No. 19-71

In The
Supreme Court of the United States

FNU TANZIN, *ET AL.*,
***Petitioners*,**

v.

MUHAMMAD TANVIR, *ET AL.*,
Respondents.

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

BRIEF OF *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENTS

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911
(434) 987-3888

Michael J. Lockerby
Counsel of Record
George E. Quillin
Rachel Kingrey O'Neil
Kevin P. Brost
Lea Gulotta
Joshua M. Hawkes
Akiesha Gilcrist Sainvil
FOLEY & LARDNER LLP
Washington Harbour
3000 K Street, N.W., Suite 600
Washington, D.C. 20007
(202) 945-6079
mlockerby@foley.com

Counsel for Amicus Curiae The Rutherford Institute

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute (the "Institute") is an international civil liberties organization headquartered in Charlottesville, Virginia. Its President, John W. Whitehead, founded the Institute in 1982. The Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated, and in educating the public about constitutional and human rights issues.

The very title of the statute at issue in this case—the Religious Freedom Restoration Act ("RFRA")—explains the Institute's interest in supporting the position of Respondents. Religious freedom is an area in which the Institute has been particularly active in terms of legal representation and public education alike.[2] The right to freedom of

---

[1] The parties have consented to the filing of this brief, either by blanket consent filed with the Clerk or individual consent. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

[2] Recent cases before the Court in which the Institute has submitted an amicus brief include *Espinoza v. Montana Dept. of Revenue*, No. 18-1195; *Adorers of the Blood of Christ v. Federal Energy Regulatory Commission*, No. 18-548; *Parkinson v. Department of Justice*, No. 17-1098; *Hoever v. Belleis*, No. 17-1035; and *Holt v. Hobbs*, No. 13-6827. Other First Amendment cases decided by the Court in which the Institute has been involved include *American Legion v. American Humanist Association*, 588 U.S. ___, 139 S. Ct. 2067 (2019); *Good News Club v. Milford Central Sch. Dist.*, 533 U.S. 98 (2001); and *Frazee v. Dept. of Employment Security*, 489 U.S. 829 (1989).

religion is meaningless, however, in the absence of effective remedies for its violation.

This is not a case in which the Institute is asking the Court to create new remedies for statutory violations that Congress never intended. Rather, the Institute merely seeks to have this Court affirm the judgment of the Second Circuit—consistent with the decision of the only other U.S. Circuit Court of Appeals to have addressed the issue, the Third Circuit—that the "appropriate relief" for violation of RFRA that Congress intended include money damages against the government officials responsible.

SUMMARY OF ARGUMENT

When Congress enacted RFRA for the express purpose of "restoring" religious freedom, it could have limited the remedies available for statutory violations to injunctive relief. Like the other provision of Title 42 that serves a similar purpose—42 U.S.C. § 1983 ("Section 1983")—RFRA was intended to authorize both equitable and legal remedies. That money damages are available for RFRA violations is the only interpretation of the statute that is faithful to basic canons of statutory interpretation and the context in which it was enacted. Similarly, the fact that RFRA authorizes relief against "officials" in addition to the governmental entities by which they are employed leads to the inescapable conclusion—as a matter of statutory construction—that money damages are recoverable against government officials in both their official and individual capacities.

It defies credulity for Petitioners to argue that judicial interpretation of the plain language of a statute somehow violates the separation of powers doctrine. If anything, it would violate the separation of powers doctrine if the Court were to substitute its judgment for the congressional determination that money damages are part of the "appropriate relief" for RFRA violations. Accordingly, the judgment of the Second Circuit should be affirmed.

ARGUMENT

I. The "Appropriate Relief" Available Under RFRA Includes Money Damages

The first step in any case of statutory interpretation "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (citation omitted). In this case, the phrase at issue, "appropriate relief," is unambiguous.

The ordinary meaning of "relief," when used in a legal sense, is well settled. By definition, "relief" is synonymous with "remedy." It means the "redress or benefit" that a party seeks from a court. *Black's Law Dictionary* 1482, 1485 (6th ed. 1991). The two most common forms of relief are "judgments that plaintiffs are entitled to collect sums of money from defendants (damages) and orders to defendants to refrain from their wrongful conduct or to undo its consequences (injunctions)." Douglas Laycock, *Modern American Remedies* 1 (4th ed. 2010). Simply put, "relief" is well understood to include both types of redress: legal and equitable. *Black's Law Dictionary* 1485; *see, e.g.,*

Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 765 (2002) (discussing a suit for "monetary damages" as one type of "relief"). In this case, there is no dispute that the phrase "relief" as used in the RFRA *includes* injunctive relief. Petitioners concede as much. (*See* Pet'rs' Br. at 16, 17). Petitioners nevertheless urge the Court to *exclude* monetary damages from the scope of "relief" available under RFRA. (*Id.* at 18). To reach this result, the Court would have to depart from the statute's ordinary language and ignore basic canons of statutory construction.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) (citing *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982)). In short, Congress selects words on purpose. By choosing the unqualified term "relief" (as opposed to "equitable relief" or "injunctive relief"), Congress is presumed to have known that monetary damages are a common form of relief. *See S.C. State Ports Auth.*, 535 U.S. at 765. Petitioners' proposed interpretation would render Congress's use of the term "relief" superfluous and meaningless. The canon against surplus usage prefers an interpretation that gives effect to every clause and word of a statute. *Microsoft Corp. v. I4I Ltd. P'ship*, 564 U.S. 91, 106 (2011).

Because the language of RFRA at issue is unambiguous and has a commonly understood definition, the Court's inquiry should go no further. The statute should simply be applied in accordance

with its plain language. *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 368 (2d Cir. 2006). An interpretation of RFRA that includes money damages as part of the "relief" available is consistent with the remedies available for analogous violations of 42 U.S.C. § 1983. *See Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 920 (2017) (discussing the proper method for assessing damage claims brought pursuant to § 1983). Petitioners' contention (s*ee* Pet'rs' Br. 20) that it would be "jarring" for Congress to authorize damages against an official ignores the fact that parallel provisions of 42 U.S.C. § 1983 do just that. *See Manuel*, 137 S. Ct. at 920. It would be "jarring" for this provision of Title 42 to be interpreted differently.

Without the right to recover damages contemplated by RFRA, the relief available is *in*appropriate—creating the very situation about which Chief Justice John Marshall warned in *Marbury v. Madison*, 5 U.S. 137, 163-164 (1803), *i.e.*, "*damnum absque injuria*—a loss without an injury." No equitable relief can restore Mr. Tanvir's ability to travel to Pakistan to see his ailing mother in the period 2011 to 2013. (App. Opp'n 32a-37a). That time has passed. Simply removing Petitioners from the "No Fly List" is not sufficient to deter FBI agents from placing others on the No Fly List in the future for years at a time to try to leverage those individuals into violating commandments of their religion to become FBI informants. The only appropriate relief in such a case is an award of damages against the officials who acted wrongfully.

II. RFRA Damages Are Recoverable Against Officials in Their Individual Capacities

As enacted by Congress, RFRA permits any "person whose religious exercise has been burdened in violation of [the statute]" to "assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000bb-1(c). RFRA defines the term "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." 42 U.S.C. § 2000bb-2(1).

This Court had repeatedly espoused the principle that "[w]hen a statute includes an explicit definition, we must follow that definition." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000); *see also Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("[W]here the statutory language provides a clear answer, [our analysis] ends there"). This rule applies even if the definition of the term in the statute differs from its ordinary meaning. *See Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 776 (2018). Here, RFRA explicitly defines the term "government" to include "officials" along with the agencies and departments that make up the government. 42 U.S.C. § 2000bb-2(1). Therefore, there is no ambiguity about the meaning of the word.

Although the term "official" is not defined in RFRA, it encompasses claims against officials in their individual capacity because an undefined term should be given its "ordinary meaning." *See, e.g.*, *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). The ordinary definition of "official" is "one who holds or is

invested with an office." *Official, Merriam-Webster's Collegiate Dictionary* (11th ed. 2016). This definition makes it clear that that term "official" means the individual, not the office held by the individual. Moreover, RFRA's parenthetical reference to "other person[s] acting under color of law" further clarifies the meaning. 42 U.S.C. § 2000bb-2(1). The official is a person acting under color of law—again, an individual, not an office. Like any other person acting under color of law, the holder of the office can therefore be sued in an individual capacity.

This reading of RFRA's text also ensures that no provision of the statute is redundant. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (canon of statutory construction instructing courts to avoid rendering statutory language superfluous or meaningless). Suits brought against officials in their official capacity are effectively identical to suits brought against that official's agency. *See Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.") Any interpretation of the term "official" as allowing claims against government officials only in their official capacities would render the term superfluous, since RFRA unambiguously authorizes claims against government agencies.

The foregoing interpretation of RFRA is bolstered by the provisions of 42 U.S.C. § 1983. Section 1983 creates a private right of action against "persons" who, acting "under color of" state law, violate a plaintiff's constitutional rights, regardless of whether that person was acting pursuant to an unconstitutional law, regulation, or policy. 42 U.S.C.

§ 1983. At the time that Congress enacted RFRA, it was clear that Section 1983 authorized suits against government officials in both their individual and official capacities and private persons. *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Kentucky v. Graham*, 473 U.S. at 166. Congress not only intended to borrow concepts from Section 1983 when enacting RFRA, it also borrowed the language of the statute. *See Mack v. Warden Loretto FCI*, 839 F.3d 286, 302 (3d Cir. 2016). Repetition of the same phrase in a new statute generally indicates the intent to incorporate the phrase's judicial interpretations as well. *Leonard v. Israel Discovery Bank*, 199 F.3d 99, 104 (2d Cir. 1999). Such an interpretation is especially appropriate here because both statutes have the purpose of creating remedies for violations of individual rights.

The conclusion that damages for RFRA violations are recoverable against government officials sued in their individual capacities is bolstered by the Court's prior holding that, when faced with "the question of what remedies are available under a statute that provides a private right of action," the Court must "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Franklin v. Gwinnet Cty. Pub. Sch.*, 503 U.S. 60, 65-66 (1992); *see also Carey v. Piphus*, 435 U.S. 247, 255 (1978) (upholding damages remedy under 42 U.S.C. § 1983 even though the Congress did not directly address whether the statute provided for a damages remedy). This presumption is based on the longstanding doctrine that where legal rights have been violated, and a federal statute provides a right to sue for such a violation, "federal courts may use any available remedy to make good the wrong done." *Franklin*, 503

U.S. at 66 (citation and internal quotation marks omitted). Consistent with the *Franklin* presumption, the plain language of RFRA clearly allows for all available remedies—including damages.

RFRA permits plaintiffs to "obtain appropriate relief against a government." 42 U.S.C. § 2000bb-1(c). It contains no exclusion prohibiting the recovery of money damages. Congress enacted RFRA one year after this Court's unanimous decision in *Franklin*, using the same "appropriate relief" language at issue in *Franklin*. The words that Congress chose when enacting RFRA should be presumed to mean what they say—when Congress provided for "appropriate relief" in RFRA, it was well aware, and indeed intended, that this language would provide for appropriate relief to plaintiffs without limitation as to the type of relief. *See Mack*, 839 F.3d at 303. This result is consistent with the presumption "that Congress legislates with knowledge of our basic rules of statutory construction." *McNary v. Haitian Refugee Center Inc.*, 498 U.S. 479, 496 (1991). It would make little sense for Congress to have intended the phrase "appropriate relief" to apply more narrowly in RFRA than the Court interpreted it a mere one year earlier without express statutory limitation. Further, it seems unlikely that Congress would intend to restrict the kind of remedies available to plaintiffs challenging free exercise violations under RFRA, when the same statute was passed to elevate the kind of scrutiny to which such challenges would be subject. *Jama v. U.S.I.N.S.*, 343 F. Supp. 2d 338, 374-75 (D.N.J. 2004).

III. Interpreting RFRA As Congress Intended Raises No Separation of Powers Issues

Petitioners would have the Court believe that permitting the recovery of damages for RFRA violations "implicates sensitive separation-of-powers considerations." (Pet'rs' Br. 26). There is no legitimate basis for this concern. The separation of powers doctrine concerns the allocation of powers among three co-equal branches of the federal government. "[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Adm'r of Gen. Serv.*, 433 U.S. 425, 443 (1977). "Only where the potential for disruption is present must [the Court] then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Id.*

In the case of RFRA, the Legislative Branch—Congress—acted within its constitutional authority by enacting the statute in the first place. The Judicial Branch is not overstepping its constitutional authority by interpreting the statute in a case in which it has allegedly been violated by the Executive Branch. Consistent with its stated purpose, RFRA merely provides redress where action by the Executive Branch burdens an individual's free exercise of religion. RFRA's stated purpose is both "to restore the compelling interest test" in free exercise cases *and* "to provide a claim or defense to persons whose religious exercise is burdened by government." 42 U.S.C. §§ 2000bb(b)(1)-(2); *see also* S. Rep. No. 101,

103d Cong., 1st Sess. 12 (1993), 1993 WL 286695, at *3.

As contemplated by the Constitution, Congress enacted RFRA, and the President signed it into law. *See Clinton v. City of New York*, 524 U.S. 417, 448 (1998). Now that RFRA has been duly enacted, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. at 177. "Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Id.* Interpreting RFRA is the very type of judicial review that has been an important part of our constitutional framework since the early days of the Republic.

Ignoring the doctrine of *Marbury v. Madison*, Petitioners argue "there is no basis to presume that Congress intended to invade the rights of the Executive Branch." (Pet'rs' Br. 26). This argument is misplaced for at least two reasons. First, it does not "invade the rights of the Executive Branch" to make its conduct reviewable by the courts and redress available to those whose rights have been substantially infringed by unlawful conduct. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."). Second, there can be no doubt that Congress intended to make such review and redress available here because that is precisely what it mandated by enacting RFRA. The plain text of RFRA expressly provides "a claim" against the government and its

officials for those whose free exercise of religion has been substantially burdened. 42 U.S.C. 2000bb-1.

It is not necessary to "presume" that Congress intended a damages remedy because such relief is expressly afforded by the language that Congress used in RFRA, which contemplates relief against government "officials." This provision would be superfluous if the available relief were limited to injunctive relief because an injunction against the agency employing the official(s) responsible would suffice. Accordingly, in recognizing a damages remedy, the Court would merely be effectuating congressional intent as expressed in RFRA's text.

Nor does damages liability somehow uniquely "invade" the rights of the Executive Branch. Petitioners acknowledge the availability of injunctive relief under RFRA. Petitioners fail to establish how the distraction of Executive attention or costs and burdens of discovery and trial are any higher where damages are sought instead of (or in addition to) prospective injunctive relief. In any case, these are empirical questions best left to Congress to answer.

The specific history of RFRA's enactment further weighs in favor of construing RFRA to permit all available remedies, including money damages. RFRA was enacted specifically in light of Congress's concern that the Court was not adequately protecting the free exercise rights of individuals, with a stated intention "to provide a claim or defense to persons whose religious exercise is burdened by government," S. Rep. No. 101, 103d Cong., 1st Sess. 12 (1993), and with language that expressly encompasses government "officials." In such circumstances, the

more modest approach is to take Congress at its word and find damages available under RFRA. If Congress *really* did not intend to provide damages liability, it could "react[] quickly" to rectify the situation. (Pet'rs' Br. 27) (discussing congressional response to prior Court decisions). Here, the fact that Congress has done nothing to "rectify" the Third Circuit's decision in *Mack*, 839 F.3d at 302—which similarly found that damages are available for RFRA violations—suggests that the Second Circuit's interpretation of RFRA is faithful to congressional intent.

Because this case involves interpretation of a damages remedy created by Congress, it is readily distinguishable from *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), in which the Court recognized a damages remedy for unlawful searches and seizures in violation of the Fourth Amendment notwithstanding the lack of any express statutory basis for such a remedy. *See Bivens*, 403 U.S. at 395 ("Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."). RFRA's statutory basis for recovery of damages also makes this case readily distinguishable from subsequent cases in which the Court has refused to use the rationale of *Bivens* as the basis for creating new remedies for constitutional violations. *See, e.g., Bush v. Lucas*, 462 U.S. 367, 368 (1983) (denying "new nonstatutory damages remedy for federal employees whose First Amendment rights are violated by their superiors"); *Chappell v. Wallace*, 462 U.S. 296 (1983) (enlisted military personnel cannot have a *Bivens*-type remedy against their superior officers); *United States v. Stanley*, 483 U.S. 669 (1987) (disallowing *Bivens* actions by military personnel for injuries

incident to service); *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (improper denial of disability benefits in violation of due process cannot be basis for *Bivens* action); and *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) (detention policy claims cannot be basis for *Bivens* action).

As the Court observed in *Ziglar*, "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs unless Congress specifically has provided otherwise," and "Congress ha[d] not provided otherwise [t]here." *Id.* at 1861 (internal quotation marks omitted). The Court therefore declined to recognize an implied right of action under the Constitution because "[a]t no point did Congress choose to extend to any person the kind of remedies that respondents seek in this lawsuit," despite the 16 years since September 11 and the fact that "Congressional interest ha[d] been frequent and intense." *Id.* at 1862 (internal quotation marks omitted).

The Court declined to recognize an *implied* cause of action because "it is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation." *Id.* at 1856. To be sure, the separation of powers doctrine requires "appropriate judicial deference to indications that congressional inaction has not been inadvertent." *Schweiker*, 487 U.S. at 423. By the same token, it would violate the separation of powers doctrine for the Court to ignore

congressional action to create a damage remedy by enacting RFRA.

IV. The Arguments of Petitioners' *Amici* FFRF and AA Are Properly Rejected

In their zeal to change the First Amendment's guarantee of freedom *of* religion into a mandate that American society be free *from* religion, Petitioners' *amici* advance arguments that this Court has already rejected and that would require this Court to legislate from the bench.

Rather than address the proper interpretation of the statute, *amici* Freedom From Religion Foundation *et al.* ("FFRF") argue that RFRA is unconstitutional in its entirety. Specifically, FFRF argues that RFRA exceeds Congress's legislative powers under the Commerce Clause and violates Article V's separation of powers principle as an attempt by Congress to usurp the Judicial Branch's role in interpreting the Constitution. These arguments have already been considered—and rejected—in *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997) (overturning RFRA as applied to the States but leaving the federal portions intact); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695 ("[a]s applied to a federal agency, RFRA is based on the enumerated power that supports the particular agency's work").

Amici American Atheists *et al.* ("AA") echo many of the arguments presented by Petitioners in arguing that the scope of the remedy in RFRA does not include money damages. The AA *amici* also make the additional argument that RFRA should be

interpreted to apply to secular individuals when government actions violate their sincerely held moral or ethical beliefs. Any other interpretation of RFRA, according to AA, would violate both the Establishment Clause and the Equal Protection Clause. (AA Br. at 19-30). While these additional arguments are beyond the scope of the grant of certiorari in this case, they also fail to persuade as they rely wholly on the tension created by the Free Exercise Clause and the Establishment Clause. *See, e.g.*, *Locke v. Davey*, 540 U.S. 712, 718 (2004) ("the Establishment Clause and the Free Exercise Clause, are frequently in tension").

CONCLUSION

For nearly three decades, it has been clear that the "appropriate relief" available for violations of religious freedom include money damages. If the Executive Branch disagrees with this policy decision, it can propose an amendment to the statute. If the Legislative Branch is concerned about the effects on legitimate government activities that the prospect of damages awards might cause, it can amend the statute so that only injunctive relief is available for RFRA violations. At this juncture, the only appropriate role for the Judicial Branch is to interpret the statute as enacted. Under basic principles of statutory interpretation, the "appropriate relief" available for RFRA violations includes money damages—against government officials in both their official and individual capacities.

Respectfully submitted,

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911
(434) 987-3888

Michael J. Lockerby
Counsel of Record
George E. Quillin
Rachel Kingrey O'Neil
Kevin P. Brost
Lea Gulotta
Joshua M. Hawkes
Akiesha Gilcrist Sainvil
FOLEY & LARDNER LLP
Washington Harbour
3000 K Street, N.W., Suite 600
Washington, D.C. 20007
mlockerby@foley.com
(202) 945-6079

February 12, 2020 *Counsel for Amicus Curiae*