

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

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DAMON LANDOR,)
)
Petitioner,)
)
v.) No. 23-1197
LOUISIANA DEPARTMENT OF)
)
CORRECTIONS AND PUBLIC SAFETY,)
)
ET AL.,)
)
Respondents.)
- - - - -

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 23-1197,
5 Landor versus Louisiana Department of
6 Corrections and Public Safety.

7 Mr. Tripp.

8 ORAL ARGUMENT OF ZACHARY D. TRIPP

9 ON BEHALF OF THE PETITIONER

10 MR. TRIPP: Mr. Chief Justice, and may
11 it please the Court:

12 It is undisputed that my client has
13 alleged an assault that is just brazenly
14 illegal. He was at Respondents' mercy in
15 federally funded custody when he handed them a
16 copy of controlling precedent holding that
17 RLUIPA protected his right to keep his hair
18 long. They threw it away, handcuffed him to a
19 chair, and shaved him bald. It is the poster
20 child for a RLUIPA violation, and the law
21 provides a damages remedy.

22 This is spending legislation, so I
23 want to go right to that and make two points
24 about clarity and constitutionality.

25 So, first, on clarity, the whole point

1 of this law is to restore pre-Smith rights and
2 remedies. Damages were available before Smith.
3 They're available under RFRA. And RLUIPA uses
4 identical language. They're like twins
5 separated at birth. They clearly mean the same
6 thing.

7 The individual capacity action is
8 especially clear. On the face of the statute,
9 it expressly authorizes suit against an
10 official or any other person acting under color
11 of state law. That obviously means individual
12 capacity. And then, once you see there's an
13 individual capacity action, the rest of it
14 falls into line because damages -- the whole
15 point of individual capacity is to have
16 damages; damages are presumptively available
17 against a non-sovereign; and without damages,
18 officials can literally treat the law like
19 garbage.

20 On constitutionality, it is
21 undisputed, Respondents admit, they must comply
22 with RLUIPA within the scope of their work as
23 officers in a federally funded state prison.
24 And this Court has already held in Salinas that
25 officers in a federally funded state prison can

1 be held individually liable for misconduct that
2 threatens the integrity or proper operation of
3 the program, and that describes this case to a
4 "T."

5 So RLUIPA is clear, it's
6 constitutional, and we're asking the Court to
7 reverse.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Do you have examples
10 of causes of action for damages that are viable
11 as a result of the Spending -- exercise of the
12 spending power?

13 MR. TRIPP: I mean, I think there's --
14 there's many statutes that have causes of
15 action under the Spending Clause. I mean,
16 under Talevski, this Court held that it was
17 enforceable under Section 1983. We also give a
18 long list in our brief of Spending Clause
19 actions that include civil liability running
20 all the way back to the founding. I mean, we
21 give an example of a 1789 law, the false
22 claims --

23 JUSTICE THOMAS: How do you -- how
24 would you get to the authority under the
25 Spending Clause to create these damages actions

1 that you suggest?

2 MR. TRIPP: So I think there's sort of
3 two -- two paths in -- in --

4 JUSTICE THOMAS: Or in this case.

5 MR. TRIPP: In -- in this case, I
6 think there's two paths to do it. One is to
7 follow the path that this Court has set forth
8 in -- in Salinas in particular, Salinas,
9 Dixson, Laudani, and Hess, and to just hold
10 that --

11 JUSTICE THOMAS: What was Salinas
12 about?

13 MR. TRIPP: Salinas was about an
14 officer in a federally funded state prison who
15 accepted a bribe to provide preferential
16 treatment.

17 JUSTICE THOMAS: And isn't there a
18 difference between a bribe and a lawsuit for
19 individual damages?

20 MR. TRIPP: Well, he was being held
21 individually liable for criminal penalties,
22 which I think is something that clearly
23 requires the Necessary and Proper Clause in
24 addition to just ordinary civil --

25 JUSTICE THOMAS: But I thought the

1 argument there was that if -- if you provide
2 the -- the funds, you have a right to protect
3 it?

4 MR. TRIPP: I mean, I -- I think that
5 protection of funds -- well, maybe sort of two
6 things. First, in Salinas, when the Court was
7 describing the thing that -- that was -- the --
8 was interfering with the proper operation of
9 the program, it wasn't the acceptance of the
10 bribe. It was the preferential conjugal
11 visits. It was the misconduct itself, and so
12 just applying the test that Salinas set forth.
13 And I think, actually, my friends don't --

14 JUSTICE SOTOMAYOR: To make that
15 clear, there were no federal funds at issue.
16 The bribe was going into a correction officer's
17 pocket, correct?

18 MR. TRIPP: That's right. There
19 was -- there was no -- no diversion of federal
20 funds.

21 JUSTICE SOTOMAYOR: So no risk to the
22 government's money?

23 MR. TRIPP: Say -- pardon? Say --

24 JUSTICE SOTOMAYOR: No risk to the
25 government's money?

1 MR. TRIPP: That's -- or at least
2 certainly not direct. If anything, it was
3 prophylactic. And, here, I think it's really
4 much more direct.

5 JUSTICE SOTOMAYOR: Slow down,
6 counsel.

7 MR. TRIPP: Sorry.

8 JUSTICE SOTOMAYOR: The question there
9 then was the risk to the government program,
10 correct?

11 MR. TRIPP: Correct.

12 JUSTICE SOTOMAYOR: And, here, the
13 risk is to what?

14 MR. TRIPP: To the government program
15 to accommodate religious liberty. I mean,
16 that's -- that's the heart of this program
17 under RLUIPA, is if you want federal funds for
18 state prisons, you need to accommodate
19 religious liberty.

20 CHIEF JUSTICE ROBERTS: Well, then
21 to --

22 JUSTICE SOTOMAYOR: Now, going back to
23 Justice Thomas's question about other statutes
24 that are at risk if we were to hold that you
25 can't bind third parties, I have dozens of them

1 cited by you and the government where we've
2 permitted -- or causes of action with damages,
3 Title IX, Title VI, the Federal Nursing Home
4 Reform Act, the Emergency Medical Treatment
5 Act, the antifraud statutes, there's a long
6 list of statutes where we said the statutes can
7 bind third parties, correct?

8 MR. TRIPP: Correct.

9 JUSTICE SOTOMAYOR: All right. Thank
10 you.

11 CHIEF JUSTICE ROBERTS: Counsel, the
12 basis for state liability here is, of course,
13 an agreement with the federal government,
14 right? In other words, they've cut a deal, get
15 the money, and they're going to be -- have to
16 comply with these conditions.

17 But there was no such arrangement with
18 the defendant in this case, right?

19 MR. TRIPP: Well --

20 CHIEF JUSTICE ROBERTS: They didn't
21 have a direct relationship with the federal
22 government. They didn't get directly any
23 federal financial assistance. So you don't
24 have the same basis for liability as we do in
25 the other typical Spending Clause case, right?

1 MR. TRIPP: Right. It's indirect,
2 right, because the officer -- and -- and what
3 this Court said in -- in Rust is that if a
4 person goes to work for a federally funded
5 program, then they take the job subject to the
6 conditions that Congress has attached to the
7 funds.

8 And, of course, I think they're --
9 they're already admitting, again, that they're
10 bound by the substantive condition really by
11 virtue of their choice to voluntarily work as
12 officers in a federally funded program. And so
13 I think it's that sort of the -- the -- the
14 chain of privity is the thing that makes this
15 case sort of considerably easier, I think, than
16 a case like Sabri or some others, where you're
17 trying to reach somebody who's a member of the
18 general public, because these -- these are not
19 members of the general public. They're state
20 officers. They voluntarily accepted this job.
21 They each have all of their own employment
22 contracts, and they take it subject to that
23 condition.

24 I think one thing that's also sort of
25 relevant is that as state officers in -- in a

1 prison, individual capacity damages are the
2 norm for them. The -- we have an amicus brief
3 from former corrections officials who talk
4 about how, of course, this is something that
5 they're all trained on, everybody understands
6 this because, under Section 1983, individual
7 capacity damages are -- they're just the
8 paradigmatic remedy --

9 JUSTICE KAVANAUGH: But the -- the
10 hard part, as I see it, for your case, for me,
11 is that you need a clear statement, and
12 "appropriate relief," you know, is not as -- as
13 clear as it could be in encompassing damages.
14 So how do you deal with that?

15 I don't want to water down our
16 precedent on that, on -- but at the same time,
17 I want to hear your response to how you -- how
18 you get there.

19 MR. TRIPP: Yeah. I -- I -- I think
20 it's sort of -- the -- the first thing, and --
21 and I'd love for you to look at it, is just to
22 lay eyes on the individual capacity action.
23 It's in the Pet. App. At 41(a). It's got a
24 cause of action. It's titled Judicial Relief,
25 is the name of the statute and then subsection

1 (a), Cause of Action.

2 A person may assert a violation of
3 this chapter as a claim or defense in a
4 judicial proceeding to obtain the appropriate
5 relief against the government. Who is the
6 government? You go in a few pages and it says
7 an official or any other person acting under
8 color of state law. And -- and that's just
9 obviously individual capacity. Tanzin already
10 says this. It says that it provides a clear
11 answer, and the text is identical.

12 And then I think, once you see
13 there's --

14 JUSTICE KAVANAUGH: Well, on -- on
15 Tanzin, I'm not sure it quite says clear
16 answer. I think it says it's the best answer,
17 it's a traditional answer. I'm not sure it
18 quite says --

19 MR. TRIPP: Sorry. One -- one --
20 one -- sorry, one -- one step. On individual
21 capacity, it says --

22 JUSTICE KAVANAUGH: Oh, yes. I'm
23 talking about damages.

24 MR. TRIPP: Yes. And then, once you
25 see there is individual capacity --

1 JUSTICE KAVANAUGH: Yes.

2 MR. TRIPP: -- because I think it's
3 express on the face of the statute, then --

4 JUSTICE KAVANAUGH: I'm asking about
5 damages.

6 MR. TRIPP: Right. Then, at that
7 point, the -- the Franklin presumption kicks in
8 because you have a cause of action against a
9 non-sovereign, and -- and the ordinary rule at
10 that point is where there's a right, there's a
11 remedy, right? There's a right. Congress has
12 created expressly the cause of action, and
13 damages are presumptively available unless
14 Congress says otherwise.

15 It then taps into the very deep
16 tradition that Tanzin sets out of individual
17 capacity liability that goes all the way back
18 to the early republic. That's what these have
19 always been for, is to obtain damages. And if
20 you can't obtain damages, the individual
21 capacity action is totally meaningless. You
22 can already enjoin them in their official
23 capacity. So the only thing you get is
24 damages.

25 And then I think also, I think, you

1 know, when you -- when you look at just the
2 operation of this statute, the -- the -- the
3 statute just doesn't actually provide its
4 promised protection in a large set of cases if
5 damages are not available.

6 And it's not just this case. I mean,
7 I think, if you go through the amicus briefs,
8 there are -- are many situations, some -- some
9 very ugly ones, where, effectively, the --
10 the -- the statute is ineffective, and I think
11 one of the things particularly troubling about
12 the way Respondents' rule would work is that
13 the very officers who are, like, violating the
14 law can also basically unilaterally decide to
15 turn it off by transferring the prisoner to a
16 different facility.

17 JUSTICE GORSUCH: Mr. --

18 MR. TRIPP: And so, even if --

19 JUSTICE GORSUCH: Sorry, go ahead.
20 Please finish.

21 MR. TRIPP: So -- so, even in a case
22 where injunctive relief might be helpful,
23 they -- they can moot it out by transferring
24 the person, and I think --

25 JUSTICE GORSUCH: Mr. --

1 MR. TRIPP: Yeah.

2 JUSTICE GORSUCH: All right. On -- on
3 that point, and then I want to get back to the
4 Chief Justice's question, as I understand it,
5 the circuits are unanimously against you and
6 have been for many, many, many years. So
7 saying that something awful is going to happen,
8 it's -- whatever has happened has happened,
9 right?

10 MR. TRIPP: That -- that's correct.
11 It's happening, yeah.

12 JUSTICE GORSUCH: Okay. Yeah. And
13 it's been -- it's been this way for a very long
14 time in every circuit in the country.

15 MR. TRIPP: That's correct.

16 JUSTICE GORSUCH: Yeah. And on the
17 Chief Justice's question, I -- I -- I -- I'm
18 struggling -- where I'm struggling is where did
19 the defendant, the individual defendants agree
20 to the -- with the federal government to be
21 bound and what notice did they have?

22 And I understand your point earlier to
23 the Chief that they're -- they're subject to
24 state regulations and -- and -- and with their
25 contract with the state. And, of course, an

1 agent can be liable to its principal for
2 violating what the principal dictates.

3 But the agent isn't normally liable to
4 a third party for a breach of the principal's
5 duties with respect to a third party. So, even
6 when the agent causes the breach, even when the
7 agent negotiates the contract, he's not liable
8 to the third party. He's only liable to the
9 principal.

10 So, if we're looking to background
11 contract principles, to the extent they're
12 relevant, and maybe you're going to tell me
13 they're not, that's fine, but to the extent we
14 would, it wouldn't seem to encompass these
15 defendants and every circuit in the court --
16 every circuit court in the country would appear
17 to be correct.

18 MR. TRIPP: So --

19 JUSTICE GORSUCH: Help me with that.

20 MR. TRIPP: Yeah. I think what that's
21 missing, and we traced this out in our opening
22 brief, is that contracts are extraordinarily
23 flexible and you can and people do --

24 JUSTICE GORSUCH: Ah, yes, okay. Your
25 brief does go into that, that -- that Congress

1 could have easily written a statute that does
2 this and says that those individual officers
3 have to agree with the federal government to be
4 bound under federal law. I agree, it could
5 have done that.

6 And -- and you say it could have done
7 this in 15 different ways in your brief. I
8 agree with you. My -- my -- my concern is
9 it -- it didn't do that. It could do that, but
10 it didn't do that. It left it to the states.

11 MR. TRIPP: And I think that's really
12 where I fundamentally disagree.

13 JUSTICE GORSUCH: Okay.

14 MR. TRIPP: I think Congress did do
15 it. What it said in this statute is that,
16 first of all, obviously, the states need to
17 accommodate religious liberty, and then it is
18 clear as day --

19 JUSTICE GORSUCH: The states.

20 MR. TRIPP: -- it -- it -- that if you
21 agree to be an -- an officer or other person
22 acting under color of state law in this statute
23 and you deprive a person of their religious
24 liberties, in violation of this statute, then
25 you are subject to suit or you will be the

1 defendant in a cause of action for appropriate
2 relief. That is on the face of the statute.

3 And the individual officers, they can
4 agree to take the job or not. They can demand
5 higher wages. They can demand indemnity, like
6 Louisiana gives it, and I think one of the
7 things that really breaks down in their
8 argument is they admit that it applies to them.
9 They admit that they need to comply within the
10 scope of their work.

11 And it comes not just with a
12 substantive condition but also with a remedial
13 one. And then also do you want to just come
14 back to, in this Court's precedents, it's made
15 clear that the court -- that Congress can
16 combine the spending power with the Necessary
17 and Proper Clause to -- to -- to impose
18 liability, I mean, criminal liability in
19 Salinas and --

20 JUSTICE GORSUCH: No, I -- I -- I
21 don't doubt it could and -- and I don't doubt
22 that when it's -- when it's protecting its
23 money, as in some of those cases, Salinas, that
24 that -- that that interest is clear. What I'm
25 struggling with is did it, not could it, did

1 it?

2 MR. TRIPP: Yeah.

3 JUSTICE JACKSON: Can --

4 JUSTICE GORSUCH: Did -- did -- did
5 these individual defendants have notice? Did
6 they agree?

7 MR. TRIPP: Right.

8 JUSTICE GORSUCH: Would you agree that
9 the -- the individual defendants have to have
10 notice?

11 MR. TRIPP: I think, as the -- the way
12 this Court's precedents work, the notice runs
13 to the state. And then, as defendants --

14 JUSTICE GORSUCH: So the defendants
15 don't have to have notice?

16 MR. TRIPP: Then the --

17 JUSTICE JACKSON: Why don't they --
18 why -- why don't they have notice if they have
19 to --

20 JUSTICE GORSUCH: Well, no, if I might
21 just finish, I'm sorry.

22 MR. TRIPP: So --

23 JUSTICE GORSUCH: Do -- do the
24 defendants have to have notice, yes or no?

25 MR. TRIPP: If I could be clear -- if

1 I could be clear, it depends on which -- which
2 way you think about it. The one way to think
3 about it runs all the way through consent and
4 then, of course, they need notice because they
5 took the job, they have to take it subject to
6 the conditions.

7 JUSTICE GORSUCH: Do -- counsel, it's
8 just really simple. Do the individual
9 defendants have to have notice?

10 MR. TRIPP: They -- they have to have
11 notice of the condition when they sign up to
12 it.

13 JUSTICE GORSUCH: Okay. And do they
14 have to consent to the -- the conditions?

15 MR. TRIPP: I mean, they consent by
16 virtue of taking the job, yes.

17 JUSTICE GORSUCH: Just do -- do they
18 have to consent?

19 MR. TRIPP: By -- by taking the job,
20 yes.

21 JUSTICE GORSUCH: Is that a -- do
22 they -- is that a yes, they have to consent, or
23 is that no, they don't?

24 MR. TRIPP: I mean, under this
25 Court's -- sorry, I just want to be clear about

1 this.

2 JUSTICE GORSUCH: I just want to know
3 what your answer is.

4 MR. TRIPP: My -- my answer is that
5 they did consent here, that if you're going to
6 think about this purely as a matter of consent,
7 which we trace through in our opening brief,
8 then, of course, they need to consent.

9 JUSTICE GORSUCH: Okay.

10 MR. TRIPP: I think this Court's cases
11 go farther. Mr. Sabri did not consent.

12 JUSTICE GORSUCH: I understand --

13 MR. TRIPP: Right.

14 JUSTICE GORSUCH: -- I understand
15 the -- the -- the -- the -- the fraud cases.
16 But I'm asking do they need to consent, and I'm
17 hearing --

18 MR. TRIPP: It depends on --

19 JUSTICE GORSUCH: -- maybe, maybe not.

20 MR. TRIPP: Not under this Court's
21 cases.

22 JUSTICE GORSUCH: Thank you.

23 MR. TRIPP: This Court's cases go
24 farther.

25 JUSTICE JACKSON: But can -- can I

1 follow up with that just on the facts of this
2 case because, as I understand your argument, we
3 do have both notice and consent under these
4 circumstances given that these individuals as
5 third parties are not just people in the world,
6 they are employees of the recipient of federal
7 funds.

8 And so, to the extent that the
9 recipient of federal funds has made clear with
10 the federal government that it's going to
11 require its employees to comply with RLUIPA and
12 not violate people's rights, then, when those
13 employees decide, choose, consent to accept a
14 job with that employer, they are thereby
15 consenting to follow those agreements.

16 Is that right?

17 MR. TRIPP: That -- that is exactly
18 right. And I think that's why, when this Court
19 has had these cases, Salinas, Dixon, Hess,
20 Laudani, it's a whole line of cases involving
21 officers, agents, employees, subcontractors,
22 where this is chain of privity.

23 JUSTICE JACKSON: Yes.

24 MR. TRIPP: Every time, the Court
25 has -- has I think actually seen, this in

1 Salinas, said there was no serious doubt. This
2 is not a hard case.

3 JUSTICE JACKSON: Because chain of
4 privity is -- is a classic contracts concept
5 so that even if you thought that contracts was
6 governing this, we have individuals who, for
7 example -- I mean, I -- I -- I suppose -- let
8 me just give you a hypothetical -- what if the
9 prison in this situation actually appends to
10 its employment contract all of the conditions
11 that it has agreed to with the federal
12 government.

13 And, of course, the prison can only
14 operate under its employees' direct -- not
15 direction but because there are employees. In
16 other words, the prison doesn't have its own
17 activity. So, to the extent that it agrees
18 with the federal government that it's going to
19 comply with RLUIPA, it's saying I and my
20 employees, the agents that I employ, are going
21 to do this.

22 And so let's say the prison actually
23 appends to its employment contract all of the
24 conditions that the federal government requires
25 for the receipt of federal funds, so the person

1 is -- who is choosing to be an employee is
2 totally apprised of what it is that is required
3 as a condition of employment.

4 I understand your argument to be that
5 that would be sufficient even if we assume that
6 there has to be notice and consent to satisfy
7 any such agreement?

8 MR. TRIPP: Of -- of course. And I
9 think what this Court has said -- if I could --

10 CHIEF JUSTICE ROBERTS: You can
11 finish.

12 MR. TRIPP: -- in Rust versus Sullivan
13 and then in Alden versus Maine as to state
14 officers specifically is, when you go into this
15 job, when you go into this line of work and you
16 voluntarily agree to be an officer in a
17 federally funded state program, then, yes,
18 you -- you -- you implicitly -- you necessarily
19 take it subject to the conditions that Congress
20 has attached to the funds.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Your answer that you've just given to
24 my colleague is based on a legal fiction,
25 right? If you're hired as a prison guard in

1 Louisiana, you don't sit down -- and I don't
2 even know if Louisiana does say here's our
3 agreement with the federal government, which
4 probably goes on for, I don't know how many
5 pages, and you should look at it carefully
6 because you're bound by it.

7 That's not what happens as a matter of
8 practice. And I don't think when the prison
9 guard is hired, he says, well, I want to see
10 the federal conditions that you agreed to under
11 the contract.

12 MR. TRIPP: I mean, I -- I certainly
13 doubt that anything like that happens, but we
14 do have the amicus brief of the former
15 corrections officials that talks about how
16 there is training on compliance with federal
17 law, that individual capacity damages are the
18 norm, and, again, they're not disputing that
19 they need to comply with RLUIPA's substantive
20 condition in the scope of their work.

21 And I think what they haven't come up
22 with is any kind of reasoned explanation why
23 Congress can impose the condition on them but
24 then can't enforce it, especially through civil
25 liability, when this Court in Salinas, Dixson,

1 Hess, and Laudani has -- has already done that
2 and actually gone farther, and I think Sabri
3 goes considerably farther.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Thomas?

7 JUSTICE THOMAS: Are we to analyze
8 this any differently under the Spending Clause
9 than we would under -- would under another --
10 under one of the enumerated powers?

11 MR. TRIPP: I think the -- the
12 Spending Clause, of course, impacts the
13 analysis. I think it impacts the textual --

14 JUSTICE THOMAS: How -- how does it
15 impact it?

16 MR. TRIPP: Well, I think from this --
17 this Court's cases in, like, Dole, among other
18 things, that there needs to be clear notice,
19 which is why I started there, and I think it's
20 been fully provided.

21 JUSTICE THOMAS: Do we throw out in
22 that -- in that analysis the contract analogy
23 or framework?

24 MR. TRIPP: I think the contract
25 analogy is a helpful framework, I think, for

1 understanding the scope of the Spending Clause
2 alone, but this Court has made clear -- and
3 Respondents are not asking you to overrule any
4 of your precedents. This Court has made clear
5 repeatedly that Congress can also combine
6 spending with necessary and proper.

7 And I think one of the things that's
8 unusual about this case is that -- is that this
9 is within Congress's power either way you look
10 at it because the chain of privity gets you
11 there on consent, and then Salinas gets you
12 with necessary and proper -- I mean, Salinas is
13 criminal liability, which is never available
14 via contract, whereas this is just civil. This
15 is an ordinary remedy available as a matter of
16 contract. I think this is really much more in
17 the heartland of Congress's power.

18 CHIEF JUSTICE ROBERTS: Justice Alito?

19 JUSTICE ALITO: Just out of -- excuse
20 me -- just out of curiosity, did this prison
21 shave the heads of all of the prisoners?

22 MR. TRIPP: As I understand it, yes,
23 that was the rule for --

24 JUSTICE ALITO: They shaved the heads?
25 They didn't allow any type of even a short

1 haircut?

2 MR. TRIPP: I guess I -- I -- I can't
3 speak to the length. As I -- as I understand
4 it, the -- the rule across the board was
5 everybody who comes in gets their hair cut, and
6 I think it's really the paradigmatic example of
7 the kind of inflexible and unyielding rule that
8 Congress in enacting this statute was trying to
9 get states to stop if they wanted to accept
10 federal funds, that they needed to accommodate
11 religious liberty.

12 JUSTICE ALITO: If the language of
13 RLUIPA was not clear enough to abrogate
14 sovereign immunity in Sossamon, why is it clear
15 enough to satisfy the Spending Clause?

16 MR. TRIPP: I think it's really two
17 answers. The -- the first is, as Tanzin
18 explained and -- and this Court has said many
19 times, you -- you always understand text in
20 context. And the context of what's appropriate
21 in a suit against a sovereign is very different
22 than the context of what's available against an
23 individual. This Court said this in Sossamon.
24 It also said it in Tanzin.

25 The tradition as to a sovereign, of

1 course, is you don't get damages, but as to an
2 individual, this is a tradition that runs all
3 the way back to the founding. I mean, damages
4 have always been available in -- in -- in that
5 context. And so I think the context is -- is
6 probably the clearest answer.

7 I think there's also some suggestion,
8 if you compare Franklin and Sossamon, that the
9 clear notice standard on the spending side is
10 not as demanding as the sovereign immunity, but
11 I think you don't need to get into that because
12 the -- the contextual difference is so -- is so
13 clear.

14 JUSTICE ALITO: Well, why should it be
15 less demanding under the Spending Clause? When
16 the question is whether Congress has abrogated
17 sovereign immunity, the question is whether
18 Congress has done something to itself. When
19 the question is whether Congress has imposed a
20 condition on the state, the question is whether
21 Congress has done something to another
22 sovereign. Why shouldn't the standard be at
23 least as strong --

24 MR. TRIPP: So I want to be -- yeah.

25 JUSTICE ALITO: -- when it is doing

1 something to another sovereign, to the
2 employees of another sovereign?

3 MR. TRIPP: So, on -- on that -- first
4 of all, Sossamon was as to another sovereign,
5 right? It was as to the state. And I'm not
6 fighting --

7 JUSTICE ALITO: I understand that,
8 yes.

9 MR. TRIPP: I think I'm comfortable
10 with it being the same standard, I mean -- but
11 I think we have the clarity. It's drawn from
12 context. And I think one of the things that's
13 very different about this case than this
14 Court's other recent cases in this area is this
15 is not an implied right of action. There's
16 nothing implied here. This is not implied
17 enforcement through Section 1983.

18 This is an express right, an express
19 remedy, it expressly runs against an
20 individual. And as -- as Tanzin said, the
21 distinction from the sovereign context is
22 obvious.

23 JUSTICE ALITO: To the extent that
24 prison officials have been doing things that
25 violate RLUIPA but wouldn't violate the Free

1 Exercise Clause, who's -- who is to blame for
2 that?

3 MR. TRIPP: The -- the conduct on the
4 ground?

5 JUSTICE ALITO: Well, who is to blame
6 for the situation that allows that to happen?

7 MR. TRIPP: I mean, I think, under --
8 under this -- this Court's decision in
9 Employment Division against Smith, there is --
10 there is some daylight. And the -- the crux of
11 this law, I think, is that Congress wanted to
12 ensure that any state prison that accepted
13 federal funds -- this is the heartland of the
14 law -- provided greater accommodations,
15 provided pre-Smith protections, and damages
16 were vital to the pre-Smith scheme, as Tanzin
17 made clear.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor?

20 JUSTICE SOTOMAYOR: I -- I see the
21 issues here on two levels. The first is, is it
22 clear that an individual is bound by the
23 statute? Is there an express cause of action?
24 And that's clear. It says anyone can bring a
25 suit against a government official or someone

1 acting under color of state law, correct?

2 MR. TRIPP: Correct.

3 JUSTICE SOTOMAYOR: So the second step
4 is, is it clear that the cause of action
5 includes money damages? That's the next step
6 of the analysis, right?

7 MR. TRIPP: Correct.

8 JUSTICE SOTOMAYOR: And your argument,
9 I believe, is that Tanzin says that appropriate
10 relief against individuals always includes
11 damages. So does Franklin and a long list of
12 our -- of our jurisprudence, correct?

13 MR. TRIPP: That's correct. That's
14 the traditional rule, is that damages are
15 available unless Congress says otherwise.

16 JUSTICE SOTOMAYOR: So those two
17 things are clear. So, in terms of contract
18 principles or causes of action, this is clear.

19 Now what my colleagues -- and I think
20 that was Justice Gorsuch's question, slightly
21 different, which is do we need to create
22 special rules under the Spending Clause
23 because, generally speaking, if you're a prison
24 official, you know you're working in a prison
25 and you are bound by law to pay damages if you

1 violate the law.

2 Do you get an out because what? I
3 think the consent question means what? Or
4 notice and consent means what? And I don't
5 know, meaning we're all presumed to know the
6 law when we take our jobs. The correction
7 officer's -- know he can't accept money.
8 Citizens know they can't pay the money. We
9 don't expect them to consent to that Spending
10 Clause condition, do we?

11 MR. TRIPP: I -- I think one of the
12 things that makes this case so much easier is
13 that the -- is that you -- you have the consent
14 of -- of the person to become an officer in a
15 federally funded program.

16 JUSTICE SOTOMAYOR: I -- I agree, but
17 I don't know why you need that.

18 MR. TRIPP: I --

19 JUSTICE SOTOMAYOR: I think that's
20 what you were saying, which is we never think
21 of needing some express consent to -- to say
22 I'm bound by the law.

23 MR. TRIPP: I think, really, the hard
24 question in most of the Court's Spending Clause
25 cases is, can Congress impose the condition on

1 that person? That's really the question in,
2 like, Sabri. Can Congress actually impose the
3 condition on that person?

4 That can be a hard question, but it's
5 not -- not here. They admit at page 46 of
6 their brief that they are bound by the
7 substantive condition. So the --

8 JUSTICE SOTOMAYOR: Your point is, if
9 they're bound to the injunctive and declaratory
10 judgment relief, then they're bound to the
11 money damages?

12 MR. TRIPP: It -- it -- it's an
13 exceedingly small step. And this Court has
14 gone --

15 JUSTICE SOTOMAYOR: It's not even a
16 step. It's --

17 MR. TRIPP: Yeah. This Court has gone
18 well beyond it, and I think you can easily get
19 there as a matter of even just -- as contract
20 principles.

21 JUSTICE SOTOMAYOR: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice Kagan?

23 JUSTICE KAGAN: Mr. Tripp, the
24 questions you've been getting, you know, is
25 there enough consent, is there enough notice, I

1 presume -- tell me if I'm wrong -- would --
2 would those questions apply just as well to any
3 1983 suit against a state employee?

4 MR. TRIPP: I mean, I think the --
5 the -- a lot of the notice questions are going
6 to the sort of Spending Clause layer, which --

7 JUSTICE KAGAN: Yeah, but, of course,
8 1983 we've said applies when a statute is based
9 on the Spending Clause power. We said that
10 most recently in Talevski, and there are other
11 cases. So, if we take ourselves out of the
12 RLUIPA context for a second and we just put
13 ourselves into the context of a Spending --
14 some other Spending Clause statute with a --
15 where -- which doesn't have its own cause of
16 action but where the cause of action is 1983,
17 presumably, you would have the exact same
18 questions about, I don't know, does the state
19 employee know about this? Has the state
20 employee consented to it?

21 And yet we've never thought about
22 those questions in that context, have we?

23 MR. TRIPP: That's right. I think you
24 don't -- you don't ask that follow-on question.
25 And there was -- there was no additional

1 question about notice in Salinas. There was no
2 additional question about notice in Sabri. I
3 don't think there was either in -- in Dixon,
4 Hess, Laudani, like, as you -- as you run down
5 the line of the other cases.

6 JUSTICE KAGAN: Yeah. I'm just sort
7 of saying that out of the RLUIPA context, just
8 1983 statute, the 1983 statute used to enforce
9 Spending Clause statutes, I mean, we just take
10 for granted that, of course, you can bring a
11 suit against a state employee.

12 MR. TRIPP: Yeah. That -- that's
13 correct, that the -- the -- the --

14 JUSTICE KAGAN: It would -- and then
15 it's like why would the rule be any different
16 under RLUIPA?

17 MR. TRIPP: I -- I don't think it
18 should be.

19 CHIEF JUSTICE ROBERTS: Justice
20 Gorsuch?

21 JUSTICE GORSUCH: Well, in fact, in
22 Medina, we said the Spending Clause adds a
23 layer to 1983. And in terms of notice and
24 consent, suppose a federal statute said
25 something like this: If a coach at a federal

1 funds-receiving university allows biological
2 men on a women's sports team, a female trying
3 to make the team could sue for a million
4 dollars.

5 Or a federal employee -- an employee
6 of a federal funding recipient in the state
7 agency dealing with family affairs gets an
8 abortion, the father can sue the employee for a
9 million dollars.

10 I think, on your theory, those are
11 perfectly fine without any particular notice to
12 the individual employee or any particular
13 consent by the employee.

14 MR. TRIPP: Maybe I can come back to
15 one of my answers I gave before. The rule
16 we're articulating has four ingredients. You
17 need to have a valid condition that applies to
18 the person.

19 JUSTICE GORSUCH: Yeah.

20 MR. TRIPP: They need to be an
21 officer --

22 JUSTICE GORSUCH: Yeah.

23 MR. TRIPP: -- within the scope.

24 JUSTICE GORSUCH: Yeah.

25 MR. TRIPP: And then it needs to

1 threaten the integrity of the program.

2 JUSTICE GORSUCH: Yeah.

3 MR. TRIPP: I think, under your
4 hypotheticals, the real question is the first
5 one. Can you actually attach the condition
6 to --

7 JUSTICE GORSUCH: Let's assume you
8 can -- let -- let's assume you can. Let's
9 assume they're germane. And they might be
10 germane, you know, in terms of, for example,
11 the -- the student athlete. They might well be
12 germane to a concern about discrimination
13 against women that -- that a federal funding
14 program might well take into account under
15 Title XI, for example, or the employee for --
16 for the Health and Human Services, that
17 might -- a pro-life Congress might well think
18 that germane and we might well find it so. So
19 take -- take -- take as given that they're
20 germane.

21 MR. TRIPP: Yeah.

22 JUSTICE GORSUCH: I can come up with
23 other examples if you want, maybe --

24 MR. TRIPP: No. I -- I -- I just -- I
25 just want to be clear that the -- the -- this

1 Court's Dole -- Dole test is already sort of
2 addressing these concerns, right? So there
3 is obviously the -- the relatedness
4 requirement, but then you also can't be
5 coercive, but then you can't have an
6 independent constitutional bar.

7 JUSTICE GORSUCH: Suppose -- suppose
8 there's no --

9 MR. TRIPP: And then --

10 JUSTICE GORSUCH: -- constitutional
11 problem with these.

12 MR. TRIPP: And -- and then, if these
13 people --

14 JUSTICE GORSUCH: Yeah.

15 MR. TRIPP: -- qualify as officers,
16 which it's --

17 JUSTICE GORSUCH: Yeah. Yeah.

18 MR. TRIPP: -- not clear to me that
19 they will --

20 JUSTICE GORSUCH: Let's say they do.

21 MR. TRIPP: -- then it would --
22 then -- then yes.

23 JUSTICE GORSUCH: Then it follows.

24 MR. TRIPP: Because the answer would
25 be -- well, yeah, sorry, hold on.

1 JUSTICE GORSUCH: So -- so the
2 Spending Clause --

3 MR. TRIPP: Sorry, I think I missed
4 one step. And then -- and then, within the
5 scope, which I think you have, and then it
6 would need to threaten the integrity and
7 proper operation of the program.

8 JUSTICE GORSUCH: Yeah.

9 MR. TRIPP: And I think it is telling
10 you that if -- if, and this is the big if --

11 JUSTICE GORSUCH: I think, Mr. Tripp,
12 where you're winding up is the Spending Clause
13 is no different than the Commerce Clause.

14 MR. TRIPP: I -- I really don't think
15 that's correct, Your Honor, because the --
16 the -- the -- the -- first, the crux, the most
17 important condition on the Dole side is you
18 can't have coercion, right? The state needs to
19 go into it eyes wide open. And I believe, in
20 your hypotheticals, the person needs to take
21 the job eyes wide open. And so there are
22 two -- those are very significant checks that
23 mean this is never going to get to the same --

24 JUSTICE GORSUCH: Both exist -- both
25 of those checks exist in my hypotheticals and

1 Congress could pass such laws. And that's
2 quite a stretch of the Spending Clause. We've
3 never before said anything like that.

4 MR. TRIPP: I mean, if this Court
5 wants to cut back on some of the sort of
6 front-line sort of scope, maybe you could do
7 that in some future case like in the
8 hypotheticals.

9 JUSTICE GORSUCH: No, I'm not talking
10 about cutting back anything. I'm talking about
11 what the -- what nine circuits have uniformly
12 done since RLUIPA's passage about 30 years ago.

13 MR. TRIPP: Yeah. And I -- and I want
14 to be clear that once Congress are -- are --
15 are -- I'm not going to back down on this at
16 all. Once Congress can impose the condition on
17 the person --

18 JUSTICE GORSUCH: I wouldn't expect
19 you to, Mr. Tripp.

20 (Laughter.)

21 MR. TRIPP: Yeah. Once they can
22 impose the condition within the scope of their
23 work, and that can a hard question -- that's a
24 hard question, but, here, it's not. And once
25 they can impose the condition, they can enforce

1 it.

2 And that's -- that's the only step
3 that we're asking about here. We're not asking
4 you to change any law on the front end about
5 what Congress can and cannot do in the first
6 instance.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh?

9 JUSTICE KAVANAUGH: Back to the
10 question on clear authorization regarding
11 damages in particular, now you rely heavily on
12 Tanzin for that. But, even after Tanzin, to
13 pick up on Justice Gorsuch's point about the
14 courts of appeals, the courts of appeals has --
15 have continued to reject the position you're
16 articulating here even in the wake of Tanzin.
17 I think Chief Judge Sutton's opinion in Ali is
18 probably emblematic of that and says, even
19 after Tanzin, you still don't have the clear,
20 express, unequivocal, unambiguous authorization
21 for damages.

22 And so my question really is just why
23 are judges, to Justice Gorsuch's question,
24 misreading the precedents that are out there in
25 your view?

1 MR. TRIPP: Yeah, I -- I -- I'm glad
2 you asked that. Maybe -- maybe two points
3 where I think Judge Oldham has -- has the
4 better of this with all due respect to Judge
5 Sutton. And, honestly, the first thing that I
6 said, Judge Sutton, if you look at his opinion
7 in Ali and also his prior opinion in Haight
8 versus Thompson, he does not ask the question
9 of whether there's an individual capacity
10 action. He goes -- he goes right into the sort
11 of appropriate relief analysis.

12 And I think that is just a critical
13 step because, once you see that there's an
14 individual capacity action, then you have an
15 express right, an express cause of action, it
16 is expressly against a private party. And then
17 whether damages are appropriate relief, I mean,
18 that -- that's the norm. That's what
19 individual capacity actions are for.

20 If you don't have it, the -- the --
21 the -- the -- the individual capacity adds
22 nothing. It's totally meaningless. And I
23 think it's because Judge Sutton sort of
24 overlooked that first step in the analysis,
25 that I think Judge Oldham has the better of it.

1 I also think that when you're
2 asking --

3 JUSTICE KAVANAUGH: So you're --

4 MR. TRIPP: -- once you're actually
5 turning to the question of, okay, we have the
6 individual capacity action, we're trying to
7 figure out what is appropriate relief, another
8 thing that Judge Oldham hit really hard, which
9 is very powerful, is the whole point of this
10 law, which everybody knows, is to go back to
11 the pre-Smith scheme and provide the same
12 rights and remedies that were available,
13 including in the original RFRA, which this
14 Court said, it made clear must include damages
15 against state officials.

16 And so I think that the parallel -- I
17 mean, these -- these are hardly even separate
18 statutes, right? Like RFRA and RLUIPA, they
19 like -- they work together as an integrated
20 whole.

21 And so, to understand them, I think
22 that, really, the only way to understand their
23 operation together is as providing the same
24 rights and remedies within their scope. I
25 mean, RLUIPA -- Congress was crystal-clear in

1 RLUIPA about the places where it needed to trim
2 its sales because this was spending
3 legislation.

4 It's on the face of the statute. It's
5 not referred to. It's the Religious Land Use
6 and Institutionalized Persons Act. It only
7 applies to institutions that accept federal
8 funds. That's on the face of the statute, it's
9 clear as day.

10 But, if you look in at the substantive
11 provisions and the remedies and you look, well,
12 how have those changed because this is spending
13 legislation, the answer is not at all. The
14 rights and the remedies are the same.

15 There, it is -- the whole point of
16 this statute is to get back to the pre-Smith
17 scheme.

18 JUSTICE KAVANAUGH: The whole point of
19 the Spending Clause jurisprudence is you need
20 more of a clear statement to get all the way
21 there for damages. I mean, at least --

22 MR. TRIPP: I -- I -- and I think,
23 really, what I'm saying is that, and this Court
24 has said this many times, is -- the question
25 is, is it unambiguous? And to answer that,

1 there's no magic words requirement. You read
2 text in light of context, like you always do.
3 And if you do that and you start by asking is
4 there an individual capacity action, it's
5 clearly yes.

6 JUSTICE KAVANAUGH: And -- and just to
7 summarize your position, individual capacity
8 action with appropriate relief --

9 MR. TRIPP: Right.

10 JUSTICE KAVANAUGH: -- equals clear
11 authorization for damages, correct?

12 MR. TRIPP: What I'm saying is the
13 first step is individual capacity action, you
14 have it, and then the question becomes, well,
15 what's appropriate relief in an individual
16 capacity action?

17 I think the answer to that is clear.
18 It's actually -- Tanzin says -- I -- I know
19 it's not applying a clear statement rule, but
20 its language bespeaks clarity each step of the
21 way, said that Congress made clear that RLUIPA
22 must -- or sorry, that RFRA must provide
23 damages, that there was no doubt damages were
24 available before Section 1983, that it was
25 going back, and then again the distinction to

1 the sovereign context, where damages are not
2 available really because of a special rule in
3 the context of suits against sovereigns, right?

4 The whole -- the crux of Sossamon was
5 that it could distinguish Franklin, it
6 distinguished the Franklin presumption because
7 it doesn't apply to sovereigns.

8 JUSTICE KAVANAUGH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett?

11 JUSTICE BARRETT: Mr. Tripp, how could
12 it have been clear to states when every
13 circuit -- as Justice Gorsuch pointed out,
14 every circuit had said that there were not
15 damages actions available against
16 non-recipients under RLUIPA, that's also true
17 under the Title IX context, so it's hard to see
18 how it could be clear to the states that were
19 accepting the money or the prisons accepting
20 the money that it was a clear condition when
21 all of the law went the other way. What would
22 your response to that be?

23 MR. TRIPP: I think a couple
24 responses. The first -- what this Court has
25 demanded every time, and I've said this before,

1 is unambiguous text in light of the context.
2 And this Court has never applied any kind of,
3 like, canon of adverse possession where, if the
4 courts of appeals are saying something --

5 JUSTICE BARRETT: If you were a lawyer
6 to the states and you -- that was the state of
7 the law and the state asks you about that, what
8 would you have said?

9 MR. TRIPP: I think the key here is to
10 look at the time when the statute was enacted,
11 right, and -- and -- which is the -- the key
12 question, right, is what did it mean when it
13 was enacted, and if you look at it when it was
14 enacted and you pick it up and you read it, I
15 think as just a -- a state officer working
16 in -- in a fed -- in --

17 JUSTICE BARRETT: And it's so obvious
18 that every single circuit to look at the
19 question went the other way?

20 MR. TRIPP: I -- I -- so this --

21 JUSTICE BARRETT: It's hard to see how
22 it's clear if every circuit is coming out
23 differently.

24 MR. TRIPP: The -- and I think this is
25 actually an important point because the -- the

1 prevailing rule in the circuits, including in
2 the Fifth Circuit below, where this case is
3 coming from, they didn't deny that there was
4 clear notice. They said it would be
5 unconstitutional because they -- they thought
6 that the -- that the -- the officers were,
7 like, they treated them as non-recipients even
8 though they're basically indirect recipients
9 and it didn't sort of see that they fit within
10 the --

11 JUSTICE BARRETT: Well, not every
12 circuit brought up the constitutionality
13 question, but putting that aside, can you
14 identify -- putting aside the bribery cases,
15 can you identify any cases in which a
16 non-recipient of funds was held individually
17 liable under a federal statute?

18 MR. TRIPP: I mean, in -- in -- I
19 think, in -- in Grove City College versus Bell,
20 you're reading -- reaching an indirect
21 recipient. In Salinas, Dixon, Hess, and
22 Laudani, those are all situations where you're
23 reaching --

24 JUSTICE BARRETT: I mean, you can
25 just -- you can just say that, yes, it would be

1 a different factual scenario.

2 MR. TRIPP: I -- I don't have a case
3 that's on this exact factual scenario, I admit
4 that, but I think actually this is, like, a
5 lesser included of Salinas and it's way inside
6 Sabri. I mean, it's more --

7 JUSTICE BARRETT: Well, but I -- but I
8 said to put aside the bribery cases, so the
9 ones under --

10 MR. TRIPP: If I could push back on
11 that a little bit, I think that's important
12 when the -- the crux of this program is to
13 provide federal funds to prisons that
14 accommodate religious liberty.

15 JUSTICE BARRETT: Well, no, I -- I
16 asked you to put them aside because I wanted
17 you to put them aside and look at the civil
18 liability context for a minute.

19 MR. TRIPP: Okay. Yeah.

20 JUSTICE BARRETT: I think that Sabri
21 and Salinas are the best cases for you,
22 particularly Sabri. I -- I take that. But, if
23 those are distinguishable, I wanted to ask you
24 the other question, and I think the answer is
25 no. And I think -- and I just kind of want to

1 clarify your answer to Justice Gorsuch. Look,
2 the facts of this case are egregious. So, if
3 on the facts we were looking for a case in
4 which there should be money damages, this is
5 it.

6 Justice Gorsuch asked you a series of
7 harder facts, harder factual scenarios, in
8 which we might think, oh, I'm not sure if money
9 damages as a policy matter make as much sense
10 in that context. You never really gave him an
11 answer yes or no. And so I just want to say --
12 I want you to give me an answer, yes or no, on
13 Justice Gorsuch's hypotheticals, and don't
14 fight the hypothetical about the conditions and
15 all that, your theory means that, yes, the
16 coach, the doctor, could be held liable?

17 MR. TRIPP: If -- but if -- let me be
18 clear about this. If but only if --

19 JUSTICE BARRETT: Yes or no? Yes or
20 no?

21 MR. TRIPP: -- the condition --

22 JUSTICE BARRETT: Take the hypo -- no,
23 no, no, no.

24 MR. TRIPP: If but only --

25 JUSTICE BARRETT: Mr. Tripp --

1 Mr. Tripp, he asked you to assume that the
2 conditions that it was -- it was perfectly
3 consistent with this Spending Clause. So yes
4 or no, would your theory say that -- let's talk
5 about the coach under Title IX on Justice
6 Gorsuch's hypothetical.

7 MR. TRIPP: If the condition is valid,
8 the -- yes.

9 JUSTICE BARRETT: Yes, yes, yes, he
10 said all that. Yes.

11 MR. TRIPP: Then I'll say yes. If the
12 condition attaches, Congress can enforce it.
13 And I think the crux of the question is can
14 the --

15 JUSTICE BARRETT: Okay, but just say
16 yes or no.

17 MR. TRIPP: Sorry.

18 JUSTICE BARRETT: Yes or no.

19 MR. TRIPP: Yeah.

20 JUSTICE BARRETT: You don't want to
21 say yes or no. Just -- just take the
22 consequences. It's totally fine if those are
23 the consequences, but I think you have to
24 follow the logic where it leads. And the logic
25 where it leads is that, yes, under Title IX,

1 say, Congress could pass a statute or Congress
2 could say that it's going to rely on its
3 spending power to hold the coach liable under
4 the -- the hypothetical Justice Gorsuch gave
5 you, right, yes?

6 MR. TRIPP: It --

7 JUSTICE BARRETT: Yes?

8 MR. TRIPP: Yes.

9 JUSTICE BARRETT: Yes.

10 MR. TRIPP: If -- if -- but if -- but
11 I think this is --

12 JUSTICE BARRETT: I just don't see how
13 you could say no given the assumptions he asked
14 you to make about the Spending Clause.

15 MR. TRIPP: But -- but I want -- I
16 want to be clear. One of -- one of the reasons
17 I've been articulating this rule under Salinas,
18 right, which is these four ingredients, valid
19 condition, officer within the scope, and
20 threatening the program, is it doesn't require
21 you to address, I think, some of these. There
22 are harder hypotheticals about --

23 JUSTICE BARRETT: Well, but,
24 Mr. Tripp, every time we decide a case, we have
25 to think about what it's -- you know, in

1 Salinas and Sabri, you know, if it had -- if
2 they had looked ahead to this case, might have
3 said, yeah, this might be where the logic leads
4 or you take a few steps from here and this is
5 where it goes. But we can't decide a case just
6 based on these facts. So you just need to own
7 it.

8 MR. TRIPP: No, no, I --

9 JUSTICE BARRETT: And it's fine --

10 MR. TRIPP: And -- and I own that.

11 JUSTICE BARRETT: -- if you own it. I
12 just don't understand why you're not owning it.

13 MR. TRIPP: I -- I -- I -- I want to
14 be clear about that. But what I'm saying and
15 the reason why, especially in our reply brief,
16 we're -- we're relying heavily on Salinas is
17 you've already said all of this, and so
18 we're -- we're not asking the Court to -- to
19 break new ground.

20 JUSTICE BARRETT: But -- but you're
21 not making -- well, okay.

22 MR. TRIPP: And -- and --

23 JUSTICE BARRETT: Let's just -- why
24 does it -- why -- logically speaking, why is
25 it -- why does it have to be individuals or

1 officers? Why couldn't you, for example, say
2 that a school district, schools that take
3 federal money, if they do and we want to -- why
4 couldn't liability extend, say, to parents who
5 choose to send their kids to those schools?
6 Let's think about, like, if a -- if a child is
7 transitioning, say, and the parent says, you
8 know, no, I'm not going to facilitate that, I'm
9 not going to call the child a different name or
10 call the child by different pronouns, could
11 there be some sort of cause of action that
12 would allow, say, the child to sue the parent
13 for civil liability? Why does it have to be an
14 officer or an employee under your theory?

15 MR. TRIPP: Because of the -- of -- of
16 the consensual contractual nature of agreeing
17 to work as an officer --

18 JUSTICE BARRETT: So contract works
19 for --

20 MR. TRIPP: -- for a federally funded
21 program. It --

22 JUSTICE BARRETT: -- that point.

23 MR. TRIPP: It -- right. And so I
24 think, when you're reaching a member of the
25 general public, which is what your hypothetical

1 is talking about, it is a totally different set
2 of questions that we're not remotely touching.
3 I think that's what Sabri gets at, is how far
4 can Congress go into reaching members of the
5 general public. Those are hard questions, and
6 we're not asking you to go anywhere near them.
7 These are --

8 JUSTICE BARRETT: And why doesn't your
9 logic require it? Because you want to rely on
10 the contract analogy for that point? Like,
11 you're just sticking on the contract road?

12 MR. TRIPP: Because of the contract
13 road and they admit the condition applies to
14 them. And it's because of the contract because
15 they've agreed to take the job subject to this
16 condition.

17 And we know that that's voluntary all
18 the way down, right? The state is voluntarily
19 accepting the funds. They're voluntarily
20 taking this job. A person who takes this job
21 might want to demand higher wages or indemnity
22 or things like that, but that's already the
23 norm for them and they -- they already provide
24 the -- you know, indemnity is the norm in the
25 Louisiana law and most states and --

1 JUSTICE BARRETT: What about other
2 contracts, though? I mean, what if you, you
3 know, contract for services with the hospital
4 because you're a patient? What if you
5 contract -- I mean, I guess I don't understand
6 why it has to be an employee.

7 MR. TRIPP: I -- I think the -- the
8 piece about being an employee -- and this is
9 what's picked up in Rust versus Sullivan and
10 Alden versus Maine as to state officers in
11 particular, who also take an oath to comply
12 with the federal Constitution and laws -- is
13 that you are sort of taking a job sort of
14 subject to the conditions, the sort of terms
15 that attach to the work. It's different than
16 being just like a stranger to the counterparty
17 in a contract.

18 I know that in Hess, United States,
19 Marcus ex rel. Hess, that's a situation where
20 you're reaching somebody who's a subcontractor
21 through sort of the chain of privity. And so
22 the Court has addressed that in some other
23 cases. But, again, I think this one's easier
24 because of just the nature of the work.

25 JUSTICE BARRETT: Okay. Speaking of

1 the layers of consent -- this is just a
2 technical question -- the Fifth Circuit talked
3 about the warden and the Secretary of State.
4 Were the guards actually defendants because,
5 here -- are the guards before us?

6 MR. TRIPP: We don't have their names.
7 They're -- they're -- they're John Does.

8 JUSTICE BARRETT: They're the John
9 Does? But the -- but the Fifth Circuit didn't
10 talk about them. The Fifth Circuit talked
11 about the warden and Secretary of State saying
12 they couldn't be sued in their individual
13 capacities?

14 MR. TRIPP: The -- the -- the warden
15 is -- is the -- I mean, the factual allegations
16 in the complaint involve the warden
17 specifically.

18 JUSTICE BARRETT: Okay. And the
19 warden -- so the warden knew your -- okay. So
20 the -- the -- the Does are not before us? It's
21 just the warden?

22 MR. TRIPP: I mean, no, the Does --
23 the Does are before you. We don't --

24 JUSTICE BARRETT: Before you --

25 MR. TRIPP: You know, it was

1 dismissed.

2 JUSTICE BARRETT: Right.

3 MR. TRIPP: We don't -- we don't know
4 who they are. Yeah.

5 JUSTICE BARRETT: Okay.

6 MR. TRIPP: We don't know their names.
7 Yeah.

8 JUSTICE BARRETT: And in terms of
9 layers of contract, is the contract with the
10 State of Louisiana or with LDOC or with the
11 prisons?

12 MR. TRIPP: So the way RLUIPA works is
13 the Department of Corrections, the -- is the --

14 JUSTICE BARRETT: Okay. So it's LDOC?

15 MR. TRIPP: It's LDOC.

16 JUSTICE BARRETT: That -- that's
17 just -- yeah. That -- That -- I just wanted to
18 understand how that worked. Thanks.

19 CHIEF JUSTICE ROBERTS: Justice
20 Jackson?

21 JUSTICE JACKSON: So can I invite you
22 to reflect back to Justice Thomas's question?
23 And you said that there were two paths to
24 getting to your result, and you mentioned
25 Salinas is one, and I think I might have heard

1 the other, but let me just give you the
2 opportunity to explain what those two paths
3 are.

4 MR. TRIPP: Yeah. In -- so, in
5 Salinas, I think because it's criminal
6 liability, the Court is very clearly relying on
7 a combination of the Spending Clause to attach
8 the condition and then the Necessary and Proper
9 Clause to enforce it because you can't do
10 criminal under -- under contract.

11 But I think, in this case, because we
12 have civil liability and it's this chain that
13 runs down to the officers, you don't even need
14 the -- the Necessary and Proper Clause. I
15 think this is an unusually easy case because --
16 because of the way that just sort of --

17 JUSTICE JACKSON: So the -- the chain
18 of privity is the second?

19 MR. TRIPP: Because the chain of
20 privity --

21 JUSTICE JACKSON: Yeah.

22 MR. TRIPP: -- is the second. So I
23 think you could come at it either way. And,
24 you know, I represent a private litigant. I --
25 I don't really care which one you do so long as

1 you reverse, of course.

2 JUSTICE JACKSON: So do you view
3 Louisiana's constitutional argument as turning
4 on the contract analogy? I mean, do we have to
5 sort of accept that the Spending Clause and
6 Spending Clause legislation is subject to
7 characterization as a contract in order to --
8 to buy their argument?

9 MR. TRIPP: I -- I'm not sure -- and
10 maybe they can speak for themselves on -- on
11 that. I think the -- the Spending Clause is
12 properly understood as being -- the Spending
13 Clause alone, I think --

14 JUSTICE JACKSON: Alone.

15 MR. TRIPP: -- is -- is consensual in
16 nature. That's -- I think this Court has been
17 clear about that. But then the question of
18 what --

19 JUSTICE JACKSON: But we've also
20 been -- I just want to be clear about this. I
21 mean, we've also expressed pretty significant,
22 in many cases, doubts about whether the
23 contract analogy totally governs.

24 MR. TRIPP: But -- yeah. And then
25 that's what I was about to say because it --

1 JUSTICE JACKSON: Yeah.

2 MR. TRIPP: -- it doesn't get -- this
3 Court has also been clear -- and they're not
4 asking to overrule any of your precedents --
5 the Court can -- that Congress can invoke the
6 Necessary and Proper Clause to protect its
7 spending prerogatives. I mean, look in our
8 reply brief. We have the example of the
9 statute that makes it a crime to arson a
10 federally funded institution, right? That's
11 the use of the Necessary and Proper Clause in
12 conjunction with the Spending Clause.

13 And which, as I understand their
14 brief, they're saying that that's off the
15 table, whereas I think what we're saying is,
16 because this is officers, you know, within the
17 scope, it's a valid condition and it's conduct
18 that threatens the sort of core operation of
19 the program, then it's just controlled by
20 Salinas and you don't need to break any new
21 ground.

22 JUSTICE JACKSON: So -- so how much
23 precedent would we undo if we held that
24 RLUIPA's individual capacity cause of action
25 for money -- money damages is unconstitutional?

1 I mean, is this a big deal case or -- or not so
2 much?

3 MR. TRIPP: I mean, I -- I -- I
4 certainly think it's a big deal case. And
5 we've -- we've included a -- I mean, I -- I
6 think there are these, like, five or six
7 precedents from this Court that I just don't
8 see how they can square their position with,
9 Salinas, Hess, Laudani, Dixon, Grove City
10 College versus Bell, and Sabri.

11 And then just above and beyond the
12 Court's cases, I mean, we traced through a
13 history of statutes that are similar to this
14 running all the way back to 1789. The first
15 Congress imposed individual -- they had a
16 scheme for imposing individual liability on
17 officers in a federally fund -- working in a
18 federally funded state prison.

19 False Claims Act of 1863, antikickback
20 provisions that started in the 1930s. Title
21 IX. Title VI, that's Grove City College versus
22 Bell. Title X of the Public Health Acts,
23 EMTALA, there's whistleblower provisions,
24 Prison Rape Elimination Act, the arson statute
25 that we were talking about, there's another one

1 about blocking interference to federally funded
2 programs. So it's -- it's a long list of
3 statutes.

4 JUSTICE JACKSON: That could be
5 imperiled by --

6 MR. TRIPP: Yeah, where -- where --
7 where -- where -- where Congress has
8 traditionally protected federal program and I
9 think, in particular, imposed conditions and
10 enforced them as to people who are in this
11 position of being in the chain of privity.
12 They're -- they're officers, agents, employees
13 or -- or -- or subcontractors of the grantee.

14 JUSTICE JACKSON: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Ms. Baird.

18 ORAL ARGUMENT OF LIBBY A. BAIRD

19 FOR THE UNITED STATES, AS AMICUS CURIAE,

20 SUPPORTING THE PETITIONER

21 MS. BAIRD: Thank you, Mr. Chief
22 Justice, and may it please the Court:

23 RLUIPA clearly authorizes individual
24 capacity damages suits against state officials.
25 Tanzin held that RFRA authorizes individual

1 capacity damages suits against federal
2 officials, and RLUIPA is RFRA's sister statute
3 and should be read the same way.

4 Congress used materially identical
5 text in RLUIPA to provide the same remedies as
6 RFRA against state officials. Respondents
7 resist that simple conclusion because RLUIPA
8 was enacted under Congress's spending power.
9 But RLUIPA's language puts states on clear
10 notice that state officials can be sued for
11 damages in their individual capacity.

12 And under the Spending and Necessary
13 and Proper Clauses, Congress could create
14 personal liability for state officials acting
15 as agents of the state when they violate
16 conditions on federal funding. Indeed, Salinas
17 and Sabri upheld more expansive uses of
18 Congress's power to impose criminal liability.

19 I welcome the Court's questions.

20 JUSTICE THOMAS: Well, let's say that
21 the state is under clear notice. Is a guard
22 also privy to that clear notice?

23 MS. BAIRD: So, Justice Thomas, we
24 don't think clear notice is required under the
25 purpose of the Spending Clause because we care

1 about the notice of the recipient, but I think
2 the officers here clearly had notice. And I do
3 think that qualified immunity --

4 JUSTICE THOMAS: Okay. So how do they
5 get that notice and what was the notice?

6 MS. BAIRD: Well, I think the statute
7 clearly applies to them if you look at -- you
8 know, Petitioner's counsel emphasized the text
9 of the cause of action, it applies to a
10 government defined as an official.

11 JUSTICE THOMAS: So do you think they
12 were aware of the state's commitment to the
13 statutory requirements?

14 MS. BAIRD: I -- I think that -- that
15 we're all sort of held liable for what's in
16 the -- the United States Code. And I think
17 that this isn't surprising to -- to state
18 officials.

19 JUSTICE THOMAS: So you think you have
20 clear notice of everything that's in the United
21 States Code?

22 MS. BAIRD: Well, Your Honor, I think
23 that the officers here clearly had notice.
24 Officers are used to facing 1983 liability and
25 are liable for violation of all constitutional

1 provisions. They know there -- that certain
2 requirements apply to them when they accept
3 employment in a federally funded prison.

4 And I do think that qualified immunity
5 is an important backstop because they can only
6 actually be held liable if their conduct
7 violated clearly established law.

8 JUSTICE JACKSON: And they concede
9 liability, right? I mean, in other words, they
10 concede that these substantive provisions apply
11 to them. So they must then know or, you know,
12 their -- their response was not we -- we didn't
13 have notice that we had to behave this way.
14 Their response is you can't sue me individually
15 for damages as a result of that.

16 MS. BAIRD: Exactly, Justice Jackson.
17 At page 46 of their brief, Respondents admit
18 that they are bound by the substantive
19 condition. I think that that makes this a very
20 easy case for purposes of the Spending Clause
21 issue because they admit they can be sued in
22 their official capacity for an injunction.

23 I think that means, as Petitioner
24 argued in -- in his brief, and I don't take
25 Respondents to have disputed, that the -- that

1 Respondents could be held for contempt. And
2 that can have personal consequences --

3 CHIEF JUSTICE ROBERTS: So -- I'm
4 sorry, finish your question.

5 MS. BAIRD: Oh. They can be held for
6 contempt. And that could have personal
7 consequences. So I think that the
8 Necessary and Proper Clause, if it means
9 anything, it can mean that Congress can go one
10 half-step further and say that we can reach
11 these people in their individual capacities as
12 a necessary and proper means to enforce the
13 substantive condition of RLUIPA.

14 CHIEF JUSTICE ROBERTS: Well, I think
15 the Necessary and Proper Clause may mean other
16 things even if you're right, but -- so, in
17 light of what you've said, your answer to
18 Justice Barrett's questions is yes, right?
19 They can be held liable whether they know,
20 whether they don't know, quite -- quite across
21 the board?

22 MS. BAIRD: For government officials,
23 yes. As to the hypos, I think that one of
24 Justice Gorsuch's hypos which Justice Barrett
25 followed might have included private parties.

1 The government doesn't take a position as to
2 how this would cash out in terms of private
3 parties.

4 I think, as Petitioner's counsel
5 noted, I think there's obviously different
6 issues of consent, especially when we're
7 talking about reaching a member of the general
8 public. But, in terms of reaching government
9 employees and agents, we think that they can
10 clearly be reached.

11 CHIEF JUSTICE ROBERTS: So --

12 MS. BAIRD: I do agree with him
13 that --

14 CHIEF JUSTICE ROBERTS: -- so, even
15 though we require pretty express consent by a
16 state before they're bound under the Spending
17 Clause, we don't require that with respect to
18 the individuals?

19 MS. BAIRD: Your Honor, no. I think
20 what -- what matters for purposes of the
21 Spending Clause is clear notice to -- to the
22 states who accepted funds. And, again, this
23 isn't surprising to individual officers.
24 They're --

25 CHIEF JUSTICE ROBERTS: So you're

1 saying, does the same standard apply to the
2 individual employees?

3 MS. BAIRD: No, I do not think under
4 the Spending Clause that they need to have
5 clear notice. And --

6 JUSTICE GORSUCH: I think that's --
7 that's got to be the implication of your
8 position, is that both clear notice and consent
9 this Court has said time and time again are
10 required for states to be bound, and you're
11 saying neither of those apply when it comes to
12 state employees.

13 MS. BAIRD: So I guess I should
14 clarify my answer that I do think it depends on
15 what power the Court relies. I think, if the
16 Court were to --

17 JUSTICE GORSUCH: Spending Clause
18 power.

19 MS. BAIRD: If the Court were to say
20 only the Spending Clause, then I do think
21 that -- that you would have to have consent of
22 the state official, and I do think we have that
23 here.

24 JUSTICE GORSUCH: Whoa, whoa, whoa,
25 whoa, whoa. Let's back up. We're talking

1 about a spending power statute, okay, and --
2 and you -- everybody has to agree, I think,
3 that consent and notice are required for -- for
4 a state to be bound, right?

5 MS. BAIRD: Yes.

6 JUSTICE GORSUCH: And are you saying
7 those are or are not required for the state
8 employee to be bound?

9 MS. BAIRD: So, under the Spending
10 Clause, I think that the sort of privity
11 argument that we've been talking about today --

12 JUSTICE GORSUCH: Right. So no is the
13 answer because it works for the state and,
14 because the state employs these individuals,
15 they're necessarily bound?

16 MS. BAIRD: I -- I do think that's
17 right. And I think that --

18 JUSTICE GORSUCH: Okay. So no consent
19 and no -- no notice is required for the
20 employees?

21 MS. BAIRD: I think --

22 JUSTICE GORSUCH: That has to be the
23 logic of your view.

24 MS. BAIRD: I think not as a formal
25 matter in terms of under the Spending Clause,

1 but I think the reason that this is such an
2 easy case under either the Spending Clause --

3 JUSTICE GORSUCH: Okay. What do we do
4 if that's true -- and I think it has to be
5 right, and I -- I appreciate the candor -- with
6 the fact this Court has always said that, you
7 know, contract is the analogy, and it's
8 certainly true that an agent is liable to its
9 principal for violating the principal's rules,
10 here, the employee to the state.

11 But it has never been the case --
12 well, never may be strong -- but, certainly, if
13 I look at the Restatement, an agent isn't
14 responsible to a third party with whom the
15 principal has a contract. Privity doesn't run
16 like that. It runs between the principal and
17 the agent, not a third party.

18 What do you do about that?

19 MS. BAIRD: Yes, Justice Gorsuch.
20 Well, I would strongly resist that the contract
21 analogy applies to answer every question that
22 arises --

23 JUSTICE GORSUCH: Okay. Okay.

24 MS. BAIRD: -- in Spending Clause
25 legislation.

1 JUSTICE GORSUCH: That -- that --
2 that's -- that's an answer, is just ignore the
3 contract analogy. Fair enough.

4 MS. BAIRD: Well -- well, I think
5 that -- well, I think what the Court's cases
6 say is that the contract analogy is important
7 for purposes of determining notice. It's did
8 the recipient --

9 JUSTICE GORSUCH: Notice and consent,
10 yeah.

11 MS. BAIRD: Did the recipient have
12 notice. I think, here, it makes it an easier
13 case under the Spending Clause, unlike all of
14 the cases where the Court has considered like
15 in Medina --

16 JUSTICE GORSUCH: But you're asking us
17 to ignore contract principles when it comes to
18 the employees, right? I mean, that has to be
19 right.

20 MS. BAIRD: No. We just don't think
21 that -- that the contract analogy answers the
22 question. We think the Court --

23 JUSTICE GORSUCH: Right.

24 MS. BAIRD: -- needs to sort of tick
25 through the constitutional analysis and ask,

1 you know, is this a necessary and proper means
2 of enforcing the substantive RLUIPA condition.
3 And we think it is.

4 JUSTICE GORSUCH: But we have -- we
5 have to look outside the contract analogy
6 because it wouldn't get to the employee here.
7 It wouldn't. I mean, there's no privity
8 between the employee and the federal
9 government.

10 MS. BAIRD: There is not. But, again,
11 the Necessary and Proper Clause gives Congress
12 the power to enforce a condition that's validly
13 imposed. So, once we have a valid condition
14 that has been imposed and to which the state
15 consented, surely, Congress can take the
16 half-step further to enforce that condition
17 against the people --

18 JUSTICE JACKSON: But --

19 MS. BAIRD: -- who are most likely to
20 violate it

21 JUSTICE BARRETT: No, Ms. Baird, so it
22 sounds to me like you want to use the contract
23 analogy to limit the scope of this argument
24 because you keep saying, well, no, this is
25 privity, this is privity, and that's why we

1 don't need to take a position on whether it
2 would reach a member of the general public,
3 right? But then you're moving away from the
4 contract analogy when Justice Gorsuch is asking
5 you about, well, do these principles of
6 contract law apply?

7 I don't understand. It seems like
8 we're slipping in and out of the contract
9 analogy.

10 MS. BAIRD: Yeah, so let me try to be
11 clear, Justice Barrett. I think that the
12 contract analogy applies to determine whether
13 there is notice. I think this Court's cases
14 are clear that the notice that matters is the
15 state's notice. I do think that the officers
16 can be fairly held to account for notice here.

17 I think, under the Spending Clause
18 alone, this is an easy case because officers
19 consent to work at a federally funded state
20 prison. I think, when we add in the Necessary
21 and Proper Clause, you know, the farthest this
22 Court has ever gone is Sabri, which reached a
23 member of the general public. There was no
24 consent there. I think that the Necessary and
25 Proper Clause allows Congress to enforce valid

1 conditions.

2 There may be hard questions about can
3 Congress impose the condition in the first
4 place, but I think, once Congress has imposed
5 the condition -- and, again, Respondents don't
6 dispute that they're bound by the substantive
7 RLUIPA condition, and courts of appeals have
8 upheld the substantive condition under the
9 Spending Clause -- Congress can go one
10 half-step further and enforce it against
11 individuals --

12 JUSTICE BARRETT: But that half-step
13 has to include members of the general public
14 because you're relying not just on the contract
15 because the answers about the contract are that
16 it does not need to give clear notice to the
17 employee. So they're getting their notice from
18 the statute, right?

19 MS. BAIRD: Yes. I think they have
20 notice from the statute. And, again, I think
21 qualified immunity is an important backstop
22 for -- for officers. I guess, with -- what I
23 would say about members of the general public
24 is I think, conceivably -- and the reason we're
25 not taking a position on sort of how this

1 nonparty liability issue cashes out there,
2 because I think there conceivably could be
3 different analysis under the Necessary and
4 Proper Clause.

5 I think, here, it's necessary --

6 JUSTICE BARRETT: What would that
7 analysis look like?

8 MS. BAIRD: Well, so let me just walk
9 through what the analysis is like for
10 individual officers, and then, as I'm doing
11 that, we can sort of see how it would be
12 different. But, here, it's necessary to
13 enforce it against individual officers because,
14 otherwise, the condition would go unenforced in
15 a significant category of cases. And the facts
16 as alleged here are a good example of that,
17 facts of one-time abuses --

18 CHIEF JUSTICE ROBERTS: You can finish
19 your answer.

20 MS. BAIRD: Thank you, Mr. Chief
21 Justice.

22 That Congress clearly had on its mind
23 in RFRA and RLUIPA, you know, the destruction
24 of a Bible, et cetera. It's also proper
25 because this is a longstanding traditional

1 remedy, and it's against state officials who
2 are most likely to violate the condition.
3 These are the people through whom the state
4 acts. A state otherwise doesn't act but
5 through its officials.

6 And so I think that necessary and
7 proper analysis could look a lot different when
8 we're reaching a member of the general public.
9 And I think there could be other safeguards. I
10 mean, there are other limits on Spending Clause
11 power too, and I think those would equally
12 apply.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas?

16 Justice Alito?

17 JUSTICE ALITO: In determining whether
18 there was clear notice, what is the relevant
19 point in time?

20 MS. BAIRD: So I think it would be
21 what is the notice as provided by the statute.
22 In Medina, I think it was Footnote 8, the Court
23 said we care about notice as provided by
24 Congress. So --

25 JUSTICE ALITO: No, what date? What

1 is the date?

2 MS. BAIRD: So when RLUIPA was enacted
3 in -- in 2000. And we care about what the --

4 JUSTICE ALITO: It's not the time --
5 it's not the point at which the state accepts
6 the money?

7 MS. BAIRD: Yes, but I think -- so --
8 so, yes, we care about the state's notice at
9 the time they accepted the funds, but I
10 think --

11 JUSTICE ALITO: And what was -- what
12 is the relevant date there?

13 MS. BAIRD: So I --

14 JUSTICE ALITO: In this case?

15 MS. BAIRD: RLUIPA is tied to all
16 sorts of federal funding. And so I don't have
17 a specific date on which they accepted funds,
18 but I imagine they're continually accepting
19 federal funds. You can go to USA.spending.gov
20 to see the different funds that they receive
21 from the government.

22 JUSTICE ALITO: Was it clear before
23 Tanzin?

24 MS. BAIRD: Yes, I absolutely do think
25 it was clear because Tanzin is illustrative. I

1 think Tanzin is helpful for us because it shows
2 why the textual analysis comes out the way it
3 does. I don't think it was necessary.

4 JUSTICE ALITO: Even though all the
5 courts of appeals have gone the other way, and
6 even without Tanzin, you think it was clear?

7 MS. BAIRD: I would say so, Justice
8 Alito. And here's what I would say. I mean,
9 in talking about the courts of appeals
10 decisions, yes, they've all gone the other way.
11 I agree with Petitioner not all of them said
12 that the statute wasn't clear. I think that,
13 really, there's no sort of how lopsided is the
14 circuit split rule. It's odd to think that at
15 time zero, a statute could not provide clear
16 notice or -- or could provide clear notice, but
17 then, at time one, when all of the circuits
18 have gone the other way, it doesn't provide
19 clear notice. There's just no administrable
20 way to administer that rule. And so --

21 JUSTICE ALITO: Well, Tanzin was
22 decided, I think, 18 days before the event in
23 question here, and maybe General Aguiñaga could
24 answer the question. But, if funds were not
25 received after that date, doesn't that make it

1 more difficult?

2 MS. BAIRD: I -- I don't think so,
3 Your Honor. I think that timing is right
4 from -- from what I understand the allegations
5 to be in the complaint. But I -- again, I
6 don't think the -- the argument depends on
7 Tanzin. The notice that we care about is the
8 notice as provided by Congress. And text is
9 the only reliable indicator of meaning.

10 The other thing I'll say is sort of
11 just as a basic principle, when Tanzin
12 interpreted RFRA to make clear that individual
13 capacity damages are available under RLUIPA
14 too, that's not just what RLUIPA meant
15 post-Tanzin. That's what RLUIPA has always
16 meant. That's Rivers versus Roadway Express.

17 JUSTICE ALITO: Okay. I -- I
18 understand the point. Could you address
19 Justice Gorsuch's hypothetical about the coach?
20 Let's just take that as an example. What is
21 the position of the United States regarding
22 that situation?

23 MS. BAIRD: So, assuming the coach,
24 this is a public entity and the coach is a -- a
25 government employee, yes, there could be a

1 cause of action there, but, again, I think the
2 difficult part -- and I'm not going to fight
3 the hypothetical -- I think yes, but the
4 difficult part is, can Congress impose the
5 condition in the first place? And there are
6 serious limits on what Congress can do under
7 the Spending Clause. There's not just Dole,
8 but there's other principles that the Court has
9 laid out, in Gordon --

10 JUSTICE ALITO: Yeah, and what would
11 be -- that's what I'm asking. What would be
12 the limitations?

13 MS. BAIRD: Sure. So there's several.
14 I mean, the Dole factors, obviously. There's
15 the unconstitutional --

16 JUSTICE ALITO: Well, would the Dole
17 factors be met in this -- in that situation?

18 MS. BAIRD: Well, you know, I don't --
19 I don't want to take a position on sort of the
20 outer reaches of the Spending Clause because
21 this case is really about enforcement. And so
22 I don't want to get ahead of the United States
23 on very difficult questions about how far does
24 the Spending Clause go.

25 I think the important thing is that

1 there are limits. The Dole factors, there's
2 the unconstitutional conditions doctrine,
3 Congress can't condition funds on someone
4 giving up their constitutional rights. There's
5 coercion. And then I think the remedy itself
6 has to be constitutional. It has to comply
7 with due process.

8 And then, as I was talking with
9 Justice Barrett about, it also has to be
10 necessary and proper. So there may be some
11 instances in which a remedy is not necessary to
12 enforce a condition or a proper means of
13 enforcing the condition. And those
14 requirements can have teeth.

15 JUSTICE ALITO: Well, you're taking --
16 you're asking us to take an important step. It
17 would be helpful if we had an idea about where
18 this road is leading, but you don't want to
19 provide an answer to that.

20 MS. BAIRD: Well, Justice Alito, I
21 think because it's not presented in this case.
22 I think that when the Court has a Spending
23 Clause case about how far Congress can go in
24 imposing the condition, then I'm sure we'll be
25 up here as a party talking about that with you.

1 I think that the United States hasn't
2 sort of taken a position on that question
3 because --

4 JUSTICE ALITO: How often -- how often
5 has this Court held that Congress has imposed
6 an impermissible condition under the Spending
7 Clause?

8 MS. BAIRD: I mean, NFIB is an
9 example.

10 JUSTICE ALITO: Yeah. What else?

11 MS. BAIRD: Alliance for Open Society.
12 There's a First Amendment violation there.
13 There are real limits. I think in Printz said
14 that there wasn't -- it was a necessary and
15 proper case -- said that it wasn't a proper
16 means of enforcement. So I think that -- that
17 the Court can, if it wants, address that in
18 a -- in a separate case.

19 I think, really, the question here --
20 and I'm not trying to frustrate the Court, but
21 the question is really just, can Congress
22 enforce a condition that is validity imposed?
23 The hard question in Your Honor's hypothetical
24 is whether Congress can impose the condition.
25 And at page 46, they admit that they are bound

1 by the condition. The only question is one of
2 enforcement.

3 And Congress can certainly -- again,
4 if these officers can be held for contempt and
5 subject to personal consequences, Congress can
6 surely hold them accountable in their
7 individual capacity for damages, which everyone
8 knows that that is what RLUIPA was trying to
9 do.

10 JUSTICE ALITO: Thank you. Thank you.

11 MS. BAIRD: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Sotomayor?

14 JUSTICE SOTOMAYOR: A new road by us
15 would be to rule for Respondent, correct?

16 MS. BAIRD: I would say so, Justice
17 Sotomayor, yes.

18 JUSTICE SOTOMAYOR: It would put at
19 risk dozens of federal statutes, correct?

20 MS. BAIRD: I think so. If the Court
21 says that neither through the Spending Clause
22 or the combination of the Spending and
23 Necessary and Proper Clause Congress can't do
24 this, then I think that would be
25 ground-breaking, yes.

1 JUSTICE SOTOMAYOR: Similarly
2 ground-breaking is the requirement that
3 somehow, when individual damages are at risk,
4 that Congress has to be more specific than
5 using appropriate relief, because we've
6 approved damages under appropriate relief in
7 other statutes, haven't we?

8 MS. BAIRD: I think --

9 JUSTICE SOTOMAYOR: Spending Clause?

10 MS. BAIRD: Well, and Franklin's a
11 good example of this because, in Franklin,
12 there was --

13 JUSTICE SOTOMAYOR: Franklin, exact --

14 MS. BAIRD: -- there was not even an
15 express cause of action. So, if we're
16 concerned about clear notice and what clear
17 notice is, here, we have an express cause of
18 action that expressly applies to these
19 officials and expressly provides for
20 appropriate relief.

21 JUSTICE SOTOMAYOR: Thank you,
22 counsel.

23 MS. BAIRD: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?

25 JUSTICE KAGAN: When -- when you just

1 said, Ms. Baird, ground-breaking, could you hum
2 a few more bars on that? I mean,
3 ground-breaking how? Ground-breaking, what
4 would happen, what would follow?

5 MS. BAIRD: Sure. Well, I mean, I
6 think Petitioner's brief laid this out nicely,
7 but there's sort of a long history of Congress
8 being able to reach outside of the strict
9 privity between the federal government and an
10 entity that receives funds. I think all of
11 that could be called into question.

12 I think we've cited some sort of
13 on-point statutes in our brief where employees
14 or agents can be held liable. That's the
15 Federal Nursing Home Reform Act, EMTALA, Title
16 X. And then I think, if -- if the Court
17 accepts Respondents' arguments on the
18 constitutional issues, I think that could call
19 into question Section 666, the bribery
20 statutes, and Sabri. I think that this case is
21 such an easy case because this case does not
22 even approach the outer limit that this Court
23 has recognized in Sabri as permissible.

24 And I think all the Court has to do,
25 the Court does not need to extend Salinas and

1 Sabri. I think all it has to do is cite those
2 cases, say that no one has asked us to overrule
3 them, case closed.

4 JUSTICE KAGAN: On -- on Salinas and
5 Sabri, I mean, one of Respondents' arguments is
6 that those cases are different because the
7 federal government's interest in funding was
8 more directly involved, that what they really
9 were all about was ensuring that the federal
10 government could make sure that the recipient
11 didn't fritter away the federal government's
12 own funds.

13 So why is that true or not true?

14 MS. BAIRD: Yes. So we would strongly
15 resist that RLUIPA isn't about protecting
16 federal funds. It absolutely is. The federal
17 government gives money to prisons, to state
18 prisons, on the condition that they won't
19 violate religious free exercise. When they do
20 that anyway, the government is not getting what
21 it pays for, which is institutions that respect
22 religious exercise.

23 So I do think that this is about
24 protecting the funds. I'll also say that in
25 Salinas and Sabri, the Court was concerned

1 about more than just protection of the actual
2 funds at issue. And I think you can see this
3 because neither case required any nexus with
4 the federal funds.

5 It's most obvious in Salinas, where
6 the Court there described the threat to the
7 federal program was the deputy sheriff who was
8 giving preferential treatment to the inmate.
9 It was clear as day that that was the threat
10 that the Court was talking about. And I think,
11 here, the -- the federal program is similarly
12 threatened when officers can violate conditions
13 on federal funds with impunity.

14 JUSTICE KAGAN: So, in -- in -- in
15 those cases, what the Court was really saying
16 is that the federal government has every right
17 to deal only with institutions that are not
18 generally corrupt. And, here, it's the same
19 except the end of the sentence would be not
20 generally rights-violating.

21 MS. BAIRD: I think that's right,
22 Justice Kagan. The government -- the federal
23 government does not want to be a party to
24 egregious violations of religious liberty like
25 the facts alleged in this case. I mean, the --

1 the federal government has the power when it
2 says it's giving federal funds on the condition
3 to enforce that condition, and the state can
4 always say no.

5 JUSTICE KAGAN: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch?

8 JUSTICE GORSUCH: I take your point
9 that a holding that -- that said that Congress
10 could never pass a statute conditioning
11 employees making them follow RLUIPA because
12 that would exceed necessary and proper bounds
13 would be quite a holding, but the same would go
14 for the coach too on the Title IX recipient.
15 It would be quite a holding for us to say
16 Congress couldn't do that. I take that point,
17 but I think it would apply to the coach as
18 well.

19 And I also think it's very different
20 to say whether Congress could or couldn't do
21 it, it didn't provide the clear statement
22 that's required. And there's nothing novel
23 about that. We just did that last year in
24 Medina for crying out loud, right --

25 MS. BAIRD: Well, Your Honor --

1 JUSTICE GORSUCH: -- at the
2 government's urging, right?

3 MS. BAIRD: Well, Your Honor, yes, I
4 think that was right.

5 JUSTICE GORSUCH: Okay. All right.
6 And then --

7 MS. BAIRD: But --

8 JUSTICE GORSUCH: And -- and -- and
9 then -- well, go -- if you want to finish, if
10 you want to add, feel free.

11 MS. BAIRD: Oh, I was just going to to
12 say there's a really important difference
13 between this case and Medina which I've sort of
14 mentioned a couple times, which is this case
15 involves an express cause of action, so I
16 think, in Medina, the hard --

17 JUSTICE GORSUCH: I understand that.
18 The question is to whom and -- and whether
19 there's clear notice. And simply saying it's
20 not clear notice and there isn't consent,
21 there's nothing novel about that. We did that
22 in Dole, we've done that in Medina, we've done
23 it not in -- but, in a lot of other cases,
24 we've done that, right?

25 MS. BAIRD: I -- I -- I think that's

1 right. But I do think --

2 JUSTICE GORSUCH: Okay.

3 MS. BAIRD: -- there's clear notice
4 here, Justice Gorsuch, and I'm happy to --

5 JUSTICE GORSUCH: I understand -- I
6 understand you think that. No, I -- I -- on
7 the clear notice point, you say, well, it
8 was -- it was obvious even before Tanzin,
9 right?

10 MS. BAIRD: Yes, Your Honor.

11 JUSTICE GORSUCH: What do we do about
12 the federal government's representation in
13 Tanzin itself that RLUIPA does not clearly
14 authorize these suits against individual
15 employees in a state?

16 MS. BAIRD: Yes, Your Honor. That's a
17 fair question. So we were a party in Tanzin.
18 We took a shot at the text, what we thought was
19 a -- a good interpretation of the text. And,
20 admittedly, we had an interest there in
21 defending federal officers against damages
22 suits, but, hey, we lost and we lost very
23 badly. It was 8-0.

24 JUSTICE GORSUCH: Well, that was RFRA,
25 and, absolutely, you lost badly. But you said

1 with respect to state officials and RLUIPA that
2 it doesn't authorize. And now you're asking us
3 to believe that it was clear even though you
4 got it wrong?

5 MS. BAIRD: So, Justice Gorsuch, we've
6 taken to heart this Court's decision in *Tanzin*.
7 And I think that *Tanzin*'s analysis really
8 does --

9 JUSTICE GORSUCH: Thank you, counsel.

10 MS. BAIRD: -- help the Court decide
11 the question. It doesn't govern squarely, but
12 I think it does illustrate why the text means
13 what it does here.

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh?

16 JUSTICE KAVANAUGH: You agree that the
17 Spending Clause statute must unambiguously
18 authorize damages in order for damages to be
19 available, correct?

20 MS. BAIRD: Yes, I think that's the
21 clear notice requirement.

22 JUSTICE KAVANAUGH: Okay. And do you
23 have any differences with Petitioner on why you
24 think this statute, RLUIPA, clearly authorizes
25 damages?

1 MS. BAIRD: I mean, I think Petitioner
2 put it about as good as I could. I think that
3 it -- it's really important to start with
4 the -- the individual capacity action. I
5 think, if you look at this text, it is clear as
6 day that it applies to officials in their
7 individual capacity. It applies to an official
8 or any other person acting under color of state
9 law.

10 I grant you that if we weren't looking
11 at appropriate relief in isolation, I think it
12 would be a much harder question, but we're not.
13 The -- the question that Tanzin started with
14 and I think the Court should start with here
15 is, who is the defendant?

16 And that makes all the difference
17 between Sossamon and this case because, in
18 Sossamon, the context of a sovereign defendant,
19 there's absolutely no history of that. Damages
20 are extremely inappropriate against a
21 sovereign, whereas -- and Tanzin lays out this
22 history in -- in a really helpful way -- in the
23 context of individual officers, damages are the
24 norm.

25 JUSTICE KAVANAUGH: And I'm not saying

1 whether I agree with this or not, but just to
2 get the order of potential operations on the
3 table, if we were to conclude that this statute
4 does not clearly, unambiguously authorize
5 damages, that avoids all the ground-breaking
6 issues that you've been discussing, correct?

7 MS. BAIRD: Well, I think you -- you
8 would also want to consider sort of downstream
9 consequences with respect to RLUIPA if the
10 Court says that the text isn't clear.

11 JUSTICE KAVANAUGH: I understand that.
12 My specific question was the ground-breaking
13 consequences you were discussing. That would
14 be put off for another day, correct?

15 MS. BAIRD: That might be --

16 JUSTICE KAVANAUGH: Even though you
17 think, and I take your point, and that's why I
18 said I'm not saying whether I agree with this
19 or not, there would be RLUIPA consequences.

20 MS. BAIRD: Yes. I think there would
21 be RLUIPA consequences because I think there
22 would be a question about the alternative
23 jurisdictional hooks of the Commerce Clause. I
24 think you'd also call into question the
25 alternative jurisdictional hooks in the land

1 use context because there would a question of
2 whether that interpretation governs those
3 separate powers.

4 And I think the Court should just sort
5 of follow the text where it leads. This is a
6 legal question like any other legal question.
7 We think the notice is clear. I do think that
8 that would probably be less disruptive than
9 sort of all of the other consequences I was
10 talking about with Justice Sotomayor.

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?

14 JUSTICE BARRETT: So I just wanted to
15 clarify one point. You said that if there were
16 not individual -- if there was not individual
17 liability for damages available here, it would
18 make it hard for the federal government to
19 protect its money because -- this was in
20 response to Justice Kagan.

21 MS. BAIRD: Yes. Yes.

22 JUSTICE BARRETT: If the federal
23 government doesn't want to give money to
24 prisons that are rights violators, essentially,
25 right?

1 MS. BAIRD: Mm-hmm.

2 JUSTICE BARRETT: But the federal
3 government, we usually say in the Spending
4 Clause context that the remedy is for the
5 federal government to pull the funds, right?
6 So it could do that?

7 MS. BAIRD: That is an option, Justice
8 Barrett. I will say -- so -- and I'd have to
9 go back to check every single case, but I
10 believe that the cases in which the Court has
11 said that, there is no express cause of action.

12 And so, yes, I think the Court has
13 said in a case like Medina, for example, when
14 you're analyzing this hard question about can
15 this right be enforced via 1983, I think
16 there's a default presumption that Congress
17 wants to enforce it by pulling the funds. But,
18 here, Congress made a policy choice to enforce
19 it through creating a cause of action.

20 And this isn't unusual. We all know
21 what Congress was trying to do. It was trying
22 to restore pre-Smith rights and remedies and
23 that had long been available under the First
24 Amendment through 1983. So I think Medina
25 makes clear that it's a policy choice whether

1 to create a cause of action. Congress has done
2 that here. And we think that should be
3 respected.

4 JUSTICE BARRETT: So you think
5 Congress couldn't pull the funds here?

6 MS. BAIRD: Oh, no. I -- I think that
7 that might -- that might be an option available
8 to the federal government. We also have a
9 cause of action for the federal government to
10 enforce RLUIPA through injunctive and
11 declaratory relief, but I guess what I'm saying
12 is that the fact that that's a usual remedy,
13 the Court has said that in cases without an
14 express cause of action. And I think, you
15 know, so is that the usual remedy? Maybe in
16 those cases. I don't think that's the usual
17 remedy here because Congress told you how it
18 wants to enforce.

19 JUSTICE BARRETT: I see. I see. Is
20 there any daylight between you and -- the
21 question the government always gets --

22 MS. BAIRD: Yes.

23 JUSTICE BARRETT: -- do you stand with
24 Petitioner all the way, or is there any
25 difference in your positions?

1 MS. BAIRD: No, I don't think there's
2 any daylight. There might be like if you drill
3 down, like, there might be some small
4 differences at the margins, but I don't think
5 there's anything that would matter to the
6 Court's resolution of the case.

7 JUSTICE BARRETT: And one other
8 question. So there's been a lot of talk about
9 whether there has to be clear notice in the
10 contract to the employees or whether the
11 statute is enough. And the government and the
12 Petitioner say the statute is enough.

13 But the statute could have or -- or
14 Congress could, in giving the funds, right, in
15 the Spending Clause context, it could say to
16 LDOC or whatever state prison system it's
17 contracting with that it has to be a condition
18 of the contracts that the guards would be
19 liable or that individuals be liable for
20 damages, right?

21 MS. BAIRD: Sure. I mean, yeah,
22 Petitioner has laid that out and says this can
23 all be done through contract. We agree with
24 that. But I don't think that that means that
25 what Congress did here is impermissible. I

1 think that there;s clear notice on the text of
2 the statute.

3 I think how a state responds, how a
4 Department of Corrections responds, I think
5 they should inform their officers. There are
6 briefs saying that officers are informed of the
7 requirements that govern prisons.

8 I do think that -- that officers
9 expect this. This isn't surprising. They're
10 not some disinterested third party. These are
11 people who work in -- in prisons and know the
12 conditions that apply to them.

13 JUSTICE BARRETT: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Jackson?

16 JUSTICE JACKSON: So I guess I'm
17 trying to understand how Congress could have
18 said it any clearer. I mean, to the extent
19 that we're puzzling over whether or not there's
20 a clear statement in the statute, you know, it
21 says, "A person may assert a violation of this
22 chapter as a claim or defense in a judicial
23 proceeding and obtain appropriate relief
24 against a government."

25 If that doesn't refer to money damages

1 being brought by an individual for a violation
2 of RLUIPA, what could Congress have meant by
3 "appropriate relief" here?

4 MS. BAIRD: I mean, we agree with you.
5 We think it's clear, especially once you look
6 at the definition of a government, "appropriate
7 relief against a government" becomes -- the
8 word "appropriate relief" becomes clear in the
9 context of who we're talking about here, which
10 is individual officers. So we would agree with
11 you.

12 JUSTICE JACKSON: And even broadening
13 out the lens more, I mean, RLUIPA is applying
14 to prisons in a circumstance in which the PLRA
15 and other statutes make it very difficult for
16 prisoners to get any other kind of relief.
17 Right? I mean, they can't get injunctive
18 relief in any sort of meaningful way.

19 MS. BAIRD: I think they could. I
20 think prisoners could get injunctive relief
21 under RLUIPA, and we would say that's another
22 form of appropriate relief.

23 But I do think that damages are
24 necessary to complement, especially for
25 instances like -- like the one alleged here

1 where there's a one-time abuse. I think it
2 also comes up in cases of -- when claims for
3 injunctive relief are mooted by release or
4 transfer.

5 JUSTICE JACKSON: Or transfer, which
6 can happen all the time, so it's --

7 MS. BAIRD: Yes, so it's very -- very
8 common.

9 JUSTICE JACKSON: And -- okay. You've
10 said many times that this is an easy case. And
11 I think it's because of the privity argument.
12 I'm trying to kind of puzzle through it.

13 The state can say no to the condition
14 in this situation. It has notice. It's a part
15 of the agreement that the state makes to accept
16 the funds. So it can say no to the condition
17 that it must follow RLUIPA.

18 But then we have this other layer,
19 which is the employees, I suppose, can say no
20 to a state that has agreed to the condition,
21 right?

22 MS. BAIRD: I think that's right.
23 They have a choice whether to voluntarily
24 accept employment in a federally funded
25 program.

1 JUSTICE JACKSON: Against the backdrop
2 of a clear cause of action against people in
3 their position for violations of the law?

4 MS. BAIRD: Yes. I think the statute
5 is clear as day that it applies to individual
6 officers. And in that context, appropriate
7 relief clearly provides damages.

8 JUSTICE JACKSON: And don't we
9 ordinarily hold people responsible, especially
10 officials, for knowing what the law requires
11 and following it?

12 MS. BAIRD: I think that's generally a
13 presumption that -- that this Court has
14 endorsed, yes.

15 JUSTICE JACKSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Mr. Aguiñaga.

19 ORAL ARGUMENT OF J. BENJAMIN AGUIÑAGA

20 ON BEHALF OF THE RESPONDENTS

21 MR. AGUIÑAGA: Thank you, Mr. Chief
22 Justice, and may it please the Court:

23 The Court should resolve this case on
24 either of two grounds. First, you should say,
25 as Chief Judge Sutton has said both before and

1 after Tanzin, that RLUIPA does not clearly and
2 unambiguously create an individual capacity
3 cause of action for damages.

4 Or, second, you should say, as Judge
5 Sullivan has said after Tanzin, that even if
6 Congress spoke with unmistakable clarity and
7 created such a cause of action, Congress
8 exceeded its constitutional authority.

9 But however you affirm the judgment
10 below, it is extraordinarily important that the
11 Court reject Petitioner's attempt to radically
12 expand congressional -- congressional power.
13 His view of the Spending Clause would mean that
14 foundational cases like Pennhurst and Cummings
15 were confused, Mr. Chief Justice, because
16 Congress can actually impose spending
17 conditions on non-recipients too.

18 And his view of the Necessary and
19 Proper Clause would make Sabri look modest,
20 Justice Thomas, because on his view, Congress
21 doesn't even have to pretend to be protecting
22 federal dollars and cents from corruption
23 before regulating members of the general
24 public.

25 Now, to be sure, I have a lot of

1 friends on the other side of this case who have
2 valid concerns about Congress's silence over
3 the past 25 years when ten federal courts of
4 appeals have said that there's no individual
5 capacity claim for damages under RLUIPA. But
6 the solution is not to distort this Court's
7 existing precedents to try to change that
8 status quo. It is instead to tell Congress to
9 act exactly like it did in 1993 after Smith and
10 in 2000 after City of Boerne, which is to pass
11 new legislation, supersede Sossamon, and amend
12 RLUIPA to allow for damages against the states.
13 And then the states can decide, each state for
14 itself, whether it accepts that express
15 condition.

16 The answer is across the street, not
17 here. I welcome the Court's questions.

18 JUSTICE THOMAS: There's been quite a
19 bit of reliance on Sabri and Salinas. Could
20 you spend just a few moments giving us your
21 argument as to why these cases aren't
22 dispositive?

23 MR. AGUIÑAGA: Absolutely, Justice
24 Thomas. So if I could give you the one
25 sentence that might be the most important in

1 this Court's precedents for this case, that's
2 the very last sentence of Section II in Sabri
3 at page 608. This is the paragraph where this
4 Court in Sabri rejected Mr. Sabri's Spending
5 Clause challenge. He said that this
6 legislation is coercive. This Court said no,
7 it's not Spending Clause legislation at all.
8 This is not Congress's -- Congress's attempt --
9 666 is not Congress's attempt to impose its
10 will on states' choices about public policy.
11 It's instead Congress's Necessary and Proper
12 Clause authority to basically target those who
13 convert public spending into unearned private
14 gain. That's the line that the Sabri Court
15 drew.

16 And, Justice Thomas, I think that is
17 exactly the line, the framework that you should
18 keep in mind when asking what is RLUIPA? Is it
19 more like 666 where you're targeting actual
20 federal dollars and cents, or is it like true
21 Spending Clause legislation where what Congress
22 is doing is imposing its own policy choices on
23 the state recipients of federal funding?

24 JUSTICE KAGAN: But the actual dollars
25 and cents weren't at issue in that case. What

1 -- what the Court was upholding was the federal
2 government's right to say we're not -- we -- we
3 shouldn't -- we need some strings in place to
4 ensure that the money we pay to a federal
5 institution is going to an honest federal
6 institution, an institution that won't be
7 profligate with our money generally even though
8 there's no nexus with the money here.

9 And so too the government can say, you
10 know, the integrity of the institution is --
11 has something to do with not taking bribes, and
12 the integrity of the institution has something
13 to do with not violating rights.

14 And both of those things fall within
15 the federal government's interests.

16 MR. AGUIÑAGA: And, respectfully,
17 Justice Kagan that's not consistent with Sabri.
18 Look at page 606. This is the "money is
19 fungible" paragraph that spans -- spans 605 to
20 606. The theory that the Court was
21 articulating there to sustain statutes like 666
22 is to say what is the articulated federal
23 interest in this statute? And the very last
24 sentence of that paragraph says the federal
25 interest here are federal dollar thresholds

1 that Congress embedded in the statute as its
2 putative protection.

3 Now, I'll grant you, Justice Kagan,
4 that Sabri, I think, has to be the outer limit
5 of Congress's Necessary and Proper Clause
6 authority because what it was doing there
7 really had no direct tie to the funds at all.
8 But the theory that this Court cited in
9 justifying reaching the result it did was to
10 say we're going to look at the federal dollar
11 thresholds in 666, we're going to say, well,
12 Congress is at least pretending to protect
13 those federal dollars --

14 JUSTICE SOTOMAYOR: I'm sorry, but
15 it's the same thing here, meaning they're
16 trying to protect their federal dollars from
17 going -- from not supporting a program that
18 violates religious liberty. So I'm not sure
19 that that distinction makes any sense to me.

20 MR. AGUIÑAGA: Your Honor, that --
21 that's not correct because there's a very
22 important difference between Congress
23 protecting its constitutional authority to
24 spend and its constitutional --

25 JUSTICE SOTOMAYOR: And it has

1 constitutional authority to spend and give
2 money to state prisons as well.

3 MR. AGUIÑAGA: But it -- but it --

4 JUSTICE SOTOMAYOR: I mean, it -- it
5 wasn't in those programs, it could spend on
6 programs, but it didn't have to.

7 MR. AGUIÑAGA: But what Congress does
8 not have inherent sovereign authority to do
9 under the Spending Clause is regulate. The
10 only way it can regulate is if the recipient of
11 the federal funds agrees in return.

12 JUSTICE SOTOMAYOR: But a criminal
13 statute is regulation.

14 MR. AGUIÑAGA: It absolutely is
15 regulation, Your Honor, but what I'm saying,
16 what this Court said in Sabri is that a statute
17 like 666 is not spending -- it's -- that's not
18 a spending condition at all. And that's why I
19 think the most important starting point in this
20 Court's analysis is to ask, is this a spending
21 condition? The federal government agrees at
22 page 23 --

23 JUSTICE SOTOMAYOR: All right. And if
24 we disagree with that?

25 MR. AGUIÑAGA: And I'm happy to take

1 the disagreement, Justice Sotomayor, but I do
2 think that that line that this Court drew at
3 the end of Section II in Sabri is the right way
4 to think about this. And I think --

5 JUSTICE SOTOMAYOR: All right. Thank
6 you, counsel.

7 JUSTICE BARRETT: Do you agree,
8 General Aguiñaga, as a spending condition, the
9 federal government could have told Louisiana
10 Department of Corrections that it had to
11 include a clause in the contract telling
12 individuals that they would be liable for
13 damages?

14 MR. AGUIÑAGA: Absolutely, Your Honor.

15 JUSTICE BARRETT: Why this so
16 different then?

17 MR. AGUIÑAGA: It's different
18 because -- you know, the -- the word "privity"
19 has been thrown around a lot on the other side
20 of the case, and with all due respect, I don't
21 understand that. When we're talking about
22 consent in the spending context, you're asking
23 whether the ultimate regulated entity has, in
24 fact, consented to whatever the conditions are.

25 In your hypothetical, Justice Barrett,

1 I think you -- you can conceive of Congress
2 saying we're going to require you to basically
3 require a contract of assumption by your
4 employees. Or any time an employee comes into
5 the state and says I want to work for the
6 state, the state says in response, if you're
7 going to do that, you have to agree to these
8 specific conditions that the federal government
9 has imposed on us.

10 There is nothing like that contract in
11 this case. And that's why I think all of those
12 hypotheticals at the end of the blue brief
13 about how Congress could have created direct
14 contractual privity between a state employee in
15 his individual capacity and the federal
16 government doesn't hold up because, at the end
17 of the day, what they're saying, what they're
18 telling you is what Congress could have done.
19 You don't see that line here. And --

20 JUSTICE BARRETT: Yeah, but aren't
21 they saying that if you have the contract and
22 then you have RLUIPA on the books, that the
23 combination of those things essentially is the
24 condition that the employees were aware of --

25 MR. AGUIÑAGA: Your Honor, that --

1 JUSTICE BARRETT: -- when they signed
2 up for the job?

3 MR. AGUIÑAGA: Your Honor, that is not
4 how this Court's Spending Clause cases conceive
5 of consent. And I think every employee in the
6 country would be shocked to learn that just by
7 accepting employment with their employer, they
8 have thereby personally bound themselves to
9 contracts that --

10 JUSTICE KAGAN: Oh, really? I mean --

11 JUSTICE BARRETT: What state damage --
12 oh.

13 JUSTICE KAGAN: Go ahead.

14 JUSTICE BARRETT: What -- what state
15 remedies did these guards have? This was
16 egregious. Is there a state RLUIPA?

17 MR. AGUIÑAGA: There is, Justice
18 Barrett. As we said --

19 JUSTICE BARRETT: And would that have
20 provided relief to them if they had chosen to
21 sue under it? As far as I can tell, they did
22 not.

23 MR. AGUIÑAGA: They did not sue.
24 Arguably, the answer would be yes, Justice
25 Barrett. At pages 13 and 14 of our BIO, we

1 describe our law, which basically mirrors
2 RLUIPA, expressly provides for damages and, you
3 know, that was available. That's available to
4 all prisoners in Louisiana and it's available
5 even to non-prisoners in Louisiana.

6 JUSTICE BARRETT: And it would permit
7 money damages or no?

8 MR. AGUIÑAGA: It has money damages
9 expressly articulated in the statute, Justice
10 Barrett, and --

11 JUSTICE BARRETT: And -- go ahead.

12 MR. AGUIÑAGAA: Well, I was just going
13 to say that that was certainly one remedy that
14 was immediately available. I will say, in
15 terms of the broad scope of remedies available
16 either to Congress, it's -- if it's unhappy
17 with a state like Louisiana or, you know,
18 otherwise, the remedy -- sorry, Justice.

19 JUSTICE BARRETT: Yeah. No, no. I
20 mean, I -- I understand that. I mean, I just
21 really did want to know as a matter of state
22 law. And -- and then just out of curiosity,
23 obviously, this is beyond the record, I mean,
24 was there disciplinary action here, do you
25 know?

1 MR. AGUIÑAGA: So it -- it is outside
2 the record, Justice Barrett. I can say the
3 warden himself is no longer associated with the
4 Department of Corrections.

5 JUSTICE BARRETT: Thank you.

6 JUSTICE KAGAN: I mean, the -- the --
7 the -- the -- the surprise that you were saying
8 employees would have, are they surprised to
9 learn that they find themselves subjected to
10 1983 suits all the time?

11 MR. AGUIÑAGA: Well, Justice --
12 Justice Kagan, Section 1938 is a remedy, right?
13 It's a cause of a action that gives a remedy,
14 and your earlier question about can't you just
15 do this all under 1983 doesn't --

16 JUSTICE KAGAN: I didn't say can't you
17 do. What I'm saying is that your -- your --
18 your arguments that they're not getting notice,
19 that they're not -- that there's not enough
20 knowledge, I mean, that would just make 1983
21 suits -- the same objections could be held with
22 respect to that.

23 And yet 1983 exists, people bring 1983
24 suits against state officers all the time,
25 including to enforce statutes that have been

1 enacted pursuant to the Spending Clause.

2 MR. AGUIÑAGA: That's right, Justice
3 Kagan. And remember that when we're talking
4 about 1983, the -- the antecedent question at
5 least in the Spending Clause context is whether
6 the asserted right under the Spending Clause
7 legislation is one that can be enforced in
8 1983.

9 And I think the important point there
10 in that antecedent question is the question
11 we're dealing with in our red brief is, can
12 Congress use the Spending Clause to create a
13 substantive right that runs against a state
14 official in his personal capacity? And if the
15 answer to that is no, then you never get to
16 Section 1983.

17 JUSTICE JACKSON: But didn't we --
18 didn't -- didn't we answer that question in
19 Talevski? I thought we said in the 1983
20 context that it didn't matter that it was
21 Spending Clause legislation. We said a law is
22 a law and you can use --

23 JUSTICE KAGAN: We said secured by the
24 laws of the United States.

25 JUSTICE JACKSON: Yes, correct.

1 JUSTICE KAGAN: Include secured by
2 laws acting -- act -- enacted pursuant to the
3 Spending Clause.

4 MR. AGUIÑAGA: That's right. And the
5 question in this case is does Congress have
6 constitutional authority under its Spending
7 Clause power to do what Petitioners say it did
8 in RLUIPA.

9 JUSTICE JACKSON: No, but I'm saying,
10 why are you not undoing that Talevski holding
11 with the argument that you're making today?

12 MR. AGUIÑAGA: Your Honor, because
13 cases like Talevski are dealing with suits that
14 are actually against recipients, funding
15 recipients, right? I mean, that's -- nobody
16 disputes that in the -- in the --

17 JUSTICE JACKSON: That's just a
18 distinction you're bringing in. What I think
19 Justice Kagan was getting at is there --
20 there's something about your argument that
21 turns on this being Spending Clause legislation
22 and that that has something to do with the
23 extent to which it can be enforced in this way.

24 And we said in the context of 1983
25 that it didn't matter that it was Spending

1 Clause legislation, and what she, I think, is
2 trying to say is, why should it matter here?

3 And if it does matter here, doesn't
4 that imperil the determination that we made in
5 Talevski that Spending Clause legislation
6 should be treated just like any other law for
7 the -- for this purpose?

8 MR. AGUIÑAGA: Your Honor, it matters
9 here because of cases like Cummings that trace
10 all the way back to Pennhurst that say the very
11 legitimacy of Congress's exercise of Spending
12 Clause authority depends on that bilateral
13 agreement. Is it -- is it sending money out
14 and taking a reciprocal promise to comply with
15 conditions in? If you're missing that
16 reciprocal consent from a recipient or putative
17 non-recipient --

18 JUSTICE JACKSON: So what's your
19 answer -- what's your answer to the other part
20 of this, which is the states are -- do you --
21 do you dispute that the states have consented?
22 I know they're not the ones that are being
23 bound. But the first step is, did they consent
24 to follow RLUIPA?

25 MR. AGUIÑAGA: I have to be very

1 precise about this, Your Honor. Yes, the state
2 consented to RLUIPA's plain terms.

3 JUSTICE JACKSON: When it accepted the
4 money, it did.

5 MR. AGUIÑAGA: That -- that's --
6 that's exactly right. And my friends love page
7 46 of our red brief. What we're saying there
8 is that when a state official in its official
9 capacity is working on the job, he is the state
10 under this Court's common division between
11 official capacities and individual capacities,
12 and, of course, state officials in their
13 official capacities as the state are bound by
14 RLUIPA. That's --

15 JUSTICE SOTOMAYOR: I'm sorry, are you
16 saying that this individual who represents the
17 state on page 46 of your brief, you said he's
18 bound by this statute, correct?

19 MR. AGUIÑAGA: At --

20 JUSTICE SOTOMAYOR: Substantively as
21 an official of the state.

22 MR. AGUIÑAGA: In his official
23 capacity, of course.

24 JUSTICE SOTOMAYOR: As the state.

25 MR. AGUIÑAGA: He is the state,

1 Justice.

2 JUSTICE SOTOMAYOR: So he is the
3 state?

4 MR. AGUIÑAGA: He is the state.

5 JUSTICE SOTOMAYOR: So you say it's
6 enough knowledge for him to know what the law
7 says and that he's working for the state and he
8 represents the state, that he can't violate the
9 law, correct? And if an injunction issues, he
10 could be held liable for violating that law,
11 correct?

12 MR. AGUIÑAGA: Because it's an
13 injunction against the state, Justice
14 Sotomayor.

15 JUSTICE SOTOMAYOR: All right. But
16 you're saying at the same time that person
17 who -- the warden, who is cutting the
18 individual's hair, should know that that's a
19 violation of the state for which an injunction
20 should be liable, but he shouldn't know that
21 he's liable for personal damages too? That's
22 what you're saying?

23 MR. AGUIÑAGA: Your Honor, that's what
24 10 federal courts of appeals have said --

25 JUSTICE SOTOMAYOR: Well, that's

1 what --

2 MR. AGUIÑAGA: -- and that --

3 JUSTICE SOTOMAYOR: -- they said, but,
4 as the other side pointed out, they didn't
5 start with the first question, which is, is
6 this statute clear that there's an individual
7 cause of action? Yes, it does make that clear.
8 And is it clear by using appropriate damages
9 clear that it includes -- appropriate relief
10 that it includes contract damages? In Tanzin,
11 we said yes.

12 So, whether they're right or wrong,
13 it's irrelevant. If we assume that the law
14 says what it says, how do we say that official
15 acting in -- as a person knows one thing is
16 wrong for the state, but it's not wrong for him
17 to do or her?

18 MR. AGUIÑAGA: So -- so, Justice
19 Sotomayor, I think that goes back to an earlier
20 question Justice Alito asked of the federal
21 government, which is, you know, what
22 perspective are we looking at?

23 I was surprised to hear the federal
24 government say you look at the time of
25 enactment, when Arlington Central, Justice

1 Alito's opinion for the Court, and then
2 Cummings, the Chief Justice's opinion for the
3 Court, said you look at when the official is
4 deciding whether to receive federal funds, what
5 would that --

6 JUSTICE SOTOMAYOR: So, frankly, that
7 would mean that -- do you know when they
8 took -- I thought federal funds came every
9 year.

10 MR. AGUIÑAGA: That's -- and that's my
11 point, Justice Sotomayor, is that --

12 JUSTICE SOTOMAYOR: So every year,
13 they know that they're bound. So does it make
14 a difference if we say it's clear enough, but
15 it wasn't clear to them at the time they took
16 this action because 10 circuits were wrong, but
17 moving forward, it's clear enough to anybody
18 else that they shouldn't do it?

19 MR. AGUIÑAGA: That's the very last
20 argument we put in the red brief, Your Honor,
21 which is, if you disagree with everything else
22 I say about the constitutional questions, then
23 that, I think, has to be the answer.

24 And I will say it's not just what has
25 happened between --

1 JUSTICE SOTOMAYOR: So a form of
2 qualified immunity you're arguing?

3 MR. AGUIÑAGA: What I'm saying, Your
4 Honor, is that between the year 2000 and
5 Tanzin, I think, certainly, we have this huge
6 body of RLUIPA precedent that would have put no
7 state prison on notice about prison officials
8 being liable in their individual capacities.

9 JUSTICE SOTOMAYOR: How many of those
10 case --

11 MR. AGUIÑAGA: But even --

12 JUSTICE SOTOMAYOR: -- how many of
13 those cases were post-Tanzin?

14 MR. AGUIÑAGA: We have four --

15 JUSTICE SOTOMAYOR: Tanzin was 2020.
16 We have this case. But how many of those were
17 post-Tanzin?

18 MR. AGUIÑAGA: I believe we have about
19 four circuits post-Tanzin, Your Honor, and that
20 Chief Judge Sutton in Ali versus Adamson, that
21 includes Judge Sullivan in the Tripathy case
22 out of New York.

23 And the other thing I was going to add
24 to that answer, Justice Sotomayor, is that,
25 like, I -- I -- I'm happy to rely on the body

1 of RLUIPA precedent, but in the spirit of
2 Footnote 6 in Sossamon, which looked at
3 pre-RLUIPA precedent, we have four federal
4 courts of appeals even before RLUIPA saying
5 this sort of cause of action for damages, like,
6 that's not a thing under the Spending Clause.
7 And so, if you --

8 JUSTICE JACKSON: Well, don't we have
9 a lot -- don't we have a number of Supreme
10 Court cases that allow for Spending Clause
11 statutes to bond -- to -- to bind
12 non-recipients?

13 MR. AGUIÑAGA: Your Honor, the best --
14 I -- I believe the only example you saw in the
15 yellow brief was the Franklin, case where my
16 friend said that the Eleventh Circuit had a
17 pre-existing case on the books that controlled
18 the answer.

19 JUSTICE JACKSON: What about Grove
20 City?

21 MR. AGUIÑAGA: Your Honor, I -- I
22 don't recall the history behind Grove City, but
23 I guess what I'd tell you is that this is an
24 extraordinarily unique context where you have
25 federal courts of appeals' on-point precedents

1 both before and after RLUIPA's enactment that
2 are, like, unanimously telling any state
3 operating within the borders -- the regional
4 borders of those circuits, like -- like, this
5 is just not a thing. And that's why when
6 we're --

7 JUSTICE JACKSON: So are you
8 distinguishing Salinas, Sabri, and Dole on -- I
9 mean, they were binding non-recipients, right?

10 MR. AGUIÑAGA: Your Honor, I -- I want
11 to resist the -- the characterization of them
12 as non-recipients because I think you talked
13 about recipients and non-recipients when you
14 were talking about Spending Clause legislation.
15 666, all of those cases, that's not Spending
16 Clause legislation. That's what this Court
17 said expressly at page 608 in Sabri.

18 And so once you conceive of a statute
19 like RLUIPA as Spending Clause legislation or
20 not Spending Clause legislation, that's going
21 to dictate which path -- you know, Petitioner
22 has given you which path you choose. And
23 that's why I'm --

24 JUSTICE JACKSON: Assuming that
25 Spending Clause legislation matters. I'm just

1 -- this is going back to the point with Justice
2 Kagan. Assuming that it makes a difference
3 that it's Spending Clause legislation, you say,
4 then we can distinguish all these other cases.

5 MR. AGUIÑAGA: I think it has to
6 matter, Justice Jackson.

7 JUSTICE JACKSON: Even though we said
8 it didn't in Talevski?

9 MR. AGUIÑAGA: Your Honor, this is --
10 the only reason we're here today is because
11 Congress used its Spending Clause authority to
12 pass RLUIPA. Like, if it had never done that,
13 we wouldn't be here today. And I think
14 Petitioner has the burden to tell the Court
15 either you use Spending Clause authority or you
16 use the 666 path --

17 JUSTICE KAGAN: I mean, Spending
18 Clause, legislation it matters because that
19 imposes a -- a bar of clarity that usually is
20 not imposed. So when we read the statute, we
21 have to be cognizant of the fact that it was
22 passed pursuant to the Spending Clause and we
23 have to say, is this clear enough?

24 MR. AGUIÑAGA: Right.

25 JUSTICE KAGAN: But that doesn't have

1 anything to do with the questions that you're
2 now talking about, which -- because once we get
3 to this constitutional issue, we've already
4 decided the statute is clear enough and the
5 question is only could Congress do this?

6 MR. AGUIÑAGA: So I respectfully
7 disagree with that, Justice Kagan, for this
8 reason, which is Cummings reiterated that
9 Congress only acts legitimately when it sends
10 federal funds out and it gets a reciprocal
11 promise to reply with conditions in turn
12 return. Sure, you can say that that existed
13 here as to the state, but you cannot say it
14 with respect to the state official in his
15 personal capacity. One, because he never
16 received --

17 JUSTICE KAGAN: Yeah, but that's what
18 I'm saying, that's always true with respect to
19 1983 suits, is that you can always say, oh, the
20 state understood this, but the state employees
21 did not. Now, in fact, that's not true as a
22 factual matter. State employees are well aware
23 that 1983 suits exist and that other federal
24 remedies exist too.

25 But the point that I'm making is that

1 this -- this -- RLUIPA is no different with
2 respect to putting an employee on notice than a
3 1983 action is.

4 MR. AGUIÑAGA: And, Your Honor, I
5 think if and when this Court gets a Section
6 1983 action where the underlying substantive
7 right --

8 JUSTICE KAGAN: We can strike that
9 down too.

10 MR. AGUIÑAGA: No, I -- well, I think
11 you're going to have a question, Justice Kagan,
12 about whether Congress could use its Spending
13 Clause authority to create the substantive
14 right that runs against an individual person in
15 his individual capacity. That's not a question
16 the Court has answered. I would say, like, if
17 you eventually have to answer it, I the answer
18 is no because that just is completely contrary
19 to how this Court has conceived of the Spending
20 Clause and the contract analogy that undergirds
21 it.

22 JUSTICE GORSUCH: To the extent we're
23 talking about a contract analogy, an agent who
24 knowingly violates a duty that the principal
25 owes to a third party may be liable to the

1 principal but not to the third party, right?

2 MR. AGUIÑAGA: That's correct.

3 JUSTICE GORSUCH: Yeah. And the
4 principal, as a result of the agent's
5 misconduct, may be liable to the third party as
6 well?

7 MR. AGUIÑAGA: May be liable. That's
8 absolutely right. And, Justice Gorsuch, we
9 have the -- the example in the red brief of,
10 you know, the -- the agent who signs a contract
11 on behalf of the principal. You know, even if
12 our state prison officials had signed whatever
13 spending contract under RLUIPA you want to pick
14 on behalf of the State of Louisiana, contract
15 principles would say you're still not
16 personally bound. That doesn't personally bind
17 the agent.

18 And so a fortiori that's what we have
19 here, is somebody who's, like, not alleged to
20 have been involved in the spending process
21 whatsoever. And let me make clear -- I mean
22 --

23 JUSTICE GORSUCH: And -- and whether
24 Congress could provide clear notice and get
25 consent from the employees, we don't have to

1 decide that?

2 MR. AGUIÑAGA: That's exactly right.

3 JUSTICE GORSUCH: Whether that might
4 be necessary and proper. And we don't to have
5 decide that?

6 MR. AGUIÑAGA: You could leave it for
7 another day, Justice Gorsuch --

8 JUSTICE SOTOMAYOR: No, but how did if
9 we don't want do?

10 (Laughter.)

11 JUSTICE SOTOMAYOR: Give me your best
12 answer. Give me your best answer. As I'm
13 hearing you, you're saying that they can bind
14 the state by giving the state money, but they
15 can have an abundantly clear notice, every
16 employee you have must abide by this statute,
17 and if they don't, that individual employee
18 will pay damages. You're saying that's not
19 adequate notice. It's not adequate notice if
20 the individual signs a contract with the state
21 agreeing because they didn't sign the contract
22 with the federal government? Is that your
23 argument too?

24 MR. AGUIÑAGA: Well, I'm not calling
25 -- I'm not quite following that last part of

1 the question, Justice Sotomayor.

2 JUSTICE SOTOMAYOR: Assume that the
3 government --

4 MR. AGUIÑAGA: What I --

5 JUSTICE SOTOMAYOR: The hypothetical
6 that the other side put forth, they could have
7 had the government say to the states: Tell
8 every employee that they are liable if they
9 breach -- to us, if they breach this contract.

10 MR. AGUIÑAGA: So -- so, Justice
11 Sotomayor, if a Congress passes a statute that
12 says, States, if you take our funds, every one
13 of your employment contracts has to tell the
14 employees that they're --

15 JUSTICE SOTOMAYOR: How about states
16 that don't have employment contracts? States
17 who just hire you pursuant to a collective
18 bargaining agreement, it's pursuant -- a -- the
19 federal government can't say you must tell
20 every employee they're personally liable?

21 MR. AGUIÑAGA: Any contract a state
22 enters into, if the state is the recipient of
23 federal funds and Congress says --

24 JUSTICE SOTOMAYOR: Will the
25 individual be liable if the state -- the

1 federal law is that clear?

2 MR. AGUIÑAGA: Your Honor, I think
3 Congress would have to tell the state you have
4 to flow down in those contracts all of these
5 requirements, and then you get consent from
6 whoever the contractee is.

7 JUSTICE SOTOMAYOR: So you want a
8 piece of paper for people to know the law?

9 MR. AGUIÑAGA: In a jurisprudence --

10 JUSTICE JACKSON: Yeah, because, I
11 mean, under contracts do you have to have it
12 written down on a piece of paper? I thought
13 you could make an agreement that didn't --

14 MR. AGUIÑAGA: It's a --

15 JUSTICE JACKSON: -- that -- that
16 wasn't express in that way?

17 MR. AGUIÑAGA: Justice Jackson, in a
18 -- in a jurisprudence based on consent, concept
19 has to mean something.

20 JUSTICE JACKSON: No, no, no, I
21 understand.

22 MR. AGUIÑAGA: The only -- the method
23 that --

24 JUSTICE JACKSON: I understand. And
25 the question, I think, that Justice Sotomayor

1 is asking is why can't that consent be
2 demonstrated through the employment agreement?
3 Whether the employment agreement has all the
4 terms written down or not, why couldn't we have
5 a situation in which Congress makes clear to
6 the states that its employees need to follow
7 the law or be held liable, you know,
8 individually in this way? And then the states
9 contract with individual employees who
10 understand, given that agreement, that is, you
11 know, part of the law, that that's what they
12 have to do?

13 MR. AGUIÑAGA: So, Justice Jackson, I
14 think in that hypothetical, you'd have a
15 factual determination to make, which is what
16 sort of notice was the employee on, what was
17 written down or said in that contracting
18 process?

19 JUSTICE JACKSON: And your view is
20 only if the state actually writes the terms
21 into the employment agreement would there be
22 sufficient notice to the employee? Only if
23 they write it down?

24 MR. AGUIÑAGA: Justice Jackson, I'm
25 not wedded to the method of the notice.

1 JUSTICE JACKSON: I'm just --

2 MR. AGUIÑAGA: But what the courts --

3 JUSTICE JACKSON: I'd like you to
4 answer that question. If they wrote it down,
5 is your answer that, yes, then the employee
6 could be held liable?

7 MR. AGUIÑAGA: If -- if the contract
8 says by accepting employment you're agreeing to
9 abide by all of the terms of RLUIPA, which by
10 the way includes money damages in your personal
11 capacity, then yes, that --

12 JUSTICE JACKSON: But we can't imply
13 that's the case because --

14 MR. AGUIÑAGA: That would --

15 JUSTICE JACKSON: -- there is a law
16 that says that federal employees under this
17 circumstance have to abide by RLUIPA?

18 MR. AGUIÑAGA: Because that is never
19 how the Court has conceived -- constructed the
20 Spending Clause analysis.

21 JUSTICE JACKSON: Thank you.

22 CHIEF JUSTICE ROBERTS: Counsel, thank
23 you very much.

24 Justice Thomas, anything further?

25 Justice Alito?

1 JUSTICE ALITO: Let me ask the same
2 question that I asked the other side about the
3 date. What specifically is the date we should
4 look to?

5 MR. AGUIÑAGA: Your Honor, it's the
6 date that the state received federal funding.
7 Now, in the -- in a statute like this, I will
8 be candid that it is difficult to pin down
9 because RLUIPA is agnostic about the source of
10 federal funding. It says any federal funds
11 that run.

12 And so if you're talking about federal
13 funding like Medicaid, which comes in basically
14 monthly, weekly, you know, that -- that's the
15 point in time at which you should look.

16 JUSTICE ALITO: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Sotomayor?

19 Justice Kagan?

20 Justice Gorsuch?

21 Justice Kavanaugh?

22 JUSTICE KAVANAUGH: You say RLUIPA
23 does not unambiguously authorize a damages
24 remedy. This is Justice Kagan's kind of bar of
25 clarity point. The other side says the statute

1 clearly authorizes individual capacity suits,
2 so that traditionally has encompassed damages,
3 and then they cite Tanzin on top of that. And
4 I just want to make sure I have your responses
5 to that precise point.

6 MR. AGUIÑAGA: Sure, Your Honor. So a
7 few things to say to that.

8 I will say the one thing this Court
9 recognized in the Sossamon case is that even if
10 you get to the appropriate relief question,
11 there are a number of ways you can infer what
12 that term means. So, for example, we laid out
13 in the red brief the fact that the Court --
14 that Congress referred to injunctive relief
15 with respect to the United States. There --
16 there's different terminology like that.
17 Another thing the Court credited as plausible
18 was that the ordinary definition of
19 "appropriate relief" is typically particularly
20 equitable relief, not damages. That's
21 plausible.

22 The other way I would attack that,
23 Justice Kavanaugh, is remember what the Court
24 said in Sossamon and repeated in Tanzin, which
25 is that the term "appropriate relief" is

1 inherently ambiguous and context-dependent.
2 And I think the thrust of everything I've said
3 today and what we say in the red brief is that
4 the most important context here, at least for
5 our purposes, is what -- what constitutional
6 authority was Congress using to actually enact
7 this putative cause of action for damages?
8 That's the point that Chief Judge Sutton made,
9 and I think that's exactly the right way to
10 think about the relevant context here.

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?

14 Justice Jackson?

15 Thank you, counsel.

16 Rebuttal, Mr. Tripp.

17 REBUTTAL ARGUMENT OF ZACHARY D. TRIPP
18 ON BEHALF OF THE PETITIONER

19 MR. TRIPP: Just a few quick points.
20 Justice Barrett, to start with the question
21 about mini-RFRA, this is in our cert reply, the
22 state's mini-RFRA departs from the compelling
23 interest test for prison safety or security
24 regulations, so it wouldn't provide any relief
25 and obviously Congress wanted to have a

1 nationwide remedy here.

2 Justice Kavanaugh, just to respond to
3 that last exchange, I hear no answer to the --
4 to the basic point that there is an individual
5 capacity action. It is express on the face of
6 the statute. And then as long as you just do
7 what you normally do and ask what damages are
8 appropriate in the context of an individual
9 capacity action, again, I still hear no answer.
10 They are presumptively available under
11 Franklin.

12 That's an implied cause of action in a
13 Spending Clause case, and they say damages are
14 available. That's the norm.

15 Tanzin explains, traces it all the way
16 back through the history. And still there's no
17 answer to the point that if you don't have
18 damages in the individual capacity action, you
19 get nothing. There's no such thing as an
20 individual capacity injunction. It's the whole
21 point.

22 And, again, if you don't have damages,
23 like look at the facts of this case. Think
24 about what Congress that enacted this law was
25 trying to do. This is exactly where they were

1 trying to have accountability. And I think
2 it's clear as day on the face of this statute.

3 I think a lot of the questions go to
4 notice. There were a lot of questions to
5 notice. The notice is -- is baked in. They
6 admit there's sufficient notice to the
7 substantive condition. The remedial condition
8 is the very next section in the statute, like,
9 I don't understand any theory of notice where
10 as a state employee, you're bound by one page
11 of the statute but not the next one. That
12 doesn't make any sense.

13 They are clearly on notice of both.
14 And they are both here. It's the individual
15 capacity action, as clear as day. And then
16 damages are just always appropriate relief in
17 an individual capacity action, as every state
18 prison official knows because they face these
19 kind of suits all the time. This is -- this is
20 the norm for them. And, of course, you have an
21 additional layer of protection on the notice
22 side because qualified immunity applies.

23 And, of course, we have an
24 extraordinary case where not only was there
25 clearly established law, but we provided them

1 actual notice of it and they still violated it.

2 I think really at the end of the day,
3 like, I'm still hearing ultimately no answer to
4 Salinas, the Salinas, Dixson, Hess, Laudani
5 line of cases. And the -- and crux of those
6 cases, again, would -- the root of the power is
7 that it runs consensually all the way down.
8 There's contract, you take the job as a prison
9 official subject to the -- as a law enforcement
10 official in a federally-funded prison, of
11 course you take it subject to the conditions
12 that Congress has attached and here has
13 attached both of them.

14 And I think really at the end of the
15 day what -- what the cases were fundamentally
16 about is has Congress actually succeeded in
17 restoring pre-Smith rights and remedies? I
18 think that's really the question.

19 And I think there's no doubt that's
20 what Congress meant to do. And there's no
21 serious doubt under this Court's precedents
22 that that's constitutional, so we're asking the
23 Court to reverse.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel. The case is submitted.

1 (Whereupon, at 11:56 a.m. the case was
2 submitted.)
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