a focus on the type of relief requested.[93]

In *Aref*, the D.C. Circuit also examined the language of § 1997e(e), noting that "[h]ad Congress intended to graft a physical-injury requirement onto every single claim, the statute could simply have provided: 'No [f]ederal civil action may be brought by a prisoner . . . for *any* injury suffered while in custody without a prior showing of physical injury.'"[94] The court said that the "mental and emotional" language in § 1997e(e) is "significant precisely because prisoners can allege types of intangible injury that fall outside that ambit."[95]

The Seventh Circuit demonstrated the slicing-and-dicing discussed by the D.C. Circuit in *Rowe v. Shake*[96] by focusing on the type of injury alleged when it ruled that First Amendment violations fell outside the scope of § 1997e(e). The court said that "[a] deprivation of First Amendment rights standing alone is a cognizable injury."[97] Because prisoner John Rowe's allegations

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89 *See Canell*, 143 F.3d at 1213 (noting that "[t]he deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred").

90 833 F.3d 242 (D.C. Cir. 2016).

91 *Id.* at 263.

92 *Id.*

93 *Id.*

94 *Id.* (emphasis in original) (quoting 42 U.S.C. § 1997e(e)).

95 *Aref*, 833 F.3d at 264.

96 196 F.3d 778 (7th Cir. 1999).

97 *Id.* at 781.

involved delays of incoming mail, giving rise to a First Amendment claim, the Seventh Circuit held that § 1997e(e) was not implicated because the provision "applies *only* to claims for mental or emotional injury," which Rowe did not allege.[98] The court then stated that it was not necessary for Rowe to allege that he suffered any additional injury, because "[a] prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained."[99]

More recently, the Sixth Circuit came to the same conclusion in *King v. Zamiara*[100] through statutory interpretation.[101] The court noted that § 1997e(e) "provides that a prisoner may not bring a civil action *for mental or emotional injury* unless he has also suffered a physical injury," but "[i]t says nothing about claims brought to redress constitutional injuries, which are distinct from mental and emotional injuries."[102] The court reasoned that because § 1997e(e) is silent on constitutional injuries, "grafting a physical-injury requirement onto claims that allege First Amendment violations as the injury" would render "the phrase 'for mental or emotional injury' . . . superfluous."[103] Since the plaintiff's claim was not for mental or emotional injury, and therefore did not need to be coupled with a physical injury claim, the Sixth Circuit ruled compensatory damages were available to him.[104]

II. RFRA AS A PATH TO COMPENSATORY DAMAGES FOR RELIGIOUS FREEDOM VIOLATIONS

As explained in Part I.B, the circuit split makes it impossible for prisoners to recover compensatory damages when litigating religious freedom violations in jurisdictions that adhere to the majority view—that First Amendment violations are mental or emotional injuries without an accompanying physical injury. But prisoners also have the option to bring RFRA claims in addition to, or instead of, First Amendment claims, which offers them an opportunity to seek compensatory damages for religious freedom violations. Importantly, RFRA claims are totally separate from First Amendment claims because they are brought under a

98 *Id.* (emphasis added).
99 *Id.* at 781–82.
100 788 F.3d 207 (6th Cir. 2015).
101 *Id.* at 212.
102 *Id.* at 213 (emphasis in original).
103 *Id.*
104 *Id.*

federal statute. Such damages can repay prisoners for damaged or destroyed property of a religious nature and compensate them for the suffering they experienced from not being allowed to engage in religious practices. Part II.A introduces RFRA. Part II.B summarizes *Tanzin*, which made monetary damages explicitly available to plaintiffs suing under RFRA. Part II.C argues that interpreting "appropriate relief" to include compensatory damages for prisoners is the most faithful reading of RFRA's language.

A. An Introduction to RFRA

In 1990, the Supreme Court held in *Employment Division of Oregon v. Smith*[105] that statutes which are generally applicable and not directed at religion will be upheld, regardless of potential infringement upon a religious practice.[106] This highly criticized decision caused religious groups and civil rights organizations to push for broader protection of religious practices.[107] Congress seemed to agree that *Smith* significantly weakened constitutional protection for freedom of religion.[108] Lawmakers introduced RFRA to address those concerns directly.[109]

President Bill Clinton signed RFRA into law on November 16, 1993. It states that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless it can demonstrate that the application of the burden to the person "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."[110] This means that courts must apply strict scrutiny to government actions that burden religious practices.[111] If a person's religious practice has been burdened, they may "assert that violation as a claim or defense in a judicial proceeding and obtain

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[105] 494 U.S. 872 (1990).

[106] *See id.* at 878.

[107] *See* Robert F. Drinan & Jennifer I. Huffman, *The Religious Freedom Restoration Act: A Legislative History*, 10 J.L. & RELIGION 531, 532–33 (1993).

[108] *See* S. REP. NO. 103-111, at 3 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1893 (stating in a report from the Senate Committee on the Judiciary, which recommended the passage of RFRA, that *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral towards religion" (quoting 42 U.S.C. § 2000bb(a)(4)).

[109] 42 U.S.C. § 2000bb(a)(4) (stating that "in *Employment Division v. Smith* . . . the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion").

[110] 42 U.S.C. § 2000bb-1(a)–(b).

[111] Drinan & Huffman, *supra* note 107, at 533.

appropriate relief against a government."[112] This is known as the express remedies provision.[113] Although the Supreme Court ruled that RFRA's application to state and local governments was unconstitutional in *City of Boerne v. Flores*,[114] the statute continues to be enforced against federal government actors today.[115] This means that state prisoners are not currently protected by RFRA, but the statute remains an important tool to provide religious freedom protections to federal prisoners.

Importantly, RFRA contains § 2000bb-3(b), which states that "[f]ederal statutory law adopted after [November 16, 1993] is subject to [RFRA] unless such law explicitly excludes such application by reference to this Act."[116] Federal courts have interpreted this provision as evidence that RFRA trumps later federal statutes.[117] In 2013, the Seventh Circuit upheld a RFRA challenge against the Patient Protection and Affordable Care Act,[118] passed in 2010, by Catholic owners of corporations who objected to providing coverage of reproductive health procedures in their employee health care plans, noting that "RFRA applies retrospectively and prospectively to 'all [f]ederal law, and the

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112 42 U.S.C. § 2000bb-1(c).

113 *Tanzin*, 141 S. Ct. at 489.

114 521 U.S. 507 (1997) (holding that RFRA was unconstitutional as applied to state and local governments because the statute exceeded Congress's Section 5 powers).

115 *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006) (holding that the federal government could not enforce the Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1236 (1971), to ban a religious sect's use of hoasca, a tea containing a hallucinogen, in religious ceremonies because it failed to demonstrate a compelling interest in barring such use); U.S. Navy Seals 1-26 v. Biden, 27 F.4th 336, 339 (5th Cir. 2022) (per curiam) (denying the federal government's motion seeking a partial stay of a preliminary injunction granted to Navy Special Warfare service members who alleged that the military's mandatory COVID-19 vaccination requirements violated their religious freedoms under RFRA).

116 42 U.S.C. § 2000bb-3(b).

117 *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1146 (10th Cir. 2013) (explaining that the Tenth Circuit's case law analogizes RFRA to a constitutional right because there is conclusive evidence that RFRA trumps later federal statutes when it has been violated); Korte v. Sebelius, 735 F.3d 654, 672–73 (7th Cir. 2013) (noting that "RFRA is structured as a 'sweeping "super-statute," cutting across all other federal statutes (now and future, unless specifically exempted) and modifying their reach'" (quoting Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 253 (1995))); Dobson v. Sebelius, 38 F. Supp. 3d 1245, 1259 (D. Colo. 2014) (stating that while a violation of RFRA is not a constitutional violation, "Congress has given RFRA similar importance by subjecting all subsequent congressional enactments to strict scrutiny unless those enactments explicitly exclude themselves from RFRA" (quoting *Hobby Lobby*, 723 F.3d at 1146–47)).

118 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

implementation of that law, whether statutory or otherwise, and whether adopted before or after' its effective date."[119]

After the initial RFRA bill passed unanimously in the House, critics of the legislation raised concerns about the statute's effect on prisoners' First Amendment Free Exercise claims.[120] If RFRA became law, it would be easier for prisoners to establish a religious freedom violation. A group of state attorneys general wrote a letter to Congress expressing fear that RFRA would give prisoners an advantage in their fights for religion-inspired privileges, such as "special diets and the right to wear certain clothing."[121] They argued that such privileges would be "prohibitively expensive and create security problems" in prisons.[122] In response, the Congressional Budget Office estimated that RFRA would not significantly increase governments' prison costs[123]—and the issue became moot for state and local governments after *City of Boerne*.

RFRA also established clearer religious freedom rights for prisoners by overriding Supreme Court First Amendment jurisprudence that eroded protections for religious exercise in prison. At the time of its passage, state actors argued that RFRA would overrule *O'Lone v. Estate of Shabazz*.[124] In *O'Lone*, the Supreme Court held that prison regulations that infringe upon prisoners' religious exercise rights must only be "reasonably related to legitimate penological objectives," a far cry from the strict scrutiny standard RFRA demanded.[125] Some lawmakers who supported RFRA thought that the *O'Lone* standard was not strong enough to provide effective protection of prisoner rights—the Senate Judiciary Committee stated in their report on the proposed statute that "the intent of the act is to restore the traditional protection afforded to prisoners to observe their religions which was weakened by the decision in *O'Lone*."[126] Other lawmakers who supported *O'Lone* introduced an amendment to RFRA that would exempt prisoners from the statute's provisions. Ultimately, the amendment failed with a vote of 41–58, demonstrating that the majority of lawmakers intended to extend RFRA protections to prisoners.[127]

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119 *Korte*, 735 F.3d at 672.
120 Drinan & Huffman, *supra* note 107, at 538.
121 *Id.* at 539.
122 *Id.*
123 *Id.*
124 482 U.S. 342 (1987).
125 *Id.* at 353.
126 Drinan & Huffman, *supra* note 107, at 539 (quoting S. REP. NO. 103-111, at 9).
127 *Id.* at 540.

B. *Tanzin v. Tanvir* Changed the Definition of "Appropriate Relief" in RFRA

The Supreme Court again changed the landscape of prisoner suits over religious freedom rights when it issued its decision in *Tanzin*. Prior to *Tanzin*, federal circuits differed in their approaches to the express remedies provision in RFRA, which grants both a cause of action and provides relief.[128] The provision states that if a person's religious practice has been burdened, they "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."[129] Some courts interpreted "appropriate relief" to include monetary relief, while others ruled that it did not, the latter relying on the 2011 Supreme Court decision *Sossamon v. Texas*.[130]

In *Sossamon*, a Texas prisoner sued state prison officials, seeking injunctive and monetary relief under the Religious Land Use and Institutionalized Persons Act[131] (RLUIPA) for prison policies that prevented prisoners from attending religious services and using the prison chapel for religious worship.[132] The Court ruled he could not recover monetary damages from Texas because states do not waive their sovereign immunity—which protects them from civil liability without their consent—in private suits for money damages under RLUIPA, even though they accept federal funding.[133] RLUIPA, which prohibits the imposition of

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[128] *Tanzin*, 141 S. Ct. at 489; *see* Mack v. Warden Loretto FCI, 839 F.3d 286, 301–02 (3d Cir. 2016) (concluding that RFRA allows for damages because it was enacted a year after Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992), which said that "any appropriate relief" is available unless Congress expressly indicates otherwise). *But see* Oklevueha Native Am. Church of Haw., Inc. v. Holder, 676 F.3d 829, 841 (9th Cir. 2012) (concluding that RFRA does not authorize suits for money damages in a case when appellants' marijuana, seized under the statute, was destroyed).

[129] 42 U.S.C. § 2000bb-1(c).

[130] 563 U.S. 277 (2011). The split over whether "appropriate relief" in RFRA included monetary damages mostly occurred in district courts. *Compare* Ajaj v. United States, 2019 WL 3804232, at *2 (S.D. Ill. Aug. 13, 2019) (discussing *Sossamon*, and noting that because RFRA and the Religious Land Use and Institutionalized Persons Act (RLUIPA) "attack the same wrong, in the same way, in the same words, it is implausible that 'appropriate relief against a government' means something different in RFRA, and includes money damages" (quoting Tanvir v. Tanzin, 915 F.3d 898, 901 (2d Cir. 2019) (Jacobs, J., dissenting from denial of hearing en banc))) *with* Patel v. Bureau of Prisons, 125 F. Supp. 3d 44, 51–53 (D.D.C. 2015) (drawing a distinction between RLUIPA and RFRA because RFRA's application to federal action is not based on the Spending Clause. *Ajaj* was reconsidered and overturned after *Tanzin* to permit recovery of monetary damages under RFRA. *See generally* Ajaj v. Roal, 2021 WL 949375 (S.D. Ill. Mar. 12, 2021).

[131] 42 U.S.C. §§ 2000cc–2000cc-5.

[132] *Sossamon*, 563 U.S. at 282.

[133] *Id.* at 293.

burdens on the ability of prisoners to worship by state and local officials, was passed in 2000 as RFRA's state and local government-facing counterpart after the *Boerne* decision, which held that RFRA was unconstitutional as applied to state and local governments.[134] In *Sossamon*, the Court said that RLUIPA's use of the phrase "appropriate relief against a government" does not "clearly and unambiguously waive sovereign immunity to private suits for damages," such that states maintain their sovereign immunity and prisoners cannot sue states under RLUIPA for monetary damages.[135] After *Sossamon*, all circuits confronted with the question of whether state prisoners can sue prison officials in their individual capacities for monetary damages have held that prisoners cannot.[136] This left state prisoners with only injunctive relief under RLUIPA.

Despite *Sossamon*, some courts recognized that the phrase "appropriate relief," which appears in both RLUIPA and RFRA, could include different types of remedies under the two statutes.[137] The Sixth Circuit summed up the murkiness after *Sossamon* in *Zareck v. Corrections Corp. of America*,[138] saying that while the circuit's case law specifies that plaintiffs could not recover money damages from state prison officials sued in their individual capacities under RLUIPA, "it is not clear that [the court's] reasoning . . . applies with equal force to . . . individual-capacity RFRA

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[134] *Id.* at 281. After *Boerne*, Congress responded by enacting RLUIPA pursuant to its Spending Clause and Commerce Clause authority. Thus, RLUIPA is less sweeping in scope and avoids the issue of exceeding Congress's Section 5 powers.

[135] *Id.* at 285.

[136] *See* Haight v. Thompson, 763 F.3d 554, 567–68 (6th Cir. 2014); Washington v. Gonyea, 731 F.3d 143, 145 (2d Cir. 2013); Stewart v. Beach, 701 F.3d 1322, 1334–35 (10th Cir. 2012). At least one district court has backtracked on this position after *Tanzin*, but whether RLUIPA should permit the recovery of monetary damages against state and local officials in their individual capacities is outside the scope of this Comment. *See* Gill v. Coyne, 2021 WL 4811300, *15–16 (W.D. Ky. Oct. 14, 2021) (declining to decide whether *Tanzin* permits monetary damages against defendants sued in their individual capacities under RLUIPA and noting that within the Sixth Circuit, district courts have diverged in their application of *Tanzin*).

[137] *See, e.g.*, *Patel*, 125 F. Supp. at 51–53 (drawing a distinction between RLUIPA and RFRA because RFRA's application to federal action is not based on the Spending Clause); *Mack*, 839 F.3d at 303–04 (stating that even though the judicial relief provision in RLUIPA mirrors that of RFRA, RLUIPA was enacted pursuant to Congress's powers under the Spending Clause, while RFRA was enacted pursuant to Congress's powers under the Necessary and Proper Clause and thus does not implicate the same concerns with holding individual officers liable).

[138] 809 F. App'x 303 (6th Cir. 2020).

claims."[139] This disagreement between the courts on whether the reasoning from *Sossamon* applied to recovery of monetary damages under RFRA continued until the Supreme Court addressed this issue in *Tanzin* in 2020.

In 2013, Muhammad Tanvir, Jameel Algibhah, and Naveed Shinwari sued the director of the Federal Bureau of Investigation (FBI) and other government officials in their personal capacities, claiming that their RFRA rights had been violated.[140] The plaintiffs alleged that FBI agents had retaliated against them for refusing to act as informants against their religious communities following 9/11 by placing them on the No Fly List—a database of people who are prohibited from boarding commercial aircraft for travel within, into, or out of the United States.[141] Because they were placed on the list, Tanvir, Algibhah, and Shinwari were unable to leave the country to see loved ones in Pakistan and Afghanistan.[142] The Supreme Court held in a unanimous opinion written by Justice Clarence Thomas that the plaintiffs could recover monetary damages against the FBI agents in their individual capacities.[143] The Court held that RFRA allows injured parties to sue government officials in their personal capacities because "government" is defined to include "a branch, department, agency, instrumentality, and *official* (*or other person acting under color of law*) of the United States."[144] In the Court's view, a "government" under RFRA "extends beyond the term's plain meaning to include officials."[145] Moreover, the phrase, "persons acting under color of law" draws on language from 42 U.S.C. § 1983,[146] which has long been interpreted to permit suits against officials in their individual capacities.[147]

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[139] *Id.* at 307. This difference likely stems from the fact that RFRA was passed pursuant to the Necessary and Proper Clause, while RLUIPA was passed pursuant to the Spending Clause. *See* Cutter v. Wilkinson, 544 U.S. 709, 715, 727 n.2 (2005) (Thomas, J., concurring).

[140] Tanvir v. Lynch, 128 F. Supp. 3d 756, 759 (S.D.N.Y. 2015), *rev'd*, *Tanvir*, 894 F.3d at 452.

[141] *Id.* at 759.

[142] *Id.* at 761–62.

[143] *Tanzin*, 141 S. Ct. at 490.

[144] *Id.* (emphasis in original) (quoting 42 U.S.C. § 2000bb-2(1)).

[145] *Id.*

[146] 42 U.S.C. § 1983. Section 1983 authorizes monetary and injunctive relief against anyone who, acting under the authority of state law, deprives a person of their constitutional rights.

[147] *Tanzin*, 141 S. Ct. at 490.

The Court then addressed the question of what "appropriate relief" entails. It noted that damages have long been awarded as "appropriate relief" in suits against government officials.[148] The Court then turned to the plain meaning of "appropriate relief."[149] Justice Thomas pointed out that "appropriate" means "[s]pecially fitted or suitable," making the language "open-ended on its face."[150] In the context of RFRA, Justice Thomas said this meant that "what relief is 'appropriate' is 'inherently context dependent.'"[151]

Finally, the Court reasoned that "parties suing under RFRA must have at least the same avenues for relief against officials they would have had before *Smith*" because RFRA clearly reinstated "pre-*Smith* substantive protections of the First Amendment *and* the right to vindicate those protections by a claim."[152] Pre-*Smith* relief included damages, which have always been available under § 1983 for clearly established First Amendment violations.[153] Crucially, the Supreme Court noted in *Tanzin* that damages may sometimes be "the *only* form of relief that can remedy some RFRA violations."[154] In this case, the Court said that an injunction would not provide effective relief, given the costs of the plaintiffs' wasted plane tickets, and affirmed the Second Circuit's award of compensatory damages accordingly.[155]

C. "Appropriate Relief" Under RFRA Must Include Compensatory Damages for Prisoners

The Supreme Court ruled that monetary damages were available in *Tanzin* under RFRA, but it was silent about whether there were limitations on the *types* of monetary damages available. Thus, courts and scholars who support the application of § 1997e(e) to all civil rights violations without an accompanying physical injury argue that injunctive relief, nominal damages, and punitive damages are still available to prisoner litigants who have meritorious claims, even if compensatory damages are not

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148 *Id.* at 491.
149 *Id.*
150 *Id.*
151 *Id.* (quoting *Sossamon*, 563 U.S. at 286 (interpreting identical language)).
152 *Tanzin*, 141 S. Ct. at 492 (emphasis in original).
153 *Id.*
154 *Id.* (emphasis in original).
155 *Id.*

available.[156] Nominal and punitive damages are monetary, so foreclosing one type of damages to prisoners is still consistent with the Court's holding in *Tanzin*.

But this argument fails to recognize that there are notable instances in which nominal and punitive damages cannot be categorized as "appropriate" under RFRA. Compensatory damages are sometimes the most "appropriate" form of relief, especially when a prisoner has lost something of value, whether it is a physical possession or the ability to practice one's religion freely. To remain faithful to the statute's text and *Tanzin*'s interpretation of the express remedies clause, federal courts should not bar compensatory damages from prisoners bringing RFRA claims. Below, I describe why the other three types of relief—injunctive, nominal damages, and punitive damages—cannot be reasonably considered "appropriate relief" for all prisoners.

1. Injunctive relief.

During oral argument in *Tanzin*, the Supreme Court demonstrated awareness that injunctive relief is not "appropriate relief" for all RFRA violations. In the midst of the petitioners' portion of oral argument, Justice Sonia Sotomayor pointed out that the Congress that passed RFRA had heard testimony from families whose loved ones had been subjected to autopsies in violation of their religious beliefs.[157] Injunctive relief could not be considered "appropriate relief" for those families because the religious violations had already taken place.[158] Justice Sotomayor then questioned the petitioners' attorney on why Congress would have intended to preclude monetary relief against individual actions that violated religious beliefs if Congress was concerned about that particular situation.[159]

The respondents' attorney also described an incident in which a prison guard destroyed a federal prisoner's hand-annotated Bible as an example of when injunctive relief would not have been "appropriate."[160] Prison officials sometimes destroy prisoners' personal property after confiscation or during moves to a new

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[156] *See* Schimmels, *supra* note 13, at 963; *see also* Santiago v. Franklin, 2021 WL 1030406, at *3 (N.D. Ill. Mar. 17, 2021) (explicitly stating the availability of nominal and punitive damages for the plaintiff).

[157] Transcript of Oral Argument at 15–16, *Tanzin*, 141 S. Ct. 486 (No. 19-71).

[158] *Id.* at 15–16.

[159] *Id.*

[160] *Id.* at 30.

prison facility.[161] When personal property is destroyed, injunctive relief does nothing for the prisoner who has suffered the destruction because the wrongful act has already been completed. Therefore, granting injunctive relief to prisoners who have suffered damage to their personal property is a benefit in name only.

In *Tanzin*, the respondents' brief noted that, while the district court action was pending, the government notified all respondents that they were no longer on the No Fly List, rendering the respondents' claims for injunctive and declaratory relief moot.[162] If the Supreme Court had ruled differently in *Tanzin*, the respondents would have been left with no relief, despite not being able to see family members for years because of the FBI's actions. They also would have received no compensation for the costs of their international plane tickets rendered unusable.

Additionally, the Second Circuit had noted when it considered this case on appeal in *Tanvir v. Tanzin*[163] that while "official capacity suits for injunctive relief already supply injunctive relief against the governmental entity as a whole," seeking injunctive relief against a defendant in their individual capacity "has limited value."[164] This is because even if a plaintiff wins injunctive relief against an individual defendant, other actors who were not named in the suit could still engage in the behavior at issue. Additionally, suing for injunctive relief requires accompaniment of "continuing, present adverse effects."[165] This means that prisoners who have had their religious property destroyed would likely not even have standing to bring an action for injunctive relief.

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[161] *See, e.g.*, Thompson v. Ferguson, 849 F. App'x 33, 35 (3d Cir. 2021) (stating that the missing personal property of the prisoner litigant included "photographs of his friends and family members, some of which depicted traditional Islamic attire and prayer rugs"); Rhoades v. Alameida, 2010 WL 2044672, at *1, 5 (E.D. Cal. May 20, 2010) (denying judgment as a matter of law for the defendant in a case where defendant destroyed prisoner's religious property); Berg v. New York, 2021 WL 3165211, at *2 (N.D.N.Y. July 26, 2021) (stating that a prisoner litigant's religious books were confiscated and destroyed); Bruno v. Hyatte, 2022 WL 203658, at *1 (N.D. Ind. Jan. 24, 2022) (stating that a prison officer destroyed a prisoner litigant's personal property, which included a prayer rug and religious books, after inspecting it for contraband).

[162] Brief for Respondents in Opposition at 1, Tanzin v. Tanvir, 141 S. Ct. 486 (2020) (No. 19-71).

[163] 894 F.3d 449 (2d Cir. 2018).

[164] *Id.* at 464.

[165] *See* City of Los Angeles. v. Lyons, 461 U.S. 95 (1983) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." (quoting O'Shea v. Littleton, 414 U.S. 488, 295–96 (1974))).

In its decision, the Supreme Court heavily implied that the damages awarded in *Tanzin* should be compensatory for the reasons discussed above.[166] The Court cited *DeMarco v. Davis*[167]—a Fifth Circuit case in which the plaintiff claimed that a prison official had seized his personal property, including religious materials, burdening his free exercise of religion[168]—as an example of when an injunction would not have been effective relief.[169] In *DeMarco*, the Fifth Circuit pointed out that the plaintiff's decision to seek damages rather than the return of his books was because his books were allegedly destroyed.[170] It is likely that RFRA violations that involve the destruction of prisoners' religious property will continue to occur. In those cases, injunctive relief is clearly inadequate it cannot replace the destroyed property. Plus, even if a court grants injunctive relief, it will only apply against the officer who committed the act of destruction. Finally, prisoners who have their religious property destroyed may not have standing to sue based on the requirement of "continuing, present adverse effects."[171]

2. Nominal damages.

Most circuits have held that nominal damages are available under § 1997e(e) because they "are not compensation for loss or injury, but rather recognition of a violation of rights."[172] But nominal damages, which affirm a plaintiff's rights and commemorate their vindication in court, are often only $1, even when the civil rights violations are egregious.[173] Therefore, some courts have shown discomfort with only awarding nominal damages in cases of constitutional violations.[174] Additionally, while courts are more likely to award nominal damages than compensatory damages when a prisoner wins their case on the merits, the prisoner may not know that they have to plead nominal damages to avoid

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166 *See Tanzin*, 141 S. Ct. at 492 (noting that "[f]or certain injuries, such as respondents' wasted plane tickets, effective relief consists of damages, not an injunction").

167 914 F.3d 383 (5th Cir. 2019).

168 *Id.* at 386.

169 *Tanzin*, 141 S. Ct. at 492.

170 *DeMarco*, 914 F.3d at 390.

171 *Lyons*, 461 U.S. at 102 (quoting *O'Shea*, 414 U.S. at 295–96).

172 Redding v. Fairman, 717 F.2d 1105, 1119 (7th Cir. 1983).

173 Corpus v. Bennett, 430 F.3d 912, 916 (8th Cir. 2005).

174 *See* Hoever v. Marks, 993 F.3d 1353, 1364 (11th Cir. 2021) (overruling precedent barring punitive damages because while plaintiff's First Amendment rights were violated seven times, he only received one dollar in nominal damages).

dismissal or summary judgment. Some jurisdictions have required the prisoner, often acting pro se, to include the request in the pleadings or at least in the appellate brief. In *Davis v. District of Columbia*,[175] the court implied that a prisoner may be entitled to nominal damages, but it dismissed the suit because he never sought nominal damages in his pleadings and raised the issue only at oral argument.[176]

When most prisoner litigants are acting pro se, this expectation that they will know to seek nominal damages is misplaced and unjust. Many of these plaintiffs may be unaware of the possibility of nominal damages "as a tool for vindicating constitutional rights" and lack awareness that pleading nominal damages can keep their claims alive."[177] There is also little incentive for prisoners to include a request for nominal damages when they are not aware of its legal significance—winning nominal damages still helps establish case law.[178]

Lastly, a single dollar is arguably not enough to deter prison officials from violating prisoners' RFRA rights.[179] It is reasonable to infer that officials who know that they will only have to pay $1 if found liable for problematic behavior "may be pushed to some degree toward caution but not nearly so much as those who know that substantial damages may be awarded against them."[180] When the violation involves destruction of property, a single dollar cannot be considered "appropriate relief" because while it vindicates the plaintiff bringing the RFRA violation, it provides no recompense for the property and very little deterrence.

3. Punitive damages.

Courts can award punitive damages in addition to nominal damages under § 1997e(e) for civil rights violations committed by

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175 158 F.3d 1342 (D.C. Cir. 1998).

176 *Id.* at 1349.

177 Cohn, *supra* note 81, at 325.

178 *Id.*

179 *See* Hudson v. Michigan, 547 U.S. 586, 611 (2006) (Breyer, J., dissenting) (saying that "[t]o argue that there may be few civil suits because violations may produce nothing 'more than nominal injury' is to confirm, not to deny, the inability of civil suits to deter violations"); Snepp v. United States, 444 U.S. 507, 514 (1980) (observing that "[n]ominal damages are a hollow alternative, certain to deter no one").

180 Michael L. Wells, *Civil Recourse, Damages-as-Redress, and Constitutional Torts*, 46 GA. L. REV. 1003, 1040 (2012).

prison officials.[181] Punitive damages have the "purpose of punishing prison administrators for violating a prisoner's constitutional rights and deterring such future behavior."[182] The Supreme Court has instructed courts reviewing punitive damages to consider the level of reprehensibility of the defendant's misconduct, the difference between the actual harm suffered by the plaintiff and the punitive damages award, and the civil penalties imposed in comparable cases.[183] This means that there is a significant level of discretion exercised by courts in deciding whether to make punitive damages available in the first place. In the context of RFRA, there is little case law discussing courts' practices in awarding punitive damages, but at least one federal court has refused to dismiss the plaintiff's claim for punitive damages in a case alleging RFRA violations.[184]

Problems arise when relying on punitive damages to resolve RFRA claims. Returning to the issue of discretion, courts often apply a standard that requires a showing that defendants acted with "evil motive or intent or reckless or callous indifference."[185] This creates a high threshold that is difficult for plaintiffs to meet. For example, in *Royal v. Kautzky*,[186] the Eighth Circuit ruled that punitive damages were not available because it found that the prison medical director—who had confiscated a prisoner's wheelchair, forcing him to use crutches in severe pain or crawl on the floor[187]—had done so not out of an evil motive or reckless indifference but rather out of frustration with the prisoner's constant complaints.[188]

It is likely that most RFRA violations will not rise to the standard for punitive damages, given that courts do not see frustration with a prisoner as an indication of an evil motive or

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[181] *See* Calhoun v. DeTella, 319 F.3d 936, 942 (7th Cir. 2003) (stating that "[b]ecause punitive damages are designed to punish and deter wrongdoers for deprivations of constitutional rights, they are not compensation 'for' emotional and mental injury").

[182] Cohn, *supra* note 81, at 323; *see also* Searles v. Van Bebber, 251 F.3d 869, 881 (stating the court's belief that "Congress simply did not choose to provide a restriction on punitive damages" in § 1997e(e)).

[183] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 409 (2003).

[184] *See* Simpson v. Davenport, 2021 WL 5360079, at *2, *10 (W.D. Pa. Nov. 17, 2021) (denying defendants' motion to dismiss prisoner's RFRA claim because he identified three officials and set forth specific allegations as to each of them).

[185] McAdoo v. Martin, 899 F.3d 521, 527 (8th Cir. 2018).

[186] 375 F.3d 720 (8th Cir. 2004).

[187] *Id.* at 726.

[188] *Id.* at 725.

reckless indifference.[189] In *Patel v. Wooten*,[190] the Tenth Circuit held that prison officials' outright refusal to consider a Hindu prisoner's dietary requests did not merit jury instruction on the issue of punitive damages.[191] The court reasoned that the defendants' preference towards Muslim and Jewish prisoners over the Hindu prisoner "[did] not rise to the level of evil intent or reckless or callous indifference to his constitutional rights sufficient to sustain a jury-award of punitive damages."[192]

In addition to the discretion exercised by the court in deciding whether the defendant's behavior was egregious enough to justify making punitive damages available, the award itself is discretionary—"[i]f the plaintiff proves sufficiently serious misconduct on the defendant's part, the question whether to award punitive damages is left to the jury, which may or may not make such an award."[193] This means that even if RFRA violations are egregious enough for a court to decide that punitive damages should be on the table as a form of relief, the prisoner is still at the mercy of a jury, so the award is not guaranteed.

III. THE FIRST AMENDMENT CIRCUIT SPLIT SHOULD NOT BE EXTENDED TO RFRA CLAIMS

Before *Tanzin* was decided, whether a prisoner brought a religious freedom violation under the First Amendment or RFRA did not result in significantly different outcomes in terms of the relief awarded—federal courts could apply (or refuse to apply) § 1997e(e) to both types of claims. *Tanzin* complicated the legal landscape by making damages *explicitly* available under RFRA, which will force courts to grapple with how § 1997e(e) interacts with the Supreme Court's interpretation of "appropriate relief" in RFRA's express remedies provision.

So far, no court has explicitly held that § 1997e(e) does not apply to RFRA claims. Existing precedent requires that § 1997e(e) be applied to all federal civil actions, which includes

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[189] *See, e.g.*, Martin v. Gold, 2007 WL 474005, at *5–6 (D. Vt. Feb. 8, 2007) (holding that a prisoner could not recover punitive damages for being denied a vegetarian diet because the prison generally does not honor requests for a vegetarian diet).

[190] 264 F. App'x 755 (10th Cir. 2008).

[191] *Id.* at 759.

[192] *Id.* at 760.

[193] Smith v. Wade, 461 U.S. 30, 52 (1983) (quoting DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 204 (1973)); *see also Searles*, 251 F.3d at 880 (holding that whether punitive damages were warranted was a question for the jury).

RFRA claims.[194] It is thus reasonable to expect the courts that take the majority view in the First Amendment circuit split to similarly bar compensatory damages for RFRA claims. At the same time, courts that take the minority view would view the RFRA violation itself—neither a mental nor emotional injury, but an injury that infringes upon a plaintiff's civil rights with the cause of action written directly into the text of the statute—as eligible for compensatory damages.

Part III argues that federal circuits adhering to the majority view in the circuit split are not bound by that position when deciding RFRA cases. Part III.A summarizes existing case law on how § 1997e(e) interacts with RFRA. Part III.B posits that § 1997e(e) does not control because RFRA is a super statute.

A. Existing Case Law on How § 1997e(e) Interacts with RFRA

The issue driving the First Amendment circuit split is whether constitutional injuries are within the scope of PLRA. While injuries under RFRA are not identical to those that occur under the Free Exercise Clause, they implicate the same right—to freely practice one's religion. While there is limited case law illustrating how § 1997e(e) and RFRA interact, one circuit has flipped and not extended its § 1997e(e) interpretation barring compensatory damages under First Amendment claims to RFRA claims.[195] This is an encouraging sign for prisoners in jurisdictions that do not award compensatory damages for First Amendment violations that the same may not be true for RFRA claims.

Currently, the Third Circuit is the only circuit that has made damages available for RFRA claims, while also applying the § 1997e(e) bar to damages for First Amendment violations.[196] In *Mack v. Warden Loretto FCI*,[197] the court ruled that "RFRA . . . provid[es] for monetary relief from officers who commit unlawful

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194 *See supra* text accompanying note 11 (discussing how § 1997e(e) has been applied to all federal civil actions brought by prisoners).

195 *Compare* Mack v. Warden Loretto FCI, 839 F.3d 286 (3d Cir. 2016) (holding that damages claims against the defendants in their individual capacities could proceed under RFRA) *with* Allah v. Al-Hafeez, 226 F.3d 247 (3d Cir. 2000) (ruling that claims for compensatory damages for an infringement to the prisoner's First Amendment right to free exercise of religion was barred by PLRA).

196 The Second Circuit has said it would apply § 1997e(e) to any federal civil action but the case in which the court said that did not involve the First Amendment. *See* Thompson v. Carter, 284 F.3d 411, 416 (2d Cir. 2002) (concluding that "Section 1997e(e) applies to all federal civil actions including claims alleging constitutional violations").

197 839 F.3d 286 (3d Cir. 2016).

conduct."[198] This means that prisoners who bring meritorious RFRA claims can recover compensatory damages in the Third Circuit, while prisoners who make the same arguments under the First Amendment cannot. The court said that damages were available under RFRA because of the statute's textual similarities to § 1983, which imposes liability upon state officials for personal unlawful conduct.[199] It also noted that the traditional presumption is that "any appropriate relief" is available unless Congress states otherwise.[200] Finally, the Third Circuit justified its decision to make damages available in *Mack* by pointing out that RFRA was enacted pursuant to Congress's powers under the Necessary and Proper Clause, unlike RLUIPA, which was enacted under Congress's Spending Clause powers.[201] The Spending Clause allows Congress to impose certain conditions, such as civil liability, on institutions that receive federal funds, like state prisons.[202] But according to the Third Circuit, because individual state officials are not direct recipients of such funds and thus have no notice of these conditions, they cannot be held liable for damages under RLUIPA.[203] The Necessary and Proper Clause contains no such limitation because it "permits Congress to determine how the national government will conduct its own affairs."[204]

More confusion exists at the district court level. Some courts have been reluctant to discuss whether § 1997e(e) applies to RFRA claims.[205] In other cases, different judges have taken different approaches, despite being in the same district. For example, one magistrate judge in the Southern District of Georgia successfully recommended in *Perez v. Watts*[206] that a federal

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198 *Id.* at 302.

199 *Id.* at 303–04.

200 *Id.* at 302.

201 *Id.* at 303–04.

202 *Mack*, 839 F.3d at 303.

203 *Id.* at 303.

204 *See* O'Bryan v. Bureau of Prisons, 349 F.3d 399, 401 (7th Cir. 2005):

> [L]egislation affecting the internal operations of the national government . . . rests securely on Art. I § 8 cl. 18, which authorizes Congress 'to make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.'

205 Patel v. Bureau of Prisons, 2011 WL 13253660, at *6 (D.D.C. Sept. 12, 2011) (stating that "[t]oday, the [c]ourt will [not] . . . address the further question of whether RFRA claims are subject to the restrictions of § 1997e(e)" because the plaintiff only sought nominal damages, which were not barred).

206 2015 WL 9592536 (S.D. Ga. Dec. 31, 2015).

prisoner's RFRA claims for monetary damages could proceed against the defendants in their individual capacities because "[t]here is no binding precedent which addresses whether RFRA bars claims against individual defendants for monetary damages."[207] But then-Chief Judge Lisa Godbey Wood chose the opposite outcome one year later in *Barrera-Avila v. Watts*[208] when she adopted a magistrate judge's recommendation to dismiss a prisoner's claim for monetary damages under RFRA because the express remedies provision in the statute was identical to the one in RLUIPA, relying on the reasoning in *Sossamon*.[209]

Several district courts issued interpretations of RFRA's "appropriate relief" language before *Tanzin* was decided, and have not yet revisited the issue. The Eastern District of Virginia ruled that § 1997e(e) applies to RFRA claims in *Godbey v. Wilson*.[210] The court said that the prisoner's "attempt to recover monetary damages under RFRA . . . fail[s] because he . . . has not alleged that he suffered any physical injury as the result of the conduct he challenges."[211] Similarly, the District of Colorado decided in *Gibson v. Zavaras*[212] that the physical injury requirement of § 1997e(e) meant that the prisoner litigant's claims for monetary damages under RFRA should be dismissed, while his claim for a permanent injunction ordering the defendant to reinstate his kosher diet should proceed.[213]

These district court decisions should not be followed anymore because of *Tanzin*'s holding that "appropriate relief" under RFRA includes monetary damages. Since *Tanzin*, some district courts have already demonstrated an openness to making monetary damages available to plaintiffs bringing RFRA claims. In *Jackson v. Federal Bureau of Prisons*,[214] a Muslim prisoner alleged that a former prison official had confiscated his refreshments during Ramadan, called him religious slurs, and locked him in his cell because the prisoner said he could not be present in the recreation yard while other prisoners listened to music that would violate

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207 *Id.* at *4.

208 2017 WL 1240763 (S.D. Ga. Mar. 31, 2017).

209 *Id.* at *1; Barrera-Avila v. Watts, 2017 WL 933123, at *4 (S.D. Ga. Mar. 8, 2017) (quoting *Sossamon*, 563 U.S. at 284).

210 2014 WL 794274 (E.D. Va. Feb. 26, 2014).

211 *Id.* at *7.

212 2010 WL 3790894 (D. Colo. Sept. 22, 2010).

213 *Id.* at *4.

214 2021 WL 3741994 (S.D. Ind. Aug. 24, 2021).

his fast.[215] The plaintiff also claimed that other prison officials had tried to "starve" Muslim prisoners off the halal diet by consistently serving meals with too few calories, serving items that did not carry the halal stamp, and allowing non-Muslims to prepare and handle the food.[216] He brought these claims under the First Amendment and RFRA in the Southern District of Indiana.[217]

The court granted the defendants' motion to dismiss for other PLRA-related reasons, but noted that the prisoner could have pursued his RFRA claim—but not his First Amendment claim—against the former prison official who confiscated his refreshments, called him slurs, and locked him in his cell.[218] The court said that it is easier to demonstrate a RFRA violation than a First Amendment one, saying that "the free exercise rights provided to prisoners by RFRA are more expansive than the free exercise rights prisoners are entitled to under the First Amendment."[219] Furthermore, the court said that *Tanzin* "[made] clear [ ] plaintiffs asserting violations of RFRA may pursue both injunctive *and monetary relief*."[220] This signaled that the district court is prepared to award monetary damages to prisoners in future RFRA cases.[221]

At least one other district court has similarly expressed that monetary damages are now available to prisoners whose RFRA rights have been violated. In *Smadi v. Michaelis*,[222] the Southern District of Illinois heard a case in which federal prison officials denied a prisoner meals that adhered to his dietary requirements. The prisoner, Hosam Maher Smadi, was a Muslim who only ate halal food that had not been prepared in any containers used to cook pork or other forbidden foods.[223] When Smadi notified the warden, he was told that kosher meals were available, but that prison officials were not otherwise required to accommodate his religious beliefs.[224] He then filed grievances requesting halal meals and a new microwave.[225] When those grievances were

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215 *Id.* at *1.
216 *Id.*
217 *Id.*
218 *Id.* at *3.
219 *Jackson*, 2021 WL 3741994, at *3.
220 *Id.* (emphasis added).
221 Calhoun v. DeTella, 319 F.3d 936, 940 (7th Cir. 2003).
222 2020 WL 7491296 (S.D. Ill. Dec. 21, 2020).
223 *Id.* at *1.
224 *Id.*
225 *Id.* at *1–2.

denied, Smadi filed suit, seeking nominal, compensatory, and punitive damages as well as appropriate injunctive relief.[226] The court then stated that Smadi could pursue monetary damages under RFRA.[227]

Pro se prisoners, too, have recognized that *Tanzin* has changed what remedies are available under RFRA. Recently, the Southern District of Illinois heard *Pitts v. Sproul*,[228] a case in which Demetrius Pitts, a federal prisoner, alleged a RFRA violation because officials denied him an Islamic prayer schedule and other materials—such as his Holy Quran, prayer rug, alarm clock, and watch—that he used for the required five prayers a day.[229] Arguing that the practice of his religion was burdened because he was unable to determine the right times to pray throughout the day without a clock or watch, Pitts sought damages and injunctive relief.[230] Like in *Jackson*, the district court granted summary judgment to the defendants because of another PLRA issue,[231] but these cases show how important it is to resolve how RFRA interacts with § 1997e(e).[232]

B. PLRA Should Not Control Because RFRA Is a Super Statute

The previous Section illustrated that federal courts have yet to conclusively determine whether § 1997e(e) applies to RFRA claims post-*Tanzin*. This Section argues that § 1997e(e) does not apply to RFRA claims because RFRA is a super statute.

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[226] *Id.* at *2. The court ruled at the summary judgment stage that Smadi met his burden of showing that his right to dietary accommodations was "clearly established at the time of the challenged conduct, thus defeating the defendants' qualified-immunity defense." *Smadi*, 2020 WL 7491296, at *3.

[227] *Id.* at *3, *6 n.4.

[228] 2022 WL 16716115 (S.D. Ill. Nov. 4, 2022).

[229] *Id.* at *1.

[230] *Id.*

[231] The court found that Pitts failed to exhaust his administrative remedies—another PRLA requirement designed to limit frivolous lawsuits by prisoners—before filing suit. *Id.* at *3.

[232] *Id.* at *3. For other cases where district courts have allowed monetary relief claims under RFRA, see Richardson v. Murray, 2022 WL 4586139, at *4 (M.D. Pa. Sep. 29, 2022) (ruling that the Muslim plaintiff's complaint about being forced to shake hands with female staff can proceed on RFRA grounds, subject to the defendant's qualified immunity defense); Byers v. Sproul, 2022 WL 1185123, at *4 (S.D. Ill. Apr. 21, 2022) (noting that the Muslim plaintiff, who alleged a burden on his religious exercise because prison officials' denial of toilet paper at the outset of the COVID-19 pandemic interfered with his ability to pray, could pursue relief under RFRA).

As discussed in Part II.A, RFRA contains a provision that establishes: "Federal statutory law adopted after [November 16, 1993] is subject to [RFRA] unless such law explicitly excludes such application by reference to this Act."[233] This particular provision led Justice Neil Gorsuch to characterize RFRA as a "super statute, displacing the normal operation of other federal laws," in *Bostock v. Clayton County*.[234] Though he did so in dicta, scholars and courts have interpreted the observation to indicate the Court's openness to allowing RFRA to supersede other federal statutes, should they come into conflict.[235]

The theory of super statutes posits that there is a small class of statutes that gains broad acceptance in normative and institutional culture. Professors William Eskridge and John Ferejohn, who developed this theory in the early 2000s, defined a super statute as "a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy," (2) "'stick[s]' in the public culture," and (3) broadly affects the law "beyond the four corners of the statute."[236] Eskridge and Ferejohn argued that while super statutes do not always prevail when they conflict with another federal statute, they can "bend" the context in which the other statutes are read and gain legitimacy through their strong effect on the public consciousness.[237] Other examples of super statutes include the Sherman Act of 1890,[238] which banned monopolies and conspiracies in restraint of trade,[239] and the Civil Rights Act of 1964,[240] which established antidiscrimination as a new normative framework that has thoroughly permeated U.S. society and affected federal statutes and constitutional law.[241] For example, Title VI of the Civil Rights Act bans federally funded programs from discriminating on the basis of race, ethnicity, or religion.[242] This principle informed and shaped most federal and state policies, and even influenced how the Court interpreted "current federal policy" in a case about racially discriminatory

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233 42 U.S.C. § 2000bb-3(b).

234 140 S. Ct. 1731, 1754 (2020).

235 *See* Sara K. Finnigan, Comment, *The Conflict Between the Religious Freedom Restoration Act and Title VII of the Civil Rights Act of 1964*, 48 FLA. ST. U. L. REV. 257, 278 (2021).

236 *See* Eskridge & Ferejohn, *supra* note 23, at 1216.

237 *Id.*

238 15 U.S.C. §§ 1–38.

239 Eskridge & Ferejohn, *supra* note 23, at 1231.

240 Pub. L. No. 88-352, 78 Stat. 241 (codified at amended in scattered sections of 42 U.S.C.).

241 Eskridge & Ferejohn, *supra* note 23, at 1237–38.

242 *Id.* at 1240.

policies at a university that received federal funding.[243] However, it is worth noting that while the Supreme Court has not settled the issue of what happens when *two* super statutes collide—Justice Gorsuch said in *Bostock* that "[b]ecause RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases," implying that RFRA might be a super statute that supersedes other super statutes.[244]

Other legal scholars have also observed that RFRA is more powerful than other federal statutes, even before Eskridge and Ferejohn coined the term "super statute." Professor Michael Stokes Paulsen called RFRA "a powerful current running through the entire landscape of the U.S. Code,"[245] highlighting how the statute "qualifies Congress' regulations of commerce, of defense, of the post office, of immigration, of bankruptcy, of federal lands, and so on."[246] He also noted that "[i]f Congress had power to pass a statute to begin with, Congress has power to modify it by enacting RFRA."[247] Professor Christian Turner classified RFRA as a "submarine statute": "[S]tatutes [that] lie in wait to affect the applications of later-passed statutes that are otherwise unrelated."[248] Though Turner used different terminology, the idea that RFRA is more powerful than other federal statutes is the same.

While Justice Gorsuch did not elaborate on his observation that RFRA is a super statute, his singling out of the statute "emphasize[d] the [C]ourt's mandate to uphold 'the promise of the free exercise of religion enshrined in our Constitution.'"[249] It also signaled the Supreme Court's openness to the idea that RFRA can modify the reach of other federal statutes. Circuit courts have given this observation weight in decisions following *Bostock*. The Seventh Circuit noted in *Korte v. Sebelius*[250] that "RFRA is structured as a 'sweeping "super-statute," cutting across all other

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243 *Id.* (describing the holding in *Bob Jones University v. United States*, 461 U.S. 574 (1983), in which the Court ruled that a university with racially discriminatory policies was not entitled to an exemption from federal income taxation even though the statutory text was broad enough to include them).

244 *Bostock*, 140 S. Ct. at 1754.

245 Paulsen, *supra* note 117, at 254.

246 *Id.* at 253.

247 *Id.*

248 Christian Turner, *Submarine Statutes*, 55 HARV. J. LEGIS. 185, 186 (2018).

249 Kelsy Burke & Emily Kazyak, *Devil in the Detail of SCOTUS Ruling on Workplace Bias Puts LGBTQ Rights and Religious Freedom on Collision Course*, THE CONVERSATION (June 20, 2020), https://perma.cc/G9FD-TWZZ (citation omitted).

250 735 F.3d 654 (7th Cir. 2013).

federal statutes (now and future, unless specifically exempted) and modifying their reach.'"[251] The court described RFRA as a statute designed to perform a constitutional function—"it simply took [the Free Exercise Clause], converted it to a statutory right, and codified the protections afforded to that *statutory right*."[252] The Eighth Circuit also acknowledged RFRA's super statute nature in *Religious Sisters of Mercy v. Becerra*[253] when it decided that a coalition of health providers affiliated with the Catholic Church did not have to provide or cover gender-transition procedures on religious grounds, saying that RFRA could "supersede Title VII's commands in appropriate cases."[254]

RFRA's categorization as a super statute means that when its provisions come into conflict with PLRA's provisions, RFRA should prevail. PLRA's language does not specifically exempt it from RFRA,[255] and § 2000bb-3(b) specifies that federal laws are subject to RFRA unless they explicitly say otherwise.[256] While RLUIPA contains language saying that it is not to be "construed to amend or repeal [PLRA]," Congress has not amended RFRA to include such language.[257] Lastly, PLRA is not a super statute—it did not seek to establish a new normative or institutional framework for state policy; it has not stuck in the public consciousness; and it does not affect law beyond its four corners. It therefore follows that § 1997e(e) is subject to the Supreme Court's interpretation of "appropriate relief" in RFRA's express remedies provision, which includes damages.[258]

IV. ALLOWING PRISONERS TO RECOVER COMPENSATORY DAMAGES UNDER RFRA DOES NOT DEFEAT PLRA'S PURPOSE OR VIOLATE SEPARATION OF POWERS PRINCIPLES

Interpreting RFRA's express remedies provision as superseding § 1997e(e) does not mean that PLRA's overall purpose of decreasing frivolous prisoner litigation will be stymied. Section 1997e(e) still applies for most prisoners' civil rights claims, which means that it will still play a significant role in prisoner

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[251] *Id.* at 673.
[252] Godfrey, *supra* note 71, at 962 (emphasis in original).
[253] 55 F.4th 583 (8th Cir. 2022).
[254] *Id.* at 595 (quoting *Bostock*, 140 S. Ct. at 1754).
[255] *See generally* 42 U.S.C. § 1997e.
[256] 42 U.S.C. § 2000bb-3(b).
[257] 42 U.S.C. § 2000cc-2(e).
[258] 42 U.S.C. § 2000-bb-1(c).

litigation generally in weeding out cases that could potentially tie up courts. RFRA simply creates one exception to its application.

In this vein, this Part addresses practical and legal concerns over making compensatory damages available to prisoners for RFRA claims. Part IV.A explains why allowing prisoners to recover compensatory damages for RFRA claims will not undercut PLRA's stated purpose of eliminating frivolous lawsuits. Judges can use other doctrines, such as qualified immunity, to dismiss meritless RFRA claims in the early stages of litigation. Part IV.B analyzes why making compensatory damages available to prisoners is faithful to separation of powers principles.

A. Qualified Immunity Serves PLRA's Stated Purpose in Limiting Frivolous RFRA Suits

PLRA's stated goal at the time of its passage was to eliminate frivolous prisoner litigation.[259] This goal made sense: a surplus of cases with outlandish claims can seriously hurt judicial efficiency.[260] But federal judges can eliminate frivolous RFRA litigation through other doctrines. One such doctrine is qualified immunity.

Qualified immunity is typically a defense raised in § 1983 claims. In cases brought by prisoners, defendants can raise qualified immunity and PLRA as simultaneous arguments for why a court should dismiss the motion.[261] Section 1983 enabled those who have had their civil rights violated by officials to sue for damages, giving them "a critical tool to hold state and local governments and their officials accountable in a court of law."[262] However, qualified immunity shields officials from civil rights claims for money damages as long as they did not violate clearly established law.[263] In *Harlow v. Fitzgerald*,[264] the Supreme Court ruled that federal government officials are entitled to qualified immunity.[265]

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259 *See supra* Part I.A.

260 One such case asked the government to construct a Statue-of-Liberty-sized statue in the plaintiff's likeness valued at $100 billion as a remedy for not receiving an unconditional pardon from the U.S. President. *See* Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1198 (2014).

261 *See, e.g.*, Jones v. Price, 696 F. Supp. 2d 618, 622 (N.D. W. Va. 2010) (reviewing the defendant's arguments that plaintiff "has failed to allege a physical injury as required by [PLRA]" and that defendant is "shielded from liability by good faith qualified immunity" in turn).

262 David H. Gans, *Repairing Our System of Constitutional Accountability: Reflections on the 150th Anniversary of Section 1983*, 2022 CARDOZO L. REV. DE NOVO 91.

263 Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 6 (2017).

264 457 U.S. 800 (1982).

265 *Id.* at 813.

Under the Supreme Court's current qualified immunity test, "officers are entitled to qualified immunity . . . unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'"[266] This means that unless cases with similar facts exist where an officer's conduct was found to violate someone's civil rights, the officer is likely entitled to qualified immunity.[267] Courts decide whether a reasonable officer would have understood that the conduct in question was unlawful based on clearly established law.[268] Because the bar for defeating qualified immunity is so high, no frivolous RFRA claim will survive the application of this defense, fulfilling PLRA's stated purpose.

While the Supreme Court has not ruled on whether qualified immunity may be raised as a defense in RFRA cases against defendants in their individual capacities, the Tenth Circuit and Second Circuit have addressed this question. The Tenth Circuit, which follows the majority view of PLRA § 1997e(e) in the First Amendment circuit split, first addressed this issue in *Ajaj v. Federal Bureau of Prisons*.[269] In this case, prison officials refused to deliver medications to Ahmad Ajaj, a prisoner at the United States Penitentiary, Administrative Maximum (ADX), outside fasting hours during the month of Ramadan in 2013.[270]

In 2015, Ajaj sued the FBOP and then–ADX warden for violating his First Amendment and RFRA rights, seeking injunctive and monetary relief against prison officials in their individual capacities.[271] He alleged RFRA violations for (1) failure to accommodate religious fasts during Ramadan and additional fasts on certain other days prescribed by Islamic tradition throughout the year, (2) failure to provide access to a religiously compliant halal diet, (3) failure to provide access to an Islamic religious leader (an imam), and (4) failure to accommodate religiously mandated group prayer five times daily.[272] The individual defendants moved to dismiss Ajaj's claims, arguing that RFRA does not authorize money damages against officials sued in their individual

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[266] District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (quoting Reichle v. Howards, 566 U.S. 658, 664 (2012)).

[267] David D. Coyle, *Getting It Right: Whether to Overturn Qualified Immunity*, 17 DUKE J. CONST. L. & PUB. POL'Y 283, 291 n.31 (2022).

[268] *Id.* at 292 & n.37.

[269] 25 F.4th 805 (10th Cir. 2022).

[270] *Id.* at 807.

[271] *Id.* at 807–08.

[272] *Id.* at 808.

capacities, and that even if it did, they would be entitled to qualified immunity.[273] The District of Colorado dismissed all of Ajaj's RFRA claims against the individual-capacity defendants, reasoning that the statute's text and history suggest that money damages are not available in individual-capacity suits.[274]

After *Tanzin* was decided in December 2020, Ajaj appealed and asked the Tenth Circuit to reverse the dismissal of his individual-capacity claims for money damages.[275] The individual defendants urged the court to affirm the dismissal on the alternative grounds of qualified immunity.[276] The Tenth Circuit ruled that the defendants could raise qualified immunity as a defense and remanded the case to the district court to determine the merits of the defense.[277]

Interestingly, the Second Circuit ruled in *Sabir v. Williams*[278] just four months later that qualified immunity was *not* available to the individual defendants at the motion-to-dismiss stage of a RFRA lawsuit.[279] In the suit, Sabir challenged a prison policy that restricted prayer by groups of more than two people to the prison's chapel.[280] Groups seeking to use the chapel could only do so when staff was present, and the rooms were not otherwise occupied or reserved.[281]

The court gave two reasons why qualified immunity was not available to the defendants in *Sabir*: (1) it was clearly established when the policy was instituted that substantially burdening prisoners' religious exercise without justification violates RFRA, and (2) the defendants failed to assert that their enforcement of the policy against Sabir was because of a governmental interest.[282]

The Second Circuit applied the two-pronged test to determine whether qualified immunity can be raised as a defense.[283] To defeat qualified immunity, a plaintiff must meet both prongs of the test. The court said that Sabir and his coplaintiff were able to fulfill the first prong, which required him to show that the defendants

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273 *Id.*
274 *Ajaj*, 25 F.4th at 808.
275 *Id.* at 810.
276 *Id.* at 813.
277 *Id.*
278 52 F.4th 51 (2d Cir. 2022).
279 *Id.* at 54.
280 *Id.* at 55.
281 *Id.*
282 *See id.*
283 *Sabir*, 52 F.4th at 58–59.

violated a statutory right, because (1) their performance of congregational prayer is undoubtedly religious exercise under RFRA, (2) the group-prayer policy against the plaintiffs substantially burdened their religious exercise, and (3) the defendants failed to establish that application of the burden is the "least restrictive means of furthering [a] compelling governmental interest."[284]

Turning to the second prong, which asks whether the right at issue was clearly established at the time of the challenged conduct, the Second Circuit concluded that the right at issue was clearly established when the policy banning congregational prayer outside the prison chapel was enforced.[285] The court cited its own decision in *Salahuddin v. Goord*,[286] in which it held that "it was clearly established that prison officials cannot substantially burden inmates' religious exercise without offering any justification."[287] In *Salahuddin*, the Second Circuit had concluded that prison officials violated prisoners' religious freedoms under both the First Amendment and RLUIPA by requiring Sunni Muslims and Shi'ite Muslims to pray and fast jointly for Ramadan.[288]

Although *Ajaj* and *Sabir* came out differently on whether qualified immunity was available to the individual defendants involved in the cases,[289] both the Second and Tenth Circuits understood that the doctrine can be used to reduce the amount of frivolous litigation in federal courts. Because qualified immunity is a question of law and can be simultaneously considered with

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[284] *Id.* at 59–64.

[285] *Id.* at 63–66.

[286] 467 F.3d 263 (2d Cir. 2006).

[287] *Sabir*, 52 F.4th at 64.

[288] *Salahuddin*, 467 F.3d at 275.

[289] Determining whether the Second or Tenth Circuit's approach is better is beyond the scope of this Comment, which views qualified immunity as a doctrine that courts can use to dismiss frivolous lawsuits brought under RFRA. It is worth noting, though, that after the Supreme Court remanded *Tanzin* to the Southern District of New York after making monetary damages available to the plaintiffs, Judge Ronnie Abrams applied the doctrine of qualified immunity and granted the government's motion to dismiss. *See* Tanvir v. Tanzin, 2023 WL 2216256 (S.D.N.Y. Feb. 24, 2023). This demonstrates how qualified immunity effectively acts as a check against most litigation involving government officials, even when a court recognizes and acknowledges the difficulties of the plaintiffs' situation. *Id.* at *1:

> The Court is sympathetic to Plaintiffs, who claim that, despite never posing a threat to aviation security . . . were . . . unable to visit ailing loved ones outside of the United States, burdened financially with the loss of job opportunities which required them to travel, and repeatedly forced to endure the basic indignity of being denied boarding passes for flights to which they had legitimately purchased tickets.

§ 1997e(e) as a defense, courts can apply the doctrine without engaging in time-consuming fact-finding. Therefore, it is not a significantly burdensome step for the court considering a RFRA action to apply qualified immunity.

Currently, these are the only two circuits that have addressed this issue post-*Tanzin*. While qualified immunity is often, and perhaps rightfully, criticized across the political spectrum as having "no basis [in] statutory text, legislative intent, or sound public policy," a suit that defeats qualified immunity on its merits often results in relief because of how difficult it is for a plaintiff to meet that bar.[290]

Congress passed PLRA to end frivolous litigation;[291] RFRA claims that survive qualified immunity cannot be reasonably categorized as frivolous or meritless. Simply put, there are no reasons that RFRA claims brought by federal prisoners that defeat qualified immunity should be subject to PLRA § 1997e(e)'s limitation on compensatory damages.

B. Allowing Recovery of Compensatory Damages Under RFRA Is Consistent with Separation of Powers

Permitting prisoners to recover compensatory damages under RFRA is also consistent with Supreme Court precedent, which reflects a practice of expanding remedies to include monetary damages when injunctive relief is inadequate. Importantly, the expansion of available remedies when a right, either constitutional or statutory, has been infringed upon is not an expansion of judicial power violative of the separation of powers doctrine. The Court explicitly recognized this difference in *Franklin v. Gwinnett County Public Schools*,[292] when it ruled that an award of damages does not violate separation of powers principles by unduly expanding the federal courts' power into a sphere properly reserved to the executive and legislative branches.[293]

In *Franklin*, the Court ruled that monetary damages were available for claims brought under Title IX.[294] The plaintiff sued Gwinnett County Public Schools after being sexually harassed by a sports coach and teacher during her sophomore year of high

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290 Coyle, *supra* note 267, at 295.
291 *See supra* Part I.A.
292 503 U.S. 60 (1992).
293 *Id.* at 75.
294 *Id.* at 75–76.

school.[295] The lower courts ruled that damages were unavailable because "Title IX was enacted under Congress' Spending Clause powers and that '[u]nder such statutes, relief may frequently be limited to that which is equitable in nature.'"[296]

However, the Supreme Court concluded that "the equitable remedies suggested by [the] respondent and the [f]ederal [g]overnment," such as backpay and prospective relief, "[were] clearly inadequate" because Christine Franklin was a student at the time of the Title IX violation, which meant she was not getting paid.[297] Additionally, the sports coach who sexually harassed her no longer taught at the school, and Franklin herself no longer attended a school in the Gwinnett County Public Schools system at the time of the lawsuit.[298] This decision demonstrated the Supreme Court's sensitivity to when proposed remedies are inadequate—as discussed in Part II.C—and its willingness to make more types of relief available when that is the case, as it did in *Tanzin*.

On the issue of separation of powers, Gwinnett County Public Schools argued that congressional silence should not mean "silent delegation of legislative authority to the [j]udicial [b]ranch in the area of formulation of remedy."[299] But the Court said that "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" because such discretion has historically been thought "necessary to provide an important safeguard against legislative and executive abuses and to insure an independent [j]udiciary."[300] The Court then went a step further, saying that when courts abdicate their authority to award appropriate relief, it would harm the 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."[301] Because Congress explicitly provided a cause of action in RFRA,[302] federal courts should have the discretion to

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295 *Id.* at 63–64.

296 *Id.* at 64–65. For example, RLUIPA, as discussed earlier, only allows equitable relief because it was enacted pursuant to Congress's Spending Clause powers.

297 *Franklin*, 503 U.S. at 76.

298 *Id.*

299 Brief for Respondents at 24, Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60 (1992) (No. 90-918).

300 *Franklin*, 503 U.S. at 61.

301 *Id.* at 74 (emphasis in original).

302 42 U.S.C. § 2000bb(b)(2).

award the relief that they deem appropriate under that cause of action. This is faithful to separation of powers principles.

Finally, the *Franklin* Court said that when faced with "the question of what remedies are available under a statute that provides a private right of action," it "presume[s] the availability of all appropriate remedies unless Congress has *expressly* indicated otherwise."[303] This presumption is rooted in the separation of powers principle discussed above that federal courts have the power "to award appropriate relief in a cognizable cause of action."[304] The Second Circuit used this reasoning when it ruled that monetary damages were available under RFRA,[305] stating that "[b]ecause Congress enacted RFRA one year after the Supreme Court decided *Franklin*, and because Congress used the very same 'appropriate relief' language in RFRA that was discussed in *Franklin*, the *Franklin* presumption applies to RFRA."[306] Since Congress debated and rejected a RFRA amendment that would have prevented application of the statute to prisoners in federal, state, and local correctional facilities,[307] courts should extend "appropriate relief," as Congress intended that phrase to be understood post-*Franklin*, to federal prisoners.

CONCLUSION

Prisoners who have suffered religious freedom violations should not receive dissimilar treatment because they are in different jurisdictions. Unfortunately, the First Amendment PLRA circuit split means that venue will continue to be a substantive factor in whether prisoners are able to recover compensatory damages when suing for religious freedom violations under the First Amendment.

But there is an alternative path to compensatory damages for federal prisoners through RFRA. The Supreme Court has ruled that compensatory damages are an available form of relief in *Tanzin*. There are also numerous reasons why PLRA § 1997e(e) should not be applied to limit monetary relief under RFRA claims, the main claim being that RFRA supersedes PLRA as a super

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303 *Franklin*, 503 U.S. at 65–66 (emphasis added).

304 *Id.* at 69–71.

305 894 F.3d 449 (2d Cir. 2018).

306 *Id.* at 463.

307 Sara Anderson Frey, Comment, *Religion Behind Bars: Prison Litigation Under the Religious Freedom Restoration Act in the Wake of* Mack v. O'Leary, 101 DICK. L. REV. 753, 765 (1997).

statute. Additionally, courts should interpret RFRA's statutory language calling for "appropriate relief" to include compensatory damages because other types of monetary relief such as nominal or punitive damages are not always adequate.

Finally, courts can also employ other doctrines, like qualified immunity, to eliminate frivolous prisoner lawsuits. And allowing courts to determine appropriate damages for a statutory cause of action is on its face consistent with separation of powers principles. Thus, extending compensatory damages to federal prisoners who have suffered religious freedom violations is the most reasonable and equitable reading of RFRA's express remedies clause.

Making compensatory damages available to prisoners whose RFRA rights have been violated means that those who have had their religious property destroyed can be paid back and those who were forced to stop engaging in religious practices—often for years—to avoid disciplinary action can recover more than just $1. This approach would also eliminate the inconsistencies that federal prisoners suing under the First Amendment must deal with, due to the ongoing circuit split over whether PLRA § 1997e(e) applies to constitutional violations with no accompanying physical injury. Reading RFRA's express remedies clause to include compensatory damages for prisoners like Sabir, who was prevented from practicing his religion for at least three years,[308] is not only the most equitable approach, but the correct one.

[308] *See Sabir*, 52 F.4th at 55–56 (noting that Sabir was threatened with discipline in 2014 and filed his RFRA claim in 2017).