# 16-1176

*To Be Argued By*:
ELLEN BLAIN

## United States Court of Appeals

**FOR THE SECOND CIRCUIT**

**Docket No. 16-1176**

MUHAMMAD TANVIR, JAMEEL ALGIBHAH,
NAVEED SHINWARI,

*Plaintiffs-Appellants*,

—v.—

AWAIS SAJJAD,

*Plaintiff*,

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR DEFENDANTS-APPELLEES

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*Defendants*.

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# BRIEF FOR DEFENDANTS-APPELLEES

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## Preliminary Statement

Plaintiffs-appellants Muhammad Tanvir, Jameel Algibhah, and Naveed Shinwari ("plaintiffs") seek to hold sixteen federal agents—law enforcement officials responsible for protecting the nation from terrorist attacks—individually liable for monetary damages, alleging that these agents substantially burdened their religious exercise in violation of the Religious Freedom Restoration Act ("RFRA"). Specifically, plaintiffs claim that they refused to serve as government informants, at least in part based on their religious beliefs, and in retaliation the agents allegedly caused plaintiffs to be included on the government's "No Fly List."

As the district court correctly determined, this action must be dismissed because RFRA does not permit claims for money damages against individuals. Congress enacted RFRA to require laws of general applicability that substantially burden religious exercise to be justified by a compelling government interest, the test that applied before the Supreme Court's 1990 decision in *Employment Division v. Smith*. But in restoring that substantive standard, Congress said nothing about creating a new type of damages claim against individual federal employees—a claim that did not exist before *Smith*. Instead, Congress merely provided that a person whose religious exercise had been wrongfully burdened could obtain "appropriate relief against a government." The Supreme Court has held that identical language in RFRA's companion statute does not permit claims for damages against the government itself. This Court and every other court of appeals to con-

sider the question have concluded that that same language in the companion statute does not permit claims for damages against individuals. And every court of appeals to address the matter has held that under RFRA itself, the language at issue does not permit damages claims against a government or person acting in an official capacity. Nevertheless, plaintiffs ask this Court to anomalously interpret "appropriate relief against a government" to mean damages when applied to individual federal employees, but not to mean damages when applied to anyone else. The district court correctly rejected that invitation, and this Court should affirm its judgment.

## Jurisdictional Statement

The district court had jurisdiction pursuant to 28 U.S.C. § 1331, as the action arose under the laws and Constitution of the United States. The district court entered final judgment on February 17, 2016 (Dist. Ct. docket, ECF No. 112), and plaintiffs filed a timely notice of appeal on April 18, 2016 (Joint Appendix ("JA") 326). Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## Issue Presented

Whether the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, provides for suits seeking money damages against individual federal employees in their personal capacities.

## Statement of the Case

### A. Procedural History

Plaintiffs filed a complaint on October 1, 2013, and an amended complaint on April 22, 2014. (JA 27, 57). Plaintiffs sought injunctive and declaratory relief against a number of individuals in their official capacities under the First and Fifth Amendments, the Administrative Procedure Act, and RFRA.[1] (JA 107, 109, 110, 112).

Plaintiffs also sought compensatory and punitive damages against the individual agents in their personal capacities, under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and RFRA. First, plaintiffs Tanvir, Algibhah, Shinwari, and Sajjad asserted a claim for First Amendment retaliation against all twenty-five agents named as defendants in the amended complaint. (JA 107).[2] Second, Tanvir, Algibhah, and Shinwari (but not Sajjad) asserted a

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[1] Those individuals are Loretta E. Lynch, United States Attorney General; James Comey, Director of the Federal Bureau of Investigation; Christopher M. Piehota, Director of the Terrorist Screening Center; Jeh C. Johnson, Secretary of Homeland Security; and twenty-five FBI agents, FNU Tanzin, Sanya Garcia, John LNU, Francisco Artusa, John C. Harley III, Steven LNU, Michael LNU, Gregg Grossoehmig, Weysan Dun, James C. Langenberg, Michael Rutkowski, William Gale, and John Does 1-13.

[2] Pursuant to a stipulation and order filed July 24, 2014, defendants FNU Tanzin, John LNU, Steven

RFRA claim against the sixteen agents who allegedly interacted with them: FNU Tanzin, John LNU, Steven LNU, Michael LNU; Agents Garcia, Artusa, Harley, Grossoehmig, Dun, and Langenberg; and John Does 1-6. (JA 109).

On July 28, 2014, the government and the individual defendants filed separate motions to dismiss the amended complaint. (JA 14-15, 121). As explained below, on June 10, 2015, the parties consented to a stay of the official-capacity claims, and on September 3, 2015, the district court granted the government's motion to dismiss the individual-capacity claims, concluding that neither *Bivens* nor RFRA permitted plaintiffs to bring claims for money damages. (JA 22-23; Special Appendix ("SPA") 2-3). On appeal, plaintiffs challenge the district court's determination that RFRA does not provide for such claims, but do not challenge the district court's determination regarding the First Amendment *Bivens* claims. (JA 326). Accordingly, the only defendants who remain parties to this appeal are the sixteen agents who allegedly interacted with Tanvir, Algibhah, and Shinwari, the plaintiffs asserting RFRA claims.

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LNU, Michael LNU, and John Does 1-6 and 9-13 proceeded under the pseudonyms in the amended complaint. (JA 115-19). John Doe 2 proceeded as John Doe 2/3. (JA 117). The government was not able to identify John Does 7-8; as a result, those defendants were not served nor did they have an opportunity to request representation by the Department of Justice to the extent they are sued in their individual capacities.

### B. Plaintiffs' Allegations

Plaintiffs claim that twenty-five FBI agents, who allegedly interacted with plaintiffs at different times and in locations in the United States and abroad, placed or retained plaintiffs on the No Fly List solely in retaliation for plaintiffs' exercise of their First Amendment rights. (JA 57-114). Specifically, plaintiffs allege that several FBI agents asked plaintiffs to serve as informants for the government, and when plaintiffs refused, those and other agents retaliated through the use of the No Fly List. (JA 57-114). Thus, according to plaintiffs, the agents forced them "into an impermissible choice between, on the one hand, obeying their sincerely held religious beliefs and being subjected to [placement or retention] on the No Fly List, or, on the other hand, violating their sincerely held religious beliefs in order to avoid [placement or retention] on the No Fly List"—thus substantially burdening their exercise of sincerely held religious beliefs. (JA 109-10). Plaintiffs acknowledge that individual agents have no authority to determine the composition of the No Fly List. (JA 63-68). Plaintiffs further allege that the administrative procedures available to challenge their inclusion on the No Fly List lack due process. (JA 57-114).

### C. Statutory and Regulatory Framework for U.S. Aviation Security

Several components of the federal government work together to secure the United States and its aviation system from terrorist threats. The Federal Bu-

reau of Investigation investigates and analyzes intelligence relating to both domestic and international terrorist activities, and the National Counterterrorism Center analyzes and integrates intelligence relating to international terrorism and counterterrorism. *See* 28 C.F.R. § 0.85(*l*). The Department of Homeland Security ("DHS") is primarily charged with "prevent[ing] terrorist attacks within the United States" and "reduc[ing] the vulnerability of the United States to terrorism." 6 U.S.C. § 111(b)(1)(A), (B), 202(1). Within DHS, the Transportation Security Administration ("TSA") is responsible for ensuring security in all modes of transportation. *See* 49 U.S.C. § 114(d).

### 1. The No Fly List

One of TSA's primary responsibilities is to ensure aircraft security by implementing the No Fly List. Congress directed TSA to establish procedures for notifying appropriate officials "of the identity of individuals" who are "known to pose, or suspected of posing, a risk of air piracy or terrorism or a threat to airline or passenger safety." 49 U.S.C. § 114(h)(2). TSA is required to "utilize all appropriate records in the consolidated and integrated terrorist watchlist maintained by the Federal Government in performing that function." 49 U.S.C. § 44903(j)(2)(C)(ii).

The government's watchlists, including the No Fly List, are maintained by the Terrorist Screening Center ("TSC"). (JA 63, 67-68). The TSC, established by Executive Order in 2003 and administered by the FBI, *see* Homeland Security Presidential Directive 6 (Sept. 16,

2003), coordinates with multiple agencies and maintains the Terrorist Screening Database ("TSDB"), a consolidated database of identifying information about persons known or reasonably suspected of being involved in terrorist activity (JA 67). The No Fly List is a subset of the TSDB, composed of individuals who satisfy heightened criteria for inclusion. (JA 68). The FBI, along with other Intelligence Community agencies and departments, nominates individuals known or suspected of being international terrorists for inclusion in the TSDB and, if the heightened criteria are satisfied, on the No Fly List. (JA 68). The TSC then determines whether those nominations will be accepted. *See* Homeland Security Presidential Directives 6, 11, and 24; (JA 63-64, 68).

### 2. The Redress Process for Travelers Denied Boarding

Congress directed TSA to "establish a timely and fair process for individuals identified [under TSA's passenger prescreening function] to appeal to [TSA] the determination and correct any erroneous information." 49 U.S.C. § 44903(j)(2)(G)(i); *see* 49 U.S.C. § 44903(j)(2)(C)(iii)(I); 49 U.S.C. § 44926(a). Accordingly, TSA administers the Traveler Redress Inquiry Program, or DHS TRIP, through which travelers may request the correction of any erroneous information if they believe, among other things, that they have been unfairly or incorrectly delayed or prohibited from boarding an aircraft as a result of TSA's watchlist matching program. 49 C.F.R. §§ 1560.201, 205. If a traveler seeking redress could be a match to a name on the No Fly List, TSA refers this inquiry to TSC, which

determines whether the name is a match to the No Fly List and, if so, whether the traveler's No Fly List status should change. (JA 71). DHS TRIP responds to a traveler's inquiry with a determination letter, which, in delayed or denied boarding cases, states that the traveler may submit an administrative appeal or seek judicial review of the government's redress determination in the courts of appeals pursuant to 49 U.S.C. § 46110.

At the time plaintiffs filed the amended complaint, in cases involving delayed or denied boarding, the determination letter advised the traveler whether or not government records have been updated as a result of his inquiry and DHS TRIP's review. Plaintiffs availed themselves of this process; Tanvir and Shinwari received letters advising that the U.S. government had made updates to its records and thereafter they were able to fly (JA 83-84, 98-99), while Aligbhah and Sajjad received letters advising of the government's determination that "no changes or corrections are warranted at this time" (JA 87, 104).

### 3. Revised DHS TRIP Procedures

On April 13, 2015, the government notified the district court and plaintiffs that it had completed the process of revising the DHS TRIP redress procedures. (Dist. Ct. docket, ECF No. 85). The revision was "directed at improving the redress procedures, including by increasing transparency relating to the No Fly List." (*Id.*). As explained in the notice, "[u]nder the previous redress procedures, individuals who had submitted inquiries to DHS TRIP generally received a letter

responding to their inquiry that neither confirmed nor denied their No Fly status." (*Id.*). Under the newly revised procedures, however, "a U.S. person . . . will now receive a letter providing his or her status on the No Fly List and the option to receive and/or submit additional information"; if so requested, "DHS TRIP will . . . identify the specific criterion under which the individual has been placed on the No Fly List and will include an unclassified summary of information." (*Id.*).[3]

The government offered plaintiffs the opportunity to have their DHS TRIP inquiries reopened and reconsidered under the revised procedures. (*Id.*). On May 25, 2015, plaintiffs elected to avail themselves of that opportunity. (Dist. Ct. docket, ECF No. 92). On June 8, 2015, the government informed all four plaintiffs that the "U.S. Government knows of no reason why you should be unable to fly." (*Id.*). As a result, plaintiffs consented to the dismissal of their official-capacity claims without prejudice. (SPA 39-40).[4]

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[3] The redress process was revised following the decision in *Latif v. Holder*, No. 3:10-cv-750, 2014 WL 2871346 (D. Or. June 24, 2014), holding that the former redress process was insufficient under the Due Process Clause. That court has since determined the revised procedures are sufficient. *Latif v. Dep't of Justice*, No. 3:10-cv-750, ECF No. 337 (D. Or. Oct. 6, 2016).

[4] While plaintiffs note that the responses to their reopened TRIP inquiries were provided "[o]nly five

### D. The District Court's Decision

On September 3, 2015, the district court issued an opinion and order dismissing this action. First, because both the Supreme Court and this Court have repeatedly "declined to extend *Bivens* to a claim sounding in the First Amendment," the district court dismissed plaintiffs' First Amendment claims under *Bivens*. (SPA 12-25). Plaintiffs do not appeal that determination.

The district court next held that RFRA does not provide for money damages against federal officials in their personal capacities.

The district court concluded that "Congress' intent in enacting RFRA could not be clearer": it was "'[t]o restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) . . . and to provide a claim or defense to persons whose religious exercise is substantially burdened by government.'" (SPA 27-28 (quoting 42 U.S.C. § 2000bb(b))). The district court explained that Congress enacted RFRA in response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which "eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." (SPA 28). Therefore, the district court concluded that Congress intended to restore the standard

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days before oral argument" (Brief for Plaintiffs-Appellants ("Br.") 1-2), the date of those responses was agreed upon by the parties.

by which free exercise claims were adjudicated, but that Congress had not intended to expand the remedies available to individuals whose religious freedom was burdened.

In support of that conclusion, the district court noted that both before and after *Smith*, the Supreme Court had not recognized a *Bivens* remedy for violations of the First Amendment in general, or the Free Exercise Clause in particular. (SPA 30-31). Thus, to allow damages claims against federal employees would be to extend, rather than restore, the scope of protections existing before *Smith*, contrary to Congress's intent. (SPA 30-31). That conclusion was bolstered, the district court observed, by legislative history "evidenc[ing] concern about the potential misinterpretation of RFRA's impact on existing law," and emphasizing that Congress did not intend to " 'expand, contract or alter the ability of a claimant to obtain relief' " as it existed before *Smith*. (SPA 31-32). The district court noted that "[i]n view of such an understanding . . . it would seem strange indeed for Congress to have employed a phrase as ambiguous as 'appropriate relief' to *create* [an individual remedy for damages] where one was not previously recognized." (SPA 32). The district court further contrasted RFRA's provision of "appropriate relief" with other statutes in which Congress specifically recognized personal-capacity damages suits against federal officials (SPA 31 (citing 42 U.S.C. § 1985; 50 U.S.C. § 1810; 47 U.S.C. § 605(e)(3); 18 U.S.C. § 2520(b))), and with 42 U.S.C. § 1983, allowing such suits against state officials (SPA 32-33 & n.21). The district court thus determined that "[b]ecause Congress knows how to create a personal capacity

damages remedy . . . , one might reasonably expect such language if Congress in fact intended to depart from the pre-*Smith* world in such a significant way." (SPA 37).

Finally, the district court rejected plaintiffs' reliance on *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), concluding that *Franklin*'s presumption that all remedies are available is inapplicable to RFRA, where Congress "has created 'an express private cause of action' that provides for 'appropriate relief.'" (SPA 33). The district court also rejected plaintiffs' reliance on a line of district court cases allowing RFRA claims for damages against individuals to proceed. (SPA 34). Accordingly, the district court ruled that Congress intended "to restore . . . the compelling interest test as it existed before *Smith*—no more, no less." (SPA 35). The court thus held that RFRA does not contemplate individual-capacity damages actions against federal officers. (SPA 35).

This appeal followed.

## Summary of Argument

As indicated by its text, purpose, and history, RFRA does not permit damages actions against federal officers in their individual capacities. The phrase at issue—"appropriate relief against a government"—plainly states who must be the subject of relief: the government, not its employees. And the statute's definition of "government" is consistent with that understanding. All the items listed in that definition, including an "official (or other person acting under color of law)," relate to the government, and that phrase does

not suggest personal liability: the Supreme Court has clearly held similar language in other statutes refers only to official-capacity suits, and statutes that do impose damages on persons acting under color of law, such as § 1983, clearly state in their text that damages are available, unlike RFRA. *See infra* Point A.1. Moreover, the Supreme Court, this Court, and other courts of appeals have held that the "appropriate relief against at government" phrase does not include damages against a government under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, *et seq*. ("RLUIPA"), does not include damages against an individual under RLUIPA, and does not include damages against a government under RFRA itself. To hold that the phrase allows damages against an individual under RFRA would anomalously make the same phrase mean different things depending on the factual circumstances, an outcome the Supreme Court has rejected. *See infra* Point A.2. Finally, the general rule of *Franklin* that appropriate relief is available and will, in some circumstances, include damages, does not apply here, where Congress specified the scope of relief in the statute itself. *See infra* Point A.3.

Additionally, RFRA's purpose and history show that damages are not available. In passing RFRA, Congress made clear its intent to restore—not to expand—the relief available before *Smith* to those claiming their free exercise of religion had been burdened. But Congress did so by imposing a compelling-interest test, without saying anything about remedies beyond providing for "appropriate relief against a government." Its intent was thus clear: to put claimants in

the same position they were in before *Smith* was decided. But at that time, there was no individual-capacity damages remedy against federal officers; thus, to infer one now would expand the available relief, contrary to Congress's design. *See infra* Point B.

Accordingly, the judgment of the district court should be affirmed.

## ARGUMENT

### Standard of Review

This Court reviews *de novo* a district court's decision resolving a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) or 12(b)(6). *Guippone v. BH S & B Holdings LLC*, 737 F.3d 221, 225 (2d Cir. 2013).

### RFRA Does Not Provide for Money Damages Against Individual Defendants

The text and purpose of RFRA each demonstrate that the statute's provision for "appropriate relief against a government" does not permit claims for damages against federal employees in their individual capacities. Indeed, federal courts of appeals have unanimously concluded that the same provision of RFRA that plaintiffs now rely on does not permit damages actions against the government itself; the Supreme Court has concluded that the essentially identical text in RFRA's companion statute, RLUIPA, does not permit damages actions against the government; and this Court and all other circuits to have addressed the question have agreed that RLUIPA does not permit

damages actions against individuals. While the Third Circuit recently held that individual defendants may be liable for money damages under RFRA, that decision misapplied a presumption in favor of damages that applies only where Congress has not spoken, and essentially ignored the Supreme Court case holding that RLUIPA's identical language does not allow damages claims. Thus, as explained below, the district court correctly held that RFRA does not permit damages liability against individuals, and its judgment dismissing this action should be affirmed.

### A. RFRA's Text Demonstrates That It Does Not Provide for Individual-Capacity Damages Suits

Any interpretation of a statute begins with its text, *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011), and the text of RFRA demonstrates that Congress did not intend to authorize suits against government employees in their personal capacities for money damages.

#### 1. RFRA Only Permits Actions Against a "Government"

RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless that burden is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000bb-1(a), (b). As relief, the statute provides that "[a] person whose religious exercise has been burdened in violation of this section may assert

that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." *Id.* § 2000bb-1(c). RFRA further provides that "[a]s used in this chapter . . . the term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States" or other federal possessions. 42 U.S.C. § 2000bb-2(1).

The plain text—"appropriate relief against a government"—compels the conclusion that an action may be brought only against the government, and not against federal officers in their individual capacities.[5] The most natural reading of the word "government" is that it means the sovereign entity, not an individual who works for that entity. *See* Black's Law Dictionary (10th ed. 2014) (defining "government" to mean the "sovereign power in a country or state" or an "organization through which a body of people exercises political authority; the machinery by which sovereign power is expressed"). Had Congress intended that a damages

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[5] An individual-capacity claim "seek[s] to impose individual liability upon . . . government officer[s] for [his or her] actions." *Hafer v. Melo*, 502 U.S. 21, 25 (1991). Any damages awarded on a personal-capacity claim "will not be payable from the public fisc but rather will come from the pocket of the individual defendant." *Blackburn v. Goodwin*, 608 F.2d 919, 923 (2d Cir. 1979). In an official-capacity claim, on the other hand, "the real party in interest . . . is the governmental entity and not the named official." *Hafer*, 502 U.S. at 25.

action could lie against a federal employee in an individual capacity, it would have said so; instead, by limiting a RFRA claim to "relief against a government," it plainly stated that no such action against an individual can proceed.

Nothing in RFRA's definition of "government" undermines that conclusion. The statute provides that "the term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States" or another federal territory or possession. 42 U.S.C. § 2000bb-2(a). The only component of that definition that could support individual liability is the phrase "official (or other person acting under color of law)." But the word "official" itself suggests an official-capacity suit.

Nor does Congress's provision of a remedy against an "other person acting under color of law" suggest that it intended for government officials to be sued in their personal capacities. Indeed, the Supreme Court has held that similar statutory language—"'an officer or employee of the United States or any agency thereof acting in his official capacity *or under color of legal authority*'"—does not describe personal-capacity suits for money damages. *Stafford v. Briggs*, 444 U.S. 527, 535-36 (1980) (quoting 28 U.S.C. § 1391(e); some emphasis removed) (holding venue provision is limited to official-capacity suits). The "person acting under color of law" phrase ensures that suits may be brought against federal officers sued under the legal "fiction that the officer is acting as an individual," *id.* at 536 n.6, 539 (quotation marks omitted), or against a "private actor

[with a] sufficiently close nexus" to the government that her "behavior may be fairly treated as that of the State itself," *Sykes v. Bank of America*, 723 F.3d 399, 406 (2d Cir. 2013) (quotation marks omitted).[6] But nothing indicates that Congress therefore meant to extend the RFRA remedy to hold those persons liable in their individual capacities.

That conclusion is reinforced by the fact that "person acting under color of law" is part of the definition of the statutory term "government." "[T]he meaning of statutory language, plain or not, depends on context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (quotation marks omitted). Thus, when interpreting each element of a definition, the Court "cannot forget that [it] ultimately [is] determining the meaning of the term" being defined. *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004); *accord Johnson v. United States*, 559 U.S. 133, 140 (2010) ("We think it clear that in the context of a statutory definition of 'violent felony,' the phrase 'physical force' means violent force—that is, force capable of causing physical pain or injury to another person."). As the subject of RFRA liability is "a government," the addition of an "official (or other person acting under color of law)" must be read to be part of "a government"—i.e., a person acting in an official, not personal, capacity. Along similar lines, every other item in the list of terms defining "government"—a "branch, department,

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[6] It is therefore not true that, if individual-capacity claims are not permitted, the "color of law" clause is surplusage. *Contra Patel v. Bureau of Prisons*, 125 F. Supp. 3d 44, 50 (D.D.C. 2015); (Br. 46-47).

agency, [or] instrumentality . . . of the United States" —is a governmental entity, and the fact that "several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well." *Beecham v. United States*, 511 U.S. 368, 371 (1994); *accord Jones v. United States*, 527 U.S. 373, 389 (1999) ("Statutory language must be read in context and a phrase gathers meaning from the words around it." (quotation marks omitted)). The other items in the definitional list thus also suggest that "official (or other person acting under color of law)" naturally refers to a person sued in an official, not individual, capacity.

Additionally, the fact that 42 U.S.C. § 1983 employs similar "color of" language does not demonstrate that RFRA allows damages actions. Section 1983 states, "Every person who, under color of any [state] statute" or other law deprives a U.S. citizen of federal rights "shall be liable to the party injured *in an action at law*, suit in equity, or other proper proceeding for redress . . . ." 42 U.S.C. § 1983 (emphasis added). Section 1983 thus explicitly contemplates an "action at law," distinguishing such an action from "suit[s] in equity" or "other . . . proceeding[s]," and provides that "[e]very person" (not "government") who commits a violation "shall be liable." This language conveys unambiguously that § 1983 renders state officials acting under color of law personally liable for money damages.[7]

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[7] As the Supreme Court has also noted, the legislative history of § 1983 refers numerous times to damages awards. *See Carey v. Piphus*, 435 U.S. 247, 255 & n.9 (1978); *Monroe v. Pape*, 365 U.S. 167, 178-80

*See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 751 (1999) (§ 1983 "provides . . . for actions at law with damages remedies," as well as other forms of relief); *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997) ("the text of the statute purports to create a damages remedy" against state officials); *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 735 (1989) ("the express 'action at law' provided by § 1983 . . . provides the exclusive federal damages remedy" for violation of separate statute); *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (§ 1983 "provides" for a "suit for damages"); *Rizzo v. Goode*, 423 U.S. 362, 370 (1976) ("plain words of the statute" provide for "redressive damages").[8]

Plaintiffs argue, and the Third Circuit has agreed, that the comparison to § 1983 supports the conclusion that individual-capacity damages suits are available under RFRA. *Mack v. Warden*, __ F.3d __, No. 14-2738, 2016 WL 5899173, at *9, *11 (3d Cir. Oct. 11, 2016); (Br. 47-48). But both ignore the express provision in § 1983 for an "action at law."[9] Plaintiffs point to Congress's use of the word "person" in both § 1983 and RFRA's definition of "government," maintaining that it signals "Congress's unmistakable intent" to allow

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(1961), *overruled on other grounds by Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

[8] Nor is it "telling[]" that Congress included the attorneys' fees provision for RFRA in 42 U.S.C. § 1988(b) (Br. 45), because that provision applies to numerous civil rights statutes.

[9] As did the *Patel* court. 125 F. Supp. 3d at 51.

personal-capacity damages suits. (Br. 48 (quoting *Hafer v. Melo*, 502 U.S. 21, 27 (1991) ("A government official in the role of personal-capacity defendant thus fits comfortably within the statutory term 'person.'")). But they fail to note that while the Supreme Court has held that a personal-capacity defendant sued for damages is a "person" under § 1983, so is "'a state official in his or her official capacity, when sued for injunctive relief.'" *Hafer*, 502 U.S. at 27 (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989)). That holding cannot be reconciled with plaintiffs' argument that the statutory term "person" necessarily or unmistakably refers to individual-capacity damages actions.

### 2. Cases Construing RFRA and RLUIPA Have Concluded That, in Context, "Appropriate Relief" Does Not Include Damages

The decisions of the Supreme Court, this Court, and other courts of appeals interpreting the remedial language of RFRA and RLUIPA confirm that the district court was correct in its ruling. With only one now-valid exception, those courts have unanimously concluded that RFRA and RLUIPA do not permit damages actions.[10]

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[10] The one exception is *Mack v. Warden*, discussed below. In *Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996), *vacated*, 522 U.S. 801 (1997), the court noted that RFRA "says nothing about remedies," but nonetheless concluded that the plaintiff could sue individuals for damages. *Id.* at 1177. But having been vacated by the Supreme Court, the *Mack v. O'Leary*

The parties agree that the essentially identical language in RFRA and its successor statute, RLUIPA, which share the common purpose of restoring the pre-*Smith* compelling interest test for substantial burdens on the exercise of religion, should be interpreted in tandem. (Br. 42 & n.15); *Redd v. Wright*, 597 F.3d 532, 535 n.2 (2d Cir. 2010) (courts apply RFRA case law to RLUIPA); *Lebron v. Rumsfeld*, 670 F.3d 540, 557 (4th Cir. 2012) (same, and vice versa); *see Northcross v. Board of Educ. of Memphis City Schs.*, 412 U.S. 427, 428 (1973) (per curiam) (where two statutes share same language and "a common *raison d'être*," they should be interpreted to have the same meaning (quotation marks omitted)). Like RFRA, RLUIPA provides for "appropriate relief against a government," 42 U.S.C. § 2000cc-2(a), and defines a "government" to in-

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decision "has no precedential authority whatsoever." *Brown v. Kelly*, 609 F.3d 467, 476-77 (2d Cir. 2010) (quotation marks and citation omitted). Moreover, *Mack v. O'Leary* is not persuasive, as the state defendants in that case did not raise the issue. 80 F.3d at 1177. Indeed, the sum total of the court's analysis of the issue was to say "the Act defines 'government' to include government employees acting under color of state law. So Mack was entitled to sue the prison officials . . . ." *Id.* (citation omitted). Additionally, *Mack v. O'Leary* was decided before all of the Supreme Court and circuit decisions interpreting RFRA and RLUIPA cited in this brief. The decision should therefore be disregarded (and in fact is not cited in plaintiffs' brief).

clude "any branch, department, agency, instrumentality, or official" of a state government, or "any other person acting under color of State law," *id.* § 2000cc-5(4)(A).

In *Sossamon v. Texas*, the Supreme Court held "appropriate relief" under RLUIPA does not include money damages against a state. 563 U.S. 277, 285-86 (2011). That phrase, the Court concluded, is "open-ended and ambiguous about what types of relief it includes," and does not "clearly identify[] money damages." *Id.* at 286. As the meaning of the phrase depends on context, the Court determined that because the statute provides for suits against sovereign governments, "monetary damages are not 'suitable' or 'proper.'" *Id.* Thus, construing the phrase "appropriate relief," the Court held that "it does not include suits for damages against a State." *Id.* at 288.

This Court has further determined that RLUIPA does not provide for individual-capacity claims. *Washington v. Gonyea*, 731 F.3d 143, 145 (2d Cir. 2013). Noting that "every circuit to have addressed the issue has held" that RLUIPA does not permit individual-capacity suits against state officials,[11] the Court concluded, "as a matter of statutory interpretation," that

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[11] Citing *Nelson v. Miller*, 570 F.3d 868, 886-89 (7th Cir. 2009); *Rendelman v. Rouse*, 569 F.3d 182, 188-89 (4th Cir. 2009); *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 328–29 (5th Cir. 2009), *aff'd on other grounds*, 563 U.S. 277 (2011); *Smith v. Allen*, 502 F.3d 1255, 1271-75 (11th Cir. 2007), *abrogated on*

no individual-capacity claim was permitted. *Id.* at 145-46.[12]

As for RFRA, again the courts of appeals are unanimous: RFRA's provision for "appropriate relief" does not include damages against a sovereign. As the D.C. Circuit concluded, the "dispositive question" for addressing whether RFRA waives sovereign immunity against damages claims is "whether RFRA's reference to 'appropriate relief' includes monetary damages." *Webman v. Federal Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006). Construed in the context of a statute that provides relief against a government, and Congress's "silence in the statute on the subject of damages," the answer is no. *Id.* Similarly, in *Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*,

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*other grounds*, 563 U.S. 277. In addition, the Third Circuit has reached the same conclusion. *Sharp v. Johnson*, 669 F.3d 144, 153-55 (3d Cir. 2012).

[12] *Washington* left open the question whether RLUIPA claims based on an effect on interstate commerce, rather than based on a condition on Congress's spending, could be brought for individual-capacity damages. 731 F.3d at 146. Plaintiffs broadly assert that such damages are available, and contend that therefore RFRA should allow them as well, but cite only an unpublished district court decision that predated *Washington* to support the availability of such remedies in commerce-clause RLUIPA suits. In any event, it is undisputed that *Washington* forbids damages suits in the only RLUIPA case on the topic to have arisen before this Court.

the Ninth Circuit interpreted "appropriate relief" in RFRA to "not authorize suits for money damages." 676 F.3d 829, 840-41 (9th Cir. 2012). Finally, in *Davila v. Gladden*, the Eleventh Circuit observed that the *Sossamon* Court had "directly addressed the ambiguity of the phrase 'appropriate relief,'" and held that "RFRA does not therefore authorize suits for money damages against officers in their official capacities." 777 F.3d 1198, 1210 (11th Cir.), *cert. denied*, 136 S. Ct. 78 (2015).

In sum, of the four relevant situations—RLUIPA claims against a sovereign, RLUIPA claims against an individual, RFRA claims against a sovereign, and RFRA claims against an individual—the Supreme Court and courts of appeals have construed "appropriate relief" to exclude money damages in three of them. Although those interpretations were influenced by the principles that (in cases against a sovereign) statutory language must be construed in favor of immunity, or that (in RLUIPA cases against individuals) conditions on Congress's spending may be imposed only on the parties directly receiving the funds, the fact remains that all of the decisions on these questions, as quoted above, interpreted the phrase "appropriate relief" to exclude money damages in RFRA and RLUIPA. *E.g.*, *Washington*, 731 F.3d at 146 ("as a matter of statutory interpretation"); *Webman*, 441 F.3d at 1026 ("dispositive question" is meaning of "appropriate relief").

That interpretation applies equally to individual-capacity damages suits under RFRA. As the Supreme Court has observed, "[t]o give the[] same words a different meaning for each category would be to invent a

statute rather than interpret one." *Clark v. Martinez*, 543 U.S. 371, 378 (2005). Indeed, the Court has "forcefully rejected" the "interpretive contortion" of "giving the same word, *in the same statutory provision*, different meanings *in different factual contexts*." *United States v. Santos*, 553 U.S. 507, 522 (2008) (plurality opinion); *accord Reno v. Bossier Parish School Board*, 528 U.S. 320, 329 (2000) ("As we have in the past, we refuse to adopt a construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying."). Yet that is the outcome plaintiffs suggest: that "appropriate relief" means money damages when applied to an individual federal official sued in his personal capacity under RFRA, but not when sued in his personal capacity under RLUIPA, and not when sued in his official capacity under either statute. That conclusion simply does not accord with the statute's text.[13]

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[13] With the exception of the Third Circuit, no circuit has analyzed whether RFRA provides for individual-capacity claims for money damages. Some cases have denied (or, in one case, remanded) individual-capacity RFRA liability without considering the question of whether the statute permits such liability, *see Davila*, 777 F.3d at 1210; *Lebron*, 670 F.3d at 557; *Rasul v. Myers*, 563 F.3d 527, 533 & n.6 (D.C. Cir. 2009); *Daley v. Lappin*, 555 F. App'x 161, 168 n.11 (3d Cir. Jan. 29, 2014) (remanded for further record development); *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277, 1285 (11th Cir. 2012); *Weinberger v. Grimes*, No. 07–6461, 2009 WL 331632, at *5 (6th Cir. Feb. 10, 2009); *see also Redd*, 597 F.3d at 538

### 3. The *Franklin* Presumption Does Not Apply

In attempting to overcome RFRA's text and the cases interpreting it, plaintiffs rely heavily on *Franklin*. But the Supreme Court has already rejected the application of that case to the language now at issue. The district court was therefore correct to hold that *Franklin* is inapposite here.

The *Franklin* presumption is the "'general rule' that 'the federal courts have the power to award any *appropriate relief* in a cognizable cause of action brought pursuant to a federal statute.'" *Sossamon*, 563 U.S. at 288 (quoting *Franklin*, 503 U.S. at 70-71; emphasis in *Sossamon*). But as the *Sossamon* Court emphasized, *Franklin* addressed remedies under an "*implied* right of action," where there is "no statutory text to interpret." *Id.* (emphasis in original). *Sossamon* then held that the *Franklin* presumption "is irrelevant to construing" the "appropriate relief" clause in RLUIPA. *Id.* "Whatever 'appropriate relief' might have meant in [*Franklin*] does not translate to this context." *Id.* at 289.[14]

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(affirming qualified immunity from RLUIPA claim). But as the issue was not addressed by those courts, they bear no weight. *Salinger v. Colting*, 607 F.3d 68, 77 n.6 (2d Cir. 2010); *contra Jama v. INS*, 343 F. Supp. 2d 338, 375 (D.N.J. 2004).

[14] *Franklin* itself did not establish a blanket presumption in favor of damages. Indeed, later addressing claims for damages under the same implied right of action under Title IX of the Education Amendments

That holding disposes of plaintiffs' argument that the *Franklin* presumption governs the meaning of "appropriate relief" in RFRA. Plaintiffs contend that damages should be presumed because "Congress had not 'expressly indicated' in the statute that damages were *not* available" (Br. 31)—but that disregards *Sossamon*'s statement that "[t]he question here is not whether Congress has given clear direction that it intends to *exclude* a damages remedy, but whether Congress has given clear direction that it intends to *include* a damages remedy." 563 U.S. at 289 (citation omitted, emphasis in original).[15] Plaintiffs maintain

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of 1972 at issue in *Franklin*, the Supreme Court held that a damages remedy does not extend to all circumstances where Title IX was violated. *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 280-85 (1998).

[15] Similarly in tension with this language, plaintiffs contend that "[w]hen Congress intends to exclude damages from the remedies available to statutory claimants, it does so clearly." (Br. 39-40). But no court has held that to be a general rule (nor do plaintiffs cite any authority). And indeed, on numerous occasions Congress has deemed it necessary to specify that damages are available in a civil action. *E.g.*, 42 U.S.C. § 1981a (certain civil rights actions, including Title VII); 18 U.S.C. § 2520(b) (actions for unlawful wire interception); 47 U.S.C. § 605(e) (actions for unlawful publication of communications); 18 U.S.C. § 1964(c) (racketeering); 35 U.S.C. § 292(b) (patent infringement); (SPA 32).

that the "distinction between implied causes of action . . . and express remedies at issue here does not find support in the case law" (Br. 32)—ignoring the fact that *Sossamon* drew precisely that distinction. *Id.* at 288-89 (*Franklin* addressed an "*implied* right of action . . . [w]ith no statutory text to interpret," but its rule "is irrelevant to construing the scope of an express waiver of sovereign immunity" such as RLUIPA's "appropriate relief" provision); *see Franklin*, 503 U.S. at 71 ("the usual recourse to statutory text and legislative history" is unavailable when cause of action has been inferred rather than expressly provided by Congress).[16]

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[16] The fact that some express rights of action, such as that in *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838), have been found to include a damages remedy, even though not stated explicitly, is irrelevant. In all cases, the dispositive question is Congress's intent in the statute at issue, and *Sossamon* and the circuit cases cited above make clear that Congress did not intend the "appropriate relief" remedy provided in RFRA and RLUIPA to include damages. Similarly, the fact that *Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1191 (1st Cir. 1994), drew a "parallel" to *Franklin*—while recognizing that an express cause of action differs from the implied cause of action in *Franklin*—is also immaterial. That case was decided before *Sossamon*, and while the First Circuit thought it "hard to believe" that the Supreme Court might construe the statutory term "all appropriate relief" to mean something narrower than "appropriate relief" in *Franklin*, *Sossamon* did just that. (*Contra*

The Third Circuit's recent decision in *Mack v. Warden*, 2016 WL 5899173, relied almost entirely on *Franklin*, and is therefore unpersuasive. Indeed, the Third Circuit cited *Sossamon* only in passing, to describe the *Franklin* presumption, *id.* at *10 & n.94, but ignoring the Supreme Court's holding that the presumption is "irrelevant" to construing the "appropriate relief" provision, 563 U.S. at 288-89. The district court decisions plaintiffs cite also erroneously rely on the *Franklin* presumption without addressing its rejection by *Sossamon*, *e.g.*, *Patel v. Bureau of Prisons*, 125 F. Supp. 3d 44, 53 & n.1 (D.D.C. 2015), or the fact that the result they reach means that "appropriate relief" means two different things in the same sentence, contrary to Supreme Court precedent, *id.* at 54.[17] These

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Br. 32-35). In any event, the statute in *Reich* expressly allowed damages; the only issue was whether the court could award double damages. *Id.* at 1190.

[17] One district court case cited by plaintiffs, although internally contradictory, appears to have actually ruled for the government. *Davilla v. Watts*, No. 2:25-cv-171, 2016 WL 1706172, at *5-6 (S.D. Ga. Apr. 28, 2016) ("RFRA does not provide for . . . monetary damage claims against the [individual] Defendants"), *adopted*, 2016 WL 3453430 (S.D. Ga. June 17, 2016) ("RFRA claims for monetary damages . . . are dismissed" (capitalization omitted)); *but see* 2016 WL 1706172, at *5-6 ("RFRA claims for monetary damages and injunctive relief will proceed against Defendants in their individual capacities"), 2016 WL 3453430 ("*Bivens* claims under [RFRA] . . . remain pending"). In

cases therefore cannot be regarded as convincing, and, as the district court did, this Court should reject their reasoning and conclusion.[18]

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an earlier case brought by the same plaintiff, the district court clearly held that individual-capacity damages suits are not permitted. *Davilla v. Nat'l Inmate Appeals Coordinator*, No. CV212-005, 2012 WL 3780311, at *1–3 (S.D. Ga. Aug. 31, 2012) ("monetary damages claims under the RFRA against [individual] Defendants are barred"), *aff'd on other grounds*, 777 F.3d 1198, 1210 (11th Cir.), *cert. denied*, 136 S. Ct. 78 (2015); (*contra* Br. 28-29 (asserting that "[e]very court" except the district court here has ruled against the government on this issue)). Other district court cases cited by plaintiffs fail to analyze the issues in any depth. *See Rezaq v. Federal Bureau of Prisons*, No. 13-cv-990, 2016 WL 97763 (S.D. Ill. Jan. 8, 2016).

[18] Plaintiffs mischaracterize a 1994 memorandum from the Department of Justice's Office of Legal Counsel as finding that "RFRA likely made money damages available in personal capacity suits." (Br. 33). But the memorandum did not go that far; in the course of assessing whether RFRA abrogated sovereign immunity shortly after the statute's enactment, OLC observed that there is a "strong argument" for money damages in personal-capacity suits, but did not further evaluate that argument or express an ultimate position. 18 Op. OLC 180, 183 (1994).

### B. RFRA's Purpose and History Confirm That the Statute Creates No Action for Individual-Capacity Damages

RFRA's purpose and history further demonstrate that individual-capacity damages suits should not be allowed.

#### 1. Congress Intended to Provide Additional Substantive Protection for the Exercise of Religion, But Not to Expand the Available Remedies

As the district court correctly noted (SPA 28-29), Congress passed RFRA in response to *Employment Division v. Smith*, which Congress deemed to have "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4). In enacting RFRA, Congress specifically found that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise"; that "governments should not substantially burden religious exercise without compelling justification"; and that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." *Id.* § 2000bb(a). Congress was explicit that the purpose of RFRA was thus "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially

burdened," and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." *Id.* § 2000bb(b). Reports of the Senate and House Judiciary Committees confirm that RFRA "responds to the Supreme Court's decision in [*Smith*] by creating a statutory prohibition against government action substantially burdening the exercise of religion, even if the burden results from a rule of general applicability, unless the Government demonstrates that the action is the least restrictive means of furthering a compelling governmental interest." S. Rep. No. 103-111, at 2 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1893; H.R. Rep. No. 103-88, at 1 (1993).

Despite these clear statements of its purposes, Congress nowhere said anything about remedies, beyond providing for "appropriate relief against a government" or, equally unspecifically, that it intended to "provide a claim or defense" to aggrieved persons. Neither phrase must be read to include damages against individuals. Thus, as the district court concluded, Congress intended RFRA to restore the standard by which government actions are measured, but did not intend RFRA to expand the scope of relief available. (SPA 31 ("the law changed the standard applicable to free exercise claims while retaining all remedies that were understood as 'appropriate' for claims under the Free Exercise Clause—and nothing more")).[19]

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[19] The Supreme Court has noted that, in decreeing a least-restrictive means test, Congress may have gone beyond pre-*Smith* law in one respect. *Burwell v. Hobby*

Indeed, the Committee Reports stated, "[t]o be absolutely clear, the act does not *expand, contract or alter* the ability of a claimant to obtain relief in a manner consistent with the Supreme Court's free exercise jurisprudence under the compelling governmental interest test prior to *Smith*." S. Rep. No. 103-111, at 12, 1993 U.S.C.C.A.N. at 1902 (emphasis added); H.R. Rep. No. 103-88, at 8. Although plaintiffs point out that this statement is under the heading "No Relevance to the Issue of Abortion" in the Senate Report (Br. 44), the fact that issues related to abortion prompted the Committees to make that statement does not change its meaning: regardless of the subject matter, RFRA provides no broader relief than was available before *Smith*. Thus, as the district court held, "Congress' intent in enacting RFRA could not be clearer: It was to restore Congress' understanding of the compelling interest test as it existed before *Smith* —no more, no less." (SPA 35).

### 2. Before *Smith*, Federal Officers Could Not Be Held Individually Liable for Damages

In short, "the purpose of the statute is to 'turn the clock back' to the day before *Smith* was decided." H.R. Rep. 103-88, at 15. And before *Smith* was decided, federal officers could not be held liable for damages in their individual capacities for violations of the Free Exercise clause: neither before nor after RFRA has the

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*Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 n.3 (2014). But whether or not that is true, the fact remains that Congress did not address the scope of relief available.

Supreme Court "found an implied damages remedy under the Free Exercise Clause." *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009); *accord Reichle v. Howards*, 132 S. Ct. 2088, 2093 n.4 (2012) ("We have never held that *Bivens* extends to First Amendment claims."); *Turkmen v. Hasty*, 789 F.3d 218, 236-37 (2d Cir. 2015) (declining to recognize *Bivens* free-exercise claim), *cert. granted on other grounds*, __ S. Ct. __ (Oct. 11, 2016). Plaintiffs' interpretation of RFRA would therefore expand the remedies against federal employees, contrary to Congress's intent. *See Webman*, 441 F.3d at 1028 (Tatel, J., concurring) ("Because Congress enacted RFRA to return to a pre-*Smith* world, a world in which damages were unavailable against the government, 'appropriate relief' is most naturally read to exclude damages against the government.").

Plaintiffs do not dispute that *Bivens* did not reach free-exercise claims before *Smith* (Br. 38, 44),[20] but

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[20] As the district court noted, the decision in *Jama v. INS* rested on the "crucial but flawed premise" that *Bivens* actions could lie for free exercise violations. (SPA 34 (quoting *Jama*, 343 F. Supp. 2d at 374)). *Jama* also reasoned that Congress's silence on whether to allow individual-capacity damages actions was "at least as likely" to mean to permit such claims. 343 F. Supp. 2d at 374. But that contradicts the Supreme Court's later decision in *Sossamon*, that Congress must "give[ ] clear direction that it intends to *include* a damages remedy." 563 U.S. at 289. Finally, *Jama* reasoned that precluding a money damages award "would seem to be at odds with the general Congressional purpose . . . to re-invigorate protection

maintain that because RFRA was intended to apply to state as well as federal actors, and damages would have been available against state actors under § 1983, Congress therefore intended to extend a damages remedy to federal officers as well. (Br. 38-39). But that is far too attenuated a chain of logic on which to conclude Congress meant to impose an unprecedented remedy for money damages against federal employees in their individual capacities.[21] "[I]mplied causes of action are disfavored," *Iqbal*, 556 U.S. at 675, and because "Congress is in a far better position than a court to evaluate the impact of a new species of litigation against those who act on the public's behalf," *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007) (quotation marks omitted), courts should refrain from inferring an individual-capacity

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of free exercise rights" after the Supreme Court's decision in *Smith*. 343 F. Supp. 2d at 374-75. As explained below, the Supreme Court has expressly rejected that approach. *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001).

[21] Even more attenuated is plaintiff's reliance on the discussion of *Yang v. Sturner*, 728 F. Supp. 845 (D.R.I. 1990) & 750 F. Supp. 558 (D.R.I. 1990), in RFRA's legislative history. The testimony plaintiffs cite reveals that Congress viewed the *Yang* case as a particularly unjust example of a state disregarding a person's religious preference. But its consideration of that example, which focused on the facts of the case and the need for a compelling-interest test, cannot be regarded as an expression of an intent to allow damages against individual actors.

claim unless Congress intended to allow one, *see Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001); *Wilkie*, 551 U.S. at 562 ("any damages remedy for actions by Government employees who push too hard for the Government's benefit may come better, if at all, through legislation"). Had Congress intended to create a never-before-seen damages remedy against federal officers, it would have chosen a clearer way to express that intent than by silently incorporating § 1983 actions into the vague phrase "appropriate relief." Moreover, in enacting RLUIPA, Congress removed states and state officers from RFRA's coverage. P.L. 106-274, 114 Stat 803, § 7. Yet it gave no indication that, with this link to § 1983's damages remedy gone, it still intended the supposed expansion of that remedy to federal officers to remain.

Plaintiffs further argue that a broad right of action for damages is needed to effectuate RFRA's broad protection of religious exercise. (Br. 37-38). But the Supreme Court has rejected that logic: the Court has long since "abandoned" the approach of "provid[ing] such remedies as are necessary to make effective the congressional purpose expressed by a statute." *Alexander*, 532 U.S. at 287 (quotation marks omitted). Instead, the Court looks only to the remedies Congress intended to permit. *Id.* And to the extent that continuing to bar damages actions against individual federal officers "shield[s] otherwise unlawful conduct from judicial review" (Br. 40), that was the state of the law before *Smith*. *See Correctional Services Corp. v. Malesko*, 534 U.S. 61, 69 (2001) ("We therefore rejected the claim that a *Bivens* remedy should be implied simply

for want of any other means for challenging a constitutional deprivation in federal court," even though injuries "must now go unredressed" (quotation marks omitted)); *Binder & Binder, P.C. v. Colvin*, 818 F.3d 66, 72 (2d Cir. 2016) (ruling "may leave some aggrieved parties without relief" (quotation marks omitted)).

Finally, the Supreme Court has recognized the "substantial social costs" imposed by individual-capacity suits. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). "These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office," as well as "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties.'" *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.); alterations omitted). In light of those harms "to society as a whole," *id.*, and the presumption against inferring causes of action, the phrase "appropriate relief against a government" cannot bear the meaning plaintiffs ascribe to it, and should not be extended to individual-capacity damages suits.

Plaintiffs point to statements in the legislative history of RLUIPA—enacted seven years after RFRA—suggesting that damages may be available. But "isolated statements by individual Members of Congress or its committees, all made after the enactment of the statute under consideration, cannot substitute for a clear expression of legislative intent at the time of enactment." *Southeastern Community College v. Davis*,

442 U.S. 397, 412 n.11 (1979); *accord NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 582 (1994) ("isolated statement" in committee report is not "authoritative interpretation" of language enacted years earlier). In any event, the passing and unspecific reference to damages in RLUIPA's history is contradicted by this Court's holding in *Washington*, and the Supreme Court's holding in *Sossamon*, that RLUIPA does not provide either individual-capacity or official-capacity damages actions.

## CONCLUSION

**The judgment of the district court should be affirmed.**

Dated: New York, New York
October 28, 2016

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 9336 words in this brief.

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