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 OF AMERICAN ATHEISTS, CENTER FOR INQUIRY, EX-MUSLIMS OF NORTH AMERICA, AND BLACK NONBELIEVERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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January 13, 2020

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF AMICI CURIAE[1]

Amici are non-profit corporations and have been granted 501(c)(3) status by the IRS. None has a parent company nor have they issued stock.

American Atheists, Inc., is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. American Atheists strives to promote understanding of atheists through education, advocacy, and community-building; works to end the stigma associated with atheism; and fosters an environment where bigotry against our community is rejected.

Center for Inquiry (CFI) is a non-profit organization dedicated to promoting and defending reason, science, and freedom of inquiry. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of church and state is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy.

Ex-Muslims of North America (EXMNA) is a non-profit organization that advocates acceptance of religious dissent, secular values, and reduced discrimination against ex-Muslims by building support communities,

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[1] All parties consented to this amicus. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than amici and their counsel made a monetary contribution to the preparation or submission of this brief.

producing educational content, and challenging religious oppression. As former Muslims, EXMNA's members are all too familiar with the oppression and loss of liberty in nations without the separation of church and state and believe that the government must provide equal remedies for all, irrespective of religious belief.

Black Nonbelievers (BN) is a non-profit organization that provides a caring, friendly, and informative community for Blacks and allies who live free of religion and might otherwise be ostracized. Instead of accepting dogma, BN leaders, members, and supporters determine truth and morality through reason and evidence.

SUMMARY OF THE ARGUMENT

"Hard cases make bad law." It is essential, then, that this Court play its constitutional role in ensuring that a deeply sympathetic fact pattern does not result in bad law—in the creation of a remedy where none exists, and where the sought-after remedy cannot constitutionally exist.

The government's actions in this case are nothing short of abhorrent. When undertaken by federal law enforcement agents, such actions constitute multiple violations of the constitutional rights of the plaintiffs. Our core values, from religious freedom to due process and equal protection under the law, are torn asunder by such reprehensible actions. That behavior, if proven, must and should be punished. Heads must roll. Rights must be defended. But this cannot be done by the judicial creation of a new, expansive, unconstitutional right to recover monetary damages against individual defendants in their personal capacities under the Religious Freedom Restoration Act ("RFRA"). 42 U.S.C. § 2000bb-1, *et seq*.

No sensible or plain-language reading of RFRA suggests the award of damages. The legislative history of RFRA reveals the purpose was a legislative reversal of *Employment Div. v. Smith*, 494 U.S. 872 (1990), and the restoration of the standard from *Sherbert v. Verner*, 374 U.S. 398 (1963), as opposed to any extension of the remedies available. Moreover, the award of damages is contrary to the spirit of RFRA, which provides injunctive relief for harms that cannot be quantified. No monetary value can be placed on the denial of a sacrament required by a person's faith. Quantifying these harms is not only impossible in any objective fashion, but diminishes individuals' core beliefs by pretending they can be compensated by a dollar amount.

Violations of religious freedom are fundamentally distinct from other claims adjudicated by the courts, but *distinct* does not mean *superior*. This Court has found that the standard of proof required to demonstrate harm is significantly shifted for a RFRA claim. Awarding damages for such claims would drastically tilt the playing field, treating religious freedom as a right separate and above all others. The threat of personal financial liability will hang like the sword of Damocles over individual government employees, paralyzing them in the execution of their duties. That fear, in turn, incentivizes them to grant religious exemptions in all areas, not only where such exemptions are legally required but in any circumstance where they fear a mistake would leave them open to significant personal financial liability.

Awarding monetary damages under RFRA would be unconstitutional. To make damages available under RFRA to a Muslim, but exclude a former Muslim who made exactly the same decision under exactly

the same circumstances, would unconstitutionally favor religion over non-religion in violation of the Establishment and Free Exercise Clauses of the First Amendment, as well as the equal protection principles of the Due Process Clause of the Fifth Amendment.

If federal law enforcement acted in the grotesque way alleged by respondents, then action must be taken to prevent these individuals suffering further harm, or individuals suffering similar harm in the future. Awarding damages for a RFRA claim, however, cannot be justified under either that statute's intent or the Constitution of the United States.

ARGUMENT

I. DAMAGES ARE NOT AN APPROPRIATE REMEDY FOR A RFRA VIOLATION.

A. Congress Neither Intended Nor Envisioned Damages.

It is rare to find a statute with clearer congressional intent than RFRA. In 1990, this Court delivered its ruling in *Employment Div. v. Smith*, 494 U.S. 872, 878-89 (1990), holding that the Free Exercise Clause did not mandate religious exemptions to laws of general applicability. This decision reversed the long-standing test for such exemptions established in *Sherbert v. Verner*, 374 U.S. 398 (1963), and subsequent cases. The response, both political and public, was immediate and largely negative. Consequently, Congress enacted RFRA, which went unopposed in the House and garnered only three "nay" votes in the Senate.

Congress was explicit as to its intentions with RFRA: to provide a legislative reversal of *Smith*, 494 U.S. 872. While the interpretation of the Constitution is the purview of the courts, in passing RFRA the

legislature intended to re-impose the *Sherbert* test through legislation, requiring strict scrutiny of laws that substantially burden religious exercise. As the House Committee noted:

> It is the Committee's expectation that the courts will look to free exercise of religion cases decided prior to *Smith* for guidance in determining whether or not religious exercise has been burdened and the least restrictive means have been employed in furthering a compelling governmental interest. . . . This bill is not a codification of any prior free exercise decision but rather *the restoration of the legal standard that was applied in those decisions*.

H.R. Rep. No. 103-88, at 6-7 (1993) (emphasis added). The Senate report was even more direct. "[T]he purpose of this act is only to overturn the Supreme Court's decision in *Smith*." S. Rep. No. 103-111, at 12 (1993).[2]

Federal courts applying RFRA have recognized this clear Congressional intent. As this Court noted, "Congress responded [to *Smith*] by enacting [RFRA] . . . which adopts a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (internal citations omitted); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 862, 694 (2014) ("Congress responded to *Smith* by enacting RFRA.").

There is no evidence that Congress intended to create a new financial remedy to violations of religious

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[2] Notably, this statement was in a section entitled "Other Areas of Law are Unaffected."

freedom. Indeed, all available evidence demonstrates that Congress intended to return the legal framework to the greatest extent possible to the *Sherbert* test. Even if the language of RFRA clearly created such a financial remedy, this Court has permitted reference to the legislative history "in the 'rare cases [in which] the literal application of the statute will produce a result demonstrably at odds with the intentions of its drafters.' In such cases, the intention of the drafters, rather than the strict language, controls." *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). In this case, not only is the desire to create such a remedy clearly absent from the legislative history, but no literal reading of the statute provides it. In the absence of Congress explicitly creating a financial remedy, or even suggesting a desire to do so, this Court should not create one.

B. The Award of Damages Undermines the Purpose of RFRA.

Creating a financial remedy under RFRA not only usurps the legislative prerogatives of Congress, but also runs contrary to its purpose. The United States has always held that harms to the rights of conscience are unique. The importance of an individual's belief system can be seen from the prominence given to such freedoms in the Bill of Rights. The First Amendment guarantees that government shall not impose religious viewpoints upon the population, nor restrict the freedom of belief or worship. This respect for individual moral determination, as well as the guarantee of free speech, are the values that define the American Constitution. No person can be free if the government is able to dictate or suppress their core moral beliefs.

While the Constitution itself does not mandate exemptions to laws of general applicability, *see Smith*, 494 U.S. at 878-89, RFRA seeks, where appropriate and constitutionally permissible, to grant such exemptions in order to facilitate individual religious belief and practice.[3] RFRA has been interpreted by this Court and others to address government actions that prevent individuals from living according to their personal religious mandates, and to relieve those individuals of the obligations which government actions impose.

For example, in *O Centro*, the Court addressed the situation of a religious sect who took as a sacrament a tea brewed from a hallucinogenic controlled substance. 546 U.S. at 423. The harm imposed by the government on the adherents of this sect was the criminalization of a central element of their religious worship, *id.*, a situation remarkably similar to that of *Smith*, where members of a Native American church sought to use peyote, also a controlled substance, for sacramental purposes. 494 U.S. at 874. The remedy to such an imposition was injunctive—the Court ruled that the religious sect was, under RFRA, entitled to an exemption to permit it to import and use the hallucinogens in religious worship, despite its illegality for other purposes. *O Centro*, 546 U.S. at 439.

[3] Amici maintain that RFRA's preferential treatment of religious beliefs alone, to the exclusion of deeply held moral and ethical beliefs, represents a violation of the Establishment Clause of the First Amendment. The violation is particularly acute where such preference shifts the burden of accommodating a religious belief onto a third party. The creation of a financial remedy under RFRA provides new evidence of its unconstitutionality. *See infra*, Part III.

In *Holt v. Hobbs*, 574 U.S. 352 (2015), this Court unanimously interpreted the Religious Land Use and Institutionalized Persons Act, Pub. L. 106-274, codified as 42 U.S.C. § 42 U.S.C. § 2000cc et seq. (RLUIPA), a sister statute to RFRA,[4] as permitting a Muslim prisoner to grow a beard despite security-based prison regulations requiring prisoners to be clean shaven. As a result, prison authorities were prevented from enforcing the policy against Mr. Holt, permitting him to wear the beard as a religious requirement following his conversion to Islam.

These cases share an overarching theme: a governmental restriction of the ability of individuals to act in accordance with the dictates of their conscience. As a result, the government ban or requirement was held not applicable to them. What is absent is any attempt to monetarily define the harm done to an individual by such governmental actions. Such a calculation is impossible, and is not only contrary to the understanding of religious and moral beliefs protected under law, but also both insulting and devaluing to the claims themselves.

The Gospel according to Mark includes a much-quoted verse: "For what does it profit a man to gain the whole world, and forfeit his soul?" Mark 8:36 (King James). The purpose of monetary damages is to restore an individual to the position in which they would be, absent the wrongful action. The legal system places a financial value on the loss of property or the breach of a contract; it calculates the monetary award to

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[4] RLUIPA was enacted by Congress in 2000, after this Court's decision in *City of Boerne v. Flores* declared RFRA unconstitutional as applied to the states. 521 U.S. 507 (1997). In RLUIPA, Congress sought to apply the protections of RFRA to land use cases and those involving incarcerated individuals.

recompense an individual for harm resulting from a defective product or an act of professional malpractice. What it cannot do is make such a quantifiable determination regarding the harm caused by being prevented from performing a religious requirement or from being required to perform an act forbidden by one's religion. No monetary amount can restore a religious person to the position they would have been, absent the government action. A person's soul, or fealty to her conscience, cannot be valued in monetary terms.

Moreover, the judicial system is patently unqualified to make such a determination. It is not for the courts, or the government at any level, to make theological calculations. Even if ascribing a financial value to preventing a Muslim prisoner from wearing a beard made sense, how can a court possibly, or constitutionally, compare such a valuation to that where a Jewish student is denied access to kosher food, or a Christian denied the ability to take the sacrament she believes is mandated by her faith? To suggest such harms can be monetized, calculated, and compared is inconsistent with the essence of religious belief.

Courts have acknowledged this in their treatment of cases under RFRA. RFRA requires a court to determine if there is a substantial burden on a sincerely held religious belief, not whether that belief is credible or correct, nor to rank the nature of the religious harm. In *Hobby Lobby*, this Court made repeated references to this nature of religious belief, noting that it was both inappropriate and impossible for the judicial system to pass judgment on it. *E.g.* 573 U.S. at 724 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim.") (citing *Smith*, 494 U.S. at 887). This Court refused to

determine whether a required action by the government actually imposed a burden on the religious individual; it was not for the Court to decide if providing insurance which an employee might later use to purchase a form of contraception that destroyed a fertilized ovum was morally distinguishable from destroying that egg. If the religious owners of the corporation believed it was not morally distinguishable, this Court refused to second-guess them. *Hobby Lobby*, 573 U.S. at 724. As this Court said:

> Similarly, in these cases, the Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our "narrow function . . . in this context is to determine" whether the line drawn reflects "an honest conviction," and there is no dispute that it does.

Id. at 725 (citing *Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981)).

The purpose of RFRA is to provide injunctive relief to religious individuals and groups to prevent the government from burdening their free exercise of religion. Such claims are not, and cannot be, financially compensable. Under RFRA, as interpreted by this Court in *Hobby Lobby*, the degree of harm caused to a religious adherent is determined by the adherent herself. A court cannot determine how much a Muslim is harmed by being compelled into activity that is *haram*—only the Muslim can determine that. And that determination, by a party to the case, cannot be the basis of a fair and just financial remedy.

C. The Award of Damages Under RFRA is Contrary to Public Policy.

1. Fear of Damage Awards Will Encourage Unwarranted Religious Exemptions to the Detriment of Third Parties.

The creation of a damages remedy under RFRA would have significant, negative consequences. Large numbers of individuals are faced with determinations of whether religious exemptions are required. These individuals include such groups as teachers, principals, and school administrators; doctors, nurses, and health care workers; employers and supervisors; and court clerks and employees of the Department of Motor Vehicles. As the reach of RFRA grows, with religious groups claiming and courts awarding exemptions in broader and broader areas, including challenges to civil rights laws, so the likelihood of such workers having to make such determinations increases.

The divisions both within the Supreme Court itself and between federal trial and appeals courts over this issue are clear. If judges and politicians can and do disagree on what situations warrant religious exemptions under RFRA, then it is surely reasonable to believe that individuals will come to a range of differing opinions over such matters. If those individuals may be held personally financially liable for determinations they make as to the appropriateness of religious exemptions under RFRA, then there will be two certain consequences.

First, individuals faced with the possibility that a "wrong" determination could expose them to personal, monetary damages awards erasing their savings, retirement accounts, and even their home will seek to

avoid making such a determination. When faced with the decision as to whether a Jewish person may wear a kippah in a driver's license photograph (or whether a Pastafarian can wear a pasta strainer on their head for such a photograph[5]), the desk employee at the Department of Motor Vehicles, in order to minimize the financial risk to herself, is incentivized to push the determination up the chain to a supervisor. The same incentive applies to the supervisor, who will seek to have a manager make the determination. As individual after individual seeks to avoid the responsibility, and accompanying financial liability, of rejecting a requested accommodation, the entire process grinds to a halt.

More dangerous, though, is the second impact. Such individuals face a binary choice. They may grant the religious exemption or refuse it. If a damages remedy against individuals is created by this Court, then refusal can lead to the aforementioned financial burden on an individual if they are later judged to have erred. The person requesting the objection may file a lawsuit under RFRA against them. However, if the official grants an exemption, there is no counterbalancing personal risk. There is no lawsuit, and no risk of damages, if an unwarranted religious exemption is granted.

The incentive is then clear. When the alternative is to run the risk of bankruptcy as the result of a damages award, an official is likely to grant religious exemptions, not only in borderline cases, but in any

[5] Samantha Grossman, *Woman Wins Right to Wear Colander on Her Head in Driver's License Photo*, TIME (Nov. 16, 2015) https://time/com/4114369/pastafarian-colander-license-photo (last visited January 8, 2020).

situation where a possible doubt exists as to whether RFRA would require such an exemption. This runs the risk of turning claims of religious freedom into an *über* right, one held above all others in the panoply of guaranteed freedoms. The threat of a lawsuit, and a monetary damages award, tilts the playing field dramatically towards the provision of religious exemptions, whether they are warranted or not.

In many situations, such as the choice of headwear for a driver's license, the harm of a system that is biased towards the provision of exemptions is not immediately visible. However, the focus of recent and upcoming cases raising RFRA claims (or claims under RFRA's state-level analogues) is shifting away from such cases and toward circumstances in which the religious accommodation sought imposes significant burdens on third parties. *See Holt*, 574 U.S. at 370 (Ginsburg, J. concurring) ("Unlike the exemption this Court permitted in *Burwell v. Hobby Lobby Stores, Inc.*, accommodating petitioner's religious beliefs in this case would not detrimentally affect others who do not share petitioner's beliefs.") (internal citations omitted); *Fulton v. City of Phila.*, 922 F.3d 140, 164 (3d. Cir. 2019), petition for cert. filed (U.S. Jul. 22, 2019) (No. 19-123); *EEOC v. R.G.*, 884 F.3d 560 (6th Cir. 2018), cert. granted, 139 S. Ct. 1599 (U.S. Apr. 22, 2019) (No 18-107). Such impositions on third parties inevitably arise when the exemptions requested are to civil rights and anti-discrimination laws.

For example, a religious government employee may claim a religious-based right to not having to work with lesbian victims under the Violence Against Women Reauthorization Act of 2013. 42 U.S.C. § 13701. The risk of facing financial liability for denying the employee an accommodation incentivizes a supervisor

to accommodate such demands, despite explicit non-discrimination protections and the negative impact for the LGBTQ individuals concerned. Similarly, a teacher who refuses on religious grounds to educate female students is more likely to be indulged by an administrator who fears that a refusal could expose him or her to personal financial liability; the harm to the students would not enter into their calculation when it comes to personal liability. And the religious nurse or orderly in a VA hospital demanding a religious exemption from the requirement to receive an influenza vaccine may be granted such a privilege without concern for the harm to patients who are more likely to be exposed to disease. Officials and administrators will be placed in an impossible situation when two requested religious accommodations conflict, creating personal liability whichever choice is made.

2. Creation of a Damages Remedy Under RFRA Changes the Balance Drawn in Law.

Only in very limited circumstances can a plaintiff be awarded damages against the federal government. As explained *supra*, the determination of harm under RFRA differs significantly from that in other situations. Where agents of the government are subjected to damages awards, such as under the doctrine of *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), or against the states under 42 U.S.C. § 1983, the plaintiffs must demonstrate and prove they have suffered harm and quantify that harm. The harms RFRA was enacted to address were not financial but instead unquantifiable injuries to an internal moral and ethical code.

Permitting monetary damages against individuals under a law which is designed to protect religious free-

dom to a significantly greater extent than required by the Constitution, without the requirements placed upon such awards in similar situations, risks destabilizing the legal structure.

The plaintiffs here suffered disgracefully at the hands of federal law enforcement. Such behavior cannot be allowed to happen again, and the purpose of a suit under RFRA is to rectify the *religious* harms involved. A remedy for *financial* harms suffered should not be shoehorned into an inappropriate law. If monetary damages are warranted, they should be awarded under one of the established mechanisms of holding the government liable for financial harm. To create such a remedy from whole cloth under RFRA tilts the legal balance unfairly in favor of remedies available to the religious. It would allow for damages in cases where the harmed party can tie the behavior to their religious belief, but not in otherwise identical cases where they could not. Our system has established where and when the government is liable for damages; this Court should not create a new avenue available only to the religious.

D. Qualified Immunity Precludes Imposing Damages Against Individual RFRA Defendants.

Any damages remedy that might be available against an individual defendant under RFRA would be rendered a dead letter by the defense of qualified immunity. Individual "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitgerald*, 457 U.S. 800, 818 (1982). The plaintiff must meet this standard in order to overcome

qualified immunity. The defendant's conduct must violate a constitutional or statutory right of the plaintiff that was defined with sufficient clarity, at the time of the act, for the official to be placed on notice that her conduct violated that right. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Defining the right in question at "a high level of generality" is not sufficient. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011); *see also City of Escondido v. Emmons*, ___ U.S. ___, 139 S. Ct. 500, 503 (2019) (per curiam). Rather, the right must be defined with sufficient granularity that "the officer had fair notice that her conduct was unlawful." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). By imposing these exacting requirements, qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

The defense of qualified immunity is stronger in some areas than others, particularly where the legal analysis focuses on fact-specific balancing tests rather than bright-line rules. This is particularly true in the First Amendment context. *See Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1323 (11th Cir. 1989); *Noyola v. Texas Dep't of Human Resources*, 846 F.2d 1021, 1025 (5th Cir. 1998); *Gaines v. Wardynski*, 871 F.3d 1203, 1210 (11th Cir. 2017). The lack of bright-line standards in adjudicating RFRA claims—by virtue of the highly individualized and context-specific nature of the statutory right at issue—makes the defense impossible to overcome.

The right created by RFRA is simple, but that simplicity masks significant complexity in applying the right to specific facts and circumstances. The Court has avoided establishing bright-line rules.

Determining whether a particular action violates RFRA with regard to a particular individual requires a detailed factual analysis of several distinct points.

First, the court must determine whether the burdened act is an exercise of a sincerely held religious belief. To do so, the court must make factual findings sufficient to conclude that the claimed belief is in fact religious and is sincerely held. *Hobby Lobby*, 573 U.S. at 717 n.28. Constitutional considerations generally preclude the courts from delving deeply into an individual's assertion that a belief is part of her religion, leaving the courts to analyze the sincerity of the individual's beliefs, a determination that is fundamentally one of credibility that the courts are well-equipped to handle. *Hobby Lobby*, 573 U.S. at 718; *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005); *Gillette v. United States*, 401 U.S. 437, 457 (1971); *United States v. Seeger*, 380 U.S. 163, 185 (1965); *United States v. Ballard*, 322 U.S. 78, 87 (1944).

A second factual inquiry is then necessary to determine whether, and to what extent, the plaintiff's religious exercise was burdened. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447 (1988). Once again, this requires detailed factual analyses. A slight or *de minimus* burden is not sufficient to trigger the protections of RFRA. *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008); *Levitan v. Ashcroft*, 281 F.3d 1313, 1321 (D.C. Cir. 2002). Rather, RFRA only guards against *substantial* burdens on religious exercise. The government must place "substantial pressure on an adherent to modify his behavior and to violate his beliefs[.]" *Thomas*, 450 U.S. at 718.

Then the court must conduct another factual analysis to determine whether that substantial burden was the result of the federal government's action(s).

RFRA's protections are not triggered if the burden was imposed as the result of the intervening act of some third party. *Vill. of Bensenville v. FAA*, 457 F.3d 52, 65 (D.C. Cir. 2006).

Once the court is satisfied that the plaintiff has demonstrated that her exercise of a sincerely held religious belief was substantially burdened by a government action, the burden shifts to the government to show that its action was the least restrictive means for achieving a compelling governmental interest. 42 U.S.C. § 2000bb-1(b). This, again, is a highly fact-specific inquiry requiring the court to determine whether alternate means were available to achieve the same interest (if indeed the interest is a compelling one), even taking into account the relative costs of different alternatives available to the government. *Hobby Lobby*, 573 U.S. at 730. If the government is not able to meet this burden, the plaintiff is entitled to "appropriate remedies" under RFRA. 42 U.S.C. § 2000bb-1(c).

In short, RFRA requires courts to engage in four distinct, fact-specific analyses, not to mention the proper application of the law as to whether the government's interest was compelling and not just an important or merely legitimate government interest, when determining whether a particular individual is entitled to a remedy under the statute. Furthermore, the highly individualized and subjective nature of the statutory right in question means that an official's act directed toward one individual may be a violation, yet be entirely permissible if directed toward the next individual who, by every outward indication, is identical to the first.

As a consequence of the detailed, subjective, case-by-case analysis required by RFRA, it would be impossible for a reasonable official to be placed on notice that her conduct in a particular situation

violated the statute at the time the act is taken. Individual government officials cannot be expected to engage in the sort of detailed factual investigations and analysis, let alone the balancing of legal principles, required in order to determine whether an act violates an individual's right under RFRA in a given situation. In order to ensure that they avoid liability, government officials will feel pressure to engage in searching inquiries into the religious beliefs of every individual they interact with in the course of their duties—an inquiry that is both intrusive and potentially unconstitutional in its own right. As explored above, pressuring individual government officials to reliably engage in this searching analysis on the fly, or risk personal financial liability, will cause the government to grind to a halt. Qualified immunity exists precisely to avoid such eventualities. The highly individualized (and intensely private) nature of religious beliefs makes it impossible to clearly establish, in advance, an individual's rights under RFRA.

II. RFRA MUST PROVIDE A REMEDY TO ALL WHOSE SINCERELY HELD BELIEFS ARE BURDENED BY GOVERNMENT ACTION.

The government's alleged conduct here was beyond egregious. Extorting innocent Americans into becoming confidential law enforcement sources is an unconscionable abuse of authority, regardless of the religious beliefs of the aggrieved individual. Attempting to remedy these abuses by awarding damages for a RFRA claim, however, only serves to layer injustice upon injustice, precluding nonreligious individuals from being made whole after suffering identical harms resulting from identical conduct. This unjust outcome can be avoided by interpreting RFRA to provide a

remedy to all those whose deeply held moral, ethical, *or* religious beliefs have been burdened by government action.

"Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned." *Sorrells v. United States*, 287 U.S. 435, 446 (1932); *see also United States v. X-Citement Video*, 513 U.S. 64, 69 (1994); *United States v. Kirby*, 74 U.S. 482, 487 (1869). Furthermore, "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998). "The reason of the law in such cases should prevail over its letter." *Kirby*, 74 U.S. at 487.

The plain text of RFRA protects only "a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). The federal judiciary, drawing on both the text of the statute and pre-*Smith* decisions of this Court, have applied this interpretation of RFRA. *See Frazee v. Ill. Dep't of Employment Sec.*, 489 U.S. 829, 833 (1989); *Thomas*, 450 U.S. at 713-14; *Wis. v. Yoder*, 406 U.S. 205, 215 (1972); *United States v. Seeger*, 380 U.S. 163, 179 (1965); *Sherbert*, 374 U.S. at 416 (Stewart, J., concurring).

The Court has previously construed the statutory use of the term "religion" broadly in order to avoid unjust and unconstitutional results. When interpreting the conscientious objector provision of the Universal Military Training and Services Act (originally enacted as Selective Service Act of 1948, Pub. L. 80-759, § 6(j), 62 Stat. 609)(codified as 50 App. U.S.C. 456(j)), (now the Military Selective Service Act, and reclassified as 50 U.S.C. § 3806(j) (2019)), this Court interpreted the

exemption for objectors whose "religious training and belief" are rooted in a belief in a "Supreme Being" so as to include individuals holding "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption." *Seeger*, 380 U.S. at 176. By interpreting the statute in this way, the Court "avoid[ed] imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others," *id.*, thereby avoiding invalidating the statute under the Free Exercise Clause. *Id.* at 188 (Douglas, J., concurring). Five years later, the Court interpreted the same provision, absent the reference to a "Supreme Being," to allow "all those whose consciences, spurred by deeply held *moral, ethical, or religious beliefs*, would give them no rest or peace if they allowed themselves to become a part of an instrument of war" to exempt themselves from combat and noncombat service. *Welsh v. United States*, 398 U.S. 333, 344 (1970) (emphasis added).

The present case provides a stark illustration of why the Court should interpret RFRA in a similarly broad manner. A narrow, literal construction—one that provides RFRA's remedies only to those whose sincerely held beliefs are religiously motivated—creates a "flagrant injustice." If the respondents, rather than being believing Muslims, were instead *nonreligious former* Muslims (as are many members of the amici) facing coercive pressure to attend a particular mosque and report their observations to law enforcement, they would have no remedy under the current interpretation of RFRA. If subjected to the *same* retributive actions by the petitioners, and suffering the *same* quantifiable harms as the respondents, an ex-Muslim would be entirely precluded from being made whole *solely because of her lack of religious belief.*

The government would violate the same rights of a former Muslim as it did the believing Muslims who brought the litigation currently before the Court. And yet, if the prevailing interpretation of RFRA persists, then *only the religious believer* will have a mechanism to be made whole. This manifestly unjust and unconstitutional outcome cannot have been intended by Congress when it drafted RFRA. Therefore, if this Court concludes that RFRA's "appropriate remedies" include damages, those must be available to all those whose sincerely held moral, ethical, *or* religious beliefs are significantly burdened by government action.

III. IF RFRA'S PROTECTIONS ARE ONLY AVAILABLE TO RELIGIOUS INDIVIDUALS, RFRA IS UNCONSTITUTIONAL.

If RFRA's "appropriate remedies" are available only to Religious individuals and leave nonreligious individuals, who may suffer identical harms as the result of identical acts, with no judicial remedy *merely because they are not religious*, then it is a violation of the United States Constitution, and a particularly Orwellian one at that. It amounts to an unconstitutional establishment of religion, infringes the free exercise of religion, and denies nonbelievers the equal protection of the laws.

A. RFRA Constitutes an Establishment of Religion.

Americans, whether religious or nonreligious, engage in practices motivated by deep and sincere beliefs. That one person's conscience demands that she act out of devotion to a deity should entitle her to no greater government protection than her neighbor who engages in the same act out of conscientious recognition of our shared humanity. The Establishment Clause prohibits

the government from giving the former favor or singling out the latter for lesser treatment. "The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *County of Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)); *see also Bd. of Educ. v. Grumet*, 512 U.S. 687, 706-07 (1994).

> [Government] may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and *between religion and nonreligion*.

Epperson v. Ark., 393 U.S. 97, 103-04 (1968) (emphasis added).

If the statutory right provided by RFRA is available only to those who are motivated by religion, it amounts to nothing less than a declaration by the government that religious people deserve to be made whole after suffering certain harms, while nonreligious individuals do not. Such a declaration shatters the neutrality the Establishment Clause demands. "[H]ostility, not neutrality, would characterize the refusal to provide" nonreligious individuals an equivalent mechanism to protect the actions dictated by their conscience from governmental burdens. *Abington School Dist. v. Schempp*, 374 U.S. 203, 299 (1963) (Brennan, J., concurring).

Such a holding would have dangerous and far-reaching ramifications. Armed with the knowledge that nonreligious individuals are not shielded by RFRA's protections, law enforcement officers like the petitioners in this case could subject nonreligious, former Muslims to the identical conduct complained of in this case, but do so free of any fear of liability. Thus, in this context, RFRA would *incentivize* negative treatment of nonreligious individuals. This is one of the very evils the Founders sought to avoid through the Establishment Clause.

Furthermore, RFRA cannot be justified as a religious accommodation. RFRA divides Americans into two groups based on a fundamental question of religious belief and singles one group out "for special treatment, and whatever the limits of permissible legislative accommodations may be, . . . it is clear that neutrality as among religions must be honored." *Grumet*, 512 U.S. at 706-07. RFRA constitutes far more than a neutral accommodation.

It would be an unconstitutional endorsement of religion if RFRA's remedies are held to be available only to religious individuals. Moreover, it evinces governmental hostility toward those who glean their deeply held moral convictions not from ancient texts or divine edicts but from the application of human empathy and reason. Such a law cannot stand if the Establishment Clause is to have any meaning.

B. RFRA Burdens the Free Exercise of Religion.

In the deepest of ironies, RFRA violates the fundamental principles of the Free Exercise Clause. Nonbelievers and religious individuals benefit alike from the constitutional right protected by the Free

Exercise Clause, which enshrines an "absolute prohibition of infringements on the 'freedom to believe' . . . ." *McDaniel v. Paty*, 435 U.S. 618, 627 (1978). This necessarily includes the ability to refrain from engaging in religious exercise or professing religious beliefs, *Smith*, 494 U.S. at 877; *Schempp*, 374 U.S. at 222-23; *Engle v. Vitale*, 370 U.S. 421, 430-31 (1962); *Torcaso v. Watkins*, 367 U.S. 488, 492-96 (1961), even if it may not prevent burdens on affirmative exercises of purely secular philosophical beliefs, *Frazee v. Ill. Dep't of Employment Sec.*, 489 U.S. 829, 833 (1989); *Thomas*, 450 U.S. 707. The effect of RFRA is to punish the nonreligious with the privation of a statutory benefit. Just as James Madison objected to Thomas Jefferson's proposal to exclude clergy from holding public office because such a limitation would violate a "fundamental principle of liberty," James Madison, Remarks on Mr. Jefferson's "Draught of a Constitution for Virginia," *in* 1 Letters and Other Writings of James Madison 1185, 189 (1865), so too must a statute making a judicial cause of action available only to the religious:

> Does it not violate another article of the plan itself, which exempts religion from the cognizance of Civil power? Does it not violate justice, by at once taking away a right and prohibiting a compensation for it? Does it not, in fine, violate impartiality, by shutting the door against the [nonreligious] and leaving it open for those of every other?

Id. But RFRA does not merely run counter to the fundamental principles held sacred by the Founders. It also violates this Court's long-standing application of those principles.

RFRA regulates not just actions but also *beliefs themselves*. Under RFRA, what the government may impose on one person may not be imposed on another *because of the latter's beliefs*. This places coercive pressure on individuals to profess religious belief in order to be relieved of a government-imposed burden. Such coercion is the hallmark of free exercise violations.

Furthermore, in order to meet the requirements of the Free Exercise Clause, a statute must either be a religiously neutral law of general applicability or meet the stringent requirements of strict scrutiny. *Smith*, 494 U.S. at 878-79. RFRA is emphatically *not* neutral toward religion, as it expressly prefers one class of Americans over another solely on the basis of their religious beliefs. Because it is not neutral, it is subject to strict scrutiny.

To survive strict scrutiny, RFRA must advance a compelling government interest and be the least restrictive means of doing so. It fails at both. First, the accommodation of religion beyond the bounds required by the Free Exercise Clause is not a compelling government interest, particularly where countervailing constitutional requirements are implicated. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, ___ U.S. ___, 137 S. Ct. 2012, 2024 (2017); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604-05 (1983). Second, it is not the least restrictive means of achieving the government's interest. The protections provided by the statute are under-inclusive, restricting the ability of nonreligious individuals to refrain from engaging in acts as demanded by their deeply held moral convictions. The nonreligious individual is put to a painful choice: abandon a course of action her conscience demands or lie, both to the public and the

courts, by claiming that the course of action is religiously motivated.

There is a simple and less-restrictive means readily available to the government for achieving the goal of RFRA. Rather than limit the statute's protections to "religious exercise," the government could easily establish a statutory framework that protects the exercise of "deeply held moral, ethical, or religious beliefs," *Welsh*, 398 U.S. at 344, thereby protecting all individuals without unconstitutionally privileging religious belief or placing coercive pressure on individuals to profess religious beliefs. If those protections cannot be read into RFRA through the principles of statutory construction, it must be recognized that, by excluding such beliefs, the government has not utilized the least restrictive means of achieving the interest at which it aims.

C. RFRA Denies the Equal Protection of the Laws.

RFRA not only violates the religion clauses of the First Amendment but also contravenes the equal protection principles implicit in the Due Process Clause of the Fifth Amendment. Government acts that utilize inherently suspect distinctions, like religion, to draw classifications are subject to strict scrutiny. *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Government actions "directed at particular religious . . . minorities" trigger this heightened standard of review because such classifications implicate "prejudice against discrete and insular minorities . . ., which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect [them]." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). This Court has recognized that religion, like race, nationality, and alienage, is

a suspect classification warranting strict scrutiny. *Dukes*, 427 U.S. at 303 (1976).

That government discrimination along religious lines should warrant the same searching judicial inquiry as discrimination on the basis of race, nationality, and alienage is well supported. Distinctions drawn on those suspect lines warrant strict scrutiny because they are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985), superseded by statute on other grounds, Fair Housing Amendments Act of 1988, Pub. L. 100–430, §§ 5, 6(a)–(b)(2), 102 Stat. 1619-22 (1988). Classes that have been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process" bear the "traditional indicia of suspectness" that warrant the application of strict scrutiny. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

An individual's particular views and beliefs regarding religion, like other suspect classifications, will rarely, if ever, be relevant to the achievement of any legitimate state interest. Yet atheists and other nonreligious people have long been disadvantaged and subjected to unequal treatment. On January 10, 2017, in response to questioning from Senator Sheldon Whitehouse (D-RI), then-Senator Jefferson Sessions (R-AL), who had been nominated for the position of Attorney General of the United States, stated that he was "not sure" whether "a secular person has just

as good a claim to understanding the truth as a person who is religious." Attorney General Confirmation Hearing, Day 1 Part 3, C-SPAN (Jan. 10, 2017), https://www.c-span.org/video/?420932-6/attorney-general-confirmation-hearing-day-1-part-3 (last visited January 2, 2020). In 2014, the New Jersey Supreme Court addressed a situation in which, after the conclusion of a civil trial, a juror informed the trial judge, ex parte, "that she was surprised that defendant had not placed his hand on the Bible before he testified." *Davis v. Husain*, 106 A.3d 438, 441 (N.J. 2014). Until the Supreme Court handed down its decision in *Torcaso*, states were permitted to block atheists from holding public office. 367 U.S. 488 (1961). Suspicion of atheists' ability to hold public office remains prevalent despite *Torcaso*. Harvard University constitutional law professor Adrian Vermeule stated on December 23, 2019, that "atheists can't be trusted to keep an oath[.]" Adrian Vermeule (@Vermeullarmine), Twitter (Dec. 23, 2019, 4:19 PM), https://twitter.com/Vermeullarmine/status/1209221990327955457.

A recent survey of the nonreligious community indicates that negative treatment is widespread, with 46.5% of respondents reporting negative experiences in military service because of their lack of religious belief,[6] 29.4% reporting negative experiences in education settings, and 11.0% reporting negative treatment in the court system. American Atheists, U.S. Secular Survey (forthcoming 2020). 21.7% reported negative treatment in the employment context, and 19.1% reported negative treatment in other interactions with private businesses. *Id.* 25.4% of respondents reported being told they are not a good person "sometimes,"

[6] All percentages are of those survey respondents who provided valid answers to the particular question.

"frequently," or "always." *Id.* 37.9% reported being told they were not capable of distinguishing right from wrong at least sometimes. *Id.*

RFRA utilizes religious belief as the *sole factor* distinguishing those who can receive its protections from those who cannot. In doing so, it perpetuates the "history of purposeful unequal treatment" that has relegated atheists and the nonreligious "to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Rodriguez*, 411 U.S. at 28. This discrimination implicates the Fifth Amendment's implied equal protection principles and constitutes a second, independent ground for subjecting the statute to strict scrutiny, a standard that RFRA cannot meet, as discussed in Part III(b) above.

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court hold that damages are not an appropriate remedy for a RFRA claim, reverse the decision of the Second Circuit U.S. Court of Appeals, and remand the matter with instructions to dismiss any such claims for damages.

Respectfully submitted,

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January 13, 2020