

# SUPREME COURT OF THE UNITED STATES

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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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Pages: 1 through 141  
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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      dam -- 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 the -- was interfering with the proper  
9 operation of the program, it wasn't the  
10 acceptance of the bribe. It was the  
11 preferential conjugal visits. It was the  
12 misconduct itself and so just applying the test  
13 that Salinas set forth. And I think, actually,  
14 my friends don't --

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

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

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

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

25 JUSTICE SOTOMAYOR: No risk to the

1 government's money?

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

6 JUSTICE SOTOMAYOR: Slow down,  
7 counsel.

8 MR. TRIPP: Sorry.

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

12 MR. TRIPP: Correct.

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

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

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

23 JUSTICE SOTOMAYOR: Now, going back to  
24 Justice Thomas's question about other statutes  
25 that are at risk if we were to hold that you

1 can't bind third parties, I have dozens of them  
2 cited by you and the government where we've  
3 permitted -- or causes of action with damages,  
4 Title IX, Title VI, the Federal Nursing Home  
5 Reform Act, the Emergency Medical Treatment  
6 Act, the antifraud statutes, there's a long  
7 list of statutes where we said the statutes can  
8 bind third parties, correct?

9 MR. TRIPP: Correct.

10 JUSTICE SOTOMAYOR: All right. Thank  
11 you.

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

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

20 MR. TRIPP: Well --

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

1 the other typical Spending Clause case, right?

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

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

25 I think one thing that's also sort of

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

10 JUSTICE KAVANAUGH: But the -- the  
11 hard part, as I see it, for your case for me is  
12 that you need a clear statement, and  
13 "appropriate relief," you know, is not as -- as  
14 clear as it could be in encompassing damages.  
15 So how do you deal with that? I -- I don't  
16 want to water down our precedent on that on --  
17 but, at the same time, I want to hear your  
18 response to how you -- how 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: Yeah. Oh, yes.  
23 I'm 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 -- 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  
19 did the defendant, the individual defendants  
20 agree to the -- with the federal government to  
21 be 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.  
25 Your brief does go into that, that -- that

1 Congress could have easily written a statute  
2 that does this and says that those individual  
3 officers have to agree with the federal  
4 government to be bound under federal law. I  
5 agree, it could 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 it  
9 had -- it didn't do that. It could do that,  
10 but it didn't do that. It left it to the  
11 states.

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

14 JUSTICE GORSUCH: Okay.

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

20 JUSTICE GORSUCH: The states.

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

1 you are subject to suit or you will be the  
2 defendant in a cause of action for appropriate  
3 relief. That is on the face of the statute.

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

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

16 MR. TRIPP: Then the --

17 JUSTICE JACKSON: But why don't  
18 they -- why -- why don't they have notice if  
19 they have 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 there's this 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 -- saying, oh,  
3 here's our agreement with the federal  
4 government, which probably goes on for I don't  
5 know how many pages, and you should look at it  
6 carefully 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 that the Spending  
12 Clause, of course, impacts the analysis. I  
13 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 on  
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  
9 to 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: Okay. I understand  
8 that, 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. This is an  
18 express right, an express remedy. It expressly  
19 runs against an individual. And as -- as  
20 Taznin said, the distinction from the sovereign  
21 context is obvious.

22 JUSTICE ALITO: To the extent that  
23 prison officials have been doing things that  
24 violate RLUIPA but wouldn't violate the Free  
25 Exercise Clause, who's -- who is to blame for

1     that?

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

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

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

17                CHIEF JUSTICE ROBERTS:  Justice  
18    Sotomayor?

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

1 MR. TRIPP: Correct.

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

6 MR. TRIPP: Correct.

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

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

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

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

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

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

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

17                  MR. TRIPP: I --

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

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

1     like, Sabri. Can Congress actually impose the  
2     condition on that person?

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

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

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

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

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

20            JUSTICE SOTOMAYOR: Thank you.

21            CHIEF JUSTICE ROBERTS: Justice Kagan?

22            JUSTICE KAGAN: Mr. Tripp, the  
23    questions you've been getting, you know, is  
24    there enough consent, is there enough notice, I  
25    presume -- tell me if I'm wrong -- would --

1 would those questions apply just as well to any  
2 1983 suit against a state employee?

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

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

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

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

1 additional question about notice in Sabri. I  
2 don't think there was either in -- in Dixon,  
3 Hess, Laudani, like, as you -- as you run down  
4 the line of the other cases.

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

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

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

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

18 CHIEF JUSTICE ROBERTS: Justice  
19 Gorsuch?

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

1 men on a women's sports team, a female trying  
2 to make the team could sue for a million  
3 dollars.

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

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

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

18 JUSTICE GORSUCH: Yeah.

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

21 JUSTICE GORSUCH: Yeah.

22 MR. TRIPP: -- within the scope.

23 JUSTICE GORSUCH: Yeah.

24 MR. TRIPP: And then it needs to  
25 threaten the integrity of the program.

1 JUSTICE GORSUCH: Yeah.

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

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

18 So take -- take -- take as given that  
19 they're germane.

20 MR. TRIPP: Yeah.

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

23 MR. TRIPP: No. I -- I -- I just -- I  
24 just want to be clear that the -- the -- this  
25 Court's Dole -- Dole test is already sort of

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

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

8             MR. TRIPP: And then --

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

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

13            JUSTICE GORSUCH: Yeah.

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

16            JUSTICE GORSUCH: Yeah. Yeah.

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

19            JUSTICE GORSUCH: Let's say they do.

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

22            JUSTICE GORSUCH: Then it follows.

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

25            JUSTICE GORSUCH: So -- so the

1 Spending Clause --

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

7 JUSTICE GORSUCH: Yeah.

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

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

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

23 JUSTICE GORSUCH: Both exist -- both  
24 of those checks exist in my hypotheticals and  
25 Congress could pass such laws. And that's

1 quite a stretch of the Spending Clause. We've  
2 never before said anything like that.

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

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

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

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

19 (Laughter.)

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

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

6           CHIEF JUSTICE ROBERTS: Justice  
7     Kavanaugh?

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

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

25           MR. TRIPP: Yeah, I -- I -- I'm glad

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

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

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

25           I also think that when you're

1 asking --

2 JUSTICE KAVANAUGH: So you're --

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

15 And so I think that the parallel -- I  
16 mean, these -- these are hardly even separate  
17 statutes, right? Like, RFRA and RLUIPA, they,  
18 like -- they work together as an integrated  
19 whole. And so, to understand them, I think  
20 that, really, the only way to understand their  
21 operation together is as providing the same  
22 rights and remedies within their scope.

23 I mean, RLUIPA -- Congress was  
24 crystal-clear in RLUIPA about the places where  
25 it needed to trim its sales because this was

1 spending legislation. It's on the face of the  
2 statute. It's not referred to. It's the  
3 Religious Land Use and Institutionalized  
4 Persons Act. It only applies to institutions  
5 that accept federal funds. That's on the face  
6 of the statute. It's clear as day.

7 But, if you look in at the substantive  
8 provisions and the remedies and you look, well,  
9 how have those changed because this is spending  
10 legislation, the answer is not at all. The  
11 rights and the remedies are the same. There --  
12 it is -- the whole point of this statute is to  
13 get back to the pre-Smith scheme.

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

18 MR. TRIPP: I -- I -- and I think,  
19 really, what I'm saying is that, and this Court  
20 has said this many times, is -- the question  
21 is, is it unambiguous? And to answer that,  
22 there's no magic words requirement. You read  
23 text in light of context, like you always do.  
24 And if you do that and you start by asking is  
25 there an individual capacity action, it's

1 clearly yes.

2 JUSTICE KAVANAUGH: And -- and just to  
3 summarize your position, individual capacity  
4 action with appropriate relief --

5 MR. TRIPP: Right.

6 JUSTICE KAVANAUGH: -- equals clear  
7 authorization for damages, correct?

8 MR. TRIPP: What I'm saying is, if a  
9 first step is individual capacity action, you  
10 have it, and then the question becomes, well,  
11 what's appropriate relief in an individual  
12 capacity action, I think the answer to that is  
13 clear. It's actually -- Tanzin says -- I -- I  
14 know it's not applying a clear statement rule,  
15 but its language bespeaks clarity each step of  
16 the way, said that Congress made clear that  
17 RLUIPA must -- or sorry, that RFRA must provide  
18 damages, that there was no doubt damages were  
19 available before Section 1983, that it was  
20 going back, and then, again, the distinction to  
21 the sovereign context, where damages are not  
22 available really because of a special rule in  
23 the context of suits against sovereigns, right?

24 The whole -- the crux of Sossamon was  
25 that it could distinguish Franklin, it

1 distinguished the Franklin presumption because  
2 it doesn't apply to sovereigns.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Barrett?

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

18 MR. TRIPP: I think a couple  
19 responses. The first -- what this Court has  
20 demanded every time, and I've said this before,  
21 is unambiguous text in light of the context.  
22 And this Court has never applied any kind of,  
23 like, canon of adverse possession where, if the  
24 courts of appeals are saying something --

25 JUSTICE BARRETT: If you were a lawyer

1 to the states and you -- that was the state of  
2 the law and the state asks you about that, what  
3 would you have said?

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

12 JUSTICE BARRETT: And it's so obvious  
13 that every single circuit to look at the  
14 question went the other way?

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

16 JUSTICE BARRETT: It's hard to see how  
17 it's clear if every circuit is coming out  
18 differently.

19 MR. TRIPP: The -- and I think this is  
20 actually an important point because the -- the  
21 prevailing rule in the circuits, including in  
22 the Fifth Circuit below, where this case is  
23 coming from, they didn't deny that there was  
24 clear notice. They said it would be  
25 unconstitutional because they -- they thought

1     that the -- that the -- the officers were,  
2     like, they treated them as non-recipients even  
3     though they're basically indirect recipients,  
4     and it didn't sort of see that they fit within  
5     the --

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

13            MR. TRIPP: I mean, in -- in -- I  
14    think, in -- in Grove City College versus Bell,  
15    you're reading -- reaching an indirect  
16    recipient. In Salinas, Dixon, Hess, and  
17    Laudani, those are all situations where you're  
18    reaching --

19            JUSTICE BARRETT: I mean, you can  
20    just -- you can just say that, yes, it would be  
21    a different factual scenario.

22            MR. TRIPP: I -- I don't have a case  
23    that's on this exact factual scenario, I admit  
24    that, but I think, actually, this is, like, a  
25    lesser included of Salinas and it's way inside

1 Sabri. I mean, it's more --

2 JUSTICE BARRETT: Well, but I -- but I  
3 said to put aside the bribery cases, so the  
4 ones under --

5 MR. TRIPP: If I could push back on  
6 that a little bit, I think that's important  
7 when the -- the crux of this program is to  
8 provide federal funds to prisons that  
9 accommodate religious liberty.

10 JUSTICE BARRETT: Well, no, I -- I  
11 asked you to put them aside because I wanted  
12 you to put them aside and look at the civil  
13 liability context for a minute.

14 MR. TRIPP: Okay. Yeah.

15 JUSTICE BARRETT: I think that Sabri  
16 and Salinas are the best cases for you,  
17 particularly Sabri. I -- I take that. But, if  
18 those are distinguishable, I wanted to ask you  
19 the other question, and I think the answer is  
20 no. And I think -- and I just kind of want to  
21 clarify your answer to Justice Gorsuch. Look,  
22 the facts of this case are egregious. So, if  
23 on the facts we were looking for a case in  
24 which there should be money damages, this is  
25 it.

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

12           MR. TRIPP: If -- but if -- let me be  
13    clear about this. If but only if --

14           JUSTICE BARRETT: Yes or no? Yes or  
15    no?

16           MR. TRIPP: -- the condition --

17           JUSTICE BARRETT: Take his hypo -- no,  
18    no, no, no.

19           MR. TRIPP: If but only --

20           JUSTICE BARRETT: Mr. Tripp --  
21    Mr. Tripp, he asked you to assume that the  
22    conditions that it was -- it was perfectly  
23    consistent with this Spending Clause. So yes  
24    or no, would your theory say that -- let's talk  
25    about the coach under Title IX on Justice

1 Gorsuch's hypothetical.

2 MR. TRIPP: If the condition is valid,  
3 the -- yes.

4 JUSTICE BARRETT: Yes, yes, yes, he  
5 said all that. Yes.

6 MR. TRIPP: Then I'll say yes. If the  
7 condition attaches, Congress can enforce it.  
8 And I think the crux of the question is can  
9 the --

10 JUSTICE BARRETT: Okay, but just say  
11 yes or no.

12 MR. TRIPP: Sorry.

13 JUSTICE BARRETT: Yes or no?

14 MR. TRIPP: Yeah.

15 JUSTICE BARRETT: You don't want to  
16 say yes or no. Just -- just take the  
17 consequences. It's totally fine if those are  
18 the consequences, but I think you have to  
19 follow the logic where it leads. And the logic  
20 where it leads is that, yes, under Title IX,  
21 say, Congress could pass a statute or Congress  
22 could say that it's going to rely on its  
23 spending power to hold the coach liable under  
24 the -- the hypothetical Justice Gorsuch gave  
25 you, right, yes?

1 MR. TRIPP: It -- it --

2 JUSTICE BARRETT: Yes?

3 MR. TRIPP: Yes.

4 JUSTICE BARRETT: Yes.

5 MR. TRIPP: If -- if -- but if -- but

6 I think this is a --

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

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

18 JUSTICE BARRETT: Well, but,  
19 Mr. Tripp, every time we decide a case, we have  
20 to think about what it's -- you know, in  
21 Salinas and Sabri, you know, if it had -- if  
22 they had looked ahead to this case, might have  
23 said, yeah, this might be where the logic leads  
24 or you take a few steps from here and this is  
25 where it goes. But we can't decide a case just

1 based on these facts. So you just need to own  
2 it.

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

4 JUSTICE BARRETT: And it's fine --

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

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

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

15 JUSTICE BARRETT: But -- but you're  
16 not making -- well, okay.

17 MR. TRIPP: And -- and --

18 JUSTICE BARRETT: Let's just -- why  
19 does it -- why -- logically speaking, why is  
20 it -- why does it have to be individuals or  
21 officers? Why couldn't you, for example, say  
22 that a -- a school district, schools that take  
23 federal money, if they do and we want to -- why  
24 couldn't liability extend, say, to parents who  
25 choose to send their kids to those schools?

1 Let's think about, like, if a -- if a child is  
2 transitioning, say, and the parent says, you  
3 know, no, I'm not going to facilitate that, I'm  
4 not going to call the child a different name or  
5 call the child by different pronouns, could  
6 there be some sort of cause of action that  
7 would allow, say, the child to sue the parent  
8 for civil liability? Why does it have to be an  
9 officer or an employee under your theory?

10 MR. TRIPP: Because of the -- of -- of  
11 the consensual contractual nature of agreeing  
12 to work as an officer --

13 JUSTICE BARRETT: So contract works  
14 with --

15 MR. TRIPP: -- for a federally funded  
16 program. It --

17 JUSTICE BARRETT: -- that point.

18 MR. TRIPP: It -- right. And so I  
19 think, when you're reaching a member of the  
20 general public, which is what your hypothetical  
21 is talking about, it is a totally different set  
22 of questions that we're not remotely touching.  
23 I think that's what Sabri gets at, is how far  
24 can Congress go into reaching members of the  
25 general public. Those are hard questions, and

1 we're not asking you to go anywhere near them.

2 These are --

3 JUSTICE BARRETT: And why doesn't your  
4 logic require it? Because you want to rely on  
5 the contract analogy for that point? Like,  
6 you're just sticking on the contract road?

7 MR. TRIPP: Because of the contract  
8 road and they admit the condition applies to  
9 them. And it's because of the contract because  
10 they've agreed to take the job subject to this  
11 condition.

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

21 JUSTICE BARRETT: What about other  
22 contracts, though? I mean, what if you, you  
23 know, contract for services with the hospital  
24 because you're a patient? What if you  
25 contract -- I mean, I guess I don't understand

1     why it has to be an employee.

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

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

20                JUSTICE BARRETT:  Okay.  Speaking of  
21    the layers of consent -- this is just a  
22    technical question -- the Fifth Circuit talked  
23    about the warden and the Secretary of State.  
24    Were the guards actually defendants because,  
25    here -- are the guards before us?

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

3           JUSTICE BARRETT: They're the John  
4   Does? But the -- but the Fifth Circuit didn't  
5   talk about them. The Fifth Circuit talked  
6   about the warden and the Secretary of State  
7   saying they couldn't be sued in their  
8   individual capacities?

9           MR. TRIPP: The -- the -- the warden  
10   is -- is the -- I mean, the factual allegations  
11   in the complaint involve the warden  
12   specifically.

13          JUSTICE BARRETT: Okay. And the  
14   warden -- so the warden knew your -- okay. So  
15   the -- the -- the Does are not before us? It's  
16   just the warden?

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

19          JUSTICE BARRETT: Before you --

20          MR. TRIPP: You know, it was  
21   dismissed.

22          JUSTICE BARRETT: Right.

23          MR. TRIPP: We don't -- we don't know  
24   who they are. Yeah.

25          JUSTICE BARRETT: Okay.

1 MR. TRIPP: We don't know their names.

2 Yeah.

3 JUSTICE BARRETT: And in terms of  
4 layers of contract, is the contract with the  
5 State of Louisiana or with LDOC or with the  
6 prisons?

7 MR. TRIPP: So the way RLUIPA works is  
8 the Department of Corrections, the -- is the --

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

10 MR. TRIPP: It's LDOC.

11 JUSTICE BARRETT: That -- that's  
12 just -- yeah. That -- that -- I just wanted to  
13 understand how that worked. Thanks.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Jackson?

16 JUSTICE JACKSON: So can I invite you  
17 to reflect back to Justice Thomas's question,  
18 and you said that there were two paths to  
19 getting to your result, and you mentioned  
20 Salinas is one, and I think I might have heard  
21 the other, but let me just give you the  
22 opportunity to explain what those two paths  
23 are.

24 MR. TRIPP: Yeah. In -- so, in  
25 Salinas, I think because it's criminal

1 liability, the Court is very clearly relying on  
2 a combination of the Spending Clause to attach  
3 the condition and then the Necessary and Proper  
4 Clause to enforce it because you can't do  
5 criminal under -- under contract.

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

12 JUSTICE JACKSON: So the -- the chain  
13 of privity is the second?

14 MR. TRIPP: Because the chain of  
15 privity --

16 JUSTICE JACKSON: Yeah.

17 MR. TRIPP: -- is the second. So I  
18 think you could come at it either way. And,  
19 you know, I represent a private litigant. I --  
20 I don't really care which one you do so long as  
21 you reverse, of course.

22 JUSTICE JACKSON: So do you view  
23 Louisiana's constitutional argument as turning  
24 on the contract analogy? I mean, do we have to  
25 sort of accept that the Spending Clause and

1 Spending Clause legislation is subject to  
2 characterization as a contract in order to --  
3 to buy their argument?

4 MR. TRIPP: I -- I'm not sure -- I  
5 mean, maybe they can speak for themselves on --  
6 on that. I think the -- the Spending Clause is  
7 properly understood as being -- the Spending  
8 Clause alone, I think --

9 JUSTICE JACKSON: Alone.

10 MR. TRIPP: -- is -- is consensual in  
11 nature. That's -- I think this Court has been  
12 clear about that. But then the question of  
13 what --

14 JUSTICE JACKSON: But we've also  
15 been -- I just want to be clear about this. I  
16 mean, we've also expressed pretty significant,  
17 in many cases, doubts about whether the  
18 contract analogy totally governs.

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

21 JUSTICE JACKSON: Yeah.

22 MR. TRIPP: -- it doesn't get -- this  
23 Court has also been clear -- and they're not  
24 asking to overrule any of your precedents --  
25 the Court can -- that Congress can invoke the

1 Necessary and Proper Clause to protect its  
2 spending prerogatives. I mean, look in our  
3 reply brief. We have the example of the  
4 statute that makes it a crime to arson a  
5 federally funded institution, right? That's  
6 the use of the Necessary and Proper Clause in  
7 conjunction with the Spending Clause.

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

16 JUSTICE JACKSON: So -- so how much  
17 precedent would we undo if we held that  
18 RLUIPA's individual capacity cause of action  
19 for money -- money damages is unconstitutional?  
20 I mean, is this a big deal case or -- or not so  
21 much?

22 MR. TRIPP: I mean, I -- I -- I  
23 certainly think it's a big deal case. And  
24 we've -- we've included a -- I mean, I -- I  
25 think there are these, like, five or six

1 precedents from this Court that I just don't  
2 see how they can square their position with,  
3 Salinas, Hess, Laudani, Dixon, Grove City  
4 College versus Bell, and Sabri.

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

13 False Claims Act of 1863,  
14 anti-kickback provisions that started in the  
15 1930s. Title IX. Title VI, that's Grove City  
16 College versus Bell. Title X of the Public  
17 Health Acts, EMTALA, there's whistleblower  
18 provisions, Prison Rape Elimination Act, the  
19 arson statute that we were talking about,  
20 there's another one about blocking interference  
21 to federally funded programs. So it's -- it's  
22 a long list of statutes.

23 JUSTICE JACKSON: That could be  
24 imperiled by a --

25 MR. TRIPP: Yeah, where -- where --

1     where -- where -- where Congress has  
2     traditionally protected federal program and I  
3     think, in particular, imposed conditions and  
4     enforced them as to people who are in this  
5     position of being in the chain of privity.  
6     They're -- they're officers, agents, employees  
7     or -- or -- or subcontractors of the grantee.

8             JUSTICE JACKSON: Thank you.

9             CHIEF JUSTICE ROBERTS: Thank you,  
10    counsel.

11            Ms. Baird.

12                    ORAL ARGUMENT OF LIBBY A. BAIRD

13                    FOR THE UNITED STATES, AS AMICUS CURIAE,

14                    SUPPORTING THE PETITIONER

15            MS. BAIRD: Thank you, Mr. Chief

16    Justice, and may it please the Court:

17            RLUIPA clearly authorizes individual  
18    capacity damages suits against state officials.  
19    Tanzin held that RFRA authorizes individual  
20    capacity damages suits against federal  
21    officials, and RLUIPA is RFRA's sister statute  
22    and should be read the same way.

23            Congress used materially identical  
24    text in RLUIPA to provide the same remedies as  
25    RFRA against state officials. Respondents

1 resist that simple conclusion because RLUIPA  
2 was enacted under Congress's spending power.  
3 But RLUIPA's language puts states on clear  
4 notice that state officials can be sued for  
5 damages in their individual capacity.

6 And under the Spending and Necessary  
7 and Proper Clauses, Congress could create  
8 personal liability for state officials acting  
9 as agents of the state when they violate  
10 conditions on federal funding. Indeed, Salinas  
11 and Sabri upheld more expansive uses of  
12 Congress's power to impose criminal liability.

13 I welcome the Court's questions.

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

17 MS. BAIRD: So, Justice Thomas, we  
18 don't think clear notice is required under the  
19 purpose of the Spending Clause because we care  
20 about the notice of the recipient, but I think  
21 the officers here clearly had notice. And I do  
22 think that qualified immunity --

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

25 MS. BAIRD: Well, I think the statute

1 clearly applies to them if you look at -- you  
2 know, Petitioner's counsel emphasized the text  
3 of the cause of action, it applies to a  
4 government defined as an official.

5 JUSTICE THOMAS: So do you think they  
6 were aware of the state's commitment to the  
7 statutory requirements?

8 MS. BAIRD: I -- I think that -- that  
9 we're all sort of held liable for what's in  
10 the -- the United States Code. And I think  
11 that this isn't surprising to -- to state  
12 officials.

13 JUSTICE THOMAS: So you think you have  
14 clear notice of everything that's in the United  
15 States Code?

16 MS. BAIRD: Well, Your Honor, I think  
17 that the officers here clearly had notice.  
18 Officers are used to facing 1983 liability and  
19 are liable for violation of all constitutional  
20 provisions. They know the -- that certain  
21 requirements apply to them when they accept  
22 employment in a federally funded prison.

23 And I do think that qualified immunity  
24 is an important backstop because they can only  
25 actually be held liable if their conduct

1 violated clearly established law.

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

10 MS. BAIRD: Exactly, Justice Jackson.  
11 At page 46 of their brief, Respondents admit  
12 that they are bound by the substantive  
13 condition. I think that that makes this a very  
14 easy case for purposes of the Spending Clause  
15 issue because they admit they can be sued in  
16 their official capacity for an injunction.

17 I think that means, as Petitioner  
18 argued in -- in his brief, and I don't take  
19 Respondents to have disputed, that the -- that  
20 Respondents could be held for contempt.

21 CHIEF JUSTICE ROBERTS: So --

22 MS. BAIRD: And that can have personal  
23 consequences --

24 CHIEF JUSTICE ROBERTS: I'm sorry,  
25 finish your question.

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

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

18           MS. BAIRD: For government officials,  
19 yes. As to the hypos, I think that one of  
20 Justice Gorsuch's hypos which Justice Barrett  
21 followed might have included private parties.  
22 The government doesn't take a position as to  
23 how this would cash out in terms of private  
24 parties.

25           I think, as Petitioner's counsel

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

7             CHIEF JUSTICE ROBERTS: So --

8             MS. BAIRD: I do agree with him  
9     that --

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

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

21            CHIEF JUSTICE ROBERTS: So you're  
22     saying -- does the same standard apply to the  
23     individual employees?

24            MS. BAIRD: No, I do not think under  
25     the Spending Clause that they need to have

1 clear notice. And --

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

9 MS. BAIRD: So I guess I should  
10 clarify my answer that I do think it depends on  
11 what power the Court relies. I think, if the  
12 Court were to --

13 JUSTICE GORSUCH: Spending Clause  
14 power.

15 MS. BAIRD: If the Court were to say  
16 only the Spending Clause, then I do think  
17 that -- that you would have to have consent of  
18 the state official, and I do think we have that  
19 here.

20 JUSTICE GORSUCH: Whoa, whoa, whoa,  
21 whoa, whoa. Let's back up. We're talking  
22 about a spending power statute, okay, and --  
23 and you -- everybody has to agree, I think,  
24 that consent and notice are required for -- for  
25 a state to be bound, right?

1 MS. BAIRD: Yes.

2 JUSTICE GORSUCH: And are you saying  
3 those are or are not required for the state  
4 employee to be bound?

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

8 JUSTICE GORSUCH: Right. So no is the  
9 answer because it works for the state and,  
10 because the state employs these individuals,  
11 they're necessarily bound?

12 MS. BAIRD: I -- I do think that's  
13 right. And I think that --

14 JUSTICE GORSUCH: Okay. So no consent  
15 and no -- no notice is required for the  
16 employees?

17 MS. BAIRD: I think --

18 JUSTICE GORSUCH: That has to be the  
19 logic of your view.

20 MS. BAIRD: I think not as a formal  
21 matter in terms of under the Spending Clause,  
22 but I think the reason that this is such an  
23 easy case under either the Spending Clause --

24 JUSTICE GORSUCH: Okay. What do we do  
25 if that's true -- and I think it has to be,

1 right, and I -- I appreciate the candor -- with  
2 the fact this Court has always said that, you  
3 know, contract is the analogy, and it's  
4 certainly true that an agent is liable to its  
5 principal for violating the principal's rules,  
6 here, the employee to the state.

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

14 What do you do about that?

15 MS. BAIRD: Yes, Justice Gorsuch.  
16 Well, I would strongly resist that the contract  
17 analogy applies to answer --

18 JUSTICE GORSUCH: Okay. Okay.

19 MS. BAIRD: -- every question that  
20 arises in Spending Clause legislation.

21 JUSTICE GORSUCH: That -- that --  
22 that's -- that's an answer, is just ignore the  
23 contract analogy. Fair enough.

24 MS. BAIRD: Well -- well, I think  
25 that -- well, I think what the Court's cases

1 say is that the contract analogy is important  
2 for purposes of determining notice. It's did  
3 the recipient --

4 JUSTICE GORSUCH: Notice and consent,  
5 yeah.

6 MS. BAIRD: -- did the recipient have  
7 notice. I think, here, it makes it an easier  
8 case under the Spending Clause, unlike all of  
9 the cases where the Court has considered like  
10 in Medina --

11 JUSTICE GORSUCH: But you're asking us  
12 to ignore contract principles when it comes to  
13 the employees, right? I mean, that has to be  
14 right.

15 MS. BAIRD: No. We just don't think  
16 that -- that the contract analogy answers the  
17 question. We think the Court --

18 JUSTICE GORSUCH: Right.

19 MS. BAIRD: -- needs to sort of tick  
20 through the constitutional analysis and ask,  
21 you know, is this a necessary and proper means  
22 of enforcing the substantive RLUIPA condition.  
23 And we think it is.

24 JUSTICE GORSUCH: But we have -- we  
25 have to look outside the contract analogy

1     because it wouldn't get to the employee here.  
2     It wouldn't. I mean, there's no privity  
3     between the employee and the federal  
4     government.

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

13            JUSTICE BARRETT: But --

14            MS. BAIRD: -- who are most likely to  
15    violate it.

16            JUSTICE BARRETT: -- now, Ms. Baird,  
17    so it sounds to me like you want to use the  
18    contract analogy to limit the scope of this  
19    argument because you keep saying, well, no,  
20    this is privity, this is privity, and that's  
21    why we don't need to take a position on whether  
22    it would reach a member of the general public,  
23    right? But then you're moving away from the  
24    contract analogy when Justice Gorsuch is asking  
25    you about, well, do these principles of

1 contract law apply?

2 I don't understand. It seems like  
3 we're slipping in and out of the contract  
4 analogy.

5 MS. BAIRD: Yeah. So let me try to be  
6 clear, Justice Barrett. I think that the  
7 contract analogy applies to determine whether  
8 there is notice. I think this Court's cases  
9 are clear that the notice that matters is the  
10 state's notice. I do think that the officers  
11 can be fairly held to account for notice here.

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

22 There may be hard questions about can  
23 Congress impose the condition in the first  
24 place, but I think, once Congress has imposed  
25 the condition -- and, again, Respondents don't

1     dispute that they're bound by the substantive  
2     RLUIPA condition, and courts of appeals have  
3     upheld the substantive condition under the  
4     Spending Clause -- Congress can go one  
5     half-step further and enforce it against  
6     individuals --

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

14            MS. BAIRD: Yes, I think they have  
15    notice from the statute. And, again, I think  
16    qualified immunity is an important backstop  
17    for -- for officers. I guess, with -- what I  
18    would say about members of the general public  
19    is I think, conceivably -- and the reason we're  
20    not taking a position on sort of how this  
21    nonparty liability issue cashes out there,  
22    because I think there conceivably could be  
23    different analysis under the Necessary and  
24    Proper Clause.

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

1 JUSTICE BARRETT: What would that  
2 analysis look like?

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

13 CHIEF JUSTICE ROBERTS: You can finish  
14 your answer.

15 MS. BAIRD: Thank you, Mr. Chief  
16 Justice.

17 That Congress clearly had on its mind  
18 in RFRA and RLUIPA, you know, the destruction  
19 of a Bible, et cetera. It's also proper  
20 because this is a longstanding traditional  
21 remedy, and it's against state officials who  
22 are most likely to violate the condition.  
23 These are the people through whom the state  
24 acts. A state otherwise doesn't act but  
25 through its officials.

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

8           CHIEF JUSTICE ROBERTS: Thank you,  
9     counsel.

10           Justice Thomas?

11           Justice Alito?

12           JUSTICE ALITO: In determining whether  
13     there was clear notice, what is the relevant  
14     point in time?

15           MS. BAIRD: So I think it would be  
16     what is the notice as provided by the statute.  
17     In Medina, I think it was Footnote 8, the Court  
18     said we care about notice as provided by  
19     Congress. So --

20           JUSTICE ALITO: No, what date? What  
21     is the date?

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

24           JUSTICE ALITO: It's not the time --  
25     it's not the point at which the state accepts

1 the money?

2 MS. BAIRD: Yes, but I think -- so --  
3 so, yes, we care about the state's notice at  
4 the time they accepted the funds, but I  
5 think --

6 JUSTICE ALITO: And what was -- what  
7 is the relevant date there?

8 MS. BAIRD: So I --

9 JUSTICE ALITO: In this case?

10 MS. BAIRD: RLUIPA is tied to all  
11 sorts of federal funding. And so I don't have  
12 a specific date on which they accepted funds,  
13 but I imagine they're continually accepting  
14 federal funds. You can go to [usa.spending.gov](http://usa.spending.gov)  
15 to see the different funds that they receive  
16 from the government.

17 JUSTICE ALITO: Was it clear before  
18 Tanzin?

19 MS. BAIRD: Yes, I absolutely do think  
20 it was clear because Tanzin is illustrative. I  
21 think Tanzin is helpful for us because it shows  
22 why the textual analysis comes out the way it  
23 does. I don't think it was necessary.

24 JUSTICE ALITO: Even though all the  
25 courts of appeals had gone the other way, and

1 even without Tanzin, you think it was clear?

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

16 JUSTICE ALITO: Well, Tanzin was  
17 decided, I think, 18 days before the event in  
18 question here, and maybe General Aguiñaga could  
19 answer the question. But, if funds were not  
20 received after that date, doesn't that make it  
21 more difficult?

22 MS. BAIRD: I -- I don't think so,  
23 Your Honor. I think that timing is right  
24 from -- from what I understand the allegations  
25 to be in the complaint. But I -- again, I

1 don't think the -- the argument depends on  
2 Tanzin. The notice that we care about is the  
3 notice as provided by Congress. And text is  
4 the only reliable indicator of meaning.

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

12 JUSTICE ALITO: Okay. I -- I -- I  
13 understand the point. Could you address  
14 Justice Gorsuch's hypothetical about the coach?  
15 Let's just take that as an example. What is  
16 the position of the United States regarding  
17 that situation?

18 MS. BAIRD: So, assuming the coach,  
19 this is a public entity and the coach is a -- a  
20 government employee, yes, there could be a  
21 cause of action there, but, again, I think the  
22 difficult part -- and I'm not going to fight  
23 the hypothetical -- I think yes, but the  
24 difficult part is, can Congress impose the  
25 condition in the first place? And there are

1 serious limits on what Congress can do under  
2 the Spending Clause. There's not just Dole,  
3 but there's other principles that the Court has  
4 laid out, in Gordon --

5 JUSTICE ALITO: Yeah, and what would  
6 be -- that's what I'm asking. What would be  
7 the limitations?

8 MS. BAIRD: Sure. So there's several.  
9 I mean, the Dole factors, obviously. There's  
10 the unconstitutional --

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

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

20 I think the important thing is that  
21 there are limits. The Dole factors, there's  
22 the unconstitutional conditions doctrine,  
23 Congress can't condition funds on someone  
24 giving up their constitutional rights. There's  
25 coercion. And then I think the remedy itself

1 has to be constitutional. It has to comply  
2 with due process.

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

10 JUSTICE ALITO: Well, you're taking --  
11 you're asking us to take an important step. It  
12 would be helpful if we had an idea about where  
13 this road is leading, but you don't want to  
14 provide an answer to that.

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

21 I think that the United States hasn't  
22 sort of taken a position on that question  
23 because --

24 JUSTICE ALITO: How often -- how often  
25 has this Court held that Congress has imposed

1 an impermissible condition under the Spending  
2 Clause?

3 MS. BAIRD: I mean, NFIB is an  
4 example.

5 JUSTICE ALITO: Yeah. What else?

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

14 I think, really, the question here --  
15 and I'm not trying to frustrate the Court, but  
16 the question is really just, can Congress  
17 enforce a condition that is validly imposed?  
18 The hard question in Your Honor's hypothetical  
19 is whether Congress can impose the condition.  
20 And at page 46, they admit that they are bound  
21 by the condition. The only question is one of  
22 enforcement.

23 And Congress can certainly -- again,  
24 if these officers can be held for contempt and  
25 subject to personal consequences, Congress can

1 surely hold them accountable in their  
2 individual capacity for damages, which everyone  
3 knows that that is what RLUIPA was trying to  
4 do.

5 JUSTICE ALITO: Thank you. Thank you.

6 MS. BAIRD: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Sotomayor?

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

11 MS. BAIRD: I would say so, Justice  
12 Sotomayor, yes.

13 JUSTICE SOTOMAYOR: It would put at  
14 risk dozens of federal statutes, correct?

15 MS. BAIRD: I think so. If the Court  
16 says that neither through the Spending Clause  
17 or the combination of the Spending and  
18 Necessary and Proper Clause Congress can't do  
19 this, then I think that would be  
20 ground-breaking, yes.

21 JUSTICE SOTOMAYOR: Similarly  
22 ground-breaking is a requirement that somehow,  
23 when individual damages are at risk, that  
24 Congress has to be more specific than using  
25 appropriate relief, because we've approved

1 damages under appropriate relief in other  
2 statutes, haven't we?

3 MS. BAIRD: I think --

4 JUSTICE SOTOMAYOR: Spending Clause?

5 MS. BAIRD: Well, and Franklin's a  
6 good example of this because, in Franklin,  
7 there was --

8 JUSTICE SOTOMAYOR: Franklin, exact --

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

16 JUSTICE SOTOMAYOR: Thank you,  
17 counsel.

18 MS. BAIRD: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?

20 JUSTICE KAGAN: When -- when you just  
21 said, Ms. Baird, ground-breaking, could you hum  
22 a few more bars on that? I mean,  
23 ground-breaking how? Ground-breaking, what  
24 would happen, what would follow?

25 MS. BAIRD: Sure. Well, I mean, I

1 think Petitioner's brief laid this out nicely,  
2 but there's sort of a long history of Congress  
3 being able to reach outside of the strict  
4 privity between the federal government and an  
5 entity that receives funds. I think all of  
6 that could be called into question.

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

19 And I think all the Court has to do,  
20 the Court does not need to extend Salinas and  
21 Sabri. I think all it has to do is cite those  
22 cases, say that no one has asked us to overrule  
23 them, case closed.

24 JUSTICE KAGAN: On -- on Salinas and  
25 Sabri, I mean, one of Respondents' arguments is

1     that those cases are different because the  
2     federal government's interest in funding was  
3     more directly involved, that what they really  
4     were all about was ensuring that the federal  
5     government could make sure that the recipient  
6     didn't fritter away the federal government's  
7     own funds.

8             So why is that true or not true?

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

18            So I do think that this is about  
19    protecting the funds. I'll also say that in  
20    Salinas and Sabri, the Court was concerned  
21    about more than just protection of the actual  
22    funds at issue. And I think you can see this  
23    because neither case required any nexus with  
24    the federal funds.

25            It's most obvious in Salinas, where

1 the Court there described the threat to the  
2 federal program was the deputy sheriff who was  
3 giving preferential treatment to the inmate.  
4 The -- it was clear as day that that was the  
5 threat that the Court was talking about. And I  
6 think, here, the -- the federal program is  
7 similarly threatened when officers can violate  
8 conditions on federal funds with impunity.

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

16 MS. BAIRD: I think that's right,  
17 Justice Kagan. The government -- the federal  
18 government does not want to be a party to  
19 egregious violations of religious liberty like  
20 the facts alleged in this case. I mean, the --  
21 the federal government has the power when it  
22 says it's giving federal funds on the condition  
23 to enforce that condition, and the state can  
24 always say no.

25 JUSTICE KAGAN: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Gorsuch?

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

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

20 MS. BAIRD: Well, Your Honor --

21 JUSTICE GORSUCH: -- at the  
22 government's urging, right?

23 MS. BAIRD: Well, Your Honor, yes, I  
24 think that was right.

25 JUSTICE GORSUCH: Okay. All right.

1 And then --

2 MS. BAIRD: But --

3 JUSTICE GORSUCH: And -- and -- and  
4 then -- well, go -- if you want to finish, if  
5 you want to add, feel free.

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

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

20 MS. BAIRD: I -- I -- I think that's  
21 right. But I do think --

22 JUSTICE GORSUCH: Okay.

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

25 JUSTICE GORSUCH: I understand -- I

1 understand you think that. No, I -- I -- on  
2 the clear notice point, you say, well, it  
3 was -- it was obvious even before Tanzin,  
4 right?

5 MS. BAIRD: Yes, Your Honor.

6 JUSTICE GORSUCH: What do we do about  
7 the federal government's representation in  
8 Tanzin itself that RLUIPA does not clearly  
9 authorize these suits against individual  
10 employees in a state?

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

19 JUSTICE GORSUCH: Well, that was RFRA,  
20 and, absolutely, you lost badly. But you said  
21 with respect to state officials and RLUIPA that  
22 it doesn't authorize. And now you're asking us  
23 to believe that it was clear even though you  
24 got it wrong?

25 MS. BAIRD: So, Justice Gorsuch, we've

1 taken to heart this Court's decision in Tanzin.  
2 And I think that Tanzin's analysis really  
3 does --

4 JUSTICE GORSUCH: Thank you, counsel.

5 MS. BAIRD: -- help the Court decide  
6 the question. It doesn't govern squarely, but  
7 I think it does illustrate why the text means  
8 what it does here.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Kavanaugh?

11 JUSTICE KAVANAUGH: You agree that the  
12 Spending Clause statute must unambiguously  
13 authorize damages in order for damages to be  
14 available, correct?

15 MS. BAIRD: Yes, I think that's the  
16 clear notice requirement.

17 JUSTICE KAVANAUGH: Okay. And do you  
18 have any differences with Petitioner on why you  
19 think this statute, RLUIPA, clearly authorizes  
20 damages?

21 MS. BAIRD: I mean, I think Petitioner  
22 put it about as good as I could. I think that  
23 it -- it's really important to start with  
24 the -- the individual capacity action. I  
25 think, if you look at this text, it is clear as

1 day that it applies to officials in their  
2 individual capacity. It applies to an official  
3 or any other person acting under color of state  
4 law.

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

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

20 JUSTICE KAVANAUGH: And I'm not saying  
21 whether I agree with this or not, but just to  
22 get the order of potential operations on the  
23 table, if we were to conclude that this statute  
24 does not clearly, unambiguously authorize  
25 damages, that avoids all the ground-breaking

1 issues that you've been discussing, correct?

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

6 JUSTICE KAVANAUGH: I understand that.  
7 My specific question was the ground-breaking  
8 consequences you were discussing. That would  
9 be put off for another day, correct?

10 MS. BAIRD: That might be --

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

15 MS. BAIRD: Yes. I think there would  
16 be RLUIPA consequences because I think there  
17 would be a question about the alternative  
18 jurisdictional hooks of the Commerce Clause. I  
19 think you'd also call into question the  
20 alternative jurisdictional hooks in the land  
21 use context because there would a question of  
22 whether that interpretation governs those  
23 separate powers.

24 And I think the Court should just sort  
25 of follow the text where it leads. This is a

1 legal question like any other legal question.  
2 We think the notice is clear. I do think that  
3 that would probably be less disruptive than  
4 sort of all of the other consequences I was  
5 talking about with Justice Sotomayor.

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Barrett?

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

16 MS. BAIRD: Yes. Yes.

17 JUSTICE BARRETT: Because the federal  
18 government doesn't want to give money to  
19 prisons that are rights-violators essentially,  
20 right?

21 MS. BAIRD: Mm-hmm.

22 JUSTICE BARRETT: But the federal  
23 government, we usually say in the Spending  
24 Clause context that the remedy is for the  
25 federal government to pull the funds, right?

1 So it could do that?

2 MS. BAIRD: That is an option, Justice  
3 Barrett. I will say -- so -- and I'd have to  
4 go back to check every single case, but I  
5 believe that the cases in which the Court has  
6 said that, there's no express cause of action.

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

15 And this isn't unusual. We all know  
16 what Congress was trying to do. It was trying  
17 to restore pre-Smith rights and remedies and  
18 that had long been available under the First  
19 Amendment through 1983. So I think Medina  
20 makes clear that it's a policy choice whether  
21 to create a cause of action. Congress has done  
22 that here. And we think that should be  
23 respected.

24 JUSTICE BARRETT: So you think  
25 Congress couldn't pull the funds here?

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

14          JUSTICE BARRETT: I see. I see. Is  
15          there any daylight between you and -- the  
16          question the government always gets --

17          MS. BAIRD: Yes.

18          JUSTICE BARRETT: -- do you stand with  
19          Petitioner all the way, or is there any  
20          difference in your positions?

21          MS. BAIRD: No, I don't think there's  
22          any daylight. There might be, like, if you  
23          drill down, like, there might be some small  
24          differences at the margins, but I don't think  
25          there's anything that would matter to the

1 Court's resolution of the case.

2 JUSTICE BARRETT: And one other  
3 question. So there's been a lot of talk about  
4 whether there has to be clear notice in the  
5 contract to the employees or whether the  
6 statute is enough. And the government and the  
7 Petitioner say the statute is enough.

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

16 MS. BAIRD: Sure. I mean, yeah,  
17 Petitioner has laid that out and says this can  
18 all be done through contract. We agree with  
19 that. But I don't think that that means that  
20 what Congress did here is impermissible. I  
21 think that there's clear notice on the text of  
22 the statute.

23 I think how a state responds, how a  
24 Department of Corrections responds, I think  
25 they should inform their officers. There are

1       briefs saying that officers are informed of the  
2       requirements that govern prisons.

3               I do think that -- that officers  
4       expect this. This isn't surprising. They're  
5       not some disinterested third party. These are  
6       people who work in -- in prisons and know the  
7       conditions that apply to them.

8               JUSTICE BARRETT: Thank you.

9               CHIEF JUSTICE ROBERTS: Justice  
10       Jackson?

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

20              If that doesn't refer to money damages  
21       being brought by an individual for a violation  
22       of RLUIPA, what could Congress have meant by  
23       "appropriate relief" here?

24              MS. BAIRD: I mean, we agree with you.  
25       We think it's clear, especially once you look

1 at the definition of a government, "appropriate  
2 relief against a government" becomes -- the  
3 word "appropriate relief" becomes clear in the  
4 context of who we're talking about here, which  
5 is individual officers. So we would agree with  
6 you.

7 JUSTICE JACKSON: And even broadening  
8 out the lens more, I mean, RLUIPA is applying  
9 to prisons in a circumstance in which the PLRA  
10 and other statutes make it very difficult for  
11 prisoners to get any other kind of relief,  
12 right? I mean, they can't get injunctive  
13 relief in any -- any sort of meaningful way.

14 MS. BAIRD: I think they could. I  
15 think prisoners could get injunctive relief  
16 under RLUIPA, and we would say that's another  
17 form of appropriate relief.

18 But I do think that damages are  
19 necessary to complement, especially for  
20 instances like -- like the one alleged here,  
21 where there's a one-time abuse. I think it  
22 also comes up in cases of -- when claims for  
23 injunctive relief are mooted by release or  
24 transfer.

25 JUSTICE JACKSON: Or transfer, which

1 can happen all the time, so it's --

2 MS. BAIRD: Yes. And it's very --  
3 very common.

4 JUSTICE JACKSON: And -- okay. You've  
5 said many times that this is an easy case, and  
6 I think it's because of the privity argument.  
7 I'm trying to kind of puzzle through it.

8 The state can say no to the condition  
9 in this situation. It has notice. It's a part  
10 of the agreement that the state makes to accept  
11 the funds. So it can say no to the condition  
12 that it must follow RLUIPA.

13 But then we have this other layer,  
14 which is the employees, I suppose, can say no  
15 to a state that has agreed to the condition,  
16 right?

17 MS. BAIRD: I think that's right.  
18 They have a choice whether to voluntarily  
19 accept employment in a federally funded  
20 program.

21 JUSTICE JACKSON: Against the backdrop  
22 of a clear cause of action against people in  
23 their position for violations of the law?

24 MS. BAIRD: Yes. I think the statute  
25 is clear as day that it applies to individual

1 officers, and in that context, appropriate  
2 relief clearly provides damages.

3 JUSTICE JACKSON: And don't we  
4 ordinarily hold people responsible, especially  
5 officials, for knowing what the law requires  
6 and following it?

7 MS. BAIRD: I think that's generally a  
8 presumption that -- that this Court has  
9 endorsed, yes.

10 JUSTICE JACKSON: Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 Mr. Aguiñaga.

14 ORAL ARGUMENT OF J. BENJAMIN AGUIÑAGA  
15 ON BEHALF OF THE RESPONDENTS

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

18 The Court should resolve this case on  
19 either of two grounds. First, you should say,  
20 as Chief Judge Sutton has said both before and  
21 after Tanzin, that RLUIPA does not clearly and  
22 unambiguously create an individual capacity  
23 cause of action for damages.

24 Or, second, you should say, as Judge  
25 Sullivan has said after Tanzin, that even if

1 Congress spoke with unmistakable clarity and  
2 created such a cause of action, Congress  
3 exceeded its constitutional authority.

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

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

20 Now, to be sure, I have a lot of  
21 friends on the other side of this case who have  
22 valid concerns about Congress's silence over  
23 the past 25 years when 10 federal courts of  
24 appeals have said that there's no individual  
25 capacity claim for damages under RLUIPA.

1           But the solution is not to distort  
2   this Court's existing precedents to try to  
3   change that status quo. It is instead to tell  
4   Congress to act exactly like it did in 1993  
5   after Smith and in 2000 after City of Boerne,  
6   which is to pass new legislation, supersede  
7   Sossamon, and amend RLUIPA to allow for damages  
8   against the states, and then the states can  
9   decide, each state for itself, whether it  
10   accepts that express condition.

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

13           JUSTICE THOMAS: There's been quite a  
14   bit of reliance on Sabri and Salinas. Could  
15   you spend just a few moments giving us your  
16   argument as to why they -- these cases aren't  
17   dispositive?

18           MR. AGUIÑAGA: Absolutely, Justice  
19   Thomas. So, if I could give you the one  
20   sentence that I think might be the most  
21   important in this Court's precedents for this  
22   case, that's the very last sentence of Section  
23   II in Sabri at page 608. This is the paragraph  
24   where this Court in Sabri rejected Mr. Sabri's  
25   Spending Clause challenge. He said that this

1     legislation is coercive. This Court said no,  
2     it's not Spending Clause legislation at all.  
3     This is not Congress's -- Congress's attempt --  
4     666 is not Congress's attempt to impose its  
5     will on states' choices about public policy.  
6     It's instead Congress's Necessary and Proper  
7     Clause authority to basically target those who  
8     convert public spending into unearned private  
9     gain. That's the line that the Sabri Court  
10    drew.

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

20           JUSTICE KAGAN: But the actual dollars  
21    and cents weren't at issue in that case.  
22    What -- what the Court was upholding was the  
23    federal government's right to say we're not --  
24    we're -- we're -- we shouldn't -- we need some  
25    strings in place to ensure that the money we

1 pay to a federal institution is going to an  
2 honest federal institution, an institution that  
3 won't be profligate with our money generally  
4 even though there's no nexus with the money  
5 here.

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

11 And both of those things fall within  
12 the federal government's interests.

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

25 Now I'll grant you, Justice Kagan,

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

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

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

22           JUSTICE SOTOMAYOR: And it has  
23    constitutional authority to spend and give  
24    money to state prisons as well.

25           MR. AGUIÑAGA: But it -- but it --

1 JUSTICE SOTOMAYOR: I mean, it -- it  
2 wasn't -- in those programs, it could spend on  
3 programs, but it didn't have to.

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

9 JUSTICE SOTOMAYOR: But a criminal  
10 statute is regulation.

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

20 JUSTICE SOTOMAYOR: All right. If we  
21 disagree with that?

22 MR. AGUIÑAGA: And I'm happy to take  
23 the disagreement, Justice Sotomayor.

24 JUSTICE SOTOMAYOR: All right.

25 MR. AGUIÑAGA: But I do think that

1     that line that this Court drew at the end of  
2     Section II in Sabri is the right way to think  
3     about this. And I think --

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

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

13            MR. AGUIÑAGA: Absolutely, Your Honor.

14            JUSTICE BARRETT: Why is this so  
15    different then?

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

24            And in your hypothetical, Justice  
25    Barrett, I think you conceive -- you can

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

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

19           JUSTICE JACKSON: But, General --

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,  
3 you know, that was available. That's available  
4 to all prisoners in Louisiana and it's  
5 available 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. AGUIÑAGA: 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 1983 is a remedy, right?  
13    It's a cause of action that gives a remedy, and  
14    your earlier question about can't you just do  
15    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 -- there's not  
20    enough knowledge, I mean, that would just make  
21    1983 suits -- the same objections could be held  
22    with 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 his 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 the --

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 Sotomayor.

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 includes Chief Judge Sutton in Ali versus  
21 Adamson, that includes Judge Sullivan in the  
22 Tripathy case 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 just --

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 -- the characterization of  
12 them as non-recipients because I think you talk  
13 about recipients and non-recipients when you're  
14 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 saying --

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

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

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

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

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

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

25 MR. AGUIÑAGA: Right.

1 JUSTICE KAGAN: But that doesn't have  
2 anything to do with the questions that you're  
3 now talking about, which -- because, once we  
4 get to this constitutional issue, we've already  
5 decided the statute is clear enough and the  
6 question is only could Congress do this.

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

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

1           But the point that I'm making is that  
2   this -- this -- RLUIPA is no different with  
3   respect to putting an employee on notice than a  
4   1983 action is.

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

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

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

23          JUSTICE GORSUCH: To the extent we're  
24   talking about a contract analogy, an agent who  
25   knowingly violates a duty that the principal

1 owes to a third party may be liable to the  
2 principal but not to the third party, right?

3 MR. AGUIÑAGA: That's correct.

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

8 MR. AGUIÑAGA: May be liable. That's  
9 absolutely right.

10 JUSTICE GORSUCH: Yeah.

11 MR. AGUIÑAGA: And -- and, Justice  
12 Gorsuch, we have the -- the example in the red  
13 brief of, you know, the -- the agent who signs  
14 a contract on behalf of the principal. You  
15 know, even if our state prison officials had  
16 signed whatever spending contract under RLUIPA  
17 you want to pick on behalf of the State of  
18 Louisiana, contract principles will say you're  
19 still not personally bound. That doesn't  
20 personally bind that agent.

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

25 JUSTICE GORSUCH: And -- and whether

1 Congress could provide clear notice and get  
2 consent from the employees, we don't have to  
3 decide that?

4 MR. AGUIÑAGA: That's exactly right,  
5 Justice.

6 JUSTICE GORSUCH: Whether that might  
7 be necessary and proper, and we don't to have  
8 decide that?

9 MR. AGUIÑAGA: You could leave it for  
10 another day, Justice Gorsuch.

11 JUSTICE SOTOMAYOR: No, but how about  
12 if we don't want to?

13 (Laughter.)

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

1 argument too?

2 MR. AGUIÑAGA: Well, I'm not  
3 calling -- I'm not quite following that last  
4 part of the question, Justice Sotomayor.

5 JUSTICE SOTOMAYOR: Assume that the  
6 government --

7 MR. AGUIÑAGA: What I -- what I --

8 JUSTICE SOTOMAYOR: The hypothetical  
9 that the other side put forth, they could have  
10 had the government say to the states: Tell  
11 every employee that they're liable if they  
12 breach -- to us if they breach this contract.

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

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

24 MR. AGUIÑAGA: Any contract a state  
25 enters into, if the state is the recipient of

1 federal funds and Congress says --

2 JUSTICE SOTOMAYOR: Will the  
3 individual be liable if the state -- the  
4 federal law is that clear?

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

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

12 MR. AGUIÑAGA: In the jurisprudence --

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

17 MR. AGUIÑAGA: It's a --

18 JUSTICE JACKSON: -- that -- that --  
19 that wasn't express in that way?

20 MR. AGUIÑAGA: Justice Jackson, in  
21 a -- in the jurisprudence based on consent,  
22 concept has to mean something.

23 JUSTICE JACKSON: No, no, no, I  
24 understand.

25 MR. AGUIÑAGA: And the only -- the

1 method --

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

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

22 JUSTICE JACKSON: And your view is  
23 only if the state actually writes the terms  
24 into the employment agreement would there be  
25 sufficient notice to the employee? Only if

1       they write it down?

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

4               JUSTICE JACKSON:   I'm just  
5       answering --

6               MR. AGUIÑAGA:   But what the courts --

7               JUSTICE JACKSON:   I'd like you to  
8       answer that question.   If they wrote it down,  
9       is your answer that, yes, then the employee  
10      could be held liable?

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

16              JUSTICE JACKSON:   But we can't imply  
17      that that's the case because --

18              MR. AGUIÑAGA:   That would require --

19              JUSTICE JACKSON:   -- there is a law  
20      that says that federal employees under this  
21      circumstance have to abide by RLUIPA?

22              MR. AGUIÑAGA:   Because that is never  
23      how the Court has concepted -- constructed  
24      the -- the Spending Clause analysis, Justice  
25      Jackson.

1 JUSTICE JACKSON: Thank you.

2 CHIEF JUSTICE ROBERTS: Counsel, thank  
3 you very much.

4 Justice Thomas, anything further?

5 Justice Alito?

6 JUSTICE ALITO: Let me ask the same  
7 question that I asked the other side about the  
8 date. What specifically is the date we should  
9 look to?

10 MR. AGUIÑAGA: Your Honor, it's the  
11 date that the state received federal funding.  
12 Now, in a -- in a statute like this, I will be  
13 candid that it is difficult to pin down because  
14 RLUIPA is agnostic about the source of federal  
15 funding. It says any federal funds that run.  
16 And so, if you're talking about federal funding  
17 like Medicaid, which comes in basically  
18 monthly, weekly, you know, that -- that's the  
19 point in time at which you should look.

20 JUSTICE ALITO: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Sotomayor?

23 Justice Kagan?

24 Justice Gorsuch?

25 Justice Kavanaugh?

1 JUSTICE KAVANAUGH: You say RLUIPA  
2 does not unambiguously authorize a damages  
3 remedy. This is Justice Kagan's kind of bar of  
4 clarity point. The other side says the statute  
5 clearly authorizes individual capacity suits,  
6 so that traditionally has encompassed damages,  
7 and then they cite *Tanzin* on top of that. And  
8 I just want to make sure I have your responses  
9 to that precise point.

10 MR. AGUIÑAGA: Sure, Your Honor. So a  
11 few things to say to that.

12 I will say the one thing this Court  
13 recognized in the *Sossamon* case is that even if  
14 you get to the appropriate relief question,  
15 there are a number of ways you can infer what  
16 that term means. So, for example, we laid out  
17 in the red brief the fact that the Court --  
18 that Congress referred to injunctive relief  
19 with respect to the United States. There --  
20 there's different terminology like that.

21 Another thing the Court credited as  
22 plausible was that the ordinary definition of  
23 "appropriate relief" is typically particularly  
24 equitable relief, not damages. That's  
25 plausible.

1           The other way I -- I would attack  
2     that, Justice Kavanaugh, is remember what the  
3     Court said in Sossamon and repeated in Tanzin,  
4     which is that the term "appropriate relief" is  
5     inherently ambiguous and context-dependent.  
6     And I think the thrust of everything I've said  
7     today and what we say in the red brief is that  
8     the most important context here at least for  
9     our purposes is what -- what constitutional  
10    authority was Congress using to actually enact  
11    this putative cause of action for damages.  
12    That's the point that Chief Judge Sutton made,  
13    and I think that's exactly the right way to  
14    think about the relevant context here.

15           JUSTICE KAVANAUGH: Thank you.

16           CHIEF JUSTICE ROBERTS: Justice  
17    Barrett?

18           Justice Jackson?

19           Thank you, counsel.

20           Rebuttal, Mr. Tripp.

21           REBUTTAL ARGUMENT OF ZACHARY D. TRIPP

22           ON BEHALF OF THE PETITIONER

23           MR. TRIPP: Just a few quick points.

24           Justice Barrett, to start with the  
25    question about mini-RFRA, this is in our cert

1     reply, the state's mini-RFRA departs from the  
2     compelling interest test for prison safety or  
3     security regulations, so it wouldn't provide  
4     any relief, and, obviously, Congress wanted to  
5     have a nationwide remedy here.

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

16            That's an implied cause of action in a  
17    Spending Clause case, and they say damages are  
18    available. That's the norm.

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

1           And, again, if you don't have damages,  
2     like, look -- look at the facts of this case.  
3     Think about what Congress that enacted this law  
4     was trying to do. This is exactly where they  
5     were trying to have accountability, and I think  
6     it's clear as day on the face of this statute.

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

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

1 protection on the notice side because qualified  
2 immunity applies.

3 And, of course, we have an  
4 extraordinary case where not only was there  
5 clearly established law, but we provided them  
6 actual notice of it and they still violated it.

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

19 And I think, really, at the end of the  
20 day, what -- what -- what -- what the case is  
21 sort of fundamentally about is, has Congress  
22 actually succeeded in restoring pre-Smith  
23 rights and remedies? I think that's really the  
24 question. And I think there's no doubt that  
25 that's what Congress meant to do, and there's

1 no serious doubt under this Court's precedents  
2 that that's constitutional, so we're asking the  
3 Court to reverse.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 The case is submitted.

7 (Whereupon, at 11:56 a.m. the case was  
8 submitted.)

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## Official - Subject to Final Review

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## Official - Subject to Final Review

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## Official - Subject to Final Review

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## Official - Subject to Final Review

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