No. 19-71

In the

Supreme Court of the United States

FNU TANZIN, ET AL.,

Petitioners,

v.

MUHAMMED TANVIR, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* RELIGIOUS ORGANIZATIONS, PUBLIC SPEAKERS AND SCHOLARS IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTERESTS OF THE AMICI CURIAE[1]

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."

-*Marbury v. Madison*, 5 U.S. 137, 163 (1803)

"Religion or the duty which we owe to our Creator and the manner of discharging it can be directed only by reason and conviction, not by force or violence."

-Article XVI of the Virginia Declaration of Rights

The **Billy Graham Evangelistic Association** ("BGEA") was founded by Billy Graham in 1950 and, continuing the lifelong work of Billy Graham, exists to support and extend the evangelistic calling and ministry of Franklin Graham by proclaiming the Gospel of the Lord Jesus Christ to all by every effective means available and by equipping the church and others to do the same. BGEA ministers to people around the world through a variety of activities including Decision America Tour prayer rallies, evangelistic festivals and celebrations, television and internet evangelism, the Billy Graham Rapid Response Team, the Billy Graham Training Center at the Cove, and the Billy Graham Library. Through its various ministries and in partnership with others, BGEA

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[1] Attorneys from First Liberty Institute authored this brief for amici curiae. No attorney for any party authored any part of this brief, and no one apart from amici curiae made any financial contribution toward the preparation or submission of this brief. All parties have consented to the filing of this brief and were timely notified.

intends to represent Jesus Christ in the public square, to cultivate prayer, and to proclaim the Gospel. BGEA's ministry depends upon the ability to freely exercise its faith in public and the laws that protect its right to do so being faithfully enforced and respected.

Samaritan's Purse is a nondenominational evangelical Christian organization providing spiritual and physical aid to hurting people around the world. Since 1970, Samaritan's Purse has helped meet the needs of people who are victims of war, poverty, natural disasters, disease, and famine with the purpose of sharing God's love through His Son, Jesus Christ. Samaritan's Purse serves in over 100 countries to combat human trafficking, fight Ebola, provide access to clean water, provide crisis relief through food and shelter programs, and touch the lives of millions of children through Operation Christmas Child. Samaritan's Purse depends upon the country's guarantee of religious freedom in order to freely engage in evangelism, discipleship and sharing the love of God through humanitarian relief efforts in times of natural disaster, famine, disease or war.

The **Chuck Colson Center for Christian Worldview** (the "Colson Center"), founded by Chuck Colson, seeks to build a movement of Christians committed to living and defending the Christian worldview. The Colson Center applies sound Christian worldview thinking to the key issues of the day, including religious freedom and the role of government, through its website, newsletters, and commentaries such as "BreakPoint" with John Stonestreet. The Colson Center also equips leaders to live out their faith

in their various callings and occupations through frequent short courses and the one-year Colson Fellows program.

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Carl F.H. Henry; and *Reenchanting Humanity: A Theology of Mankind*. He also speaks regularly on a range of topics including cultural issues, theology, and religious liberty.

Throughout American legal history, religious liberty has been understood to afford "special solicitude to the rights of religious organizations." *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189, 182-88 (2012). James Madison (author of the First Amendment) explained in his 1785 Memorial and Remonstrance Against Religious Assessments, that the right of religious liberty is derived from "the duty of every man to render to the Creator such homage…as he believes to be acceptable to him….This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society." Michael W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," 103 *Harvard Law Review* 1409 (1989). As Justices Alito and Kagan put it, "the autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws. To safeguard this crucial autonomy…the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs." *Hosanna-Tabor*, 565 U.S. at 199 (Alito and Kagan, JJ., concurring). If damages are unavailable against federal officials sued in their individual capacity, the private sphere within which amici are free to govern themselves will have been violated by an oppressive civil law, leaving amici with ineffective/incomplete redress for their injuries.

As one 2016 study concluded, religious communities in America contribute more than an estimated $1 trillion annually to American society.[2] Another overview of the impact of faith-based organizations on society in America stated that faith-based organizations "are among the largest and most critically needed U.S.-based deliverers of human services in the world measured by the scope of services provided and the number of persons served" and noted that the Salvation Army, for example, "reports that it offers services in virtually every zip code in the nation, and serves more than 30 million Americans every year."[3] The amici are faith-based organizations and religious individuals that contribute significantly to society by serving Americans nationwide and around the world and who are likely to suffer injury, including emotional distress, reputational harm and/or economic loss if a federal official violates the Religious Freedom Restoration Act (RFRA), thus inhibiting their most hallowed liberty interest, their religious liberty.

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[2] Brian J. Grim and Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, 12 Interdisciplinary J. of Research on Religion 2 (2016), *available at http://www.religjournal.com/pdf/ijrr12003.pdf*.

[3] Brief for the United States Conference of Catholic Bishops et al. as *Amicus Curiae*, 13-14, *Zubik v. Burwell,* 136 S. Ct. 1557 (2016).

SUMMARY OF ARGUMENT

"Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

-*Olmstead v. United States*, 277 U.S. 438, 485 (1928)
(Holmes, J., dissenting)

What might be a tough question in most cases is straightforward in this one. The Second Circuit's analysis and conclusion is correct, the Religious Freedom Restoration Act ("RFRA") authorizes an injured party to bring suit against a federal official in his individual capacity and recover monetary damages should the claims be found meritorious. To hold otherwise permits a federal official to exist in a sphere separate and above the citizenry, subject to disparate rules of conduct, and creates public policy in contravention of the clear legislative purpose, the common good, and the furtherance of our democratic principles.

The Religious Freedom Restoration Act provides comprehensive protection against religious discrimination. RFRA was passed to roll back judicial legal analysis for claims of government violation of the

religious guarantees enshrined in the First Amendment to what it was prior to this Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990). With RFRA's passage, Congress expanded the scope of protection for religious expression beyond simply reinstituting the balancing test set forth in *Sherbert v. Verner*[4] and *Wisconsin v. Yoder*[5] that evaluated whether the "challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest,"[6] to now include the requirement that government action must also be "the least restrictive means of furthering that compelling governmental interest."[7] Congress created an express right of action in RFRA, against "government," defined to include "an official (or other person acting under color of law),"[8] With this Congress also provided "appropriate relief" for a claimant,[9] instituting a proportional remedy in congruence with the new breadth of the RFRA cause of action.[10]

The appropriate relief Congress provided in RFRA comports with the longstanding "general rule" that

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[4] *Sherbert v. Verner*, 374 U.S. 398 (1963).

[5] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

[6] *Burwell v. Hobby Lobby*, 573 U.S. 682, 693 (2014).

[7] 42 U.S.C. § 2000bb-1(b)(2)

[8] 42 U.S.C. § 2000bb-2(1)

[9] 42 U.S.C. § 2000bb-1(c)

[10] *See City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (discussing the latitude afforded Congress to determine measures that remedy or prevent unconstitutional actions).

federal courts may award any appropriate relief in a "cognizable cause of action brought pursuant to a federal statute," unless Congress affirmatively states otherwise. *Franklin v. Gwinnett County Pub.Sch.*, 503 U.S. 60, 66, 70-71 (1992). It would be sophistry to gainsay the conclusion that, in the absence of explicit congressional direction to the contrary, RFRA permits suit against a federal official in his individual capacity to impose personal liability and the recovery of damages. An argument to the contrary necessarily fails, requiring a strained reading of RFRA and imputing unsupported statutory interpretation.

ARGUMENT

I. The Religious Freedom Restoration Act (RFRA) Provides Comprehensive Protection Against Religious Discrimination.

A. *Smith* Upended Necessary Religious Freedom Protection.

The centrality of the human and civil right to the free exercise of religion is clearly articulated in the Bill of Rights to the United States Constitution and its protection has remained a priority in this nation.[11] The historic protection of free exercise was compromised, however, by the *Smith* decision which lowered the level of scrutiny from strict to minimum scrutiny when analyzing burdens placed on religion by neutral laws of general applicability.[12] Under *Smith*, such neutral laws that cause religion to be substantially burdened

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[11] U.S. Const. amend. I

[12] *Smith, supra.*

without accommodation would be upheld in nearly all cases. Justice O'Connor described this decision as "incompatible with our Nation's fundamental commitment to individual religious liberty."[13] Justice O'Connor aptly stated that, although *Smith* downplayed its effect on free exercise because the lower scrutiny standard would only apply regarding neutral, generally applicable laws, "[o]ur free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which the State directly targets a religious practice."[14] Congress, spurred on by the *Smith* decision, quickly mobilized in a bipartisan effort to legislatively reinstitute stalwart protection for the free exercise of religion.

B. Consistent with Its Stated Purpose, RFRA Guarantees Broad Protection for Religious Liberty.

In the wake of *Smith*, both the House and the Senate passed RFRA with overwhelming support.[15] The language and specificity of the act make clear its purpose of returning to broad protection for religious freedom and reinstating the higher standard of scrutiny previously afforded. The clearly asserted purpose of the Act was twofold: (1) to restore

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[13] *Id.* at 891 (O'Connor, J., concurring).

[14] *Id.* at 894 (O'Connor, J., concurring).

[15] Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 210 (1994).

comprehensive protection to free exercise, as there had been prior to *Smith*, reinstating *Sherbert's* compelling interest test and (2) to provide a cause of action for government harm to religious freedom. The decision to legislatively reimpose strict scrutiny illustrates Congress's legislative purpose of recognizing the critical importance of free exercise in a just society and the desire to uphold this fundamental civil right by providing a clear avenue for relief. The Religious Freedom Restoration Act plainly states this purpose:

> (b) Purposes.--The purposes of this Act are—
> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.[16]

The swiftness and near unanimity of the passage of RFRA as well as the specified exemptions illustrate the clear, singularly-focused goal Congress had in mind: to return to comprehensive and effective legal protection for religious freedom.[17] The Act provides an unambiguous basis to challenge religious discrimination by the government and provide "appropriate relief" to victims of the same.[18] In the

[16] Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(b)(1)-(2).

[17] *See id.* §§ 2000bb-1-4.

[18] *See id.* § 2000bb-1(c).

same vein, the *City of Boerne v. Flores* court found that RFRA expands protections for religious exercise beyond the pre-*Smith* opportunities available.[19] More recently, in *Burwell v. Hobby Lobby*, the Supreme Court noted that "[o]n this understanding of our pre-*Smith* cases, RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions." *Burwell*, 573 U.S. at 695 n.3 ("…[it] would be absurd if RFRA, a law enacted to provide very broad protection for religious liberty, merely restored this Court's pre-*Smith* decisions in ossified form…" *Id*. at 685) When Congress enacted RFRA, it went "far beyond" what this court determined to be "constitutionally required." *Id*. at 706.

C. RFRA's Language Provides Clear and Certain Relief to Injured Parties.

RFRA's drafters were deeply concerned with the protection of religious freedom and had a profound understanding of its place as a cornerstone civil right. Accordingly, three things are inescapable. First, RFRA's language clearly conveys the broad and comprehensive relief Congress intended. This relief includes damages in suits against officials in their private capacity:

> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and *obtain appropriate relief* against a government…

[19] *See City of Boerne*, 521 U.S. at 509.

> [T]he term "government" includes a branch, department, agency, instrumentality, and official (or *other person* acting *under color of law*) of the United States, a State, or a subdivision of a State.[20]

Second, interpreting RFRA as a statutory scheme with a loophole enabling federal officials to evade justice and permitting violations of religious freedom to go without appropriate relief is inconsistent with Congress's stated purpose. In cases where damages are the only available remedy, the absence of damages constitutes a significant deprivation, barring the claimant from the recovery of any relief. Third, damages must be available to provide "appropriate relief" in suits not subject to sovereign immunity.

1. RFRA's language conveys the comprehensive relief Congress intends.

Precluding the availability of damages in an individual capacity suit opens the door for officials and others to escape accountability by engaging in religious discrimination and leaving victims of this discrimination without remedy.[21] RFRA's language clearly affords broad protection for religious liberty

[20] Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1(c), -2(1) (emphasis added).

[21] *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971) ("An agent acting, albeit unconstitutionally, in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.").

through "appropriate relief," and an interpretation that allows for damages in these circumstances best effectuates the purpose as articulated in the statute. A House report for a precursor to the Religious Land Use and Institutionalized Persons Act[22] states unambiguously that RFRA "creat[ed] a private cause of action for damages." H.R. REP. NO. 106-219, at 29 (1999). Congress used an ambiguous term such as "appropriate relief" to provide RFRA plaintiffs with "a broad protection of religious exercise, to the maximum extent." 42 U.S.C. Sec. 2000cc-3(g). It is incongruous that "Congress would restrict the kind of remedies available to plaintiffs who [seek relief] for free exercise violations in the same statute written to elevate the kind of scrutiny to which such claims should be entitled." *Jama v. United States INS*, 343 F. Supp.2d 338, 374-75 (D.N.J. 2004) (emphasis omitted). Congress clearly knows how to specify that a statutory provision applies to government officials only in their "official capacity," and it declined to do so in RFRA. *Id.* at 374-75 (*See, e.g.* 28 U.S.C. § 1391(e), which provides, in part, "[a] civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity…may…be brought in any judicial district.").

2. RFRA's language contemplates individual capacity suits, leaving no loophole contrary to RFRA's purpose available.

The similarity in RFRA's language to that of § 1983 in referring to persons acting "under color of" law,

[22] 42 U.S.C. § 2000cc *et seq.*

supports the finding that comparable remedies for religious freedom violations, including damages, are available.[23] Furthermore, in guidance published in 1994—only one year after RFRA was passed—the United States Assistant Attorney General explained that damages may be understood as a proper form of relief under RFRA, except in cases where sovereign immunity applies to preclude money damages, in which case an "unequivocal expression" that damages are allowed would be needed for them to be available.[24] The guidance states: "to the extent § 1983 allows recovery of money damages against state officers in their personal capacities… a RFRA claimant also may recover damages against an officer in his or her personal capacity by asserting RFRA in a § 1983 action."[25] It further clarifies that "sovereign immunity poses no bar to the recovery of damages against officials sued in their personal capacities or private parties acting under color of law."[26]

Section 1983 articulates a remedial system giving rise to individual capacity suits.[27] "Congress intended for courts to borrow concepts from § 1983 jurisprudence when construing RFRA." *Mack v. Warden Loretto FCI*,

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[23] 42 U.S.C. § 1983.

[24] Memorandum from Walter Dellinger, Assistant Att'y Gen., Office of Legal Counsel, to John R. Schmidt, Associate Att'y Gen., Re: Availability of Money Damages Under the Religious Freedom Restoration Act (Oct. 7, 1994) (quoting *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33 (1992)).

[25] *Id.* (citations omitted).

[26] *Id.*

[27] 42 U.S.C. §1983.

839 F.3d 286, 302 (3d Cir. 2016). It is undisputed that federal officials are not immune to money damages under RFRA, because they can be sued for money damages under § 1983 for conspiring with a state official to engage in the same conduct. *See Kletschka v. Driver*, 411 F.2d 436, 442, 448-49 (2d Cir. 1969) (holding that Sec.1983 permits an action against federal defendants in their individual capacity where "state and federal defendants conspire[] under color of state law to deprive plaintiff[s] of federal guaranteed rights").

The *Patel* court engaged in a thorough analysis of this issue and determined damages were available against an official in his individual capacity, using the reasoning that the language of RFRA made clear that non-official capacity suits were contemplated and damages would be an appropriate form of relief in such cases.[28]

3. Damages must be available to provide "appropriate relief" in suits not subject to sovereign immunity.

"Appropriate relief" conveys an inherent meaning that the nature and scope of the remedy may vary depending on the conduct and the defendant.[29] Pursuant to the Eleventh Amendment, an individual

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[28] *Patel v. Bureau of Prisons*, 125 F. Supp. 3d 44 (D.D.C. 2015); *Tanvir v. Tanzin*, 894 F.3d 449, 465, 468 (2d Cir. 2018); *See also Webman v. Federal Bur. of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006) ("In some contexts, 'appropriate relief' might include damages." (discussing the damages provision in RFRA)).

[29] *See* Dellinger, *Memorandum, supra* note 24.

cannot recover damages from federal and state governments.[30] The legislative purpose for sovereign immunity is well-defined.[31] Sovereign immunity, however, poses no bar to the recovery of damages against officials sued in their personal capacities.[32] In choosing to define the term "government" to include an "official (or other person acting under color of law)," Congress opened the door for personal liability suits in cases which do not implicate sovereign immunity. When sovereign immunity concerns are removed from the equation, the interpretive presumption is reversed: as against entities unprotected by sovereign immunity, Congress must provide "clear direction to the contrary" if it wishes to make money damages unavailable in a cause of action under a federal statute. *See Franklin*, 503 U.S. at 70-71 ("absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute").

Moreover, the holding in *Franklin* itself supports allowing damages under RFRA in this context.[33] *Franklin* follows the long historical tradition in American jurisprudence that, in the absence of specific language to the contrary, all traditional judicial remedies, including damages, are presumed available when Congress provides a statutory right of action.

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[30] U.S. Const. amend. XI.

[31] *Sossamon v. Texas*, 563 U.S. 277, 284 (2011) ("Sovereign immunity principles enforce an important constitutional limitation on the power of federal courts.").

[32] *Hafer v. Melo*, 502 U.S. 21, 24-30 (1991).

[33] *See generally, Franklin*, *supra*.

Franklin, 503 U.S. at 68-69 (damages available under Title IX's implied cause of action); *Carey v. Piphus*, 435 U.S. 247, 255 (1978) (damages available under § 1983 though Congress did not "address directly the question of damages"); *Bell v. Hood*, 327 U.S. 678, 684 (1946). RFRA, passed a year after the *Franklin* decision issued, was written by legislators well-versed in this principle of American law. Thus, the *Franklin* presumption of an existing remedial system for religious freedom violations is enshrined in RFRA and allows damages in suits against officials in their individual capacity and "other persons acting under color of law."

Given that RFRA's language is most plausibly read to allow both individual capacity suits against federal officials and suits against other persons acting under color of law, it follows naturally that damages must be an available remedy. Otherwise, such language is unnecessary, as an injunction would not provide appropriate relief in a case against a person acting "under color of law." Damages are the only remedy available against both officials in their individual capacity and against persons acting "under color of law." To hold a person "acting under color of law" liable for damages and *not* hold an official in his individual capacity liable for the same offense contravenes RFRA's very purpose to remedy, in the most robust fashion, harm suffered in violation of the statute. Damages must be available in both instances.[34]

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[34] *See Patel*, 125 F. Supp. 3d at 50–51 (Given the availability of qualified immunity, it would be anomalous if actual government officials were wholly immune from personal liability for even clear RFRA violations while private citizens "acting under color of law"

II. Historically, Damages Have Been an Integral Element of Available Relief for Federal Statutory Offenses.

It is well-settled that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell*, 327 U.S. at 684 ("Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.") (citing *Marbury v. Madison*, 5 U.S. 137, 162, 163 (1803)). As *Franklin* pointed out, "the *Bell* court's reliance on this rule was hardly revolutionary." *Franklin v. Gwinnett County Pub.Sch.*, 503 U.S. 60, 66 (1992). This principle "originated in the English common law, and Blackstone described it as a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit of action at law, whenever that right is invaded." *Id.* at 66 (quoting 3 W. Blackstone, Commentaries 23 (1783)). The mere fact that RFRA does not provide a written litany of specific types of available relief is no more significant than the fact that it is silent with respect to authorizing execution to issue on a judgment.[35]

"Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests

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were subject to suit—and it would certainly do nothing to further RFRA's purpose of "provid[ing] a claim or defense to persons whose religious exercise is substantially burdened by government." (quoting 42 U.S.C. § 2000bb(b)).

[35] *See Franklin*, 503 U.S. at 60, 68.

in liberty." *Bivens*, 403 U.S. at 395. "[T]he presumed availability of federal equitable relief against threatened invasions of constitutional interests appears entirely to negate the contention that the status of an interest as constitutionally protected divests federal courts of the power to grant damages absent express congressional authorization. …[I]f a general grant of jurisdiction to the federal courts by Congress is thought adequate to empower a federal court to grant equitable relief for all areas of subject-matter jurisdiction enumerated therein, *see* 28 U.S.C. Sec.1331(a), then it seems…that the same statute is sufficient to empower a federal court to grant a traditional remedy at law." *Id.* at 405 (Harlan, J., concurring). The availability of all appropriate remedies is presumed, unless Congress expressly states otherwise.[36]

III. In the Absence of Actual Damages, the Government May Simply Moot an Otherwise Actionable Civil Rights Violation.

When a RFRA violation occurs, injunctive relief is often inadequate to provide the injured party with adequate relief. "Injunctive or declaratory relief is useless to a person who has already been injured." *Butz v. Economou*, 438 U.S. 478, 504 (1978). A court doesn't actually impose injunctive relief against individuals, even in their official capacities. Injunctive relief against an official sued in his official capacity is effectively obtaining injunctive relief against a government, and if a government ceases the complained-of behavior, the

[36] *Id*. at 66.

issue becomes moot, leaving no avenue of recovery to the injured claimant. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-691 (1949) (overruled on other grounds). "[O]fficial capacity suits 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" *Hafer*, 502 U.S. at 25, *citing Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (*quoting Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n.55 (1978)). The real party in interest is the governmental entity employing the named official. When an official sued in his official capacity in federal court dies or leaves office, his successor automatically assumes his role in the litigation.[37]

"The cardinal principle of damages in Anglo-American law is that of compensation for the injury caused to plaintiff by defendant's breach of duty." *Carey,* 435 U.S. at 254-55 citing 2 F. Harper & F. James, Law of Torts Sec. 25.1, p.1299 (1956). The *Bivens* court established that "a citizen suffering a compensable injury to a constitutionally protected interest could invoke the federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official." *Butz*, 438 U.S. at 504.

"In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name." *United States v. Lee*, 106 U.S. 196, 219 (1882). "Our system of jurisprudence rests on the assumption that all

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[37] *See Hafer*, 502 U.S. at 25; *see also* Fed. R. Civ. Proc. 25(d)(1).

individuals, whatever their position in government, are subject to federal law: No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *Butz*, 438 U.S. at 506 (quoting *id.* at 220). The general rule is that "a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers…A federal official who acted outside his federal statutory authority would be held strictly liable for his trespassory acts." *Butz*, 438 U.S. at 489-90.

Regardless how creative an alternative solution may appear, the court must not simply abandon a traditional canon within the ambit of judicial decision-making, namely, the authority of the judiciary to award a remedy. Importantly, "[f]ederal courts cannot reach out to award remedies when the Constitution or laws of the United States do not support a cause of action," but when a cause of action exists, the court necessarily presumes "the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Franklin*, 503 U.S. at 75, 66. "If…all officials exercising discretion were exempt from personal liability, a suit under the Constitution could provide no redress to the injured citizen, nor would it in any degree deter federal officials from committing constitutional wrongs…The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees." *Butz*, 438 U.S. at 505. This court should not be swayed to "abdicate [its] historic judicial authority to award appropriate relief in cases brought

in [its jurisdiction]." *Franklin*, 503 U.S. at 74 (emphasis omitted).

IV. Awarding Damages Against Individuals Sued in Their Individual Capacity Accords With the Interests of Justice and Public Policy.

"The very fact that we have constitutional guarantees of civil liberties and the specificity of their command where freedom of speech and religion are concerned require some accommodation of the powers which government normally exercises, when no question of civil liberty is involved, *to the constitutional demand that these liberties be protected against the action of government itself*."

-*Minersville School District v. Gobitis*, 310 U.S. 586, 602-03(1940) (Stone, J., dissenting) (emphasis added)

Those freedoms which can be considered basic are those upon which all other freedoms in a democratic society rest, and among the most basic, religion is a preferred freedom. *United States v. Carolene Products Company*, 304 U.S. 144, n.4 (1938). The one thing that can never be taken from a human being is his interior dialogue with God, his freedom to pursue his conscience.[38] The Founding Fathers were firmly convinced that an individual's freedom of conscience and the well-formed morality of the citizenry are tantamount to the successful governance and flourishing of the Republic. Thomas Jefferson said this:

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[38] Viktor E. Frankl, *Man's Search for Meaning*, 66 (1946).

"[O]ur rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit…[because] we are answerable for them to our God."[39] In his farewell address to the nation, our first President, George Washington, told the gathered crowd, "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports."[40] And James Madison reasoned, "all men are to be considered as entering into Society on equal conditions…. Above all they are to be considered as retaining an equal title to the free exercise of Religion according to the dictates of conscience."[41] Justice Frankfurter opined that in matters of religious freedom, "history, through the Constitution, speaks so decisively as to forbid legislative experimentation" with them. *See American Federation of Labor v. American Sash and Door Co.*, 335 U.S. 538, 550 (1949). And Justice Robert H. Jackson articulated this principle this way, in the seminal West Virginia Flag Salute Case:

> "If there is any fixed star in our constitutional constellation, it is that *no official, high or petty, can prescribe what shall be orthodox in politics,*

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[39] Vincent Phillip Muñoz, *God and the Founders*, 89 (2009) (citing Jefferson, Notes of the State of Virginia, Query XVII, "Religion," in Thomas Jefferson, *The Portable Thomas Jefferson* 210 Merrill D. Peterson (1977)).

[40] *Id.* at 54 (quoting George Washington, Farewell Address, September 19, 1796).

[41] *Id.* at 27 (quoting James Madison, Memorial and Remonstrance Against Religious Assessments, Article IV).

> *nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein*…The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right of life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote, [for] they depend on the outcome of no elections."[42]

Every federal official takes an oath to uphold the U.S. Constitution and thus, to defend and protect the first freedom enshrined therein, the freedom of religion. Public servants are just that – servants of the people. Article VI of the Constitution requires an oath of allegiance be sworn by every federal employee. For federal civil service employees, the oath is set forth by law in 5 U.S. Code § 3331, which states:

> "An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: 'I, ___, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental

[42] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638, 642 (1943) (emphasis added).

> reservation or purpose of evasion; and *that I will well and faithfully discharge the duties of the office on which I am about to enter.* So help me God.'" (emphasis added)

In performing their duties, federal officials are charged with implementing a wide range of neutral policies, statutes and regulations. These federal officials must be diligent in their application so as not to offend individual constitutional rights, in particular, the right to religious liberty. The question of damages need not ever be addressed unless a court decides that a claim against an official has merit. A proper interpretation of RFRA's remedies provision will not cause an onslaught of cases seeking damages, rather, will likely result in more prudential behavior by officials to act in accordance with their oath of office.

CONCLUSION

The Religious Freedom Restoration Act enshrines longstanding principles of religious liberty and restores comprehensive protection for religious individuals and faith-based organizations from the overreach of the federal government. RFRA provides a general right to sue for an invasion of religious freedom, and federal courts may use any available remedy to rectify the injury suffered, including personal liability through an award of damages against federal officials sued in their individual capacity.

Respectfully submitted,

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