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 RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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MISCELLANEOUS

BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF THE *AMICI CURIAE*

Amici are religious and civil-rights organizations that share a commitment to safeguarding religious freedom by ensuring that the Religion Clauses of the U.S. Constitution and statutory protections for religious freedom are faithfully applied. *Amici* believe that a damages remedy in individual-capacity suits is a critical tool for protecting civil rights, including those protected by the Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq*. Indeed, some of the *amici* were leaders in the Coalition for the Free Exercise of Religion, which led the effort to persuade Congress to enact remedial legislation that would become RFRA. *Amici* therefore oppose petitioners' efforts categorically to foreclose damages remedies in cases concerning religious freedom.[1]

The *amici* are:

- Americans United for Separation of Church and State.
- Central Conference of American Rabbis.
- Hindu American Foundation.
- Interfaith Alliance Foundation.
- Men of Reform Judaism.

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to the brief's preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

- Methodist Federation for Social Action.
- People For the American Way Foundation.
- Union for Reform Judaism.
- Women of Reform Judaism.

INTRODUCTION AND SUMMARY OF ARGUMENT

As alleged in the Complaint, respondents are practicing Muslims who were improperly added to the government's No Fly List, thus causing them severe personal and financial harms. Petitioners are FBI agents who promised to remove respondents from the List if they would spy on their faith community. But respondents refused, consistent with their sincere belief that a religious obligation forbade them to comply with the government's demand. Respondents thus alleged violations of their religious-exercise rights under RFRA.

After respondents initiated this action, they were removed from the No Fly List, mooting their claims for injunctive relief—and demonstrating the ease with which governmental actors can avoid adverse judgments (and the concomitant deterrence of future misconduct) when only prospective relief is available. Money damages against the individual-capacity defendants are now the only way to vindicate respondents' rights and deter future violations.

RFRA's legislative history demonstrates Congress's judgment that, in the wake of *Employment Division* v. *Smith*, 494 U.S. 872 (1990), certain government-imposed burdens on religious exercise should be alleviated statutorily. The burdens that Congress specifically contemplated included one-time harms—*i.e.*, those that are neither ongoing nor likely to recur.

Absent the ability to seek damages from individual-capacity defendants, the legislative solution that Congress crafted would be empty for many of the people whom Congress specifically intended to cover.

In urging this Court categorically to limit respondents and all other RFRA plaintiffs to prospective relief only, petitioners make much of the supposed chilling effect that individual-capacity suits could have on the operations of government and the actions of public officials. Gov't Br. 29–34. Those worries reflect a deeper danger that RFRA may be misused beyond its intended purposes.

But when properly understood and applied, RFRA is not subject to the sorts of expansive interpretations that could create uncertainty among public officials and thus potentially result in overdeterrence. For RFRA's scope is defined both by the Act's text and by the Establishment Clause; and RFRA claimants may proceed beyond the initial stages of litigation only if they make a *prima facie* showing that their suit complies with those limitations.

First, RFRA claimants may challenge official action only when the government substantially burdens activity that the claimants believe is religiously obligated; it is insufficient that their allegedly burdened conduct merely has a religious motivation or that the burden is the product of actions of a third party. Second, RFRA requires that plaintiffs' religious beliefs be sincere rather than pretextual. And third, the Establishment Clause prevents the government from providing an exemption from a generally applicable law if doing so would impose meaningful burdens on third parties. As long as the district courts faithfully apply these standards, including in examining complaints on motions to dismiss, RFRA will be

appropriately limited to the uses that Congress intended, preventing misuse and the resulting overdeterrence of official conduct. Moreover, the doctrine of qualified immunity and related considerations of fair notice provide added defense against unreasonable risks of liability in individual-capacity suits for damages.

The government's valid concerns that RFRA may be misinterpreted and applied overly aggressively should not override Congress's intent to provide relief to those whose religious rights have been substantially burdened. Rather, this Court should address the risks of that misuse by underscoring the need for public officials and the lower courts to apply RFRA's prerequisites and the Establishment Clause's mandates carefully and correctly. The constitutional and statutory bounds on RFRA's application, when properly and faithfully applied, adequately safeguard against potential overdeterrence of lawful official conduct.

ARGUMENT

A. Congress Intended RFRA To Ameliorate Government-Imposed Burdens On Religious Exercise, Including Those That Only Damages Might Remedy.

Damages against individual-capacity defendants are a critical component of the remedy that Congress designed when it authorized courts to grant "appropriate relief" to RFRA plaintiffs (see 42 U.S.C. 2000bb-1), just as they are for other classes of civil-rights violations. To determine the contours of the remedies available, this Court should look to the types of injuries that the Act was meant to address. See *Sossamon* v. *Texas*, 563 U.S. 277, 286 (2011) (the word "appropriate" in the term "appropriate relief" is

"inherently context dependent"); *Webman* v. *Fed. Bureau of Prisons*, 441 F.3d 1022, 1027 (D.C. Cir. 2006) (Tatel, J., concurring) ("the type of injury [a] statute addresses makes clear [whether] damages are 'appropriate,'" such as when "one-time injur[ies]" are contemplated).

Because RFRA does not waive the government's traditional immunity from liability for money damages (see *Lane* v. *Pena*, 518 U.S. 187, 192 (1996) ("waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text")), damages assessed against individual-capacity defendants are the only meaningful remedy available apart from prospective injunctive relief. Yet as this Court has explained, prospective relief provides "no remedy at all" when a plaintiff has suffered a one-time injury that is neither ongoing nor likely to be repeated by the same defendant. *Franklin* v. *Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 76 (1992); see also *O'Shea* v. *Littleton*, 414 U.S. 488, 495–96 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief * * * if unaccompanied by any continuing, present adverse effects.").

One-time injuries with respect to religious exercise are, sadly, all too common. For example, a number of faith groups "have strong teachings against mutilation of the human body, and * * * view autopsies as a form of mutilation." Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. Rev. 221, 226 (1993) ("Faith groups with such teachings include many Jews, Navajo Indians, and the Hmong, an immigrant population from Laos. The Hmong believe that if an autopsy is performed, the spirit of the deceased will never be free."). Were a medical examiner

knowingly to perform a needless autopsy on an adherent to one of these faiths, the family would suffer a harm that, though serious and discrete, would be neither ongoing nor likely to recur. And once an autopsy has been completed—or even started—an action for injunctive relief is moot; only money damages can provide any relief to the family or do anything to deter similar violations of other families' rights in the future.

Congress specifically contemplated these one-off burdens on religious exercise when it enacted RFRA. Notably, for example, in a floor statement supporting RFRA's passage, Senator Chafee explained:

> One case directly affected by [*Employment Division* v. *Smith*] * * * involved the Yangs, a Hmong family in Providence. Neng Yang was admitted to RI Hospital for an unknown illness and died 1 week later. For religious reasons, the family asked that no autopsy be performed * * *. But at the funeral home, when the Yangs went to carry out the traditional cultural dressing of the body, they were upset to find that an autopsy had in fact been performed. The Yangs protested in court, and in January of 1990, U.S. District Court Judge Raymond Pettine ruled in their favor. In light of [*Smith*], however, in November Judge Pettine, with deep regret, recalled his original decision and reversed his ruling * * *. [W]ithout congressional action to restore the pre-1990 standard, [the Yangs] and many, many others like them are and will remain helpless to prevent similar violations.

139 Cong. Rec. 26,463 (1993) (statement of Sen. Chafee); see *Yang* v. *Sterner*, 728 F. Supp. 845, 850

(D.R.I. 1990) (concluding that "alternative remedies * * * fall far short of providing the compensation and protection of a damage suit" because deceased's family "did not and would not have the chance to rush to a court for an injunction to stop an autopsy"), withdrawn, 750 F. Supp. 558 (D.R.I. 1990) (rejecting Free Exercise Clause claim under *Smith*). The Senate Judiciary Committee's Report recommending the adoption of RFRA pointed to this same case. S. Rep. No. 111, 103d Cong., 1st Sess. 8 n.13 (1993); see also 139 Cong. Rec. at 26,181 (statement of Sen. Hatch) ("This bill * * * is important because it restores protections to individuals like the Yangs and others who have suffered needlessly.").[2]

Statements during House deliberations on RFRA likewise pointed to the problem of unauthorized autopsies of religious minorities. See, *e.g.*, 139 Cong. Rec. at 9685 (statement of Rep. Hoyer) ("Since *Smith*, more than 50 cases have been decided against religious claimants. * * * Orthodox Jews have been subjected to unnecessary autopsies in violation of their family's religious faith."); 139 Cong. Rec. at 10,466 (statement of Rep. Coppersmith) (listing mandatory-autopsy laws as potentially burdening religious exercise).

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[2] Because *Yang* involved a state medical examiner, *amici* recognize that RFRA would not authorize *any* relief, prospective or retrospective, following *City of Boerne* v. *Flores*, 521 U.S. 507, 530–536 (1997) (holding that RFRA exceeded Congress's enforcement authority against states under § 5 of Fourteenth Amendment). But *City of Boerne* does not change the harms that Congress *meant* to address or the remedies that it therefore intended to authorize. Hence, it cannot limit how, for example, RFRA applies to unnecessary autopsies by federal officials. And many states look to federal precedent and legislative history in construing state RFRAs inspired by and patterned on the federal Act.

As explained, an unauthorized and unnecessary autopsy that violates a family's religious obligations is a paradigmatic example of a harm that cannot be redressed by prospective relief—and one that Congress specifically sought to remedy through RFRA. Nor is it the only injury warranting that treatment. See, *e.g.*, *Holland* v. *Goord*, 758 F.3d 215, 217–18 (2d Cir. 2014) (inmate alleged that he was ordered to break religiously mandated fast). Categorically barring damages in RFRA actions against individual-capacity defendants would thus entirely subvert Congress's purpose to remedy and deter violations of these sorts.

B. Allowing Damages Awards Against Individual-Capacity Defendants Will Not Overdeter Legitimate Official Action.

In arguing against any possibility of damages remedies under RFRA, petitioners complain vaguely of "chilling effects" on federal officials. Gov't Br. 29–34. Judge Jacobs's opinion below is to the same effect. See Pet. App. 57a–58a (Jacobs, J., dissenting from denial of rehearing en banc). These concerns are overblown.

When properly understood and applied, RFRA is not susceptible to expansive interpretations that would leave "well-intentioned federal employees" forced to "navigate a minefield of liability" (Gov't Br. 32). In part, that is because RFRA by its plain terms requires plaintiffs to make a *prima facie* case that satisfies constitutional and statutory mandates, such as the requirement that any alleged burden on religious exercise must be "substantial" to give rise to a colorable legal claim. 42 U.S.C. 2000bb-1 ("Government shall not *substantially* burden a person's exercise of religion.") (emphasis added).

To be sure, *improper* applications of RFRA might well chill legitimate governmental operations. But lawsuits seeking those sorts of applications are legally deficient and hence should be dismissed regardless of whether damages are potentially available. And indeed, trial courts holding that RFRA authorizes damages in individual-capacity suits have done just that. See *Patel* v. *Bureau of Prisons*, 125 F. Supp. 3d 44, 53–57 (D.D.C. 2015) (holding that RFRA authorizes individual-capacity suits for damages but dismissing improper RFRA claims); *Lepp* v. *Gonzales*, No. C-05-566, 2005 WL 1867723, at *8–11 (N.D. Cal. Aug. 2, 2005) (same).

As long as courts properly dismiss RFRA actions that do not comport with constitutional and statutory requirements, as outlined below, public officials will be adequately shielded from any potential "minefield of liability" (Gov't Br. 32). This Court could better address overdeterrence concerns, therefore, by reminding the lower courts to apply RFRA's constitutional and statutory requirements strictly, including at the motion-to-dismiss stage, rather than by curtailing the remedies that Congress authorized and intended.

1. The requirement that RFRA plaintiffs may challenge only substantial burdens on religious exercise ameliorates overdeterrence concerns.

a. While a religious practice need not be "central" to a RFRA plaintiff's "system of religious belief" (42 U.S.C. 2000bb-2(4)), a burden must be substantial to give rise to a cognizable claim (42 U.S.C. 2000bb-1(a); accord Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc(a)(1); *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) ("Under RFRA, the Federal Government

may not, as a statutory matter, substantially burden a person's exercise of religion."); see also *Hernandez* v. *C.I.R.*, 490 U.S. 680, 699 (1989) (pre-*Smith* free-exercise case noting that while it "is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, * * * [we] have doubts whether the alleged burden imposed * * * is a substantial one")).

This requirement is not just a statutory prerequisite but a constitutional imperative: In the absence of a genuinely substantial burden on a religious practice, a religious accommodation would favor the benefited faith over others, "devolv[ing] into 'an unlawful fostering of religion'" that violates the Establishment Clause. *Cutter* v. *Wilkinson*, 544 U.S. 709, 714 (2005) (quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 334–35 (1987)).

b. Lower courts have appropriately recognized that a burden on religious exercise is substantial, thus potentially giving rise to a RFRA claim, only if there is a sufficient nexus between the plaintiff's perceived religious obligations and the asserted burden imposed by the challenged governmental action. See, *e.g.*, *Mahoney* v. *Doe*, 642 F.3d 1112, 1121–22 (D.C. Cir. 2011) ("inquiry on the nexus between religious practice and religious tenet" entails considering "whether the regulation at issue 'forced plaintiffs to engage in conduct that their religion forbids or . . . prevents them from engaging in conduct their religion requires'" (brackets omitted) (quoting *Henderson* v. *Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001), cert. denied, 535 U.S. 986 (2002))); *Navajo Nation* v. *U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008) ("[A] 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and

receiving a governmental benefit or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions."), cert. denied, 556 U.S. 1281 (2009); see also *Abdulhaseeb* v. *Calbone*, 600 F.3d 1301, 1325 (10th Cir. 2010) (Gorsuch, J., concurring) (no triable issue on substantial burden under RLUIPA where complainant described "only a moderate impediment to—and not a constructive prohibition of—his religious exercise").

In *Mahoney*, for example, the plaintiffs argued that their religious exercise was impermissibly burdened by a statute preventing them from drawing chalk art on a sidewalk near the White House. 642 F.3d at 1114–16. The D.C. Circuit affirmed dismissal of their RFRA claim for lack of sufficient nexus between the conduct being restrained and the religious tenet asserted, explaining that the "inquiry on the nexus * * * avoids expanding RFRA's coverage beyond what Congress intended, preventing RFRA claims from being reduced into questions of fact, proven by the credibility of the claimant." *Id*. at 1121; see also *id*. at 1122 (Kavanaugh, J., concurring) (joining court's "thorough and well-crafted opinion in its entirety" and adding that there can be "no serious First Amendment objection" to a neutral law barring defacement of government property).

In *United States* v. *Sterling*, 75 M.J. 407, 418–19 (C.A.A.F. 2016), cert. denied, 137 S. Ct. 2212 (2017), the U.S. Court of Appeals for the Armed Forces concluded that RFRA did not license a servicemember's disobedience of orders to remove homemade signs from her workstation, in part because she did not show that "it is any tenet or practice of her faith to display signs at work."

And in *United States* v. *Zimmerman*, 514 F.3d 851, 854 (9th Cir. 2007) (per curiam), the court recognized that while a sincere religious objection *might* be a valid basis under RFRA for a criminal defendant to assert a right to refuse to provide a DNA sample, whether that was so depended on the precise nature of the religious objection and its relation to the specific DNA request. Accordingly, because the RFRA claimant's "beliefs clearly prohibit blood samples, [but] it's unclear whether providing a tissue sample, hair sample or a cheek swab would also violate his beliefs," the court remanded to determine whether there was a colorable objection under RFRA. *Ibid.*[3]

c. As the D.C. Circuit explained in *Henderson*:

> [I]t is hard to think of any conduct that could not potentially qualify as religiously motivated by someone's lights. To make religious motivation the critical focus is, in our view, to read out of RFRA the condition that only substantial burdens on the exercise of religion trigger the compelling interest requirement.

253 F.3d at 17 (rejecting RFRA claim for exemption from ban on peddling on National Mall to sell T-shirts bearing religious messages).

While it is not the role of courts to evaluate "the relative merits of differing religious claims" (*United States* v. *Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens,

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[3] Though *Sterling* and *Zimmerman* involved RFRA defenses to prosecutions, if they had instead been affirmative RFRA suits, dismissals for failure to state a claim would have been not only the routine stuff of trial-court practice but also an important tool to screen out overly aggressive RFRA claims that might otherwise make public officials hesitate to perform their legitimate job duties.

J., concurring in the judgment)), requiring plaintiffs to show a burdened religious obligation or prohibition, rather than merely a religious motivation associated with conduct that they wish to have exempted from general legal requirements, is the only sensible way to construe and apply RFRA's statutory prerequisite of a substantial burden on religion.

Moreover, that requirement can in most instances be applied readily and straightforwardly, without intrusive inquiry or protracted litigation, not only because it does not implicate impermissible judgments about the validity of any religious beliefs or practices, but also because, at the motion-to-dismiss stage, it would turn simply on whether there is a clear allegation of a religious obligation or prohibition. And that is the sort of review that the district courts always undertake in considering Rule 12(b)(6) motions.[4]

Indeed, because the substantial-burden prerequisite forecloses bringing harassing RFRA claims over trivial or nonexistent burdens on religious exercise, and because whether a burden is substantial is

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[4] See, *e.g.*, *Wilson* v. *James*, 139 F. Supp. 3d 410, 424–26 (D.D.C. 2015) (dismissing national guardsman's RFRA claim because sending e-mail disparaging weddings of same-sex couples, though religiously motivated, was not required by religious beliefs), aff'd, No. 15-5338, 2016 WL 3043746 (D.C. Cir. May 17, 2016) (per curiam); *Heap* v. *Carter*, 112 F. Supp. 3d 402, 422 (E.D. Va. 2015) (RFRA plaintiff failed to show "that becoming a Humanist Navy chaplain is dictated by the tenets of Humanism or that by not becoming a Navy chaplain he is somehow in violation of the tenets of Humanism"); see also *Gunning* v. *Runyon*, 3 F. Supp. 2d 1423, 1433 (S.D. Fla. 1998) (holding on summary judgment that plaintiff failed to establish *prima facie* RFRA claim regarding refusal to allow him to play Christian radio over post office's loudspeakers because "by his own admission listening to Christian radio is not a requirement of his faith").

normally a question of law (*Wheaton Coll.* v. *Burwell*, 573 U.S. 958, 966 (2014) (Sotomayor, J., dissenting from grant of injunction pending appeal) ("Not every sincerely felt 'burden' is a 'substantial' one, and it is for courts, not litigants, to identify which are.")), the determination that a substantial burden has not been adequately pleaded is a particularly appropriate basis for dismissal at the outset of litigation or on summary judgment.[5]

d. Relatedly, lower courts have readily disposed of RFRA claims when a nonfederal third party is primarily responsible for imposing the asserted burden on religion—thus foreclosing expansive and unfair surprise liability that might overdeter federal officials. In *Village of Bensenville* v. *Federal Aviation Administration*, 457 F.3d 52, 57 (D.C. Cir. 2006), for example, the court rejected a RFRA challenge to an FAA determination of eligibility for federal funding for a city's airport extension, where the construction project would have involved relocation of a church cemetery. The court concluded that because the "City—not the FAA—is the cause of any burden on religious exercise * * * as [the] inventor, organizer, patron, and builder of the * * * expansion," while the FAA played only a "peripheral role" (*id.* at 65), there was no need to conduct a burdensome compelling-interest analysis to dispose of the RFRA claim (*id.* at 57). Though the case was an appeal from an agency action, it involved the sort of determination that trial courts can and do routinely make at the motion-to-dismiss stage, thus

[5] As for any concerns about artful pleading to mischaracterize religious motivation as religious mandate, this Court has repeatedly recognized that courts can and should make threshold sincerity determinations for religious claims. See Section B.2., *infra*.

avoiding protracted litigation, expense, and unreasonable liability risks.

e. In the absence of faithful application of the substantial-burden prerequisite, petitioners' worries about a "minefield of liability" (Gov't Br. 32) would have greater merit. Because religion is, by definition, "comprehensive in nature" (see *Africa* v. *Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981)), plaintiffs who view themselves as guided by religion in all aspects of life might potentially assert a religious motivation for virtually any conduct (see *Henderson*, 253 F.3d at 17). RFRA was never intended to stretch so widely. See 139 Cong. Rec. at 26,180 (statement of Sen. Hatch) (RFRA "does not require the Government to justify every action that has some effect on religious exercise"); 139 Cong. Rec. at 26,178 (statement of Sen. Kennedy) ("Not every free exercise claim will prevail, just as not every claim prevailed prior to the *Smith* decision.").

But determining whether a RFRA claimant has adequately pleaded that she is being required by the government to do (or refrain from) what she believes that her religion prohibits (or requires) is straightforward. Barring RFRA claims over "only a moderate impediment to—and not a constructive prohibition of" religious exercise (*Abdulhaseeb*, 600 F.3d at 1325 (Gorsuch, J., concurring)) further ameliorates the concern. See also, *e.g.*, *Henderson*, 253 F.3d at 17. And as long as RFRA claims without a sufficient nexus between the challenged official action and a religious duty are disposed of expeditiously, as they most of the time can be, petitioners' concerns about undesirable effects of protracted individual-capacity litigation are substantially mitigated. By reiterating these standards for the district courts (and for the federal officials

who must make accommodation determinations in the first instance), this Court may largely resolve petitioners' legitimate concerns.

2. The requirement that RFRA plaintiffs must assert sincere religious beliefs ameliorates overdeterrence concerns.

RFRA also protects only the sincere exercise of religion. See *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 717 n.28 (2014). It "does not cover *insincere* religious beliefs * * * such as when someone asserts a personal objection dressed up as a religious objection." *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, 808 F.3d 1, 17 n.4 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc) (emphasis in original). "Under RFRA, the courts must police sincerity." *Ibid*. This requirement reduces the potential for spurious RFRA lawsuits, whether for damages or otherwise, that might otherwise overdeter official action.

When it enacted RFRA and its sister statute, RLUIPA, Congress was "confident of the ability of the federal courts to weed out insincere claims." *Hobby Lobby*, 573 U.S. at 718. As this Court explained:

> RLUIPA applies to "institutionalized persons," a category that consists primarily of prisoners, and by the time of RLUIPA's enactment, the propensity of some prisoners to assert claims of dubious sincerity was well documented. * * * If Congress thought that the federal courts were up to the job of dealing with insincere prisoner claims, there is no reason to believe that Congress limited RFRA's reach out of concern for the seemingly less

> difficult task of doing the same in corporate cases.

Ibid.; cf. *United States* v. *Seeger*, 380 U.S. 163, 185 (1965) (explaining test for sincerity of religious beliefs in conscientious-objector context).

Congress's judgment was not misplaced.

In *Zimmerman*, *supra*, for example, after the court of appeals remanded for a determination whether the criminal defendant's "religious beliefs [about DNA samples] are sincerely held" (514 F.3d at 854), the district court examined him "about his willingness to give bodily fluids for medical purposes[,] * * * found that [he] voluntarily parts with biological fluids in other circumstances," and concluded that his asserted religious objection to providing DNA was insincere (*United States* v. *Zimmerman*, No. 8-50298, 2009 U.S. App. LEXIS 22689, at *2–3 (9th Cir. Oct. 7, 2009) (affirming district court's order)). See also, *e.g.*, *United States* v. *Quaintance*, 608 F.3d 717, 723 (10th Cir. 2010) (Gorsuch, J.) (concluding that assertions about religious significance of marijuana were insincere, in part because RFRA claimant sold cocaine in same setting), cert. denied, 562 U.S. 1019 (2010); *Multi Denominational Ministry of Cannabis & Rastafari, Inc.* v. *Gonzales*, 474 F. Supp. 2d 1133, 1146–47 (N.D. Cal. 2007) (claim of Rastafarian plaintiffs seeking exemption from drug laws failed because "asserted religious practices bear little relation to the scope of marijuana production and distribution acknowledged in their complaint"); *Davis* v. *Scott*, No. Civ. A. H-95-69, 1997 WL 34522671, at *12–13 (S.D. Tex. Mar. 31, 1997) (dismissing RFRA claim of inmate who had brought RFRA claims just months before premised on adherence to different religion).

There is no more reason to doubt Congress's judgment about the courts' competence in weeding out disingenuous RFRA actions in suits for money damages than in suits for injunctive relief only. Because the courts can effectively and expeditiously dispose of insincere RFRA claims, federal officials have little to fear from sham suits for damages.

3. The requirement that religious accommodations must not materially burden nonbeneficiaries ameliorates overdeterrence concerns.

Finally, this Court has made clear that religious accommodations or exemptions from generally applicable laws are impermissible and therefore unavailable if they would materially burden nonbeneficiaries. See *Cutter*, 544 U.S. at 714 ("At some point, accommodation may devolve into 'an unlawful fostering of religion.'" (quoting *Amos*, 483 U.S. at 334–35)); *Holt* v. *Hobbs*, 574 U.S. 352, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring). If, in purporting to accommodate the religious exercise of some, the government imposes costs and burdens on others, it impermissibly favors the faith of the benefitted over the beliefs and rights of the burdened. That constitutional principle is well settled in this Court's Religion Clause jurisprudence.

In *Estate of Thornton* v. *Caldor*, 472 U.S. 703, 709–10 (1985), for example, this Court invalidated a statute guaranteeing employees a day off on the Sabbath of their choosing. By requiring those who observe a Sabbath to be relieved of work "no matter what burden or inconvenience this impose[d] on the employer or fellow workers," the Court held, the statute "impermissibly advance[d] a particular religious practice" in contravention of the Establishment Clause. *Id.* at 708–10. In *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1

(1989), this Court invalidated a sales-tax exemption for religious publications on the ground that third parties would be burdened by additional taxes required to offset the lost revenue (*id.* at 18 n.8 (plurality op.); see also *id.* at 28 (Blackmun, J., joined by O'Connor, J., concurring in the judgment) (agreeing that exemption was unconstitutional)). And in *United States* v. *Lee*, 455 U.S. 252, 261 (1982), this Court rejected a claim that the Free Exercise Clause required that religious objectors be exempted from paying Social Security taxes, in part because "[g]ranting an exemption from social security taxes to an employer [would] operate[ ] to impose the employer's religious faith on the employees."

Because the prohibition against material harms to third parties was a foundation of this Court's pre-*Smith* free-exercise jurisprudence, it is included in what Congress intended as RFRA's statutory standard. See *Gonzales*, 546 U.S. at 424 (RFRA "adopts a statutory rule comparable to the constitutional rule rejected in *Smith*"). And hence, this Court held in *Cutter* that "courts *must* take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." 544 U.S. at 720 (emphasis added); see also *Hobby Lobby*, 573 U.S. at 729 n.37 ("It is certainly true that in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'" (quoting *Cutter*, 544 U.S. at 720)); *id.* at 738 (Kennedy, J., concurring) ("RFRA is inconsistent with the insistence of [the government] on distinguishing between different religious believers—burdening one while accommodating the other").

Indeed, in only one type of circumstance has this Court ever upheld religious exemptions from

generally applicable laws when the exemptions would have meaningfully burdened third parties: employment cases implicating "religious organizations[']autonomy in matters of internal governance" (*Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *E.E.O.C.*, 565 U.S. 171, 197 (2012) (Thomas, J., concurring); see also *Amos*, 483 U.S. at 339–40). For in those cases, both Religion Clauses forbade governmental intrusion and interference. See, *e.g.*, *Hosanna-Tabor*, 565 U.S. at 181 ("Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."). Thus, these decisions further underscore that Establishment Clause concerns must be taken into account in adjudicating free-exercise claims, be they constitutional or statutory. See also *Cutter*, 544 U.S. at 714.

Therefore, when the government cannot accommodate a RFRA claimant without shifting costs or harms to others, there is no cause of action and suits should be dismissed, eliminating the risk of unfair or unexpected damages awards. For the same reason, federal officials who evaluate accommodation requests (and therefore must themselves consider effects on nonbeneficiaries) would know that when third parties would be materially burdened, no accommodation is available—and there is no risk of liability for damages for failing to provide one.

* * *

By ensuring that there can be no liability for failing to award accommodations that materially harm third parties, the constitutional framework in which RFRA operates gives clear guidance to federal officials about how to balance the interests of RFRA claimants against the rights and interests of third parties. This Court should therefore reiterate the principle that

accommodations under RFRA must not burden non-beneficiaries. The Court would thus further alleviate petitioners' generalized angst about overdeterrence from damages remedies, which would have no bearing whatever in many accommodation determinations.

4. Qualified immunity and related considerations provide additional protections against unfair liability and overdeterrence of official action.

a. Even when a plaintiff's *prima facie* case satisfies RFRA's prerequisites, the doctrine of qualified immunity provides yet another layer of protection for individual-capacity defendants. Though petitioners posit that "qualified immunity is never a foregone conclusion, and many courts * * * have occasionally failed to apply it when appropriate" (Gov't Br. 34 (quoting Pet. App. 58a (Jacobs, J., dissenting from denial of rehearing en banc))), Congress trusted in the federal courts' faithful application of RFRA (see *Hobby Lobby*, 573 U.S. at 718). And "[t]he erroneous grant of summary judgment in qualified-immunity cases imposes no less harm on society as a whole than does the erroneous denial of summary judgment in such cases." *Salazar-Limon* v. *City of Houston*, 137 S. Ct. 1277, 1283 (2017) (Sotomayor, J., dissenting from denial of certiorari) (internal citations omitted). See generally James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 Colum. L. Rev. 1601, 1606 (2011) ("A finding of unsettled law may yield a qualified immunity decision that can deprive individuals of their only effective mode of redress and their only opportunity to test the constitutionality of government action.").

b. Without needing to decide whether a damages remedy actually exists under RFRA, lower courts

have not hesitated to recognize qualified immunity and dismiss claims in particular cases. See, *e.g.*, *Davila* v. *Gladden*, 777 F.3d 1198, 1210–11 (11th Cir.) ("Even if RFRA did authorize individual-capacity suits for money damages, these Defendants would be entitled to qualified immunity."), cert. denied, 136 S. Ct. 78 (2015); *Rasul* v. *Myers*, 563 F.3d 527, 532 n.6 (D.C. Cir.) (per curiam) (concluding that individual defendants were entitled to qualified immunity, without addressing availability of damages under RFRA), cert. denied, 558 U.S. 1091 (2009); *Hardy* v. *Bureau of Prisons*, No. 18-794, 2019 WL 3085963, at *4–5 (D. Minn. June 10, 2019) (declining to decide whether RFRA authorizes damages because individual-capacity defendants were entitled to qualified immunity); *Cooper* v. *True*, No. 16-cv-2900, 2017 WL 6375609, at *6 (D. Minn. Nov. 2, 2017) (same).

There is simply no reason to think that the district courts will systematically fail to recognize qualified immunity in RFRA cases any more than in any other class of suits. The government's complaint is thus really about individual-capacity liability generally—and that objection is one that this Court dispensed with long ago. See, *e.g.*, *Butz* v. *Economou*, 438 U.S. 478, 506 (1978) ("it is not unfair to hold liable the official who knows or should know he is acting outside the law").

c. Concerns about unfair surprise liability are further ameliorated by a related consideration: Damages remedies are generally available to plaintiffs, not to defendants. See, *e.g.*, *Bowen* v. *Massachusetts*, 487 U.S. 879, 895 (1988) ("The term 'money damages,' we think, normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to substitute for a suffered loss * * *." (quoting *Maryland*

Dep't of Human Res. v. *Dep't of Health & Human Servs.*, 763 F.2d 1441, 1446 (D.C. Cir. 1984) (emphasis and internal citation omitted))); cf. *Ray Haluch Gravel Co.* v. *Cent. Pension Fund of Int'l Union of Operating Eng'rs*, 571 U.S. 177, 185 (2014) (noting that attorney-fee provisions cannot always be construed as a measure of damages because they "often provide attorney's fees to prevailing defendants"). Accordingly, in suits in which a defendant first identifies a religious basis for exemption from a legal requirement only late in the game as an affirmative defense, there is no risk of damages remedies or untoward effects therefrom.

When, on the other hand, a religious accommodation is requested at the outset and affirmative litigation is a possibility, officials will already be on notice that the basis for the request is religious. And being on constructive notice also of RFRA's requirements on them (see, *e.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 815 (1982); *Slakan* v. *Porter*, 737 F.2d 368, 376 (4th Cir. 1984) ("a public official cannot escape" liability through "lack of actual knowledge about the extent of his constitutional or statutory duties")), they will have ample opportunity to consider and apply those requirements without incurring liability.[6]

These notice considerations matter, too, because objections that do not appear to be religious and that the objector does not even ask to have accommodated for religious reasons are particularly likely to be deemed insubstantial as a matter of law, thus failing

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[6] *Amici* are aware of the contested factual issues here regarding notice to petitioners of the religious basis for respondents' refusal to act as informants. Compare Pet. Br. 5, with Resp. Br. 7 n.5. While questions about notice may bear on qualified immunity or on the merits on remand, they are not currently before this Court.

RFRA's prerequisites and foreclosing all risk of liability, whether for damages or otherwise—reinforcing the protections against surprise liability afforded by qualified immunity.[7]

d. Finally and relatedly, even when a plaintiff's allegations satisfy RFRA's prerequisites and qualified immunity does not attach, the defendants may still prevail on the merits. Cf. *Gonzales*, 546 U.S. at 436 ("We do not doubt that there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under

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[7] In *Sterling*, *supra*, for example, the defendant marine's commander had no reason to be aware of any religious concerns, and military regulations required the defendant to request a religious accommodation and await a determination rather than simply disobeying orders. See 75 M.J. at 419-20. Yet she vaguely identified a religious basis for disobeying orders only well into her trial by court-martial. *Id.* at 419; *United States* v. *Sterling*, NMCCA 201400150, 2015 WL 832587, at *4-5 (N-M. Ct. Crim. App. Feb. 26, 2015). The U.S. Court of Appeals for the Armed Forces held that the requirement to request an accommodation in order to receive one "interposes a de minimis ministerial act, reducing any substantial burden otherwise threatened by an order or regulation of general applicability." *Sterling*, 75 M.J. at 420. The RFRA defense failed, therefore, because the defendant "did not bother to either inform the government that the action was religious or seek an available accommodation." *Id.* at 415.

On the same logic, if an individual asks for some legal exemption without identifying the religious reason (or does not request one at all) and then sues over not getting the exemption, the failure of notice would likely foreclose a showing of the requisite culpability to be liable for damages. Cf., *e.g.*, *Gallagher* v. *Shelton*, 587 F.3d 1063, 1070 (10th Cir. 2009) (culpability exceeding negligence required for § 1983 action for violation of Free Exercise Clause); *Lovelace* v. *Lee*, 472 F.3d 174, 194-95 (4th Cir. 2006) (holding that culpability exceeding negligence was required for RLUIPA action for damages), abrogated by *Sossamon* v. *Texas*, 563 U.S. 277 (2011).

RFRA."). Many governmental interests, ranging from the orderly management of prisons to the effective administration of antidiscrimination laws, will be sufficiently compelling to survive even strict-scrutiny review in particular cases. Cf., *e.g.*, *Masterpiece Cakeshop, Ltd.* v. *Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018) ("it is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services"); *Hoevenaar* v. *Lazaroff*, 422 F.3d 366, 371 (6th Cir. 2005) (RFRA and RLUIPA require that courts give "requisite deference to the expertise and experience of prison officials"), cert. denied, 549 U.S. 875 (2006). The more consistently and reliably RFRA is applied in accordance with the statutory prerequisites and constitutional limitations described above, the less federal officials have to fear unreasonable or unexpected damages remedies—making it all the more important for this Court to underscore those requirements.

CONCLUSION

Congress intended that RFRA's authorization of "appropriate relief" include money damages against individual-capacity defendants. While misuses of RFRA resulting from failures to enforce statutory prerequisites and Establishment Clause mandates might have the dangerous consequences that petitioners fear, that is true regardless of whether damages are available. The solace that petitioners seek lies in properly applying RFRA, not in ignoring Congress's intent to vindicate one-off violations of religious-freedom rights.

The decision of the court of appeals should be affirmed and the case remanded for adjudication of the qualified-immunity question and the substantive RFRA claims.

Respectfully submitted.

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FEBRUARY 2020

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