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 FOR THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE SUPPORTING RESPONDENTS

ANYA BIDWELL
Counsel of Record
INSTITUTE FOR JUSTICE
816 Congress Avenue
Suite 960
Austin, TX 78701
(512) 480-5936
abidwell@ij.org

PATRICK JAICOMO
KEITH NEELY
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
pjaicomo@ij.org
kneely@ij.org

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COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Are monetary damages appropriate relief for a person whose religious exercise has been burdened by a federal official in violation of the Religious Freedom and Restoration Act?

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INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit public interest law center committed to defending the essential foundations of a free society by securing greater protection for individual liberty. Central to that mission is promoting accountability to the Constitution for government officials.[1]

SUMMARY OF THE ARGUMENT

Damages are not only appropriate relief for constitutional violations, they are the primary mechanism by which individuals hold government officials accountable to the Constitution.

That is as true today as it was at the founding and in 1993, when Congress enacted the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb, *et seq*. As long as the United States has been a country, individuals have vindicated their rights through suits for damages against federal officials. In those suits, courts assumed their traditional role by simply deciding cases and ordering appropriate relief without making policy determinations. If good reasons existed to shield officials from accountability via immunity or indemnifications, courts left those considerations to Congress.

[1] Both Petitioners and Respondents issued consent to filing this amicus brief. No party's counsel authored this brief in whole or in part, and no person or entity other than the amicus made a monetary contribution toward the preparation and submission of this brief.

This historical separation of powers makes good sense. Congress does policy and this Court does law. Often, that law includes equitable relief; often it includes damages; and, often, it is "damages or nothing." *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

For that reason, the government's position that Congress must explicitly provide for a damages remedy is puzzling. It inverts the constitutional order, demanding that courts—not Congress—make the sensitive policy decisions necessary to justify governmental immunity and that Congress—not courts—set the specific relief.

Even if such a constitutional inversion were appropriate, data simply does not support the parade of horribles so enthusiastically staged by the government to bolster its position. As study after study has shown, the immunization of government officials will have no impact on the litigation costs faced by the government or those officials, and the imposition of damages will not deter government officials from fulfilling their legal duties.

This Court should affirm the Second Circuit's decision and, along with it, the foundational concepts that Congress does policy, this Court does law, and government officials must be held accountable for their illegal and unconstitutional actions.

ARGUMENT

I. Suits for damages against government officials are the historical cornerstone of government accountability.

For most of this nation's history, suits for damages against responsible government officials were at the heart of a republican system that prided itself on government accountability. Instead of worrying about policy concerns, such as whether making government officials personally liable would chill their conduct, courts focused on whether rights were violated, and, if they were, implementing suitable relief. The legislature, on the other hand, did not concern itself with relief. Its job was to weigh policy considerations and fashion indemnity and immunity provisions to address them.

This allocation of responsibility allowed each branch to perform its constitutional duties. Judges, tasked with deciding cases in law and equity, interpreted the law, evaluated whether it was violated, and ordered appropriate relief. See U.S. Const. Art. III, § 2. Legislators, in charge of the government's purse and matters of public policy, calibrated incentives, ensuring that government officials were subject to, or protected from, liability. See U.S. Const. Art. I, § 8.

The reallocation of responsibilities advocated by the government in this case—with political branches providing for remedies and the judiciary calibrating incentives—turns these constitutional roles on their head.

A. Since the founding, the constitutional role of courts has been to adjudicate legal violations by awarding damages and other appropriate relief.

Government accountability for violations of individual rights was the judiciary's North Star. It was achieved through various common-law causes of action against responsible government officials, including trespass and assumpsit, both of which resulted in the entry of judgment for money damages. James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1874 (2010).

The rule was strict and did not spare even officers who acted in good faith or under official orders, prompting Chief Justice Marshall to admit that his "first bias" was "in favor of the opinion that though instructions of the executive could not give a right, they might yet excuse from damages." *Little* v. *Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804). Still, the Court's focus was on evaluating the lawfulness of the government conduct and—since attenuating circumstances, like good faith on the part of the officer, could not "change the nature of the transaction, or legalize an act which without [such attenuating circumstances] would have been a plain trespass"—making a wronged individual whole. *Ibid*.

Two fundamental ideas are at the heart of this founding principle of government accountability: the

importance of redress and the separation of powers. The first idea hardly needs explanation. As William Blackstone famously proclaimed, without a method for "recovering and asserting" fundamental rights, "in vain would rights be declared, in vain directed to be observed." 1 William Blackstone, *Commentaries on the Laws of England* 55–56 (1765). Thus, federal courts, well into the twentieth century, insisted on redress by the government, including through judgments for money damages, payable by the responsible official.[2] An alternative framework, in which "courts cannot give remedy when the citizen has been deprived [of his rights] by force" would be contrary to the nation's character and would "sanction[] a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights." *United States* v. *Lee*, 106 U.S. 196, 220–221 (1882).

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[2] See, *e.g.*, *Yearsley* v. *W.A. Ross Constr. Co.*, 309 U.S. 18, 20–21 (1940) (admitting plaintiffs can sue federal officers for damages if they exceed their authority or this authority is not within the government's constitutional power to confer); *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 619–620 (1912) (stating "[t]he exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded"); *Belknap* v. *Schild*, 161 U.S. 10, 18 (1896) (reasoning federal officers can be "personally liable to an action of tort by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the United States"); *Bates* v. *Clark*, 95 U.S. 204, 209 (1877) (holding federal officers personally liable for wrongfully seizing private property, even under official orders).

The second idea was best articulated by Justice Story, who clearly delineated the role of the judiciary by writing in *The Apollon* that "this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress." 22 U.S. 362, 366–367 (1824). It was not the job of the judiciary to perform policy analyses and adjust the incentives of government officials by providing them with protections from liability. See Pfander & Hunt, 85 N.Y.U. L. Rev. at 1870. That was the province of the legislature. See *The Apollon*, 22 U.S. at 366–367 (reasoning that the role of the courts is to analyze legal claims; the Legislature is the one that "will doubtless apply a proper indemnity"); see also Pfander & Hunt, 85 N.Y.U. L. Rev. at 1868 ("[P]erhaps as early as 1804, when the Marshall Court decided *Little* and *Murray* [v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804)], and certainly by 1836, the Supreme Court simply assumed that indemnity was routinely available to take the sting out of any official liability.").

The case of *Tracy* v. *Swartwout* aptly demonstrates both ideas. 35 U.S. 80 (1836). There, importers of sugarcane syrup sued a New York customs collector for demanding they pay much higher taxes on the import than those actually owed. *Id.* at 93, 95. Because the importers could not afford the payment, the collector seized the syrup and kept it "for a long time," causing deterioration in value. *Id*. at 93. When the importers sued for damages, the customs collector defended by

claiming he acted in good faith and in compliance with the instructions of the Secretary of the Treasury. *Ibid*.

This Court disregarded the collector's defense, making it clear that its concern lay with enforcement against the government: "It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress." *Tracy*, 35 U.S. at 95. But the Court also emphasized that even though it was holding the customs officer responsible in damages "for illegal acts done under instructions of a superior * * * the government [Congress] in such cases is bound to indemnify the officer." *Id*. at 99. In other words, as the Court in *Swartwout* saw it, courts do the legal work by deciding whether the government conduct was unlawful and, if so, awarding appropriate relief; Congress does the policy work by determining whether indemnification is warranted.

B. Legislatures have historically considered policy in determining the need for immunity and indemnity from damages.

At the founding, Congress dealt with matters of immunity and indemnity, leaving the matter of damages to the judiciary. See Pfander & Hunt, 85 N.Y.U. L. Rev. at 1873 & n.45 ("Leading thinkers of the day agreed that, from the perspective of the separation of government powers, the task of adjudicating money

claims against the government was one that the courts should perform."). As James Madison described it, "injuries committed on aliens as well as citizens, ought to be carried in the first instance at least, before the tribunal to which the aggressors are responsible." Letter from James Madison to Peder Blicherolsen (Apr. 23, 1802), 3 The Papers of James Madison: Secretary of State Series 152 (D.B. Mattern et al. eds., 1995); see also Pfander & Hunt, 85 N.Y.U. L. Rev. at 1925.

But once the courts determined that there was a violation of a right and ordered damages against the responsible officer, it was up to Congress to decide whether to shield the officer from liability. Congress did not shy away from this role. Between 1789 and 1860, Congress evaluated 57 petitions of officers held responsible by the courts. Pfander & Hunt, 85 N.Y.U. L. Rev. at 1904. It granted 36 of these 57 petitions, with its determinations focusing on whether the officer acted in good faith, whether he followed government instructions, and whether there was any malicious motive involved. *Id*. at 1905–1906.

If the officer acted outside the scope of his agency and without any other attenuating circumstances, as demonstrated by the case of Joel Burt,[3] no indemnity

[3] Joel Burt served as the collector for one of New York's ports when he arbitrarily refused a shipment of potash from his port to go to another port in New York, on the ground that the collector there would permit the potash to enter Canada and violate the Embargo Act. James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1907 (2010). A New York State court ordered $1,500 in damages

was granted. Pfander & Hunt, 85 N.Y.U. L. Rev. at 1907; see also H.R. Rep. No. 24-255, at 1 (1st Sess. 1836). If Congress found that the officer's duties were performed with "a strict adherence to the letter of his instructions, with a laudable zeal, and with all good faith," H.R. Rep. No. 25-780, at 3 (2d Sess. 1838), like in the case of Nathaniel Mitchell,[4] then Congress indemnified. Pfander & Hunt, 85 N.Y.U. L. Rev. at 1909. By doing so, Congress calibrated the system of incentives for government officials, encouraging fervent pursuit of official duties, while also making sure there was

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against Burt, who petitioned Congress for indemnification. *Id*. The House of Representatives on several occasions denied Burt the indemnity, eventually explaining that "[i]t should not be a policy of the United States to screen their officers from making a just renumeration for losses sustained by her citizens, when the acts of such officers are illegal, unjust, and without palliating circumstances." H.R. Rep. No. 24-255, at 1 (1st Sess. 1836).

[4] Nathaniel Mitchell was the postmaster in Portland, Maine, when he was tasked by his superiors with investigating the case of missing letters containing money. *Merriam* v. *Mitchell*, 13 Me. 439, 444 (1836). Mitchell set up a trap, by putting several test packages in the mail. *Ibid*. Because one of these packages did not reach its destination, Mitchell concluded that his assistant postmaster William Merriam was the culprit and initiated a criminal investigation against Merriam. *Ibid*. The missing package eventually turned up and Mitchell closed the investigation. *Id*. at 446. Merriam sued Mitchell for malicious prosecution and requested damages. *Id*. at 456. When the jury awarded $1,666 to Merriam and the Maine Supreme Court upheld the verdict, Mitchell petitioned Congress for indemnification. His petition was successful. According to a House committee's report, Mitchell simply followed instructions and performed his duties in good faith. H.R. Rep. No. 25-780, at 3 (2d Sess. 1838). The House appropriated $2,392.21 to cover the judgment against him, plus costs and fees. Act for the Relief of Nathaniel Mitchell, ch. 49, 6 Stat. 754 (1839).

an understanding that this fervent pursuit could not veer outside the scope of duties. Cf. *Lee*, 106 U.S. at 220 ("All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.").

In addition to indemnity, Congress provided for a very limited statutory immunity for certain types of officers who acted in good faith. For example, in 1789, Congress passed the Collection Act, which allowed courts to absolve collectors, despite adverse jury verdicts, upon finding reasonable cause for a seizure. Jerry Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 Yale L.J. 1256, 1330 (2006). That same act allowed officers to recover double their costs if the plaintiff lost the suit. *Ibid*. Similarly, in the revenue law of 1799, Congress established a probable cause defense in certain forfeiture cases, so long as the vessel or merchandise was restored to the claimants. *Ibid*.

During the Civil War, Congress adopted legislation immunizing federal officers from liability for "any search, seizure, arrest, or imprisonment" made pursuant to a presidential order. Amanda Tyler, *Suspension as an Emergency Power*, 118 Yale L.J. 600, 640 (2009).

By passing these immunity provisions, Congress—just as in the examples involving indemnity—weighed policy considerations to encourage vigorous pursuit of official duties, discourage rogue behavior, and disincentivize baseless lawsuits. In other words, Congress left remedy questions to the courts, but

ensured that under certain circumstances these remedies did not prove counterproductive.

For at least a century and a half after the founding, the allocation of responsibility between Congress and the courts was simple. Courts did law—analyzing whether the conduct by the government officer was illegal and, if so, ordering damages—and Congress did policy—carefully adjusting incentives that lead to the optimal outcome.

The system advocated for by the government in this case inverts this historical practice, making courts do policy—by weighing impacts and other policy concerns that holding government officials accountable may have—and restricting the power of Congressional lawmaking by applying a presumption against enforcement of statutory prohibitions.

That inversion is inconsistent with American constitutional design and runs against more than a century of legal tradition in this country. Where there is a legal right, it is for the courts to order appropriate relief; it is for Congress to consider the policy implications and determine whether that relief should be mitigated by immunity or indemnification.

II. Damages are essential to constitutional accountability and the rule of law.

As both parties in this case acknowledge, RFRA represents a codification of principles and case law that find root in the Constitution. The government

attempts to use this lineage to discredit the availability of damages, but the history runs the opposite way: damages have played an essential role in constitutional accountability and the rule of law. See *Wheeldin* v. *Wheeler*, 373 U.S. 647, 656–657 (1963) (Brennan, J., dissenting) (collecting cases dating back to 1765). The reason is obvious: without damages, individuals cannot "hold public officials accountable when they exercise power irresponsibly." *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009). "Without some effective sanction, [legal] protections would constitute little more than rhetoric." *Bivens*, 403 U.S. at 415 (Burger, J., dissenting); see also *id*. at 392.

A. This Court and the government have long agreed that damages are appropriate relief for certain constitutional violations.

"Injunctive or declaratory relief is useless to a person who has already been injured." *Butz* v. *Economou*, 438 U.S. 478, 504 (1978). For such a person, "it is damages or nothing." *Davis* v. *Passman*, 442 U.S. 228, 245 (1979) (citing *Bivens*, 403 U.S. at 410 (Harlan, J., concurring)). For that reason, damages are essential to government accountability to the law. *Bivens* is instructive.

In *Bivens*, federal officers violated the Fourth Amendment when they arrested Webster Bivens and searched his apartment without a warrant. 403 U.S. at 389. Notwithstanding the availability of damages

through state tort law, this Court recognized that violation of the Constitution "by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct." *Ibid.*

Though the Justices and parties disputed the appropriateness of a constitutional cause of action, none disputed the appropriateness of damages as relief or the ability of a court to award them.[5] Writing for the Court, Justice Brennan explained: "That damages may be obtained for injuries consequent upon a violation of the [Constitution] by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." 403 U.S. at 395 (citations omitted).

The government—represented by President Nixon's Solicitor General, Erwin Griswold—also acknowledged the appropriateness of damages. 403 U.S. at 390. It agreed that its officials were historically subject to "substantial jury awards of damages" when

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[5] Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. Penn. L. Rev. 509, 543 (2013) ("Consistent with the pre-*Bivens* approach to constitutional remedies * * * all of the Justices in *Bivens*, and all of the litigants, regarded the *Bivens* question as a choice between recognizing a federal right of action for damages directly under the Constitution or leaving the matter of damages for violations of the Constitution by federal officials to the common law. It was common ground in *Bivens* that, in the absence of a federal cause of action, damages would be available on the basis of the common law.").

they acted contrary to the law. Gov't Br. at 10, *Bivens* (No. 301).

> In America, as in England, government officers were subject to the same common-law actions for damages as those applicable to private persons. And the Fourth Amendment insured that when the Amendment's proscriptions had not been followed, the officers would be precluded from justifying an infringement made actionable by *state* common law.

Id. at 10–11 (footnote omitted).

This Court affirmed and extended the existence of a constitutional cause of action in *Davis*, and *Carlson* v. *Green*, 446 U.S. 14 (1980). By that time, it had become "established law" that

> where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. *Bivens* * * * holds that in appropriate circumstances a federal district court may provide relief in damages for the violation of constitutional rights if there are "no special factors counselling hesitation in the absence of affirmative action by Congress."

Davis, 442 U.S. at 245 (citing *Bell* v. *Hood*, 327 U.S. 678, 684 (1946) and *Butz*, 438 U.S. at 504 (internal quotation marks omitted)); see also *Carlson*, 446 U.S. 18 ("[T]he victims of a constitutional violation by a federal agent have a right to recover damages against the

official in federal court despite the absence of any statute conferring such a right.").

According to the government's brief here, in the decade following *Carlson*, "this Court became increasingly cautious about implying * * * damages remedies against federal employees." Gov't Br. 21. But none of the cases the government cites extinguishes the fundamental concepts of *Bell* or *Bivens*. To the contrary, those cases focused not on the relief of damages, but on the appropriateness of a constitutional cause of action. For example, in *Chappell* and *Stanley*, the Court declined to recognize a *Bivens* action arising out of activity incident to military service because Congress has established "a comprehensive internal system of justice to regulate military life." *United States* v. *Stanley*, 483 U.S. 669, 679 (1987) (quoting *Chappell* v. *Wallace*, 462 U.S. 296, 302 (1983)). Similarly, in *Bush* and *Schweiker*, the Court focused on the complex alternative remedial scheme that Congress had created to address the sorts of injuries that the plaintiffs had suffered. *Schweiker* v. *Chilicky*, 487 U.S. 412, 429 (1988); *Bush* v. *Lucas*, 462 U.S. 367, 388 (1983). In each case, in other words, this Court declined to imply a cause of action because Congress had already implemented "carefully calibrated administrative regime[s]." *Wilkie* v. *Robbins*, 551 U.S. 537, 576 (2007) (Ginsburg, J., concurring in part and dissenting in part) (discussing *Bush*, *Chilicky*, *Chappell*, and *Stanley*).

Not one of these cases suggested that federal officers could violate the law without consequence, let alone that damages would be inappropriate if they did.

> [T]he Court's decisions declining to recognize a *Bivens* action did so in deference to another existing remedial scheme, or in rare cases in favor of an affirmative congressional decision to deny a remedy. They did not reflect a judicial judgment that there should be no remedy at all, nor a judicial determination that the Constitution established a default rule of no damages remedy.

Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. Penn. L. Rev. 509, 581 (2013) (footnote omitted).

B. Through the Westfall Act, Congress codified the availability of damages as appropriate relief for constitutional violations.

In 1988, Congress exercised its historical policymaking role by immunizing federal officials from state-law torts through enacting the Westfall Act, 28 U.S.C. 2679, which made the Federal Tort Claims Act, 28 U.S.C. 1346, the exclusive avenue to sue federal officials in tort, 28 U.S.C. 2679(a).

Although Congress used the Westfall Act to immunize its officers from certain tort liability, it explicitly confirmed and left in place the availability of constitutional liability, providing that the Westfall Act does not preclude claims "brought for a violation of the Constitution of the United States." 28 U.S.C. 2679(b)(2)(A); see also *Hui* v. *Castaneda*, 559 U.S. 799,

807 (2010) (acknowledging "[t]he Westfall Act's explicit exception for *Bivens* claims").

Accordingly, by the time Congress passed RFRA in 1993, all three branches of government were in agreement that individuals could bring claims for damages against federal officials for constitutional violations. Thus, when Congress included "appropriate relief" for violations of religious exercise under RFRA, 42 U.S.C. 2000bb-1, it, like a number of federal courts,[6] understood that relief to include damages.[7] Thus, in 1993—

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[6] As noted by the Second Circuit below, by the time of RFRA's passage, several Courts of Appeals had held that damages were appropriate relief for free-exercise violations. See *Caldwell* v. *Miller*, 790 F.2d 589, 600 (7th Cir. 1986) ("[T]he district court erred in granting summary judgment against Caldwell on his free-exercise claim, and remand for further proceedings[.]"); *Jihaad* v. *O'Brien*, 645 F.2d 556, 558 n.1 (6th Cir. 1981); see also *Paton* v. *La Prade*, 524 F.2d 862, 870 (3d Cir. 1975) (holding that *Bivens* claims are broadly available for First Amendment violations); *Scott* v. *Rosenberg*, 702 F.2d 1263, 1271 (9th Cir. 1983) (assuming, without deciding, that the plaintiff could recover damages if his free-exercise rights had been violated). And at least one district court held the same before this Court decided *Employment Division* v. *Smith*, 494 U.S. 872 (1990). *You Vang Yang* v. *Sturner*, 728 F. Supp. 845, 852 (D.R.I. 1990), opinion withdrawn, 750 F. Supp. 558 (D.R.I. 1990) ("It is with deep regret that I have determined that the *Employment Division* case mandates that I recall my prior opinion.").

[7] As of 2009—more than a decade after RFRA was enacted—the government did not dispute that an injured person could bring a constitutional claim for damages where his free-exercise rights were violated. See *Ashcroft* v. *Iqbal*, 556 U.S. 662, 687 (2009) (Souter, J., dissenting) ("This case is here on the uncontested assumption that *Bivens* * * * allows personal liability based on a federal officer's violation of an individual's rights under the First and Fifth Amendments."); *id.* at 675 ("Petitioners do not press

just as it was in 1893 and 1793—damages were considered appropriate relief for constitutional violations.[8]

C. The government seeks to undermine the historical importance of damages by urging this Court to engraft its recent criticisms of *Bivens* onto a statute passed decades earlier.

Notwithstanding the clear history and broad acceptance of damages as relief for constitutional violations, the government attempts to retroactively smuggle this Court's recent criticism of *Bivens* into Congress's enactment of RFRA years earlier. See Gov't Br. *passim* (citing *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017)), 24 (citing *Reichle* v. *Howards*, 566 U.S. 658 (2012);

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this argument, however, so we assume, without deciding, that respondent's First Amendment claim is actionable under *Bivens*."). The government's argument in this case is novel by comparison.

[8] This historical conception is also embodied in the broad language Congress chose. While the parties' analysis focuses almost exclusively on "appropriate," the term "relief" holds the key. The common legal meaning of "relief" emphasizes monetary payment. Only as a third alternative does it encompass equitable mechanisms, which are more commonly referred to as "remedies," not relief. See, *e.g.*, *Black's Law Dictionary* (Del. 9th ed. 2009) (defining "relief," first, as "[a] payment made"; second, as "[a]id or assistance * * * esp., financial aid"; and third, as "redress or benefit, esp. equitable in nature (such as an injunction or specific performance), that a party asks of a court.—Also termed *remedy*"). Thus, while the parties correctly agree that "appropriate relief" includes equitable remedies, the very definition of "relief" more strongly suggests monetary damages. And the history leading up to RFRA clearly indicates that both are appropriate to ensure the free exercise of religion in the United States.

Ashcroft v. Iqbal, 556 U.S. 662 (2009); *Correctional Servs. Corp* v. *Malesko*, 534 U.S. 61 (2001)). Whatever the current state of the *Bivens* cause of action, it can have no impact on the Congressional understanding of "appropriate relief" that went into a statute enacted in 1993. The appropriateness of damages for constitutional violations was settled and widely known at the time Congress enacted RFRA, before, and after. Compare, *e.g.*, *Bell*, 327 U.S. at 684 ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be allowed to adjust their remedies so as to grant the necessary relief."), with *Minneci* v. *Pollard*, 565 U.S. 118, 123 (2012) (quoting *Bivens*, 403 U.S. at 395) ("[H]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.").

III. This Court should resist the government's request to interpret "appropriate relief" as a call for judicial policymaking.

Relying on *Ziglar* v. *Abbasi*, the government argues that the inclusion of damages as "appropriate relief" violates the separation of powers. Gov't Br. 15. As explained above, nothing could be further from the truth. But *Ziglar* should, nevertheless, give this Court pause when considering the government's parade of horribles: "When an issue involves a host of considerations that must be weighed and appraised, it should be committed to those who write the laws rather than those who interpret them." 137 S. Ct. 1843, 1857 (2017).

That is precisely the type of issue presented on certiorari here.

Congress has spoken. "Appropriate relief" includes damages. And any holding that money damages should not be included under RFRA relies on inappropriate policy considerations that belong to Congress.

A. Congress's retention of damages as "appropriate relief" upholds the constitutional roles of the judicial and legislative branches.

The government asserts that imposing damages under RFRA against federal officers "implicates sensitive separation-of-powers considerations." Gov't Br. 26. Under the government's view, permitting damages amounts to a legislative "inva[sion upon] the rights of the Executive Branch" because it might expose federal officers to personal liability for burdening a person's religious exercise in violation of federal law. Gov't Br. 26–28. The government therefore asks this Court to read a special immunity into RFRA.

These sorts of policy decisions about statutory causes of action are precisely the kind of judgments that the Constitution empowers Congress to make. As this Court recently reminded the bench and bar, "Congress . . . is both qualified and constitutionally entitled to weigh the costs and benefits of different approaches and make the necessary policy judgment." *Azar* v. *Allina Health Serv.*, 139 S. Ct. 1804, 1816 (2019).

Through RFRA, Congress made the policy judgment that "governments should not substantially burden religious exercise without compelling justification." 42 U.S.C. 2000bb(a)(3). In furtherance of that policy, Congress created a statutory cause of action, 42 U.S.C. 2000bb(b)(2), for "appropriate relief." 42 U.S.C. 2000bb-1(c), -2(1). In crafting this expansive remedial right, "Congress recognize[d] that the creation of private actions is a legislative function" that it alone may choose to exercise. *Thompson* v. *Thompson*, 484 U.S. 174, 191–192 (1988) (Scalia, J., concurring) (citation and internal quotation marks omitted).

The role of the judiciary, conversely, is limited to "interpret[ing] the statute Congress has passed." *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). "Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence' dictates." *Lexmark Intern., Inc.* v. *Static Control Comps., Inc.*, 572 U.S. 118, 128 (2014). This Court has long recognized that "federal courts may use any available remedy to make good the wrong done." *Bell*, 327 U.S. at 684 (citations omitted). That has consistently included damages. See §§ I, II, *supra*.

Far from offering a solution to a separation-of-powers issue, the government is asking this Court to create one. The government does not dispute that Congress has the power to make federal officers individually liable for violating federal law. Instead, it argues for this Court to apply a new restrictive canon of

construction that would constrain Congress and require a specific incantation before damages may be awarded. But there is no "'magic words' requirement" for Congress to express its intent. *I.N.S.* v. *St. Cyr*, 533 U.S. 289, 327 (2001) (Scalia, J., dissenting). And by asking this Court to create such a rule, the government is asking this Court to restrict Congress's constitutional power for policy reasons.

B. Even if this Court's constitutional role encompassed the policymaking urged by the government, the government's preferred policy is empirically unsound.

Even were this Court prepared to invade the role of Congress by restricting RFRA for policy considerations, the reasons expressed by the government fail. The government argues that permitting damages against federal officers under RFRA would impose litigation burdens on both federal officers and the government itself, Gov't Br. 30–35, and that it would impair the government's ability to enforce the law. Neither is correct.

1. Including damages as "appropriate relief" will not increase the burdens of litigation on the government or its officers.

As the procedural posture of this case illustrates, federal officers sued for damages do not bear their own litigation costs. Instead, they are almost always

represented by government attorneys. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 915–916 (2014). Thus, individual officers face almost no burden at all, especially compared to the burden faced by civil litigants stuck footing the bill for litigation or criminal defendants incarcerated or on bail while their charges are pending.

There is similarly no reason to expect higher litigation costs will strain federal budgets. As the government concedes, RFRA, at minimum, permits plaintiffs to seek prospective injunctive relief against the federal government and its officers. Gov't Br. 40–41. Therefore, even without the availability of damages, litigants would still be entitled to bring suits under RFRA against individual officers. The government offers no reason why the "burdens of discovery" somehow weigh more heavily in cases for personal damages, which it argues RFRA forbids, than in cases for injunctive relief, which it admits RFRA allows. Moreover, claims under RFRA are rarely brought in isolation. As in this case, litigants frequently bring RFRA claims in conjunction with others. There is little reason to believe that Respondents' interpretation of RFRA would produce significant additional marginal costs to litigating these extant claims.

2. Including damages will not impair the government's ability to enforce the law.

The government similarly argues that the availability of damages would "deter employees from carrying out their duties" by causing them to "second-guess difficult but necessary decisions." Gov't Br. 33, 30–31.

As a threshold, if Congress has created a cause of action aimed at prohibiting certain government action, presumably deterrence of violative action is its purpose. But even if over-deterrence is a graver concern than under-deterrence, and even if that decision is one for this Court to make, there is no foundation for the government's cries of chilled behavior. "[T]he prospect of civil liability has a deterrent effect in the abstract survey environment but * * * does not have a major impact on field practices." Victor E. Kappeler, *Critical Issues in Police Civil Liability* 7 (4th ed. 2006); see also Arthur H. Garrison, *Law Enforcement Civil Liability Under Federal Law and Attitudes on Civil Liability: A Survey of University, Municipal and State Police Officers*, 18 Police Stud. Int'l Rev. Police Dev. 19, 26 (1995) (finding that 87% of state police officers, 95% of municipal police officers, and 100% of university police officers surveyed did not consider the threat of a lawsuit among their "top ten thoughts" when stopping a vehicle or engaging in a personal interaction); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1811–1812 n.98 (2018) (listing other studies).

This Court's role is not to weigh policy considerations and carve immunities out of Congressional enactments. But even if it were, the bases of the government's policy goals have no empirical support.

CONCLUSION

In keeping with its historical role under the Constitution, this Court should affirm the Second Circuit's decision below and decline the government's invitation to restrict Congress's provision of "appropriate relief" under RFRA on the basis of policy. Damages are "appropriate relief" now, in 1993, and at the founding of this country.

Respectfully submitted,

INSTITUTE FOR JUSTICE
ANYA BIDWELL
Counsel of Record
816 Congress Avenue
Suite 960
Austin, TX 78701
(512) 480-5936
abidwell@ij.org

INSTITUTE FOR JUSTICE
PATRICK JAICOMO
KEITH NEELY
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
pjaicomo@ij.org
kneely@ij.org