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 GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The General Conference of Seventh-day Adventists is the national administrative body for the Seventh-day Adventist Church, a Protestant Christian denomination with more than 20 million members. In the United States, the Church has more than 1.2 million members. The Church operates the largest Protestant school system in the world, with nearly 7,600 schools, more than 80,000 teachers, and 1,545,000 students. The Church operates 65 healthcare institutions in the United States and also operates publishing houses, an international development NGO, and numerous community service centers.

Since its founding, the Seventh-day Adventist Church has held a long commitment to religious liberty. From its earliest days, the Adventist Church experienced conflicts between its values and the requirements of governments. Through its own programs and the work of the International Religious Liberty Association founded in 1893, the Adventist Church has worked to guarantee religious liberty for all people in the United States and around the world.

Amicus curiae has a powerful interest in ensuring that the Religious Freedom Restoration Act (RFRA)—a law whose passage the Church strongly and successfully advocated—is not wrongly limited in its remedial

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and that no entity or person aside from counsel for *amicus curiae* made any monetary contribution toward the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that petitioner has consented to the filing of this brief and respondent has granted blanket consent to the filing of *amicus* briefs.

scope. *Amicus* is particularly concerned with the consequences of a holding that RFRA allows for no individual-capacity damages. Such a holding would not only invite procedural gamesmanship and make it harder to make free exercise plaintiffs whole, it would remove an important deterrent against harassment of those with minority religious views, including Church members. *Amicus* submits this brief in favor of a reading of RFRA that is both true to its clear text and its powerful vision.

SUMMARY OF ARGUMENT

The plain text of the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb *et seq.*), makes clear that free exercise plaintiffs may recover money damages against government officials in their individual capacities. This understanding confirms Congress's intent to provide robust protections for religious liberty and to broadly remedy violations of free exercise rights.

RFRA § 2000bb-2 imposes liability for free exercise violations to "person[s] acting under color of law." 42 U.S.C. § 2000bb-2(1). This well-established term of art denotes government officials acting in their individual capacities. Indeed, this Court has long read nearly identical language in Section 1983 to have that very effect. RFRA § 2000bb-1, in turn, allows free exercise plaintiffs to recover "appropriate relief" against those who have harmed them. *Id.* § 2000bb-1(c). The ordinary meaning of "appropriate relief" includes money damages, and it would be passing strange to abandon that understanding in the context of a remedial, civil rights statute. Reading these provisions together, RFRA's authorization of individual-capacity damages is unavoidable.

This conclusion matches this Court's longstanding presumption that federal courts may award "any appropriate relief" in a cognizable cause of action. *Franklin* v. *Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 69 (1992). The Government's protests notwithstanding, this case has nothing to do with *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Whereas *Bivens* crafted an extra-statutory constitutional private right of action, this case concerns what remedies are available through a statutory action.

Finally, RFRA's plain text squares with its broader statutory purpose. The availability of money relief better secures the right to free exercise for three reasons. First, monetary damages discourage procedural gamesmanship that would otherwise keep meritorious claims out of court. Second, monetary relief provides a complete remedy against unlawful burdens on individuals' religious exercise. And finally, damages better deter the harassment of religious minorities.

ARGUMENT

I. RFRA AUTHORIZES MONEY DAMAGES AGAINST INDIVIDUAL GOVERNMENT OFFICIALS.

As this Court has already made clear, RFRA "provide[s] even broader protection for religious liberty than was available" under the Court's pre-*Smith* jurisprudence. See *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 n.3 (2014). This "broad" protection naturally includes a robust set of remedies. As relevant here, RFRA provides "appropriate relief against a government," 42 U.S.C. § 2000bb-1(c), which includes all "official[s]" and "other person[s] acting under color of law," *id.* § 2000bb-2(1). Read together,

these provisions authorize monetary damages against rogue government officials.

A. The phrase "person acting under color of law" authorizes individual-capacity actions.

The phrase "person[s] acting under color of law" is a term of art that unambiguously authorizes individual-capacity suits against government officials. Congress first used this phrasing in the Civil Rights Act of 1871, often referred to as Section 1983, extending liability against "person[s]" acting "under color of any statute, ordinance, regulation, custom, or usage." 42 U.S.C. § 1983. Subsequently, this Court has consistently interpreted that language to authorize personal liability. *Hafer* v. *Melo*, 502 U.S. 21, 23-25, 30-31 (1991); see *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 69 n.24 (1997). Indeed, the Court has used the phrase "under color of [] law" to distinguish personal-capacity from official-capacity litigation. See *Kentucky* v. *Graham*, 473 U.S. 159, 165-66 (1985). It is well-established that, when "'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute' is presumed to incorporate that interpretation." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1386 (2015) (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998)). RFRA's reference to "person[s] acting under color of law" thus authorizes individual-capacity actions.

The Government's discussion of *Stafford* v. *Briggs*, 444 U.S. 527 (1980), does not disturb this analysis. Pet. Br. at 43. That case concerned a venue statute governing "civil action[s] in which a defendant is an officer or employee . . . of the United States . . . acting in his official capacity or under color of legal authority." 28 U.S.C. § 1391(e). *Stafford* interpreted the

above language to exclude individual-capacity suits, and the Government encourages this Court to extend that construction to RFRA. Pet. Br. at 43.

But the Government neglects the precise text of the two statutes. Whereas the statute at issue in *Stafford* referred to "officer[s] or employee[s]," 28 U.S.C. § 1391(e), RFRA applies instead to "person[s]," 42 U.S.C. § 2000bb-2(1). This distinction is crucial. As this Court discussed in *Hafer*, "[s]tate officers sued for damages in their official capacity are not 'persons' for purposes of the suit"; they instead "assume the identity of the government that employs them." 502 U.S. at 27. By contrast, government officials sued in their individual capacities "come to court as individuals," and so "fit[ ] comfortably" within the term "person." *Ibid.* RFRA's specific reference to "person[s]" thus distinguishes this case from *Stafford*, confirming that RFRA authorizes individual-capacity actions.

Any other reading of "person[s] acting under color of law" would render the phrase either superfluous or a chameleon. The Government argues, as it must, that its interpretation does not read the phrase out of the statute, instead construing it to refer to "private actors effectively exercising government authority," such as contractors operating private prisons. Pet. Br. at 41 n.6. But the Government's only authorities for this reading are cases interpreting Section 1983. See *id.* (citing *Brentwood Acad.* v. *Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 & n.2 (2001); *Richardson* v. *McKnight*, 521 U.S. 399 (1997); *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 928-32 (1982)). And although this Court has interpreted Section 1983 to extend to contractors, see Pet. Br. at 41 n.6, it has *also* interpreted that same language to authorize individ-

ual-capacity litigation, *Hafer*, 502 U.S. at 31. The Government's proposed limitation is thus no limitation at all.

There is no good reason why this Court should draw on some of its Section 1983 precedents but not others. Nor is there good reason to read RFRA's text to be "inoperative or superfluous, void or insignificant." *Corley* v. *United States*, 556 U.S. 303, 314 (2009). Properly understanding "person[s] acting under color of law" as authorizing individual-capacity actions avoids both of these errors.

The Government's final argument, concerning the phrase "relief against a government," § 2000bb-1(c), also fails. The Government argues repeatedly that relief against individual government officials cannot be "relief against a government." Pet. Br. at 13-14, 16, 18, 22, 24, 29, 39-40. But it is black-letter law that "[w]hen a statute includes an explicit definition, we must follow that definition." *Dig. Realty Tr., Inc.* v. *Somers*, 138 S. Ct. 767, 776-77 (2018) (quoting *Burgess* v. *United States*, 553 U.S. 124, 130 (2008)); *accord Bilski* v. *Kappos*, 561 U.S. 593, 603-04 (2010). Because RFRA defines the term "government" to include "person[s] acting under color of law," § 2000bb-2(1), this Court need not consider that term's meaning in the abstract. By its express terms, RFRA provides relief against "person[s] acting under color of law." *Id.* And under this Court's precedents, that phrase plainly refers to individual-capacity actions.

B. "[A]ppropriate relief" against a person acting under color of law includes monetary damages.

Although "appropriate relief" is "context dependent," *Sossamon* v. *Texas*, 563 U.S. 277, 286 (2011), here the context only reinforces that monetary damages are

"suitable" and "proper." See *id.*; see also 1 *Oxford English Dictionary* 586 (2d ed. 1989) (defining "appropriate" as "[s]pecially fitted or suitable, proper"). Damages are a suitable remedy when government officials violate citizens' rights to freely exercise their religion, especially when Congress has expressly provided for individual-capacity actions. Indeed, as the Second Circuit observed below, the fact that RFRA "permits individual capacity suits leads logically to the conclusion that it permits a damages remedy against those individuals." Pet.App. 26a n.9. This is because individual-capacity actions are poor vehicles for obtaining injunctive relief; they do not provide relief against government entities as a whole and do not persist after particular officials leave office. See *Hafer*, 502 U.S. at 25. By contrast, individual-capacity actions are well-suited to obtaining money damages; unlike official-capacity suits, they are not "suits against the State[s]," *id.* at 25, and so do not implicate Eleventh Amendment immunity, *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989). It is for these reasons that "individual capacity suits tend to be associated with damages remedies, and official capacity suits with injunctive relief." Pet.App. 26a n.9. RFRA's allowance for individual-capacity actions is thus powerful evidence that it also authorizes monetary damages.

Moreover, "the traditional presumption in favor of all appropriate relief" confirms this interpretation. *Franklin*, 503 U.S. at 71. This Court recognized in *Franklin* that, absent a contrary congressional command, federal courts may generally "award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Id.* at 70-71. This principle has a long pedigree. As the Court explained in *Bell* v. *Hood*, "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." 327 U.S. 678, 684 (1946).

There are no grounds for, as the Government argues, confining this traditional presumption to statutes with implied causes of action. Pet. Br. at 45. For one, this Court has not done so historically. See *Bell*, 327 U.S. at 684-85 (discussing the presumption with respect to 28 U.S.C. § 41(1) (1940), which governed the original jurisdiction of the federal district courts). Further, as the Second Circuit pointed out below, "[t]he logical inference . . . runs the other way." Pet.App. 33a. All else being equal, one would expect courts to be more at ease granting any appropriate remedy when Congress has explicitly created a cause of action, compared to when a cause of action is only implied. *Ibid.*

Franklin also sheds light on the phrase "appropriate relief." This Court's opinion in *Franklin*, handed down almost two years before RFRA's enactment, repeatedly uses the phrase "appropriate relief" to encompass money damages. 503 U.S. at 66, 68-71. Congress thus had abundant notice that allowing for "appropriate relief" entailed allowing for damages.[2]

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[2] The Government notes that drafts of RFRA included the phrase "appropriate relief" as early as 1990, and also that RFRA's sparse legislative history does not reference the *Franklin* decision. Pet. Br. at 46 n.9. But "silence in the legislative history" can neither "defeat the better reading of the text" nor "lend any clarity" to points of ambiguity. *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1143 (2018). Moreover, the statute's drafting history sheds little light on how the unanimous House and nearly unanimous Senate assessed the final product. When supermajorities in both houses of Congress enacted RFRA, both

This Court's holding in *Sossamon*, 563 U.S. 277, is not to the contrary. *Sossamon* stands for the proposition that the Religious Land Use and Institutionalized Persons Act (RLUIPA) does not "waive sovereign immunity to private suits for damages." *Id.* at 285. In this respect, it clarifies that money damages are not "appropriate relief" in the "context . . . where the defendant is a sovereign." *Id.* at 286. That reasoning has no application in individual-capacity actions, which do not implicate sovereign immunity. See *Lewis* v. *Clarke*, 137 S. Ct. 1285, 1291 (2017); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949). *Sossamon* thus has no bearing on this case.

C. Reading RFRA in light of Section 1983 confirms these conclusions.

Both RFRA and Section 1983 create private rights of action against "person[s]" who, acting "under color of [law]," violate individuals' constitutional rights. This similarity in text and purpose strongly suggests that "Congress intended for courts to borrow concepts from [Section] 1983 when construing RFRA." Pet.App. 22a. Every court of appeals to consider the question has endorsed this view. See *ibid.*; *Mack* v. *Warden Loretto FCI*, 839 F.3d 286, 302 (3d Cir. 2016); *Listecki* v. *Official Comm. of Unsecured Creditors*, 780 F.3d 731, 738 (7th Cir. 2015); *Sutton* v. *Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834-35 (9th Cir. 1999). After all, "when Congress uses the same language in two statutes having similar purposes, . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith* v. *City of Jack-*

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bodies had front-page notice that "appropriate relief" meant damages. *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb *et seq.*).

son, 544 U.S. 228, 233 (2005) (plurality). Thus, because Section 1983 allows for monetary damages in individual capacity claims, the appropriate construction is that RFRA does as well. This reading harmonizes the two statutes, thereby completing the full suite of civil rights remedies.

The Government puts great stock in the fact that Section 1983, but not RFRA, refers specifically to "action[s] at law." This stock is misplaced. The text of Section 1983 allows plaintiffs to bring both "action[s] at law" for monetary damages and "suit[s] in equity" for injunctive relief. Because RFRA does not similarly mention "action[s] at law," the Government argues that RFRA does not allow money damages. Pet. Br. at 29. But the same logic would problematically imply the reverse: that RFRA does not allow for injunctive relief. See *Franklin*, 503 U.S. at 75-76 ("Under the ordinary convention, the proper inquiry would be whether monetary damages provided an adequate remedy, and if not, whether equitable relief would be appropriate."). The Government's argument thus sheds little light on the meaning of "appropriate relief"—and certainly not enough to displace the ordinary meaning of "appropriate," the *Franklin* presumption in favor of all appropriate remedies, and the textual similarities between RFRA and Section 1983.

The Government also seeks to diminish RFRA's parallel to Section 1983 by contending that the phrase "'color of [law]' . . . speaks to the *types of actors subject to suit*, not the types of available remedies." Pet. Br. at 29. But these questions are intertwined. As discussed above, RFRA's allowance for individual-capacity actions strongly suggests that the statute also allows monetary relief. Otherwise, there would be little value in allowing for such actions in the first place.

See *supra* Section I.B. The textual similarities between RFRA and Section 1983 therefore support Respondents' case.

The statutory history of Section 1983 also informs the meaning of "appropriate relief" in this context. Prior to *Employment Division* v. *Smith*, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, plaintiffs could bring free exercise claims against state officials in their individual capacities. See, *e.g.*, *Shabazz* v. *Coughlin*, 852 F.2d 697 (2d Cir. 1988); *Farid* v. *Smith*, 850 F.2d 917 (2d Cir. 1988). These claims proceeded under Section 1983, on the ground that free exercise violations are "deprivation[s]" of a right "secured by the Constitution." 42 U.S.C. § 1983. This Court's decision in *Smith* ultimately restricted the scope of these claims—by limiting the substantive reach of the Free Exercise Clause, the decision consequently limited the reach of Section 1983. But Congress drafted RFRA to restore, and in fact exceed the protections of, the pre-*Smith* equilibrium. See *id.* § 2000bb(b); *Burwell*, 134 S. Ct. at 2761 n.3. Given this broad remedial purpose, it would be bizarre to read "appropriate relief" to authorize fewer remedies than Congress had previously authorized under Section 1983.

Notably, when Congress passed RFRA in 1993, the statute's text imposed liability on both federal and state officials. 42 U.S.C. § 2000bb-2(1) (1993). And although this Court held in *City of Boerne* v. *Flores* that applying RFRA against the states exceeded Congress's enumerated powers, 521 U.S. 507, 536 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 682 (2014), that decision did not

alter the meaning of RFRA with respect to federal officials.[3] As such, because RFRA initially authorized individual-capacity relief against state officials, 42 U.S.C. § 2000bb-2(1) (1993), and because the remedial section of the statute never distinguished between state and federal officials, RFRA, as amended, must also authorize individual-capacity relief, *i.e.*, money damages, against federal officials. See *id.* § 2000bb-2(1) (2000).

D. The decision below neither extends nor implicates *Bivens*.

Amicus agrees that it is a "significant step under separation-of-powers principles" for a court "to create and enforce a cause of action for damages." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1856 (2017). This case, however, concerns only interpreting a statutory cause of action, not creating a new one. RFRA already contains "an *express* private right of action with an *express* provision for 'appropriate relief.'" Pet.App. 47a (quoting 42 U.S.C. § 2000bb-1(c)). Under this Court's precedents, the "'determinative' question" for resolving this case is thus "one of statutory intent." *Abbasi*, 137 S. Ct. at 1855.

This Court has traditionally applied two canons of construction to parse statutory causes of action. First, it has required a clear statement of congressional intent before initially recognizing a cause of action. See *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 284 (2002); *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 717 (1979). Second, once this Court has recognized a cause of action, it has

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[3] In 2000, Congress amended RFRA to codify *City of Boerne* by restricting the statute to federal officials, but made no adjustments to RFRA's remedial reach. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803.

"presume[d] the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Franklin*, 503 U.S. at 66; *accord Bell*, 327 U.S. at 684-85. Because RFRA explicitly provides a private right of action, the *Franklin* presumption applies.

Muddying the waters on this point, the Government conflates the distinction between crafting an equitable remedy under the Constitution, as in *Bivens*, and interpreting a statutory remedy, as here. This distinction is especially important because questions of statutory interpretation involve "different considerations" than *Bivens*'s equitable inquiries. *Ziglar*, 137 S. Ct. at 1856. Indeed, several practical concerns explain why this Court has been both cautious respecting *Bivens* claims and permissive concerning statutory causes of action. Designing a *Bivens* claim requires this Court to weigh separation-of-powers principles, *id.* at 1857, estimate the deterrence value of its choices, *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 70-71 (2001), and engage the "policy considerations" that permeate preexisting and "elaborate remedial system[s]," *Bush* v. *Lucas*, 462 U.S. 367, 388 (1983). There are good reasons for Article III courts to tread lightly in that area. By contrast, in this case, *Amicus* simply asks that the Court interpret RFRA in a manner that is consistent with its plain and unambiguous meaning. This Court has long taken that approach to statutory causes of action, leaning, if anything, toward a greater range of remedies. See *Franklin*, 503 U.S. at 69. It should do so here as well.

II. SECURING FREE EXERCISE CONSISTENT WITH THE BROAD SCOPE OF RFRA REQUIRES THE AVAILABILITY OF MONETARY RELIEF.

Monetary relief serves the core purposes of RFRA for at least three reasons. First, the availability of monetary relief guards against procedural gamesmanship that would otherwise keep meritorious religious liberty claims out of court. Second, it allows individuals to be fully compensated for burdens on their religious exercise across a range of scenarios. Lastly, monetary relief better deters harassment of religious minorities in many contexts, from Native American worship, to refugees seeking to read the Bible. When combined with the doctrine of qualified immunity, this deterrent establishes the proper balance between ensuring the effective operation of government and protecting citizens' constitutional rights to the free exercise of religion.

A. Monetary relief prevents procedural gamesmanship that would otherwise keep meritorious claims out of court.

Injunctive relief is often inadequate as a remedy for free exercise violations because, when monetary relief is unavailable, the government often has options to moot a claim for past violations. In the prison context, for example, the government can moot claims through (1) transferring inmates and (2) providing eleventh hour relief after the culmination of a lengthy litigation process.

1. Because the Federal Bureau of Prisons can transfer an inmate to another district "at any time for any reason whatsoever or for no reason at all," *Brown-Bey* v. *United States*, 720 F.2d 467, 470 (7th Cir. 1983), it has an unfettered ability to moot free exercise claims

for injunctive relief. The availability of monetary damages would ensure that meritorious RFRA claims remain justiciable.

As a practical matter, transfers have the immediate effect of mooting inmates' claims for injunctive relief, rendering their claims non-justiciable. Inmates in this position cannot avail themselves of the traditional exceptions to this Court's mootness doctrine, including the argument that a violation is "capable of repetition yet evading review." Rather, their claim is moot once the inmate has become subject to a new set of regulations and decisionmakers in the new facility. See, *e.g.*, *Gladson* v. *Iowa Dep't of Corr.*, 551 F.3d 825, 835 (8th Cir. 2009); *Martin* v. *Sargent*, 780 F.2d 1334, 1337 (8th Cir. 1985); *McKinnon* v. *Talladega Cty.*, 745 F.2d 1360, 1363 (11th Cir. 1984); *Crocker* v. *Durkin*, 53 F. App'x 503, 505 (10th Cir. 2002); *Nasious* v. *Ray,* 3 F. App'x 745, 747 (10th Cir. 2001).

One consequence of this arrangement is to prevent courts from addressing important free exercise questions. For instance, the scope of the right to congregational prayer in prisons is one such important question that can remain unanswered in the absence of monetary relief. This was the case in *Chesser* v. *Walton*, where a Muslim prisoner filed suit against federal prison officials in Illinois alleging they forbade him from engaging in congregational prayer. *Chesser* v. *Dir. Fed. Bureau of Prisons*, No. 15-cv-01939-NYW, 2016 WL 1170448, at *1 (D. Colo. Mar. 25, 2016). Prison officials then transferred him to a federal prison in Colorado, where he filed a similar suit. *Id.* at *1, *3. The Colorado district court dismissed his RFRA claims because they were "duplicati[ve]" of his pending claims in Illinois. *Id.* at *4. The Illinois district court then dismissed his RFRA claims as moot since he had been transferred to a new facility, and it

was unlikely that he would be transferred back. *Chesser* v. *Walton*, No. 12-cv-1198-JPG-RJD, 2016 WL 6471435, at *4 (S.D. Ill. Nov. 2, 2016).

This illustrates that construing RFRA to afford only injunctive relief would deny many claimants of any meaningful relief and deprive government officials of helpful judicial instruction on a range of important constitutional issues. Worse, limiting RFRA to injunctive relief would allow federal officials to moot claims by strategic gamesmanship, as with prison transfers: "[I]n cases for injunctive relief that present important constitutional questions, the BOP's modus operandi is to move the prisoner-plaintiff from the jurisdiction in which the case was filed to another judicial district in an attempt to moot or otherwise throw unique procedural wrenches into the prisoner's claim." Nicole B. Godfrey, *Holding Federal Prison Officials Accountable: The Case for Recognizing a Damages Remedy for Federal Prisoners' Free Exercise Claims*, 96 Neb. L. Rev. 924, 958 (2018). Thus, federal jurisdiction will remain elusive in RFRA cases unless monetary relief is available as a remedy.

2. Monetary relief also mitigates the problem of selective mootness—a different sort of gamesmanship where the government provides eleventh-hour relief after lengthy litigation when unfavorable precedent is on the horizon. For example, the Federal Bureau of Prisons can selectively moot prisoners' free exercise claims by providing eleventh-hour relief after the culmination of a lengthy litigation process. Ordinarily, a defendant's "voluntary cessation" of challenged conduct does not render a case moot unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982) (quoting *United States* v. *Concentrated Phosphate Exp.*

Ass'n, 393 U.S. 199, 203 (1968)). The government, however, often receives a presumption that it will "act in good faith" so that the burden is shifted to the plaintiff to show that "there is a reasonable expectation" that the unlawful government conduct will recur. *Marcavage* v. *Nat'l Park Serv.*, 666 F.3d 856, 861 (3d Cir. 2012) (quoting *Bridge* v. *U.S. Parole Comm'n*, 981 F.2d 97, 106 (3d Cir. 1992)); *Bd. of Trs. of Glazing Health & Welfare Tr.* v. *Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019). This allows last-minute policy changes to render meritorious claims moot, depriving lower courts, government officials, and free exercise plaintiffs of much-needed decisions. See Joseph C. Davis & Nicholas R. Reaves, *The Point* Isn't *Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine*, 129 Yale L.J.F. 325 (2019).

For example, in *Guzzi* v. *Thompson*, state prison officials denied an inmate kosher food because he was not certified as Jewish. 470 F. Supp. 2d 17, 19-20 (D. Mass. 2007) (per curiam), *vacated*, No. 07-1537, 2008 WL 2059321 (1st Cir. May 14, 2008). The prison began providing the plaintiff kosher food only after the district court ruled in favor of the state and the inmate appealed to the First Circuit. *Guzzi* v. *Thompson*, No. 07-1537, 2008 WL 2059321, at *1 (1st Cir. May 14, 2008). Although only the plaintiff was provided kosher food, without a general policy change, the First Circuit dismissed the appeal as moot without inquiry as to whether culpable conduct beyond a "mutual misunderstanding" had occurred. *Id.*

Mooting claims through last-minute relief occurs in the federal prison context as well. In *Ajaj* v. *United States*, a Muslim inmate claimed that prison officials refused to distribute his medications before dawn and after sunset during Ramadan, thereby preventing him

from fasting. No. 15-cv-00992-RBJ-KLM, 2016 WL 6212518, at *1 (D. Colo. Oct. 25, 2016). Prison officials began accommodating the inmate only after he initiated the suit and then succeeded in having the claim dismissed as moot. *Id.* at *3. Yet for the prior two years that the inmate was allegedly denied an opportunity to fast, he could receive no further relief. Monetary relief under RFRA would allow these claims their day in court, provide guiding precedent, and prevent the strategic mooting of claims through eleventh-hour relief.

B. Monetary relief provides full redress against monetary harms.

Monetary damages are the appropriate form of relief when an individual has suffered monetary harm. The present case provides a ready example: Mr. Tanvir purchased a plane ticket to Pakistan, the government blocked Mr. Tanvir from getting on his flight, and Mr. Tanvir was able to obtain only a partial refund from the airline. Pet.App. 9a. Making Mr. Tanvir whole requires, at the very least, compensating him for the amount he lost on that plane ticket. Moreover, Mr. Tanvir sustained monetary harm when, unable to fly, he had to quit his trucking job. *Ibid.* Monetary harms are best remedied through monetary relief.

Interpreting RFRA to prohibit monetary relief ensures that some meritorious claims will fall flat at the courthouse doors. Yet this Court has noted the "essentiality of the survival of civil rights claims for complete vindication of constitutional rights." *Carlson* v. *Green*, 446 U.S. 14, 24 (1980). This Court has further recognized that "[w]hen government officials abuse their offices, action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982)).

Indeed, money damages under RFRA are necessary to fully vindicate free exercise violations. For instance, in *In re Navy Chaplaincy*, a group of chaplains alleged that Navy officials discriminated against certain "non-liturgical" Protestant chaplains on the basis of their religion. 306 F.R.D. 33 (D.D.C. 2014). They alleged that the Navy's "Thirds Policy," which limited the number of chaplains based on religious categories, increased their workloads. *Id.* at 44. The policy was discontinued by the time the district court issued its ruling. But because plaintiffs could only sue for declaratory and injunctive relief, their claims were dismissed as moot: "[T]here is nothing in the record to suggest that the limited declaratory and injunctive remedies available in this Court could provide effective relief for any injuries Plaintiffs sustained in the past as a result of the alleged Thirds Policy." *Id.* at 45. Precisely because injunctive and declaratory relief are inappropriate to remedy past violations, monetary relief would have been the appropriate remedy. Likewise, an individual capacity claim for money damages under RFRA would allow courts to vindicate constitutional rights in cases where time or changed facts render injunctive relief inadequate.

A recent district court case, *Hawk* v. *Federal Bureau of Prisons*, provides another illustration. See No. 1:18-cv-1768, 2019 WL 4439705 (M.D. Pa. Aug. 30, 2019), *report and recommendation adopted*, No. 3:18-cv-1768, 2019 WL 4439883 (M.D. Pa. Sept. 16, 2019). The plaintiff in that case, who was deaf, had repeatedly asked prison administrators for accommodations that would allow him to participate in Jewish religious services. *Id.* at *1. Although the administrators repeatedly rebuffed his requests, and although the plaintiff had exhausted all administrative remedies within the prison system, the district court dismissed his RFRA

claim as moot. *Id.* at *9. It reasoned that, because the plaintiff had since been released from prison, RFRA provided no avenue for further relief. *Id.* This was incorrect. The "appropriate relief" for an individual who was arbitrarily deprived of a religious accommodation, resulting in emotional distress, is monetary damages. See, *e.g.*, *Buonanno* v. *AT&T Broadband, LLC*, 313 F. Supp. 2d 1069, 1084 (D. Colo. 2004). Similarly, claims for past violations of RFRA are better remedied through money damages than injunctive relief.

Finally, monetary relief prevents the arbitrary differential treatment of state and federal inmates with regard to their free exercise claims. Consider *Arroyo Lopez* v. *Nuttall*, in which a state corrections officer shoved a Muslim inmate without provocation while the inmate was praying at night, even though such prayers were allowed under the prison's policies. 25 F. Supp. 2d 407 (S.D.N.Y. 1998). The prisoner brought a Section 1983 action, and the district court awarded monetary damages against the corrections officers for acting "recklessly and with callous indifference to plaintiff's constitutional rights." *Id.* at 410. If the same exact scenario were to play out in a federal prison, no such monetary relief would have been available under the Government's interpretation of RFRA. And, at least in a New York federal prison, a prisoner could not proceed alternatively under Section 1983, RLUIPA, or the First Amendment. See, *e.g.*, *Turkmen* v. *Hasty*, 789 F.3d 218, 236 (2d Cir. 2015), *rev'd in part and vacated in part on other grounds sub nom. Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017); *Washington* v. *Gonyea*, 731 F.3d 143, 145 (2d Cir. 2013) (per curiam). Ensuring the equal treatment of state and federal prisoners requires allowing federal prisoners to pursue damages claims under RFRA.

Similar to *Arroyo Lopez*, the district court in *Fegans* v. *Norris* awarded an inmate monetary damages when Arkansas state prison officials denied him kosher food for two years, even though a previous court decision had already established a right to a kosher diet in prison. No. 4:03-CV-00172, 2006 WL 6936834 (E.D. Ark. Aug. 25, 2006), *aff'd*, 537 F.3d 897 (8th Cir. 2008). Later, the prison changed its policy and began accommodating kosher diets. Under the Government's interpretation of RFRA, if the inmate had been in federal rather than state prison, a damages remedy would have been unavailable, and a claim for injunctive relief most likely would have been dismissed as moot after the policy change, resulting in no relief at all.

This arbitrary differential treatment of state and federal prisoners also can occur in the context of interstate prison compacts and prisoner transfer statutes. Through these agreements and statutes, state-sentenced inmates can be transferred between state and federal prisons. See 18 U.S.C. § 3623; Morris L. Thigpen et al., Nat'l Inst. of Corr., *Interstate Transfer of Prison Inmates in the United States* (Feb. 2006), https://s3.amazonaws.com/static.nicic.gov/Library/021242.pdf. There is no principled reason why inmates should lose their ability to recover money damages for violations of their free exercise rights upon transfer from state to federal prison. This Court can rectify the arbitrary differential treatment of state and federal prisoners with regard to their free exercise claims by recognizing that RFRA authorizes monetary relief in appropriate situations.

C. Monetary relief deters the harassment of religious minorities.

Monetary relief under RFRA vindicates past harms to free exercise at the same time that it deters government actors from violating federal rights in the future.

In this way, RFRA serves the same functions that Section 1983 serves for state violations of religious liberty. This Court has long extolled the dual function of Section 1983. For instance, the Court in *Wyatt* v. *Cole* noted that the "purpose of [Section 1983] is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." 504 U.S. 158, 161 (1992). Similarly, in *City of Newport* v. *Fact Concerts, Inc.*, the Court recognized that the "deterrence of future abuses of power by persons acting under color of state law is an important purpose of § 1983." 453 U.S. 247, 268 (1981). See also *Robertson* v. *Wegman*, 436 U.S. 584, 590-91 (1978) ("The policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law."). For the same reasons, monetary relief is an appropriate and necessary remedial option under RFRA.

Monetary relief also would provide a deterrent against gross mistreatment of religious minorities. In 2006, federal agents raided a Native American ceremony, seizing nearly fifty eagle feathers that were being used in religious worship. *McAllen Grace Brethren Church* v. *Salazar*, 764 F.3d 465 (5th Cir. 2014). Pastor Robert Soto, a Lipan Apache religious leader, was threatened with criminal fines and imprisonment for possession of these feathers in supposed violation of the Bald and Golden Eagle Protection Act. Because Soto's tribe was state-recognized but not federally-recognized, he was not able to receive his property back until 2015, after a decade of litigation resulted in a settlement with the Department of the Interior. See Becket Fund for Religious Liberty, *McAllen Grace Brethren Church v. Jewell*, https://www.becketlaw.org/

case/mcallen-grace-brethren-church-v-jewell/ (last visited Feb. 11, 2020).

The possibility of monetary relief would serve the core purposes of RFRA—compensating Soto for past harms to his religious exercise and deterring the overzealous enforcement of the Eagle Act against religious minorities. The confiscation of Soto's property is a prime example of where a money damages claim would have been appropriate under RFRA. Soto sustained direct monetary loss—use value—due to the confiscation of his property such that damages would have been the only "appropriate remedy" to compensate him. Moreover, for ten years, Soto was deprived of the ability to use these sacred objects in his religious ceremonies—a harm that declaratory or injunctive relief cannot remedy but that monetary relief can. In addition, money damages would serve to deter federal actors from overzealous enforcement against religious minorities. The federal agents who shamefully dubbed the confiscation of feathers, "Operation Powwow," might have acted with greater regard for the free exercise rights of Native Americans if money damages were recognized as available under RFRA.

Monetary relief would provide a deterrent against malicious treatment of religious minorities in private contractor detention facilities as well. In 1994, foreign nationals and refugees who sought political asylum in the United States were detained at an INS facility operated by private contractors. These foreign nationals alleged that private contractor guards physically abused detainees and perpetrated numerous free exercise violations. Guards confiscated religious texts, discarded bibles, denied requests for food other than pork, and prohibited religious prayer for extended periods. *Jama* v. *INS*, 343 F. Supp. 2d 338, 378 (D.N.J. 2004). These guards "were federal actors because they were

employees of a corporation performing governmental functions pursuant to a contract with the INS under which the INS monitored the performance of the corporation and its employees." *Id.* at 362. As such, they were liable under RFRA for violations of detainees' free exercise rights.

A money damages claim under RFRA against the private guards would have an important deterrent effect. As the district court explained, "[t]here is no assurance that [their employer] would make good any money damages against them, and, in fact, might theoretically have a claim against them for the damages which their conduct caused." *Id.* at 363. Effective deterrence of free exercise violations in the private contractor context requires recognition of money damages under RFRA.

D. The government overstates the potential impacts of allowing damages.

Allowing monetary relief in RFRA suits will not interfere with the ordinary operations of the federal government because the doctrine of qualified immunity recognizes the "need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009). Consequently, the only officials who would face individual-capacity suits under RFRA are those who act in such a manner that violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982).

Lower courts have a long history of applying qualified immunity in RFRA cases when officials perform their duties in a manner not contrary to clearly established law. See, *e.g.*, *Davila* v. *Gladden*, 777 F.3d 1198, 1210-12 (11th Cir. 2015); *Muhammad* v. *City of N.Y.*

Dep't of Corr., 904 F. Supp. 161, 202-03 (S.D.N.Y. 1995); *Muslim* v. *Frame*, 897 F. Supp. 215, 221 (E.D. Pa. 1995); *Woods* v. *Evatt*, 876 F. Supp. 756, 771 (D.S.C. 1995), *aff'd*, 68 F.3d 463 (4th Cir. 1995); *Rust* v. *Clarke*, 851 F. Supp. 377, 381 (D. Neb. 1994).

Contrary to the Government's prognostications, there is thus little chance that the possibility of damages will have "systemic implications" for the creation of policy. See Pet. Br. at 31. At the same time, qualified immunity ensures that requests for monetary relief provide a deterrent effect where it matters most: when government officials have "fair notice" that their conduct violates "clearly established" free exercise rights. *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam). In this way, qualified immunity strikes the proper balance "between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Davis* v. *Scherer*, 468 U.S. 183, 195 (1984).

The Government encourages this Court to "treat[] the immunity question separately from the remedies question." Pet. Br. at 33. But this Court has not done so historically. Confronted with the possibility that "imposing personal liability on state officers [through Section 1983] may hamper their performance of public duties," the *Hafer* Court noted that this concern was "properly addressed within the framework of [its] personal immunity jurisprudence." *Hafer*, 502 U.S. at 31. Likewise, the availability of monetary relief under RFRA is properly addressed within the framework of the Court's qualified immunity jurisprudence.

* * *

The text of the Religious Freedom Restoration Act effectively furthers the statute's purpose. By author-

izing "appropriate relief" against "person[s] acting under color of law," RFRA both protects claimants from religious harassment in the first instance and allows them to obtain full and complete redress when such harassment occurs. Consistent with this text and purpose, this Court should hold that RFRA allows for individual-capacity damages.

CONCLUSION

For these reasons, the judgment of the Second Circuit should be affirmed.

Respectfully submitted,

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