No. 19-71

In the Supreme Court of the United States

FNU TANZIN, ET AL., PETITIONERS

v.

MUHAMMAD TANVIR, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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Respondents identify no sound basis to delay review of the court of appeals' holding that the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, authorizes the award of money damages against federal officers sued in their individual capacities. Respondents primarily rely on the posture of the case and the absence of a division of authority in the courts of appeals. Br. in Opp. 11-16. But the fact that no other court of appeals has rejected the novel damages remedy recognized by the court of appeals here (and by the Third Circuit in an earlier case) does not diminish the significance of the question presented. The prospect of personal liability for damages imposes substantial practical costs on the federal defendants named in suits like this one, to the detriment of their ability to carry on the work of the government. Congress speaks clearly when it nonetheless wishes to take the extraordinary step of authorizing damages against individual federal officials.

Congress did not do so in RFRA. The provision for "appropriate relief against a government," 42 U.S.C. 2000bb-1(c), does not include damages against federal officials sued in their personal capacities. At a minimum, whether RFRA should be understood to permit such damages is a question warranting this Court's review.

A. The Question Presented Is Important And Warrants Review At This Time

The question whether RFRA makes federal officials sued in their individual capacities liable for money damages is important and likely to recur, with significant practical implications for the functioning of the Executive Branch—including in sensitive matters of national security and law enforcement. Pet. 23-26.

Respondents urge the Court (Br. in Opp. 11-12) to delay review until the question prompts a division of authority in the courts of appeals. As the petition demonstrates, however, the court of appeals "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c); see Pet. 12-20. By interpreting the phrase "appropriate relief against a government," 42 U.S.C. 2000bb-1(c), to include money damages against federal officers sued in their individual capacities, the decision below effectively creates a damages remedy against federal officers for alleged infringements on religious free exercise —despite this Court's repeated refusal to extend *Bivens* to such a novel context. See Pet. 20. It was for that reason that Judge Cabranes described the panel opinion as "a transparent attempt to evade, if not defy, the precedents of the Supreme Court." Pet. App. 59a (Cabranes, J., dissenting from the denial of reh'g en banc); accord *id.* at 57a (Jacobs, J., dissenting from the denial of reh'g en

banc) ("The panel has done what the Supreme Court has forbidden: it has created a new *Bivens* cause of action, albeit by another name and by other means."). The decision below means that federal officers, but not the federal government, States, or state officers, may be liable for money damages for a violation of RFRA or its "sister statute," *Holt* v. *Hobbs*, 574 U.S. 352, 356 (2015)—the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C 2000cc *et seq.*

The decision below will also have important practical consequences if permitted to stand. The prospect of personal liability for damages can increase litigation burdens and discourage officials from the discharge of their duties. Pet. 24; cf. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982) (observing that the "fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties'") (brackets and citation omitted). Respondents suggest (Br. in Opp. 15) that those concerns are overstated because there has not yet been "a flood of RFRA damages suits." But RFRA was not previously understood to permit damages claims against individual federal officers. Armed with the decision below, plaintiffs—especially federal prisoners—are likely to bring such claims with increasing frequency. See Pet. 25.

Additionally, this particular RFRA suit arises in the context of national security. This Court has not hesitated to grant review of important federal questions implicating national-security concerns, even without a circuit conflict. See *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1852 (2017); *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 407-408 (2013); *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 734-735 (2011); *Ashcroft* v. *Iqbal*, 556 U.S. 662, 670 (2009).

Here, the gravamen of the complaint is that federal officials misused the "No Fly List" in retaliation for respondents' refusal to become informants. Pet. App. 3a-4a. The "No Fly List" is a governmental watchlist of individuals barred from commercial air travel in the United States because of known or suspected risks of terrorism. See *id.* at 5a, 65a-66a. The complaint also alleges that federal agents questioned respondents about their knowledge of "terrorist training camps." First Am. Compl. ¶ 75; see *id.* ¶ 148.

Respondents suggest (Br. in Opp. 26) that this case is unlike *Abbasi*, *Iqbal*, and similar cases because respondents seek damages only against "FBI field agents or their immediate supervisors," not more senior officials. But nothing about the court of appeals' holding is so limited. Indeed, because RFRA plaintiffs often challenge the application of "rule[s] of general applicability," 42 U.S.C. 2000bb-1(a), which are likely to be set by high-level policy-makers rather than individual agents or field officers, the decision below is unlikely to be cabined in the manner respondents suggest. In any event, the prospect of individual liability for damages is harmful to decision-making by the entire chain of command, not simply senior officials. See Pet. 24-26. This Court has declined to extend *Bivens* even in contexts involving subordinate officials. See, *e.g.*, *Minneci* v. *Pollard*, 565 U.S. 118, 120-121 (2012).

Respondents also stress (*e.g.*, Br. in Opp. 2) the "interlocutory posture" of the case. But respondents do not contend that further proceedings on remand would have any bearing on the correct resolution of the question presented, which is purely an issue of law. And if this Court were to grant the petition for a writ of certiorari and reverse, no further proceedings on remand

would be necessary—thus preserving judicial resources and sparing the individual defendants from burdensome and intrusive discovery requests into, for example, their reasons for nominating particular individuals for the No Fly List. Cf. p. 6 n.1, *infra*.

Finally, the potential availability of a qualified immunity defense does not counsel against granting the petition. Contra Br. in Opp. 12-14. "[T]he availability of a damages action * * * is a question logically distinct from immunity to such an action on the part of particular defendants." *United States* v. *Stanley*, 483 U.S. 669, 684 (1987) (emphasis omitted). Moreover, this Court has recognized that "[t]he doctrine of qualified immunity is not [a] panacea." *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 351 n.22 (2001). "[E]ven where personal liability does not ultimately materialize, the mere 'specter of liability' may inhibit public officials in the discharge of their duties," *ibid.* (citation omitted), "for even those officers with airtight qualified immunity defenses are forced to incur 'the expenses of litigation' and to endure the 'diversion of their official energy from pressing public issues,'" *ibid.* (quoting *Harlow*, 457 U.S. at 814) (brackets omitted).

Qualified immunity also would not necessarily spare petitioners or other future defendants from the burdens of discovery. Indeed, contrary to their current suggestion that qualified immunity could be decided on the pleadings (Br. in Opp. 13), respondents maintained below that the issue could only be resolved "with the benefit of full factual development" and that "[d]iscovery * * * would be essential." Resp. C.A. Supp. Letter Br. 2, 4 (July 24, 2017); cf. *Iqbal*, 556 U.S. at 685 (noting that discovery "exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might

otherwise be directed to the proper execution of the work of the Government").[1] And, as Judge Jacobs explained, "qualified immunity is never a foregone conclusion, and many courts * * * have occasionally failed to apply it when appropriate." Pet. App. 58a (Jacobs, J., dissenting from the denial of reh'g en banc).

B. The Decision Below Is Incorrect

1. The court of appeals wrongly concluded that the phrase "appropriate relief against a government" in RFRA, 42 U.S.C. 2000bb-1(c), authorizes the award of money damages against federal officers sued in their personal capacities. As a matter of plain language, damages assessed against a federal officer personally are not "appropriate relief against [the] government." *Ibid.* The individual officer, not the government, is liable to pay them. Pet. 12. Respondents observe (Br. in Opp. 21-22) that the statute defines "government" to include "official[s] * * * of the United States" and other persons "acting under color of law." 42 U.S.C. 2000bb-2(1). But that observation is beside the point. RFRA's definition of "government" ensures that injunctive relief is available against federal officers in official-capacity suits. It does not indicate that awarding damages against those officers personally would be a form of "appropriate relief" against the "government." Respondents are also wrong to suggest that indemnification of officer defendants by the government is a "virtual cer-

[1] Those concerns are acute in a case like this one, where discovery into qualified immunity could implicate sensitive national-security issues. Placements on the "No Fly List" are often based at least in part on classified information. See, *e.g.*, *Kashem* v. *Barr*, No. 17-35634, 2019 WL 5303288, at *16-*18 (9th Cir. Oct. 21, 2019).

tainty." Br. in Opp. 22 (citation omitted). Federal employees are not entitled to be indemnified. Any indemnification is discretionary and is subject to the availability of appropriated funds. See 28 C.F.R. 50.15(a)(8)(iii), (c)(1) and (4). In any event, subsequent discretionary decisions about indemnification would not make a personal damages award against an individual official appropriate relief against "a government."

At the least, the term "appropriate relief" does not clearly authorize the award of damages against federal officers sued in their personal capacities, and this Court's decisions counsel against recognizing a damages remedy without the clear imprimatur of Congress. Pet. 12-15. Fashioning such a damages remedy is primarily a task for elected legislators, who can investigate and weigh the "substantial costs" that damages liability imposes on individual defendants and on the administration of federal law. *Abbasi*, 137 S. Ct. at 1856; see also, *e.g.*, *Wilkie* v. *Robbins*, 551 U.S. 537, 562 (2007); *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68-69 (2001). Respondents contend (Br. in Opp. 28) that those separation-of-powers concerns are absent here because the court of appeals was interpreting RFRA, rather than "implying a right of action" under the Constitution. That distinction does not withstand scrutiny. This Court "did not shut the *Bivens* door so that [the court of appeals] could climb in a window," recognizing a new damages remedy that Congress did not clearly contemplate. Pet. App. 57a (Jacobs, J., dissenting from the denial of reh'g en banc); see *id.* at 60a (Cabranes, J., dissenting from the denial of reh'g en banc) (criticizing the panel for "presuming that Congress legislated a *Bivens*-like remedy—*sub silentio*—in enacting RFRA").

Respondents also observe (Br. in Opp. 19 n.17) that Congress has expressly "exclude[d] damages" claims in other contexts. But respondents' main example—the sovereign-immunity waiver in the Administrative Procedure Act (APA), 5 U.S.C. 702—is inapposite. Section 702 waives federal sovereign immunity, but only for claims "seeking relief other than money damages." *Ibid.* That provision authorizes only *official*-capacity claims against officers, not *personal*-capacity claims. See *ibid.* (permitting suits against officers for acting "in an official capacity"); cf. *Lewis* v. *Clarke*, 137 S. Ct. 1285, 1292 (2017) (explaining that official-capacity claims seek relief "only nominally against the official" and are effectively claims "against * * * the sovereign itself"). The APA thus cannot serve as evidence of any established congressional practice regarding damages remedies against individual federal officers.[2]

The more telling points of comparison are the statutes in which Congress has expressly created a private right of action that permits the plaintiff to recover damages from individual governmental officers. See Pet. 15 (collecting examples); Pet. App. 103a (same). When Congress has taken that consequential step, it has done so with explicit statutory language, such as the language in Section 1983 making "[e]very person" acting under color of state law "liable to the party injured *in an action at law*." 42 U.S.C. 1983 (emphasis added). Respondents would dismiss that language (Br. in Opp. 30-31) as a relic of bygone procedural distinctions, but the reference to an "action at law" clearly bespeaks

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[2] The other two statutes respondents identify (Br. in Opp. 19 n.17) authorize litigation against private persons and do not speak to the damages liability of federal officers at all. See 15 U.S.C. 797(b)(5); 42 U.S.C. 6395(e)(1).

damages, which were "the traditional form of relief offered in the courts of law." *Curtis* v. *Loether*, 415 U.S. 189, 196 (1974). Other federal statutes are even more express. For example, when Congress authorized civil actions to obtain "such relief as may be appropriate" for illegal wiretaps, it specified that "appropriate relief includes * * * damages." 18 U.S.C. 2520(a) and (b). Had Congress likewise wished to authorize a damages remedy against federal officers sued in their individual capacities under RFRA, it would have said so clearly.

That is also the upshot of this Court's decision in *Sossamon* v. *Texas*, 563 U.S. 277 (2011). Respondents' contention that *Sossamon* "bears only a surface-level similarity to this case" (Br. in Opp. 22) is belied by the fact that *Sossamon* interpreted *identical* statutory language in RFRA's sister statute, RLUIPA, not to authorize damages claims against States. See 563 U.S. at 285 (interpreting "RLUIPA's authorization of 'appropriate relief against a government'") (quoting 42 U.S.C. 2000cc-2(a)); see also *id.* at 289 n.6 (drawing an inference from lower-court decisions interpreting "the same phrase in RFRA * * * not to include damages relief against the Federal Government"). The Court explained, in particular, that that the term "[a]ppropriate relief" is "open-ended and ambiguous about what types of relief it includes," that the term does not "clearly identify[] money damages," and that it takes its meaning from context. *Id.* at 286. Here, the statutory text and context make clear that RFRA and RLUIPA should be read in parallel and that neither authorizes damages remedies against state or federal governmental officials sued in their personal capacities. See Pet. 16-18; Pet. App. 53a (Jacobs, J., dissenting from the denial of reh'g en banc). To be sure, *Sossamon* also rested

in part on a clear-statement rule for waivers of sovereign immunity. 563 U.S. at 287. But separation-of-powers concerns with recognizing a damages remedy against individual federal officials similarly counsel in favor of requiring Congress to speak clearly. See Pet. 18.

Respondents' remaining efforts (Br. in Opp. 24-25) to distinguish *Sossamon* lack merit. Respondents note that RLUIPA was an exercise of Congress's powers under the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, and RFRA was not. That is not a "[s]eparate" distinction (Br. in Opp. 24), but rather simply a way of restating that RLUIPA implicates considerations about when a State will be held to have waived its sovereign immunity as a condition of receiving federal funds. As explained above, *Sossamon* rested in part on those considerations but also in part on textual and contextual considerations that apply equally to RFRA.

Respondents also fail to square the decision below with RFRA's history and purpose, which was primarily to restore the *substantive* status quo for free-exercise claims that had prevailed before *Employment Division* v. *Smith*, 494 U.S. 872 (1990). Construing the statute to create a *Bivens*-like damages remedy against federal officials that was never available before or after *Smith* would not further that purpose. See Pet. 18-20. Respondents' only rejoinder is to observe that "RFRA did more than merely restore the balancing test" from pre-*Smith* cases. Br. in Opp. 31 (quoting *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695 n.3 (2014)). But it does not follow from Congress's limited departures from pre-*Smith* case law, recognized by this Court in *Hobby Lobby*, see 573 U.S. at 695 n.3, that Congress also intended to create a previously unknown damages remedy against individual federal officers.

2. This Court's decision in *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), does not require a contrary result. See Pet. 20-23. Like the court of appeals (Pet. App. 23a-26a), respondents invoke *Franklin* as a broad charter for presuming that damagers are available under any private right of action created by Congress. Br. in Opp. 18-19. But *Franklin* concerned the remedies available for an implied right of action. See 503 U.S. at 65-66. That distinction is significant (contra Br. in Opp. 20-21) because it demonstrates that *Franklin* did not interpret "appropriate relief" as a statutory term of art—as confirmed by the Court's interchangeable use of other formulations, such as "'appropriate remedies.'" Pet. 23 (quoting *Franklin*, 503 U.S. at 66); cf. *Sossamon*, 563 U.S. at 288 (describing *Franklin* as a case in which there was "no statutory text to interpret"). And in *Sossamon*, which *did* interpret the term "appropriate relief" in a statute authorizing suits against government officials, this Court declined to apply *Franklin*. 563 U.S. at 288.

Sossamon demonstrates, at a minimum, that the presumption recognized in *Franklin* may be overcome or displaced by other considerations—*i.e.*, that *Franklin*'s understanding of "appropriate relief" does not necessarily "translate" to other contexts. *Sossamon*, 563 U.S. at 289. Here, the statutory text contemplates "appropriate relief against [the] government," 42 U.S.C. 2000bb-1(c), and damages awarded against federal officers personally are not appropriate relief against the government. The court of appeals' contrary decision imposes significant ongoing practical harms to the Executive Branch and merits this Court's review.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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