16-1176

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MUHAMMAD TANVIR, JAMEEL ALGIBHAH, NAVEED SHINWARI,

Plaintiffs-Appellants,

AWAIS SAJJAD,

Plaintiff,

(*Caption continued on inside cover*)

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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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—against—

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Defendants-Appellees,

LORETTA E. LYNCH, Attorney General of the United States; JAMES COMEY, Director, Federal Bureau of Investigation; CHRISTOPHER M. PIEHOTA, Director, Terrorist Screening Center; JEH C. JOHNSON, Secretary, Department of Homeland Security; MICHAEL RUTKOWSKI, Special Agent, FBI; WILLIAM GALE, Supervisory Special Agent, FBI; JOHN DOE #7, Special Agent, FBI; JOHN DOE #8, Special Agent, FBI; JOHN DOE #9, Special Agent, FBI; JOHN DOE #10, Special Agent, DHS; JOHN DOE #11, Special Agent, FBI; JOHN DOE #12, Special Agent, FBI; JOHN DOE #13, Special Agent, FBI,

Defendants.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Consistent with its text, purpose, and history, the Religious Freedom Restoration Act ("RFRA") permits damages against federal officials in their individual capacity. The text allows "appropriate relief against a government," where "government" is defined to encompass individual officers in their personal capacity. The statute itself further provides that Congress's purpose was not merely to "restore the compelling interest test" and overturn *Employment Division v. Smith*, 494 U.S. 872 (1990), but also "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." Rarely does Congress speak to a statute's purpose so plainly. It did so here because Congress intended to regulate both federal and state officials—on the model of 42 U.S.C. § 1983, which allows both injunctive relief and damages.

Faced with all this evidence, Defendants make two arguments. First, they assume that, because RFRA lacks the language in § 1983 specifying that defendants shall be liable "in an action at law" as well as a "suit in equity," RFRA does not contemplate the prospect of damages. This argument ignores the critical fact that § 1983 was passed in 1871, some 64 years before the elimination of the law/equity distinction in federal courts. By the time RFRA was passed in 1993, that distinction had no relevance in adjudicating cases in federal courts. Second, Defendants argue that the Religious Land Use and Institutionalized Persons Act of

2000 ("RLUIPA")—the statute passed in the wake of the Supreme Court's ruling foreshortening RFRA's application to states and state officials[1]—has been interpreted not to provide for damages in certain contexts. But the decisions Defendants rely on turn on questions of state sovereign immunity, not on whether Congress intended to allow for damages actions. Even RLUIPA may in fact permit damages against state officials in their individual capacity if the official action complained of implicates Congress's Commerce Clause powers.

For these reasons, virtually every court that has faced this precise issue has adopted the interpretation Plaintiffs urge here. The district court's ruling in this case should be reversed.

POINT I

RFRA's Text Provides for Individual-Capacity Damages Suits

A. RFRA's Broad Definition of "Government" Demonstrates that the Statute Provides for Individual Liability

RFRA defines "government" to expressly include "person[s]"—*i.e.*, individuals—other than those operating in an official capacity. *See* 42 U.S.C. § 2000bb-2(1). RFRA 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 other covered entity.

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[1] *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

Id. (emphasis added). Analyzing this language, the Third Circuit recently ruled that the "plain language of RFRA" provided for damages claims to be brought against officials in their individual capacity, finding that such an interpretation was "consistent with the Supreme Court's view of RFRA's '[s]weeping coverage.'" *Mack v. Warden Loretto FCI*, --- F.3d ---, 2016 WL 5899173, at *9 (3d Cir. Oct. 11, 2016).

To argue that the plain text does not refer to officials sued in their individual capacity, Defendants would treat the "or other person acting under color of law" language as surplusage. *See* Defs.' Br. 18-19. As the court explained in *Patel v. Bureau of Prisons*, 125 F. Supp. 3d 44 (D.D.C. 2015), the phrase "or other person acting under color of law" cannot be read as superfluous; instead, it is to be read "not as a final, 'catch-all' item in a list, but instead as a parenthetical modifier that expands upon one item on the list." *Id.* at 50. *Patel* went on: "The phrase at issue is intended to *enlarge* the category of 'person[s]' subject to suit, not to refer to miscellaneous things that are 'akin to' 'branch[es], department[s], agenc[ies], instrumentalit[ies], and official[s].'" *Id.* (quoting 42 U.S.C. § 2000bb-2(1)) (emphasis added). Defendants' interpretation would improperly render this entire phrase meaningless, as "once Congress authorized official-capacity suits against 'officials,' adding another term that allowed only official-capacity suits would have had no effect whatsoever." *Id.*

Defendants insist that the "or other person acting under color of law" language cannot refer to individual-capacity defendants because that phrase should possess the same attributes as the other items in the definition—namely, government official defendants. *See* Defs.' Br. 16-18. *Patel* identified the flaw in this reasoning, noting that "the phrase 'or other person acting under the color of law' has a 'character of its own'" because "[t]here is no apparent congruity between a 'branch, department, agency [or] instrumentality' of the government and a 'person,' and the statute expressly differentiates 'officials' from '*other* person[s].'" *Patel*, 125 F. Supp. 3d at 50 (quoting 42 U.S.C. § 2000bb-2(1)) (emphasis added).[2] Defendants' interpretation, which would deprive the phrase of its "independent meaning," makes even less sense given that the statutory context "suggests that Congress meant that term to serve a particular function . . . consistent with, but distinct from the functions of the other" items used to define "government." *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 702 (1995) (discussing canon of *noscitur a sociis* and its application to the Endangered Species Act).[3]

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[2] "Other" refers to "a person or thing that is different or distinct from one already mentioned or known about." *Other*, Oxford Dictionary, https://en.oxforddictionaries.com/definition/other (last visited Nov. 13, 2016).

[3] Contrary to Defendants' assumption, *see* Defs.' Br. 18-19, this conclusion is consistent with *Stafford v. Briggs*, 444 U.S. 527 (1980). Defendants overread *Stafford*, a case holding that the federal venue statute did not permit personal-

Defendants' attempts to distinguish RFRA from § 1983 similarly fall flat. Ignoring this Circuit's guidance that "repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well," *Leonard v. Israel Discount Bank*, 199 F.3d 99, 104 (2d Cir. 1999) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)), Defendants assert that RFRA's use of "person acting under color of law" is substantively different from similar language used in § 1983, *see* Defs.' Br. 20-22, which has long been interpreted to permit an action for damages against state officials in their individual capacity. *See, e.g.*, *Hafer v. Melo*, 502 U.S. 21, 25 (1991). Yet, as the Third Circuit recently observed, several circuit courts "have concluded that this word choice was not coincidental and that Congress intended for courts to borrow concepts from § 1983 jurisprudence when construing RFRA."[4] *Mack*, 2016 WL 5899173, at

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capacity suits for money damages. The Court held in *Stafford* that, "Congress intended nothing more than to provide nationwide venue for the convenience of individual plaintiffs in actions which are nominally against an individual officer but are in reality against the Government." 444 U.S. at 542. The purpose of the Mandamus and Venue Act, 28 U.S.C. § 1391(e), was simply to expand venue for mandamus actions and actions for injunctive relief under the Administrative Procedure Act; the statute does not even implicate actions for damages. *Id*.

[4] *See, e.g.*, *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 738 (7th Cir. 2015), *cert. denied*, —— U.S. ——, 136 S.Ct. 581, 193 L.Ed.2d 464 (2015) (applying § 1983 "under color of" law analysis to determine whether private defendant was the "government" for purposes of RFRA); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834–35 (9th Cir. 1999) (same).

*9; *see also Patel*, 125 F. Supp. 3d at 51 ("[I]t is safe to assume that Congress understood that it acted against the backdrop of settled § 1983 precedent when it added the similar 'under color of law' language to RFRA."). Courts must presume Congress understands how to draft statutes. So, Congress's use of "person" in RFRA, paralleling the use of the term in § 1983, signals its unmistakable intent to make federal officials liable in personal-capacity suits, just as state officials are liable in their personal capacity under § 1983 for violating a person's right to free religious exercise. Accordingly, the Third Circuit determined that "[b]ecause RFRA's definition of 'government' tracks the language of § 1983, it is reasonable to assume that liability can be imposed similarly under both statutes." *Mack*, 2016 WL 5899173, at *9.

Defendants also attempt to distinguish RFRA from § 1983 based on the latter's provision for "actions at law" and "suits in equity." *See* Defs.' Br. 20. Defendants argue that the inclusion of language regarding "actions at law" means that § 1983 unambiguously provides for damages actions, and likewise, the omission of such language from RFRA means that damages actions are not contemplated. *See* Defs.' Br. 20. Yet, the explicit provisions in § 1983 providing for actions at law and in equity have their roots in the statute's long history. Section 1983 is the codification of § 1 of the Civil Rights Act of 1871. *Briscoe v. LaHue*, 460 U.S. 325, 337 (1983) (describing legislative history of § 1983). At the time of the passage of

the Civil Rights Act of 1871, there was a distinction between two forms of civil action—suits in equity and actions at law. *See, e.g.*, *Liberty Oil v. Condon Nat'l Bank*, 260 U.S. 235, 242 (1922) (acknowledging separation between remedies in law and equity depending on the court and cause).[5] Section 1983 was passed in 1871, when the distinction between suits in equity and actions at law had practical implications for civil procedure and available remedies. Conversely, it was in 1993 that RFRA was drafted and enacted, 55 years after the abolition of that distinction eliminated any need for textual denotation. Instead of providing for suits in equity and actions at law, Congress made clear in RFRA the breadth of available remedies with language befitting of the present era. *See* 42 U.S.C. § 2000bb-2(1) (providing for "appropriate relief" against state officials).

Going farther afield, Defendants suggest that a state official sued in her official capacity for injunctive relief would qualify as a "person" under § 1983; according to Defendants, therefore, the parallel use of "person" in RFRA can be limited to injunctive relief. Defs.' Br. 22 (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989)). However, Defendants ignore that the reason-

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[5] Owing to procedural and practical complications, the Supreme Court ordered the distinctions between actions at law and in equity eliminated in 1935, sixty years after the passage of the Civil Rights Act of 1871. *See* Charles E. Clark & James William Moore, *A New Federal Civil Procedure—I. The Background*, 44 Yale L.J. 387, 391 (1935). Accordingly, that distinction was abolished in 1938 with the promulgation and adoption of the Federal Rules of Civil Procedure. FED. R. CIV. P. 2 ("There is one form of action—the civil action.").

ing of *Will* is based on the legal fiction of *Ex parte Young*, 209 U.S. 123 (1908), that suits against state officials in their official capacity for prospective relief are not suits against the state and therefore do not violate state sovereign immunity. *See Will*, 491 U.S. at 71 n.10 ("Of course, a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official-capacity actions for prospective relief are not treated as actions against the State." (internal quotation marks omitted)). Such authority in no way limits the prospect of damages against a natural person for violations of either § 1983 or RFRA.

The plain text of RFRA and its similarity to language used in § 1983 confirm that RFRA's use of "or other person acting under color of law" permits individual-capacity suits for money damages.

B. RLUIPA Decisions Do Not Support the Argument that Damages Are Unavailable in Individual-Capacity Suits under RFRA

Defendants rely extensively on precedents in which courts have found "RLUIPA's identical language" to preclude damages suits against state officials. *See* Defs.' Br. 16, 23-24 (discussing *Sossamon v. Texas*, 563 U.S. 277 (2011), and *Washington v. Gonyea*, 731 F.3d 143 (2d Cir. 2013)). As RLUIPA was modeled after RFRA, Defendants claim RFRA similarly cannot allow damages actions.

However, unlike RFRA, RLUIPA exclusively targets state and local conduct.[6] *See Sossamon*, 563 U.S. at 281. The plaintiffs' claims in those RLUIPA cases were premised on the idea that the state officials' actions were subject to congressional regulation under the Spending Clause, under which Congress's authority is limited.

In addition to Congress's power under the Spending Clause, RLUIPA was also enacted pursuant to Congress's power under the Commerce Clause and Section 5 of the Fourteenth Amendment. *See* 42 U.S.C. § 2000cc(a)(2)(A-C). Given constitutional protections afforded to states under our federal system, Congress's power to regulate conduct and impose liability on states is different—and presumptively more limited than its power to regulate federal actors. Most recently, the Third Circuit expressly rejected the argument that RLUIPA decisions would control the outcome in RFRA cases for this very reason—Congress's power to impose liability on state officials through the Spending Clause is fairly limited. *Mack*, 2016 WL 5899173, at *11 (holding that RLUIPA allowed "Congress to impose certain conditions, such as civil liability, on the recipients of federal funds, such as state prison institutions" and that since "state officials are not direct recipients of the federal funds . . . they cannot be held individually liable under RLUIPA"). RFRA, by contrast, is authorized under the Necessary and Proper Clause, to pre-

[6] Although Congress intended for RFRA to apply to the states, the Supreme Court held in *City of Boerne* that it did not.

serve Free Exercise rights against encroachment by federal officials. *See Hankins v. Lyght*, 441 F.3d 96, 107 (2d Cir. 2006). Thus, as *Mack* observed, RFRA, in contrast to RLUIPA, "does not implicate the same concerns." *Mack*, 2016 WL 5899173, at *11.

Moreover, even Defendants acknowledge the possibility that damages may be available under RLUIPA in a case that presents facts sufficiently pleaded to appropriately invoke Congress's power over state officials under the Commerce Clause—where the Spending Clause concerns about imposing liability on non-recipients are absent. *See* Defs.' Br. 25 n.12. In fact, this Court and the Fourth, Fifth, Seventh, and Eleventh circuits have noted that RLUIPA may allow for damages if the complained-of conduct had substantial effects on interstate or foreign commerce, under current Commerce Clause doctrine. *See Washington*, 731 F.3d at 145-46 (withholding decision on whether "RLUIPA authorizes individual capacity suits under the imprimatur of the Commerce Clause" because plaintiff had not pled facts indicating any effect on interstate or foreign commerce); *Stewart v. Beach*, 701 F.3d 1322, 1334-35 n.11 (10th Cir. 2012) (same); *Nelson v. Miller*, 570 F.3d 868, 886 (7th Cir. 2009) (same); *Rendelman v. Rouse*, 569 F.3d 182, 188-89 (4th Cir. 2009) (same); *Smith v. Allen*, 502 F.3d 1255, 1274 n.9 (11th Cir. 2007), *abrogated on other grounds by Sossamon*, 563 U.S. 277 (2011) (same).

For both reasons, interpreting RFRA to permit individual-capacity suits for money damages would not "attribute different meaning to the same phrase in the same sentence" in RLUIPA, as Defendants suggest. Defs.' Br. 27. The meaning of the terms must be read in connection with the scope of congressional power authorizing federal action. Indeed, if Congress's power under the Commerce Clause reaches sufficiently far—the question Defendants acknowledge was "left open" by this Court in *Washington*, Defs.' Br. 25 n.12 (citing *Washington*, 731 F.3d at 146)—then RLUIPA may be read to permit damages actions on appropriate facts as well.

C. The *Franklin* Presumption Applies to the Interpretation of RFRA's Use of "Appropriate Relief"

When Congress provides for "appropriate relief" to remedy violations of a statute—as it did in RFRA—and includes no express indication that money damages are not allowed, courts apply the traditional presumption articulated in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66, 76 (1992), that damages fall within the ambit of available relief. In October, the Third Circuit became the most recent court to apply the *Franklin* presumption to RFRA, ruling that "Congress expressly stated that a claimant may obtain 'appropriate relief' against the government—the exact language used in *Franklin*." *Mack*, 2016 WL 5899173, at *11. Further bolstering its conclusion, *Mack* observed that: "Congress enacted

RFRA one year after *Franklin* was decided and was therefore well aware that 'appropriate relief' means what it says, and that, without expressly stating otherwise, all appropriate relief would be available." *Id.* *Mack* now joins *Patel*, decided last year, in holding that RFRA provides for money damages in suits brought against individual-capacity defendants.[7]

Rather than contend with the line of authority establishing that the *Franklin* presumption applies to RFRA, Defendants principally rely on, and mischaracterize, *Sossamon v. Texas*, 563 U.S. 277 (2011). The case is inapposite, as it deals with a statute directed at a different class of defendants, a different claim for relief, and a different judicial presumption. In *Sossamon*, a state prisoner brought RLUIPA claims for damages against state prison officials who were sued in their official capacity—a suit that effectively sought damages against the state sovereign. *Id.* at 282. At issue was whether the defendants could assert sovereign immunity; *Sossamon* addressed the narrow Spending Clause issue of "whether the States, by

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[7] An unpublished district court opinion recently ruled that RFRA does not allow for individual-capacity damages suits. *See Ahmad Ajaj v. United States*, No. 15-CV-00992-RBJ-KLM, 2016 WL 6212518, at *1 (D. Colo. Oct. 1, 2016). The district court did not undertake an analysis of the issue, deferring instead to the magistrate judge's recommended ruling. The magistrate judge relied on the opinion in *Tanvir v. Lynch*, 128 F. Supp. 3d 756 (S.D.N.Y. 2015), but the analysis is cursory and conclusory, finding that the opinion's reasoning was "persuasive" without more. *Ahmad Ajaj v. United States*, No. 15-CV-00992-RBJ-KLM (D. Colo. Aug. 30, 2016) (recommendation of magistrate judge). It thus adds nothing to the analysis of the District Court's decision under review by this Court.

accepting federal funds, consent to waive their sovereign immunity to suits for money damages under [RLUIPA]." *Id.* at 280. The Court took pains to note that, in deciding whether the *Franklin* presumption applied, it was doing so in the narrow and unique context of "construing the scope of an express waiver of sovereign immunity." *Id.* at 288. For that distinct analysis, which implicates independent federalism concerns, the traditional presumption is reversed: "[t]he question [. . .] 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." *Id*. at 289 (emphasis in original). In that special context, the Court ruled that "reliance on *Franklin* . . . is misplaced," since "congressional silence had an entirely different implication than it does here." *Id.* Contrary to Defendants' contention, *Sossamon*'s narrow ruling on sovereign immunity waivers in the context of RLUIPA claims brought against states does not dictate the result here.

Defendants selectively quote *Sossamon*, arguing that the Court "held that the *Franklin* presumption 'is irrelevant to construing' the 'appropriate relief' clause in RLUIPA," and that therefore *Franklin* is equally "irrelevant" to the analysis of "appropriate relief" under RFRA. Defs.' Br. 28-29. Defendants attempt to significantly broaden *Sossamon*'s holding, but the actual language in *Sossamon* makes clear that the Court's analysis is narrow: "[t]he presumption in *Franklin* and

Barnes is irrelevant to construing the scope of an express waiver of sovereign immunity." *Sossamon*, 563 U.S. at 288. Both *Mack* and *Patel* recognized that the sovereign immunity waiver presumption has no relevance to whether RFRA permits damages in individual-capacity suits. *See Mack*, 2016 WL 5899173, at *10 n.92 (finding that "[b]ecause Mack brings his RFRA claim against only [o]fficers [. . .] in their individual capacities, the federal government's sovereign immunity to suits for damages is irrelevant here"); *Patel*, 125 F. Supp. 3d at 54 (distinguishing sovereign immunity waiver case because "[t]hat decision turned on the principle that courts must strictly construe any waiver of sovereign immunity, allowing relief against the government only when its authorization is unequivocal" (internal quotation marks omitted)).[8]

Defendants also claim that *Sossamon* held that the *Franklin* presumption is "irrelevant" in cases where a statute provides an express private cause of action.[9]

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[8] Furthermore, the overbroad reading of *Sossamon* presented by Defendants ignores the precept that "if a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *United States v. Santiago*, 268 F.3d 151, 155 n.6 (2d Cir. 2001) (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)) (internal quotation marks omitted). *Sossamon*, decided in the inapposite context of sovereign immunity, should not be read as implicitly narrowing *Franklin*, which directly controls.

[9] The right of action at issue in *Franklin* was not implied, as Defendants contend; Congress had enacted legislation after the case was initially filed that

Defs.' Br. 29 (citing *Sossamon*, 563 U.S. at 288). Before *Sossamon* was decided, at least one court of appeals had applied *Franklin* to express private causes of action; if the *Sossamon* Court had intended to overturn this precedent, it did so in complete silence. *See* Pls.' Br. 33-34 (citing *Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1191 (1st Cir. 1994)). Further, the cases decided subsequent to *Sossamon* have not construed that decision as standing for the broad proposition Defendants interpose here. *See* Pls.' Br. 33-34 (citing *Francisco v. Susano*, 525 F. App'x 828, 833 (10th Cir. 2013); *Ditullio v. Boehm*, 662 F.3d 1091, 1098 (9th Cir. 2011)). *Sossamon* stands for the limited holding that *Franklin* "does not translate" in a case applying the sovereign immunity waiver presumption. It should not be extended to render *Franklin* inapplicable in all cases involving express rights of action.[10]

"must be read" as an "implicit acknowledgement that damages are available." *Franklin*, 503 U.S. at 78 (Scalia, J., concurring in judgment).

[10] Indeed, as Plaintiffs have previously noted, in deciding *Franklin*, the Court relied on *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838), where the Court determined that a statute provided for damages when it expressly provided a right of action but failed to specify available remedies. Pls.' Br. 32 (citing *Franklin*, 503 U.S. at 67). And, like here, *Kendall* was a suit brought against a government official—the postmaster general of the United States. *Franklin*'s reliance on *Kendall*, and the fact that the right of action at issue in *Franklin* was not implied at the time of decision, makes clear that the Court did not intend to limit its holding to implied rights of action.

Defendants argue that damages should not be presumed unless Congress has made it clear that it intends to include a damages remedy—a reversal of the traditional presumption. *See* Defs.' Br. 29. Setting aside the fact that Defendants apply the wrong presumption, the argument makes little sense on its own terms. How could it be that courts would find all forms of relief are available when Congress is silent as to whether a right of action exists, as in *Franklin*, but then restrict the scope of remedies when Congress creates a right and broadly provides that "appropriate relief" is available, as it did with RFRA?

Together, *Mack* and *Sossamon* stand for the proposition that while reliance on the *Franklin* presumption "is misplaced in determining whether damages are available against the Federal Government," *Sossamon*, 563 U.S. at 288-89, the presumption does apply when construing express causes of action brought against defendants to whom sovereign immunity does not apply.

POINT II

RFRA's Legislative History and Purpose Confirm that Congress Intended for the Statute to Provide for Recovery of Money Damages

The legislative history of RFRA and its companion statute, RLUIPA, are consistent with Congress's plainly-worded intent to provide "a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g).

A. RFRA's Legislative History Confirms the Availability of Money Damages Suits

In enacting RFRA and, later, RLUIPA, Congress made very clear its desire to protect religious exercise to the outer bounds of existing law. The statutes were meant to provide "a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014) ("Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty.").

The legislative history supports Plaintiffs' contention that in using such broadly prophylactic language, and in using context-dependent terms like "appropriate relief," Congress intended for damages to be available under RFRA. A House report for a precursor to RLUIPA clearly states that RFRA "creat[ed] a private cause of action for damages." *See* Pls.' Br. 42 (quoting H.R. REP. NO. 106-219, at 29 (1999)). While this is a single statement in the legislative record for the companion statute, Defendants have offered no similarly clear, unambiguous evidence from the legislative history demonstrating that Congress intended to *exclude* damages from the ambit of available relief. And the court holdings, distinguished earlier, that RLUIPA actions brought pursuant to Congress's Spending Clause authority do not provide for individual-capacity damages actions, *see* Defs.' Br. 40,

do not contradict the statement recognizing that RFRA creates a cause of action for damages.

Defendants offer no convincing rebuttal to Plaintiffs' argument that since Congress originally intended RFRA to apply to federal and state officials—each of whom were susceptible to damages suits pursuant to § 1983—Congress must have intended for "appropriate relief" to include damages suits. *See, e.g.*, *Kletschka v. Driver*, 411 F.2d 436, 442, 448-49 (2d Cir. 1969) (holding that § 1983 permits an action against federal defendants in their personal capacity where "state and federal defendants conspire[] under color of state law to deprive plaintiff[s] of federally guaranteed rights"). Defendants do not account for the incongruous results compelled by their interpretation of the statute. Under Defendants' reading, a plaintiff alleging Free Exercise Clause violations could sue state officials for money damages under § 1983, but would be prevented from seeking money damages against federal officials under RFRA—notwithstanding Congress's unmistakable intent to provide "maximum protection" for religious exercise through RFRA. The result is particularly absurd when considering that the same federal officials that Defendants argue are immune from money damages under RFRA can be sued for money damages under § 1983 for conspiring with a state official to engage in the same conduct. *See, e.g.*, *Kletschka*, 411 F.2d at 442, 448-49.

Instead of pointing to clear and unambiguous language from the legislative histories of RLUIPA and RFRA to support the theory that Congress intended to exclude damages claims under RFRA—even though Congress later acknowledged that they were included—Defendants rely on an opaque statement in the Committee Reports that RFRA does not "expand, contract or alter" the relief available to claimants prior to *Smith*. *See* Defs.' Br. 35; SPA 31-32. The statement, appearing in a section titled "No Relevance to the Issue of Abortion," is part of an assessment that RFRA would not impact available remedies to protect abortion rights. *See* S. REP. NO. 103-111, at 12; H.R. REP. NO. 103-88, at 8 (1993). Defendants' argument that the language applies more broadly runs contrary to the Supreme Court's holdings in both *City of Boerne* and *Burwell*. In *City of Boerne*, the Supreme Court found that RFRA's "least restrictive means requirement" was not used "in the pre-*Smith* jurisprudence RFRA purported to codify," indicating that RFRA actually expanded protections for religious exercise. 521 U.S. at 509. In *Burwell*, the Supreme Court revisited this finding, noting that "[o]n this understanding of our pre-*Smith* cases, RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided *even broader protection* for religious liberty than was available under those decisions." 134 S. Ct. at 2761 n.3 (emphasis added). Whereas Plaintiffs' reading of the legislative history is consistent both with

the stated purpose of RFRA and Supreme Court cases construing RFRA's scope, Defendants' view creates tension—if not direct contradiction—with them.

B. Prior to *Smith*, No Supreme Court Precedent Barred Damages in First Amendment *Bivens* Suits and Such Claims Existed in Many Jurisdictions

Even if the statement in the legislative history regarding RFRA's impact on abortion rights had actually reflected Congress's intended interpretation of the entire statute, the statement that RFRA did not "expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Courts's [sic] free exercise jurisprudence," Defs.' Br. 35, does not support Defendants' position.

First, Defendants' argument that "before *Smith* was decided, federal officers could not be held liable for damages in their individual capacities for violations of the Free Exercise Clause," Defs.' Br. 35, simply mischaracterizes the state of the law when *Smith* was decided. At that time, *Bivens* damages were available as a remedy against individual federal officers for violations of free religious exercise in numerous jurisdictions. *See Jihaad v. O'Brien*, 645 F. 2d 556, 558 n.1 (6th Cir. 1981) (assuming that *Bivens* was available to remedy Free Exercise violations); *You Vang Yang v. Sturner*, 728 F. Supp. 845, 849 (D.R.I.), *opinion withdrawn*,[11]

[11] After *Smith*, the district court judge withdrew his prior opinion and entered a judgment holding that application of the Rhode Island law governing autopsies

750 F. Supp. 558 (D.R.I. 1990) (permitting *Bivens* claim for damages against state medical examiner due to alleged violation of plaintiff's Free Exercise rights). Defendants are therefore mistaken that "[p]laintiffs do not dispute that *Bivens* did not reach free-exercise claims before *Smith*." Defs.' Br. 36. Prior to *Smith*, district and circuit courts had concluded that a *Bivens* remedy was available against individual federal officers for violations of Free Exercise rights.

Second, although the Supreme Court had not expressly extended *Bivens* to Free Exercise claims prior to *Smith*, the Supreme Court had also not expressly rejected such an extension. *See Bush v. Lucas*, 462 U.S. 367, 378 (1983) (affirming that courts have "adequate power [under *Bivens*] to award damages to the victim of a constitutional violation," including in Free Exercise context before it, but declining to do so on account of special factors). And the Supreme Court has assumed without deciding that such a remedy is available in Free Exercise contexts today. *See Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (assuming without deciding that respondent's "First Amendment claim is actionable under *Bivens*"). Thus, it is Defendants' interpretation of RFRA—in which damages claims are unavailable—that would improperly "alter[]" and "contract[]" a claimant's pre-*Smith* ability to obtain relief. *See* Defs.' Br. 12.

"did not profoundly impair" the religious freedom of the Hmongs. *Yang*, 750 F. Supp. at 558-59.

Neither Defendants nor the District Court provide any support for the proposition that Congress would have looked to Supreme Court rulings alone in determining the scope of relief available to future RFRA plaintiffs. It is more likely that Congress used the ambiguous term "appropriate relief" in order to provide RFRA plaintiffs with "a broad protection of religious exercise, to the maximum extent," including remedies that courts—including the Supreme Court—had acknowledged could be available. 42 U.S.C. § 2000cc–3(g). For example, since RFRA claims would be brought in the district courts, it stands to reason that if the Sixth Circuit recognized a *Bivens* claim for Free Exercise violations, *see Jihaad*, 645 F. 2d at 558 n.1, then Congress likely would have intended for damages to be available in the district courts of that circuit and would not have excluded such relief.

As noted in *Jama v. United States Immigration & Naturalization Service*, 343 F. Supp. 2d 338 (D.N.J. 2004), Defendants' interpretation yields a bizarre and unwieldy outcome—that Congress somehow intended to "*restrict the kind of remedies* available to plaintiffs who challenge free exercise violations in the same statute it passed to *elevate the kind of scrutiny* to which such challenges would be entitled." 343 F. Supp. 2d at 374-75 (emphasis in original). This is not the outcome that Congress sought to achieve.

Finally, Defendants overlook the import of congressional testimony at a hearing on an earlier proposed version of RFRA, H.R. 2797. *See* Pls.' Br. 43. A

witness at the hearing, Robert Peck, Legislative Counsel for the American Civil Liberties Union, discussed the pre-*Smith* claim in *Yang* for money damages arising out of an alleged Free Exercise violation brought against a defendant in his individual capacity. *See Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102nd Cong. 107-16 (1992). Mr. Peck testified that the plaintiffs had brought an action for damages under the *Bivens* doctrine and that, in December 1990, the judge ruled in their favor using a compelling interest test. *Id.* The testimony is further evidence that, when it enacted RFRA, Congress was aware that prior to *Smith*, a potential claim for money damages arising from a Free Exercise violation was available.

The District Court here therefore erred in ruling that Congress intended to exclude a remedy—known to be potentially available—in a statute that nonetheless did not intend to "alter" or "contract" such remedies.

C. Excluding Damages Claims in Cases Where Prospective Relief Affords No Remedy Runs Contrary to RFRA's Purpose

In addition to overturning *Smith*, Congress expressly indicated that in RFRA it wanted to "provide a *claim* . . . to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb (emphasis added). The District Court's reading of RFRA, however, effectively eliminates such claims in those in-

stances where "prospective relief accords . . . no remedy at all." *Franklin*, 503 U.S. at 76.

In cases where only damages can make a plaintiff whole, the District Court's reading would effectively shield violations of RFRA from judicial review. Defendants have offered no evidence suggesting Congress's intent to restrict RFRA plaintiffs to prospective relief, arguing simply that to the extent their reading of the statute shields unlawful conduct from judicial review, "that was the state of the law before *Smith*." Defs.' Br. 38. As previously noted, however, damages were available as a remedy before *Smith* in several jurisdictions.

Defendants also argue that allowing damages in personal-capacity litigation would impose "substantial social costs" on public officials and dampen their "ardor," ignoring that those same public officials are already protected by the powerful shield of qualified immunity. Defs.' Br. 39. Moreover, this case serves as a reminder that absent the threat of litigation with the possibility of a meaningful remedy, including damages where prospective relief affords no relief, it is the unchecked "ardor" of public officials that can sometimes result in abuses of power.

Damages are "appropriate"—and indeed, necessary—here because of the nature of Plaintiffs' RFRA injuries. Plaintiffs suffered, *inter alia*, "material and economic loss" as a result of Defendants' RFRA violations. JA 110 (Am. Compl. ¶ 215). In this particular context, only damages would be "appropriate" to vindi-

cate Plaintiffs' statutory rights. Furthermore, outside of the exceptional case, money damages are the sole form of relief available in individual-capacity suits against federal officers. As *Patel* ruled, "[t]he only significant purpose for an individual-capacity claim [under RFRA], then, would be to seek damages—damages that are unavailable in RFRA actions against the sovereign." *Patel*, 125 F. Supp. 3d at 53.

Absent the ability to seek monetary damages in circumstances where prospective relief is unavailing or has been rendered moot, RFRA's creation of "a claim" is a hollow proposition with respect to Plaintiffs and future similarly-situated claimants.

CONCLUSION

For all of the foregoing reasons, the portion of the Opinion and Order of the United States District Court for the Southern District of New York (Hon. Ronnie Abrams, U.S.D.J.) directing dismissal of Plaintiffs' RFRA claims should be REVERSED.

Dated: November 14, 2016
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Dated: November 14, 2016