No. 19-71

In the Supreme Court of the United States

FNU TANZIN, ET AL.,

Petitioners,

v.

MUHAMMAD TANVIR, ET AL.,

Respondents.

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

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb et seq., permits suits seeking money damages against individual federal employees.

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INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm that protects the free expression of all religious faiths. Becket has represented agnostics, Buddhists, Christians, Hindus, Jains, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.[1]

Becket has litigated numerous cases under the Religious Freedom Restoration Act (RFRA). Becket has litigated several RFRA cases in this Court, and currently has one RFRA case pending this term. *Burwell* v. *Hobby Lobby*, 573 U.S. 682 (2014); *Zubik* v. *Burwell,* 136 S. Ct. 1557 (2016); *Little Sisters of the Poor* v. *Pennsylvania*, 930 F.3d 543 (3rd Cir. 2019), *cert. granted*, 2020 WL 254158 (U.S. Jan. 17, 2020) (No. 19-431). Becket has also litigated numerous cases under RFRA's companion statute, RLUIPA, including in this Court. See, *e.g.*, *Holt* v. *Hobbs,* 574 U.S. 352 (2015); *Rich* v. *Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525 (11th Cir. 2013); *Elijah Group, Inc.* v. *City of Leon Valley*, 643 F.3d 419 (5th Cir. 2011); *Moussazadeh* v. *Texas Dep't of Criminal Justice*, 703 F.3d 781 (5th Cir. 2012), *as corrected* (Feb. 20, 2013); *Murphy* v. *Collier*, 139 S. Ct. 1475 (2019) (amicus brief). And Becket has frequently appeared as amicus curiae on matters involving RFRA and RLUIPA, including in the *Sossamon* case, which is of particular

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[1] *Amicus* states that no counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

importance here. See, *e.g.*, Brief *Amicus Curiae* of the Becket Fund for Religious Liberty, *Sossamon* v. *Texas*, 563 U.S. 277 (2011) (No. 08-1438), https://perma.cc/KN4G-URGH.

Becket submits this brief to explain how RFRA's authorization of individual-capacity damages is not only unambiguous, but also critical to achieving the statute's goals. RFRA confers on government actors both the authorization and the obligation to take action to protect religious exercise. But the government sometimes fails to heed that obligation. Without the possibility of damages, claimants are left at the mercy of government actors, who can (and do) easily moot meritorious claims by providing temporary religious accommodations. And the potential for damages creates an incentive for officials to take care in considering requests for religious accommodation. Recognizing the availability of damages under RFRA in this lawsuit will have a profound effect on the fundamental rights RFRA was designed to protect.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Religious Freedom Restoration Act was designed to require the federal government to protect religious exercise, and when the government fails to do so, to provide a cause of action for those whose rights are burdened. RFRA's plain text demonstrates that Congress had more than one purpose in creating the statute. Congress imposed a direct obligation that persons acting under color of law "shall not" burden religious exercise, and Congress also created a cause of action, providing "appropriate" remedies when government actors fail to meet their statutory obliga-

tions. The best reading of the statute is that those remedies include monetary damages.

The damages remedy is not only supported by the text; its wisdom is borne out in practice. Without access to damages, government entities may engage in unlawful behavior, cease when they are sued, and use mootness as a shield from liability. This is not an isolated event, but a recurring pattern in cases originating under RFRA and its companion statute, RLUIPA. Damages, even nominal damages, protect RFRA claimants from government gamesmanship. The government's counterargument to this—that the sky would fall if officials were subjected to liability—is not borne out in practice, given the strict limitations on damages in federal law and the high bar of qualified immunity.

More puzzling still is the invocation of sovereign immunity analysis to a case involving claims against individuals. Individuals abusing their official positions to conduct egregious violations of rights under color of law are not sovereigns. In cases where immunity is not in play, courts have awarded damages as "appropriate relief." Sovereign immunity analysis as a whole is thus a poor fit for this case.

RFRA was specifically designed to ensure greater protection for religious exercise than that currently available under the Free Exercise Clause and Section 1983. Interpreting it to deny individual capacity damages here is contrary to the text and purpose of the Act.

ARGUMENT

I. Individual-capacity damages are necessary to give meaning to RFRA's text and purpose.

A. RFRA's text demonstrates an intent to provide broad protection, including damages.

RFRA was an ambitious legislative undertaking that resulted in the passage of "the most important congressional action with respect to religion since the First Congress proposed the First Amendment. It resembles the great civil rights acts both in its sweep and in its restatement of fundamental principles." Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 243 (1994).

Congress made clear that RFRA applies to "all Federal law, and the implementation of that law" unless an underlying statute "explicitly excludes such application." 42 U.S.C. 2000bb-3(a)-(b). Thus "RFRA operates as a sweeping 'super-statute,' cutting across all other federal statutes (now and future, unless specifically exempted) and modifying their reach. * * * [It] is thus a powerful current running through the entire landscape of the U.S. Code." Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 253-254 (1995). This sweep is evident throughout the statutory text.

This Court has repeatedly recognized the scope of protections guaranteed by RFRA. In *Hobby Lobby,* 573 U.S. at 683, the majority found that "RFRA's text shows that Congress designed the statute to provide very broad protection for religious liberty." In invali-

dating RFRA as applied against the states, this Court explained that RFRA's reach was vast; it was originally intended to apply to every government entity, apply to both past and future laws, contained no sunset clause, and authorized challenges to any law. See *City of Boerne* v. *Flores*, 521 U.S. 507, 532 (1997). RFRA's "broad protection" includes not only an affirmative obligation for the government to protect religious exercise, but also a deliberate choice by Congress to ensure that, when the government fails to obey the statutory command, individuals can protect that right by bringing a claim under the statute. These purposes permeate the statute's text.

RFRA both places obligations on the government to accommodate religious exercise and creates remedies when the government fails to meet its obligations. Congress specified that RFRA would "restore the compelling interest test" in cases where the free exercise of religion was substantially burdened. 42 U.S.C. 2000bb(b)(1). Congress also provided remedies when the government gets it wrong: RFRA "provide[s] a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. 2000bb(b)(2). Congress backed up those express purposes by creating an affirmative duty for government: "Government shall not substantially burden a person's exercise of religion * * *." 42 U.S.C. 2000bb-1. And it applied that duty across the federal government, including officials "acting under color of law." 42 U.S.C. 2000bb-2(1).

The government spends a great deal of time on the statutory text, but fails to take into account the affirmative obligations that RFRA places on government actors, as well as its express goal of providing

remedies. The government mentions this language of obligation only in passing, failing to give it any weight. See Gov't Br. 22-23. Instead, the government treats the legislative history as a factor limiting the plain text. See Gov't Br. 23 ("[T]he Senate Report confirms, 'the purpose of this act is only to overturn the Supreme Court's decision in *Smith*.'" (citation omitted)); Pet. 15 (instead of doing more, "RFRA instead *simply* provides for 'appropriate relief against a government'" (emphasis added) (internal punctuation excluded)).

Given RFRA's express language creating both affirmative obligations and remedies, it would be inconsistent to construe the statute to limit the remedies available. RFRA's plain text issues a statutory command to the government, specifies a test, and creates a cause of action for when the government fails to meet its obligations. RFRA guarantees a legal claim could be raised to "obtain appropriate relief against a government," including persons acting under "color of law." 42 U.S.C. 2000bb-1(c), 2000bb-2(1). And as Respondents have discussed at length, Resp. Br. 23-31, "appropriate relief" generally includes damages.

The Second Circuit recognized RFRA's scope and found it counterintuitive that Congress would simultaneously create a broad statute and limit the remedies. "[I]t seems unlikely that Congress would *restrict the kind of remedies* available to plaintiffs who challenge free exercise violations in the same statute it passed to *elevate the kind of scrutiny* to which such challenges would be entitled." Pet. App. 32a (quoting *Jama* v. *U.S.I.N.S.*, 343 F. Supp. 2d 338, 374-375) (emphasis in original).

The most natural reading of the statute, the one that is consistent with the statute's broad reach and gives effect to every term, is one that includes monetary damages. As the respondents have discussed at length, Congress passed RFRA just one year after this Court's decision in *Franklin*, which recognized that "the federal courts have the power to award any appropriate relief" pursuant to statute, unless Congress says otherwise. Resp. Br. 1-2 (quoting *Franklin* v. *Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 70-71 (1992)). Congress thus used a well-defined term, one that includes damages. See Resp. Br. 2-3.

Any other reading of the statutory text would narrow "appropriate relief" beyond the customary and well-known use of that term and would use one portion of RFRA's statement of purpose (using a specific test) to limit the rest of the statute. That reading fails to take into account even the remainder of the purpose statement, which states the intent to create a cause of action. If Congress wished to limit the remedies available, it could have specified that it created a cause of action for "injunctive relief." Instead, it selected the known legal term "appropriate relief," allowing courts to make case-specific determinations about which form of relief is available in a particular case.

B. Nothing in the legislative history suggests that "appropriate relief" was meant to exclude compensatory and nominal damages.

The text of the statute is clear, and that ought to be dispositive. The government perhaps unsurprisingly looks instead to legislative history to narrow

the scope of RFRA. The government's attempt fails for three reasons.

1. This Court has already recognized that RFRA does more than merely restore pre-*Smith* caselaw. In *Hobby Lobby*, the Court recognized that the result would be "absurd" if the Court were to conclude that "RFRA merely restored this Court's pre-*Smith* decisions in ossified form." *Hobby Lobby*, 573 U.S. at 715. Nothing in the statute's text limits RFRA's application to the circumstances presented in a handful of pre-*Smith* cases, nor does the legislative history support such application. The best reading of the statute, one consistent with its legislative history, is that Congress meant to provide broad protection for religious exercise, including all customary and appropriate forms of relief.

2. There is also a simple structural problem with the government's story about Congress' intent: a statute cannot actually restore a constitutional right. A statute can approximate a constitutional right as closely as possible, but it is inherently limited by the scope of Congress' Article I powers, as was borne out in *Boerne* and other cases. 521 U.S. at 536. And of course statutes can be amended or repealed by subsequent legislation, while constitutional provisions cannot. Thus, as a matter of constitutional structure, Congress *was unable* to intend to "restor[e] a particular substantive standard," Gov't Br. 23.

3. A closer inspection of the legislative history proves that the government's account of Congress' legislative intent is also simply wrong.

The government claims that RFRA could not be read to provide for damages, citing a snippet of legis-

lative history stating that "the purpose of this act is only to overturn the Supreme Court's decision in *Smith*." Gov't Br. 23 (citing S. Rep. No. 111, 103d Cong., 1st Sess. 12 (1993) (Senate Report)). But this statement was not made in reference to remedies; it was a response to fears that RFRA might impinge on the Establishment Clause.

The Second Circuit correctly notes that instead of remedies, "the [Senate and House] reports were concerned with claimants bringing particular causes of action." Pet. App.38a. Various organizations and elected officials had raised concerns about RFRA being interpreted to allow for challenges to abortion restrictions, tax exemptions, or issues surrounding government funding. Pet. App.38a-39a; see also Laycock & Thomas, 73 Tex. L. Rev. at 236-239. It is in this context that those statements in the reports were made. The Senate Report discussion on this point reads as follows:

> Although the purpose of this act is only to overturn the Supreme Court's decision in *Smith*, concerns have been raised that the act could have unintended consequences and unsettle other areas of the law. Specifically, the courts have long adjudicated cases determining the appropriate relationship between religious organizations and government. * * * Such cases have been decided under the establishment clause and not the free exercise clause.

Senate Report 12. This context makes clear that the discussion of *Smith* was included to highlight the contrast between RFRA claims and Establishment Clause law. What is more, this discussion occurred in reference to statutory provisions discussing standing

and the Establishment Clause, not the provision authorizing remedies. See 42 U.S.C. 2000bb-1(c); 2000bb-4. The Senate Report continued by saying:

> Several provision[s] have been added to the act to clarify that this is the intent of the committee. These include the provision providing for the application of the article III standing requirements; a section which provides that the granting of benefits, funding, and exemptions, to the extent permissible under the establishment clause, does not violate the Religious Freedom Restoration Act; and a further clarification that the jurisprudence under the establishment clause remains unaffected by the act.

Senate Report 12-13. The statement, read in context, is a reference to the provisions of RFRA governing standing to bring suit and its impact upon the Establishment Clause, not the provision providing "appropriate relief."

It is notable that in its merits brief, the government switches the snippet of legislative history it uses to make this argument. In the petition, the government relied upon another, equally out-of-context, quote. There, the government cited the following Senate Report as proof that Congress explicitly foreclosed any monetary damage suits: "To be absolutely clear, the act does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Court's free exercise jurisprudence under the compelling governmental interest test prior to *Smith*." Pet. 19 (quoting Senate Report 12 with alteration).

The government assumes that "relief" here was meant to apply to the scope of available remedies. It was not. The meaning of these statements is evident when one reads the statement in its *full* context. Found under subsection F, "No Relevance to the Issue of Abortion," the full statement reads:

> There has been much debate about this act's relevance to the issue of abortion. Some have suggested that if *Roe v. Wade* were reversed, the act might be used to overturn restrictions on abortion. While the committee, like the Congressional Research Service, is not persuaded that this is the case, we do not seek to resolve the abortion debate through this legislation. Furthermore, the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which describes the way under the Constitution in which claims pertaining to abortion are resolved, means that discussions about this act's application to abortion are academic. To be absolutely clear, the act does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Courts's [sic] free exercise jurisprudence under the compelling governmental interest test prior to *Smith*.

Senate Report 12 (footnotes omitted). The full context of this statement demonstrates that it was part of a discussion about RFRA's potential impact on abortion laws, not about the availability of money damages.

Elsewhere, the legislative history indicates that Congress had more in mind than restoring a handful of pre-*Smith* Supreme Court cases. The House Committee's report makes clear that Congress was not

limiting RFRA to a narrow set of Supreme Court decisions. The House described RFRA's test as "consistent with free exercise jurisprudence, *including* Supreme Court jurisprudence." See H.R. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993) (emphasis added). In other words, Congress was also considering the free exercise decisions of the lower courts. And as the Second Circuit demonstrated, "it [is] highly relevant that at the time of RFRA's passage, several Courts of Appeals had held that plaintiffs could pursue individual damages claims for violations of their free exercise rights." Pet. App.42a. Even if the legislative history could be used to read an extratextual limitation into the statute, the legislative history indicates that courts should consider appellate Free Exercise cases, including those permitting damages.

II. Individual-capacity damages play a critical role under RFRA in protecting vulnerable religious minorities.

A. Damages prevent government defendants from strategically mooting out meritorious claims.

Damages play an important role in RFRA's purpose of providing a claim for those whose religious exercise is substantially burdened. In addition to compensating past civil rights violations, damages also protect RFRA plaintiffs from governmental attempts at strategic mootness. Plaintiffs challenging unlawful government action often face a double burden: they are limited to injunctive relief by sovereign immunity or Eleventh Amendment immunity. But they are often unable to obtain even that relief if the government reverses its unlawful course mid-litigation. Government actors can thus shield them-

selves from adverse precedent by mooting out otherwise meritorious claims.[2] This relaxed mootness standard, combined with the lack of access to even nominal damages, makes it difficult to successfully challenge unlawful government conduct. RFRA's damages remedy is therefore about more than recovering money—it plays an important role in ensuring that Congress's intent is put into practice.

This Court has long recognized that a defendant's voluntary cessation of challenged conduct does not render the case moot unless the defendant demonstrates it is "absolutely clear" that the conduct will not resume. *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States* v. *Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968)). This stringent standard ensures that the defendant cannot "engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013).

Some lower courts have applied a different standard when the defendant is the government, flipping the burden of proof and holding that the plaintiff must show it is "virtually certain" that the old law "will be reenacted." *Teague* v. *Cooper*, 720 F.3d 973, 977 (8th Cir. 2013) (quoting *Native Village of Noatak*

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[2] See Joseph C. Davis & Nicholas R. Reaves, *The Point* Isn't *Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine*, 129 Yale L.J. Forum 325 (2019). *Amicus* also filed an amicus brief discussing some of the same issues in *New York State Rifle & Pistol Ass'n, Inc.* v. *City of New York*, No. 18-280 (argued Dec. 2, 2019).

v. *Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994)). Under this standard, lower courts often give government actors a presumption that they act in the public interest, rather than in the interest of litigation-driven gamesmanship. *Sossamon* v. *Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009) ("[C]ourts are justified in treating a voluntary governmental cessation of possibly wrongful conduct with some solicitude, mooting cases that might have been allowed to proceed had the defendant not been a public entity."); *Marcavage* v. *National Park Serv.*, 666 F.3d 856, 861 (3d Cir. 2012) ("[G]overnment officials are presumed to act in good faith.") (citation omitted); see also 13C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3533.7 (3d ed. 2008) (noting that courts are "more apt to trust public officials than private defendants to desist from future violations"). The doctrine of voluntary cessation has thus proven to be an inadequate check on government gamesmanship.

This is particularly true in the prison context, the context in which many claims under RFRA (and its companion statute, RLUIPA) arise. See Davis & Reaves, 129 Yale L.J. Forum at 329-331. Prison systems often fight to the end when litigating against *pro se* prisoners. But when a prisoner is represented by an experienced attorney, prison systems will often reverse course, granting accommodations and mooting likely meritorious claims. One notable example occurred in the Florida prison system. Florida was one of the last states to deny Orthodox Jewish prisoners a kosher diet. For nearly ten years, its prison system litigated against *pro se* prisoners seeking kosher food, and each time the prison won on the mer-

its. See, *e.g.*, *Gardner* v. *Riska*, 444 F. App'x 353, 354 (11th Cir. 2011) (arising where a *pro se* prisoner was denied a kosher diet and the case was taken to final judgment); *Linehan* v. *Crosby*, No. 4:06-cv-00225, 2008 WL 3889604, at *1 (N.D. Fla. Aug. 20, 2008) (same).

Florida even succeeded in establishing that it had a "compelling state interest[]" in avoiding the "excessive cost, as well as administrative and logistic difficulties, of implementing a kosher meal plan." *Rich* v. *Buss*, No. 1:10-cv-00157, 2012 WL 694839, at *5 (N.D. Fla. Jan. 12, 2012), *report and recommendation adopted,* No. 1:10-cv-157, 2012 WL 695023 (N.D. Fla. Mar. 5, 2012). But then the state changed course when the formerly *pro se* prisoner obtained counsel for his appeal. *Rich*, 716 F.3d at 530-532. Now facing worse odds, the prison concluded its compelling interest could be overcome and sought to moot the case by providing a kosher diet only to the plaintiff prisoner's specific unit. *Ibid.* The Eleventh Circuit saw through Florida's transparent attempt to avoid judicial review and ruled against the state on the merits. *Id.* at 532-534. While the wrong result was avoided in that case, the point remains: government actors often act strategically to avoid judicial resolution of cases they are worried they might lose.[3]

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[3] See Davis & Reaves, 129 Yale L.J. Forum at 329-332. In a similar example, the Texas prison system litigated a *pro se* prisoner's kosher case to judgment. *Baranowski* v. *Hart*, 486 F.3d 112, 116-117 (5th Cir. 2007). It then attempted to moot a similar case with a different prisoner who was represented by counsel. *Moussazadeh* v. *Texas Dep't of Criminal Justice*, 703 F.3d 781, 786-787 (5th Cir. 2012).

The Bureau of Prisons has recently engaged in similar actions under RFRA. In one case, a Muslim prisoner filed suit in the Southern District of Illinois against prison officials claiming he was impermissibly forbidden to gather with other prisoners for congregational prayer. *Chesser* v. *Walton*, No. 12-cv-1198, 2016 WL 6471435, at *1, *4 (S.D. Ill. Nov. 2, 2016). When prison officials transferred him from a federal prison in Illinois to another prison in Colorado, he filed a similar suit that was transferred to the District of Colorado. *Chesser* v. *Director, Fed. Bureau of Prisons*, No. 15-cv-1939, 2016 WL 1170448, at *1 (D. Colo. Mar. 25, 2016). The Colorado court dismissed his RFRA claims because they were "duplicative" of his pending claims in the Illinois suit. *Id.* at *2-4. The Illinois court then dismissed the RFRA claims as moot because the prisoner had been transferred to Colorado. *Walton*, 2016 WL 6471435, at *4 (finding RFRA claim moot because prisoner could not show he would likely "face the same conditions" despite his allegation that he was subject to the same conditions in Colorado).

Another Muslim inmate likewise challenged prison officials' refusal to allow him to engage in group prayer. *Johnson* v. *Killian*, No. 1:07-cv-06641, 2009 WL 1066248, at *1 (S.D.N.Y. Apr. 21, 2009). A few days later he was transferred to another federal prison, mooting his RFRA claim. *Id.*

In *Guzzi* v. *Thompson*, 470 F. Supp. 2d 17 (D. Mass. 2007), Massachusetts denied a *pro se* inmate kosher food because he was not certified as Jewish, and the district court ruled in favor of the State. *Id.* at 19-20. On appeal, Becket became involved as an *amicus curiae,* arguing the appeal in lieu of the plain-

tiff. After oral argument in the First Circuit, the State abruptly reversed course and decided to provide kosher food. *Guzzi* v. *Thompson*, No. 07-1537, 2008 WL 2059321, at *1 (1st Cir. May 14, 2008). It then moved to moot the appeal before any decision could issue. See Notice to the Court Regarding Equitable Relief, *Guzzi* v. *Thompson*, No. 07-1537 (1st Cir. Apr. 18, 2008). The First Circuit agreed, dismissing the appeal as moot and vacating the decision below. *Guzzi*, 2008 WL 2059321, at *1.

A claim for damages—even nominal damages—would have preserved these claims. Without a damages remedy, the government can undermine RFRA's protections for religious liberty by selectively mooting RFRA claims. Damages are thus a necessary component of "appropriate relief" to prevent this sort of gamesmanship.

Just such gamesmanship is alleged here. Respondents challenge their inclusion on the No Fly List, claiming that defendants "forced [Respondents] into an impermissible choice between, on the one hand, obeying their sincerely held religious beliefs and being subjected to the punishment of placement or retention on the No Fly List, or, on the other hand, violating their sincerely held religious beliefs in order to avoid being placed on the No Fly List or to secure removal from the No Fly List." Pet. App.4a. In June 2015, a mere four days before oral argument on the government's motions to dismiss the official-capacity and individual-capacity claims, DHS informed Respondents that the travel restriction had been lifted. Resp. Br. 8-9. Tanvir and the other plaintiffs confirmed that they were indeed able to board flights,

and then dismissed the official capacity claims, which sought only injunctive relief. Resp. Br. 8-9.

Because of the government's voluntary cessation of its unlawful conduct, now only the individual capacity claims remain, seeking damages for an egregious violation of constitutional rights. Without this remedy available, government actors in cases like this one can continue to use strategic mootness to evade liability. Even the most serious violations of rights—the very rights RFRA was passed to protect—would go unremedied. This is a result directly contrary to the text and purpose of RFRA.

B. Damages will not create disruption because appropriate safeguards are already in place.

Central to the government's argument in favor of certiorari was the underlying policy concern that monetary claims under RFRA will significantly impair executive functions. See Gov't Br. 29-34. According to the government, allowing damages against federal officials creates significant "potential for disruption" by forcing employees to "expend their energies on defending litigation" instead of "devoting the time and effort required for the proper discharge of their duties." Gov't Br. 30. This risk, so the argument goes, will increase the likelihood of officials "second-guess[ing] difficult but necessary decisions." Gov't Br. 30-31.

These concerns are overstated. Striking the proper balance between protection and accountability for government officials is not a novel question. Well-developed legal mechanisms are already in place to handle such concerns.

Qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *White* v. *Pauly*, 137 S. Ct. 548, 551, (2017) (per curiam) (citation omitted). Both sides agree that the well-established doctrinal test for qualified immunity would apply in the RFRA context, and thus damages under RFRA warrant no greater concern than any other suit that implicates government officials. See 14 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3656 (4th ed. 2019) (noting the availability of damages against the federal government under the Tucker Act, the Federal Tort Claims Act, the Tax Code, the Bankruptcy Code, the Privacy Act, the Public Vessels Act, and others). The government thus unsurprisingly argued below that the officials should be shielded by qualified immunity. "[I]f official defendants were unaware that their actions burdened plaintiffs' particular religious beliefs, those officials should be shielded by qualified immunity." Br. in Opp'n 14 (citing Mot. to Dismiss 58-60).

Qualified immunity specifically includes protections from frivolous pre-trial requirements. This Court has explained that "[t]he basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 685 (2009) (quoting *Siegert* v. *Gilley,* 500 U.S. 226, 236 (1991) (Kennedy, J., concurring)). This directly addresses the government's concern about costly pre-trial disruptions for otherwise immune officials. See Gov't Br. 33-34.

The existing legal framework is also suited to handle the government's concern about such suits in

the prison context. See Gov't Br. 27-28. In addition to qualified immunity, the Prison Litigation Reform Act contains multiple safeguards to prevent mass litigation against prison officials. These include a requirement that prisoners must exhaust all available administrative remedies before bringing a suit in court (see 42 U.S.C. 1997e(a)), as well as a requirement that any claim demonstrate physical harm to the prisoner, meaning emotional or mental harm alone is insufficient (see 42 U.S.C. 1997e(e)). The physical harm requirement is a strict limitation on potential RFRA claims.

Furthermore, 28 U.S.C. 1915(g) enacted what is commonly called a "three strikes rule," where courts can require prisoners to pay litigation fees up-front if that prisoner has filed three or more previous suits that the court has deemed frivolous. All of these protections ensure that prison officials will be able to execute their job responsibilities free of any fear from mass litigation that could arise under RFRA. This statutory scheme adequately accounts for the need to balance the obligations of governing with civil rights protections.

The main practical applications of individual capacity damages in the RLUIPA context are to prevent strategic mooting and to provide a remedy for especially egregious behavior (that is, where qualified immunity would not come to bear). See 42 U.S.C. 1997e(e) (limiting recovery of damages by prisoners to cases involving physical harm). But allowing strategic mooting and egregious behavior are not legitimate policy reasons to deviate from the plain text of the statute.

III. The sovereign immunity analysis applied in *Sossamon* and other cases is not the proper analysis to apply in this case.

Government officials sued in their individual capacities do not enjoy sovereign immunity. As this Court recognized in *Alden* v. *Maine*, "[e]ven a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally." 527 U.S. 706, 757 (1999). See also 33 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 8352 (2d ed. 2019) ("One way around sovereign immunity is to sue not the sovereign, but the sovereign's officers. * * * [T]he suit must be leveled against the officer in her 'personal' or 'individual' capacity."). Consequently, the *Franklin* presumption in favor of damages—not the sovereign immunity presumption against them—should apply when the Court considers the availability of individual capacity damages.

This is consistent with the logic of the holding in *Sossamon*, which recognizes that the analysis is different when sovereign immunity is not in play: "The presumption in *Franklin* * * * is irrelevant to construing the scope of an express waiver of sovereign immunity." *Sossamon*, 563 U.S. at 288.

In fact, the "general rule" described in *Franklin* is effectively reversed: "The question [in a case against the sovereign] is not whether Congress has given clear direction that it intends to *exclude* a damages remedy, see *Franklin*, *supra*, [503 U.S.] at 70-71, but whether Congress has given clear direction that it

intends to *include* a damages remedy." *Sossamon*, 563 U.S. at 289 (emphasis in original). When courts are considering lawsuits against non-sovereign defendants, *Sossamon*'s presumption against damages does not apply.

Where immunity waivers do not apply, lower courts have recognized that the use of the phrase "appropriate relief" is sufficient to provide a damages remedy against defendants who do not enjoy sovereign immunity. See *Reich* v. *Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1191 (1st Cir. 1994) ("We conclude that the phrase 'all appropriate relief' under § 11(c) [of OSHA] includes 'monetary damages' as specifically held in *Franklin*."). That logic extends to cases under RFRA's companion statute, RLUIPA. The government makes much of RLUIPA, stating it "uses the identical 'appropriate relief' phrase." Gov't Br. 49. But lower courts have repeatedly determined that damages are available against non-sovereign defendants under RLUIPA. See, *e.g.*, *Opulent Life Church* v. *City of Holly Springs*, 697 F.3d 279, 290 (5th Cir. 2012) ("[M]unicipalities and counties may be held liable for money damages under RLUIPA, but states may not."); *Centro Familiar Cristiano Buenas Nuevas* v. *City of Yuma*, 651 F.3d 1163, 1168 (9th Cir. 2011) ("[U]nder *Franklin,* municipalities are liable for monetary damages for violations of RLUIPA[.]"); *Reaching Hearts Int'l, Inc.* v. *Prince George's Cty.*, 368 F. App'x 370 (4th Cir. 2010) (affirming damages award under RLUIPA); *Lighthouse Inst. for Evangelism, Inc.* v. *City of Long Branch*, 510 F.3d 253, 273 (3d Cir. 2007) (remanding RLUIPA claim to the district court "to enter summary judgment for Lighthouse and to determine compensatory damages"). Those

courts have determined that, in some circumstances, "appropriate relief" includes damages.

Perhaps this is why the only other circuit court to have addressed the issue agrees that "federal officers who violate RFRA may be sued in their individual capacity for damages." *Mack* v. *Warden Loretto FCI*, 839 F.3d 286, 304 (3d Cir. 2016); see also *Davila* v. *Gladden*, 777 F.3d 1198, 1211 (11th Cir. 2015) (holding that RFRA does not waive sovereign immunity for official capacity claims, but "declin[ing] to address whether RFRA authorizes suits against officers in their individual capacities"). This reasoning is consistent with the general construction of "appropriate relief" in cases involving non-sovereign defendants.

The Department of Justice's Office of Legal Counsel reached the same conclusion shortly after Congress enacted RFRA. See *Availability of Money Damages Under the Religious Freedom and Restoration Act*, 18 Op. O.L.C. 180, 183 (1994). Relying on the "strict standard" for waiving sovereign immunity, OLC concluded that "RFRA's reference to 'appropriate relief' is not sufficiently unambiguous to * * * waive sovereign immunity for damages." *Id.* at 180-181. By contrast, OLC noted that the "unequivocal expression" standard does not apply to suits against non-sovereigns like government officials sued in their individual capacities. *Id.* at 182. "When sovereign immunity concerns are removed from the equation, * * * the interpretive presumption is reversed: as against entities unprotected by sovereign immunity, Congress must provide 'clear direction to the contrary' if it wishes to make money damages unavailable in a cause of action under a federal statute." *Id.* at 182-183 (quoting *Franklin*, 503 U.S. at 70-71).

Thus "to the extent § 1983 allows recovery of money damages against state officers in their personal capacities, a RFRA claimant also may recover damages against an officer in his or her personal capacity by asserting RFRA in a § 1983 action." *Availability of Money Damages Under the Religious Freedom and Restoration Act*, 18 Op. O.L.C. at 182 (internal citations omitted). OLC concluded that "there is a strong argument" under *Franklin* that RFRA authorizes damages against officials sued in their individual capacities. *Id.* at 183. The same analysis should apply here.

CONCLUSION

RFRA's text and history support a determination that monetary damages are appropriate relief under the statute. Damages are necessary to safeguard RFRA claimants from gamesmanship by government defendants, particularly those who act in their individual capacities to carry out egregious violations of rights.

Respectfully submitted.

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