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 AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The American-Arab Anti-Discrimination Committee ("ADC") is a nonprofit, grassroots civil rights organization committed to defending the rights of people of Arab descent and promoting their rich cultural heritage. Founded in 1980 by U.S. Senator James Abourezk, ADC is non-sectarian and non-partisan. With members from all fifty states and chapters nationwide, it is the largest Arab-American grassroots organization in the United States. ADC protects Arab-American and immigrant communities against discrimination, racism, and stereotyping, and it vigorously advocates for immigrant and civil rights. ADC uses litigation, advocacy, and Know-Your-Rights education to bring the promise of America to all who seek it, and has worked with tens of thousands of clients seeking to protect their religious freedom, most of them Muslim Arabs.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

For many Muslims living in the United States, the abuse of federal power described by Respondents is as familiar as it is shocking. As described in this brief, over the past several decades federal employees have run roughshod over the religious rights of Muslim Americans in a diverse set of ways, of which we provide a small sample. Fringe federal policies and rogue bad actors continue to target Muslims to this day, leaving many Americans unable to practice their

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[1] ADC certifies that all parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amicus or its counsel made such a monetary contribution.

faith freely without fear of suffering a groundless government sanction—like being placed on the No Fly List for no valid reason.

Injunctive relief cannot fully compensate aggrieved believers nor adequately deter future violations of their religious rights. Damages are essential to make them whole and to turn the page on an era where faith so often meets suspicion.

The government nevertheless argues that the "specter" of damages liability "might deter employees from carrying out their duties to the fullest extent" in its push to flip the interpretive presumption established in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). Pet'rs' Br. 33 (quoting *Atwater v. City of Lago Vista*, 532 U.S. 318, 351 n.22 (2001)). But that practical concern is wildly overstated. As others have explained, *see, e.g.*, Resp'ts' Br. 22, qualified immunity protects government employees unless they violate "clearly established" rights. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Even then, as explained in this brief, federal employees rarely pay damages awards or settlements on account of employer indemnification, according to recent empirical work on the issue.

Thus, the only behavior that will be deterred by the recognition of a damages remedy in this case will be behavior that (a) violates clearly established religious rights and (b) is so shocking that it falls into the very small percentage of cases in which the federal government will not come to the defense of its employee. Such behavior *ought* to be deterred. And, contrary to the government's claim, Pet'rs' Br. 31–32, no "well-intentioned" federal employee might unwittingly engage in it.

The government also expresses concern that damages will strain the financial resources of executive agencies. *See* Pet'rs' Br. 33–34. But the recent empirical research shows such burdens barely exist, because the United States Judgment Fund, and not the agency, almost always covers the costs of an award or settlement. That finding also undercuts the government's argument that "[d]amages awards against individual federal employees in their personal capacities—for which the employees, rather than the federal treasury, are responsible—are not 'against a government' in any real sense," *id.* at 18, because it shows that the Treasury in fact *is* responsible for paying such awards in the vast majority of cases.

Amicus ADC agrees with Respondents' interpretation of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb–2000bb-4. ADC submits this brief to demonstrate that there is misconduct that ought to be deterred and harm that should be compensated, and to assure the Court that a damages remedy can fulfill these objectives without interfering with legitimate attempts by federal employees to carry out their duties.

ARGUMENT

I. DAMAGES ARE NEEDED TO REMEDY EXTREME MISCONDUCT.

While the fact pattern raised below is no doubt "sympathetic," this is not a "hard case" that risks making "bad law." *Cf.* Br. of American Atheists et al. 2. Government misconduct directed at Muslims has a decades-long history—and still occurs frequently enough to warrant judicial concern about the adequacy of remedies. The very fact that the

problem persists today demonstrates that injunctive relief will not suffice. Communities of faith aggrieved by clearly unlawful actions by federal employees need damages, both to compensate them for violations already suffered and deter future violations through financial accountability.

A. Many Muslim Americans have experienced violations of their religious rights similar to those inflicted on Respondents.

Whatever remedies may be available under RFRA, the egregiousness of the government misconduct alleged below is beyond reasonable dispute. Identified on the basis of their faith and not reasonable suspicion, Jameel Algibhah, Naveed Shinwari, and Muhammad Tanvir were approached by the Federal Bureau of Investigation ("FBI"). The FBI agents offered modest incentives to comply with immodest requests for investigative cooperation, which included surveilling Muslim communities thousands of miles away in Pakistan and Afghanistan. Am. Compl. ¶¶ 69–77 (Resp'ts' App. 23a–26a). Met with reasonable resistance, the agents soon shifted from carrots to sticks, and when their demands were not met, they exacted a petty—but painful—revenge. *Id.* ¶¶ 78–88 (Resp'ts' App. 26a–29a). Among other things, the agents placed the Respondents on the No Fly List, prompting missed flights and canceled family visits, along with emotional distress, lost employment, and a bevy of belittling personal indignities. *Id.* ¶ 91 (Resp'ts' App. 30a). Even after meting out this arbitrary and unjust punishment, the government's misconduct continued. The agents trapped the Respondents in a maze of bureaucracy, forcing them

to fight for years to have the groundless prohibition lifted. *Id.* ¶¶ 91–114 (Resp'ts' App. 30a–36a).

Extreme though it might be, the misconduct the Respondents allege is not isolated. It finds its place within a long history of federal law enforcement misdeeds directed at Muslims because they are Muslim—and that make it much more difficult for Americans to practice Islam.

Take, for example, Operation "Vulgar Betrayal" ("OVB"), an FBI counterterrorism probe dating back to the late 1980s. The full scope of the operation is only now coming into view based on the recent release of FBI records that reveal a sprawling, decades-long surveillance operation targeting Arab-American Muslims living outside of Chicago in suburban Illinois.[2] From 1989 to 2000, FBI agents tapped phones, tracked residents' everyday movements, and sent undercover officers and informants to attend mosque and infiltrate spiritual organizations. Notwithstanding the intensity of the surveillance and the many years over which it occurred, OVB failed to yield any arrests, let alone successful prosecutions. For no discernible security gain, the operation chilled the religious exercise of hundreds of innocent Muslims, who feared attending religious services, connecting with spiritual leaders, and speaking candidly about their faith as a result of the surveillance.[3]

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[2] Steve Bynum & Jerome McDonnell, *The Government Has Been Watching Muslims in Bridgeview for Years*, WBEZ 91.5 Chicago (Oct. 30, 2017), https://www.wbez.org/shows/worldview/the-government-has-been-watching-muslims-in-bridgeview-for-years/0dc248f0-b878-495c-a44f-199efab6c273.

[3] *Id.*; Jackie Spinner, *Filmmaker on FBI Surveillance of Her*

Operation Flex is another example of recent surveillance targeting Muslim Americans.[4] In June 2006, the FBI recruited Craig Monteilh, an ex-felon, to pose undercover as a recent convert to Islam.[5] The FBI paid him to meet as many Muslims as he could in the greater Los Angeles area, and to report back with his observations. Monteilh recorded the audio of his interactions, and fastidiously documented names, addresses, phone numbers, political and religious views, travel plans, and other data on hundreds of Muslims who attended the mosques he visited. Monteilh's tenure as an FBI informant ended abruptly when the same community members he was watching reported him to the FBI after hearing him make troubling statements about "jihad" and violence. After hundreds of hours of surveilling protected religious activity, Operation Flex resulted in zero criminal convictions.[6] It did, however, succeed in burdening Americans' practice of Islam—and fundamentally altered the nature of interactions with faith leaders and fellow congregants in the religious communities

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Neighborhood, Colum. Journalism Rev., (Aug. 16, 2017), https://www.cjr.org/united_states_project/the-feeling-of-being-watched-assia-boundaoui.php; *see also, e.g.*, Nausheen Husain & Morgan Greene, *Filmmaker Sued to Find out Why the FBI was Watching Her Muslim Community*, Chi. Trib., Jan. 30, 2020, https://www.chicagotribune.com/news/breaking/ct-bridgeview-muslims-fbi-surveillance-20200130-eoyicwf4vvhulhhyej6r4nnjeq-story.html.

[4] *See generally Fazaga v. FBI*, 916 F.3d 1202 (9th Cir. 2019).

[5] *This American Life: The Convert*, Chicago Public Radio (Aug. 10, 2012), https://www.thisamericanlife.org/471/the-convert.

[6] Peter Bibring, *You Have the Right to Remain Spied On*, ACLU (August 16, 2012), https://www.aclu.org/blog/national-security/discriminatory-profiling/you-have-right-remain-spied; *This American Life: The Convert*, *supra* note 5.

affected.[7]

Extorted cooperation like that alleged by Respondents has been another lasting feature of the federal government's treatment of Muslims. Consider the predicament that beset I.I., a local religious leader who "met regularly with the FBI as part of the Bureau's 'community outreach'" efforts.[8] I.I.'s conversations with the government had been constructive until one day the agents "started asking him about the political and religious beliefs of other congregants."[9] When the religious leader refused to provide that information, the FBI stated that it would be "a shame" if the Department of Homeland Security ("DHS") "misplaced" his mother-in-law's immigration paperwork.[10] While it is unclear whether the agents followed through, the burdens posed by the threat itself are remarkable.

Even now, nearly two decades after the terrorist attacks of September 11, 2001, pockets of the federal law enforcement community continue to target Muslim Americans unlawfully. One example lies in the abuse of the secondary screening process at U.S. airports, a vetting process that, for Muslims arriving home, is often stressful and invasive, and driven by religious stereotyping rather than individualized facts.

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[7] *See Fazaga*, 916 F.3d at 1245–47.

[8] Faiza Patel, *Domestic Intelligence: Our Rights and Safety*, Brennan Center for Justice, 72 (Nov. 8, 2013), https://www.brennancenter.org/sites/default/files/2019-08/Report_Domestic-Intelligence-%20Our-Rights-Our-Safety_0.pdf.

[9] *Id.*

[10] *Id.* at 72–73.

To illustrate the point, consider the investigative approach adopted in a very recent DHS directive issued in reaction to the January 3, 2020 killing of Iranian General Qasem Soleimani.[11] The directive instructs Customs and Border Patrol ("CBP") officers to conduct "high side vetting" of persons who meet certain criteria, including persons with a connection to a hostile military.[12] To test whether a screened individual shares such a connection, the directive advises officers to determine whether the person identifies as Shi'a, a branch of Islam practiced by hundreds of millions of people. The directive even encourages officers to ask intrusive questions to ascertain the true faith of screened individuals, out of concern that they might "state they are from a different faith to mask their intentions."[13]

Since the directive issued, hundreds of U.S. citizens and lawful permanent residents have been asked invasive questions about their religion and held in airports for long hours without access to counsel or the outside world.[14] One of them is ADC client, S.A., a Shi'a Muslim and American citizen. On January 20, 2020, after landing at J.F.K. airport, S.A. was taken into secondary screening and questioned without

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[11] Patrick Grubb, *Source Provides Directive Telling CBP Officers to Detain Iranian-born Travelers*, Northern Light, Jan. 29, 2020, https://www.thenorthernlight.com/stories/source-provides-directive-telling-cbp-officers-to-detain-iranian-born-travelers, 9315.

[12] *Id.*

[13] Laura Strickler, *CBP Ordered Agents to Question Iranian Americans at the Border*, NBC (Jan. 30, 2020), https://www.nbcnews.com/politics/immigration/memo-shows-cbp-ordered-agents-question-iranian-americans-border-n1126776.

[14] Grubb, *supra* note 11.

access to counsel or even a phone for nearly three hours. The questions asked of S.A. focused almost exclusively on his religion, and not on inquiries that might yield facts of investigative use. For example, S.A. was asked about "the difference between Shi'a and Sunni," why "Shi'a Muslims travel to Iraq so often," and for his "opinion of the Ahmadiyah community," a movement of Islam founded in India in the 1880s. He also was asked explicitly about his opinion of the killing of Soleimani "as a Shi'a person." A disturbing number of other Muslims have reported similar religious questioning at airports across the country since the beginning of the year.[15]

How these questions might possibly aid the screening process is at best unclear. But the consequence for Muslim-American travelers is clear: express your faith and face the repercussions—because your "faith" is probative of your "intentions" against the United States.[16]

In addition to these more systematic measures, Muslim Americans continue to suffer retaliation at the hands of rogue bad actors. Consider the recent experience of ADC client A.F., a lawful permanent resident who fled torture in Syria to settle with his wife and children in the United States. A.F. is grateful to live in a free nation, which is why he voluntarily answered all questions, including many inquiring about his religious beliefs, when U.S. federal law enforcement officers visited his Pittsburgh home

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[15] Tim Stelloh & Rima Abdelkader, *Killing of Iranian General Stokes Fears of Heightened Surveillance in the U.S.*, NBC (Jan. 5, 2020), https://www.nbcnews.com/news/us-news/killing-iranian general-stokes-fears-heightened-surveillance-u-s-n1110736.

[16] Grubb, *supra* note 11.

twice in a 90-day period. Eventually, the FBI and DHS, through the Joint Terrorism Task Force, insisted that A.F. come in for a polygraph. When A.F. asked if he was obligated to take the polygraph, a DHS official responded with a threat: If A.F. refused, he would not receive a waiver he requested to travel to Saudi Arabia on a religious pilgrimage. A.F. did not submit to the polygraph, and within weeks of the refusal, his waiver request was rejected.

B. RFRA damages can compensate victims and deter extreme violations.

These experiences demonstrate that religious discrimination against Muslims has continued for too long—and may be too ingrained to disappear from federal law enforcement efforts overnight. Effective remedies are therefore needed to root misconduct out of the system, and to make victims whole in the interim. Through RFRA, Congress provided people of faith with a legal vehicle for protecting their religious rights against federal burdens like the ones just described. The government acknowledges that RFRA permits "injunctive relief" to be "entered against individual officials." Pet'rs' Br. 16. Yet for RFRA's cause of action to be effective, injunctive relief alone cannot suffice.

First, damages are needed to compensate victims whose rights have been violated. It simply is wrong to assume that because a RFRA violation impacts the exercise of religion, the harms that result are by definition non-compensable. *Cf.* Br. of American Atheists et al. 6–7; *see also* Pet'rs' Br. 6–7. Unjustified religious burdens often cause discrete economic injuries that readily can be compensated in court. In the case of Respondents, for example, "placement on

the [No Fly] List resulted" in lost plane tickets and lost employment income. Resp'ts' Br. 7–8. It takes little imagination to see how a prolonged secondary screening—or retaliatory denial of a travel waiver—might have the same result.

Moreover, while the more extensive losses suffered in these cases may well be intangible, courts commonly award damages to compensate non-economic harms. Humiliation, emotional distress, and reputational injury are routine components of compensatory damages calculations for personal injury victims—and are no less compensable because the person suffering them experienced a violation of her religious rights.

Injunctive relief is inadequate for the additional reason that it offers little deterrence of violations *ex ante*. Federal officials who might merely be required to stop what they are doing have little reason not to engage in misconduct in the first place. *See* Resp'ts' Br. 31 ("[i]n cases like this one, where . . . injunctive relief is unavailing or has been rendered moot, Petitioners' reading would effectively shield violations of RFRA from judicial review"). Damages, on the other hand, can pack a powerful deterrent effect. Knowing that they might be found personally financially liable for their extreme misconduct, federal officials otherwise inclined to single out Muslims might decide to adhere to constitutional requirements instead.

II. THE COMMON PRACTICE OF GOVERNMENT INDEMNIFICATION UNDERCUTS THE GOVERNMENT'S ARGUMENTS REGARDING DISRUPTION AND OVER-DETERRENCE.

The government argues that interpreting RFRA to permit individual monetary damages could go beyond deterring serious violations, however, and would raise "sensitive separation-of-powers concerns" by "disrupt[ing] . . . Executive Branch operations" and "chilling" federal officials in the performance of their duties. Pet'rs' Br. 30–31. A critical piece of this argument is that "federal officials whose decisions or conduct allegedly burden the exercise of a person's religious beliefs," even "well-intentioned" ones, will fear "the potential for disruptive litigation followed by a possibly devastating damages award." *Id.* at 31–32. This "minefield of liability," "difficult to predict or avoid," would undermine the Executive Branch, including in areas of "core Article II authority," or so the argument goes. *Id.* at 32.[17]

ADC agrees with the general maxim that it would be harmful if the threat of personal liability created an over-deterrent effect—that is, if it caused well-

[17] *Amici* in support of the government or neither party argue similarly. *See* Br. of Freedom from Religion Foundation and American Humanist Association 23 (so interpreting RFRA "will stifle countless legitimate exercises of government authority at the expense of those the laws are meant to protect"); Br. of American Atheists et al. 11–14 (officials "expose[d] . . . to personal, monetary damages awards erasing their savings, retirement accounts, and even their home will seek to avoid" determining whether to grant religious exemptions to neutral laws and err on the side of granting unwarranted exemptions").

intentioned officials to hesitate when doing their jobs. But that concern is unfounded.

That is because longstanding Department of Justice regulations expressly permit government representation of employees in individual-capacity suits, as well as payment of an adverse judgment, when it is "in the interest of the United States." 28 C.F.R. §§ 50.15(a)–(c); *see also* U.S. Attorneys' Manual (Civil) § 4-5.412, Constitutional Torts—Representation Process.[18] And indemnification[19] is not only a theoretical possibility under Department regulation—it is a practical *certainty* in the real world. Recent empirical research on individual damages awards in *Bivens* cases demonstrates that even in the small subset of cases in which plaintiffs secure judgments or settlements against federal officials—*i.e.*, those claims not already barred by qualified immunity or other legal deficiencies—officials "*almost never* contribute any personal funds." James E. Pfander, Alexandra E. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 Stan. L. Rev. (forthcoming 2020) (hereinafter *Myth of Personal Liability*).[20]

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[18] *See* https://www.justice.gov/jm/jm-4-5000-tort-litigation#4-5.412.

[19] We use "indemnification" to mean the government's
(1) defense of an official sued in his individual capacity and
(2) payment of any adverse judgment or settlement.

[20] *See* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3343800.

A. Federal officials rarely contribute to resolving claims for monetary damages against them.

To test common assumptions regarding the costs of *Bivens* lawsuits, Professors Pfander, Reinert, and Schwartz submitted Freedom of Information Act ("FOIA") requests to the Bureau of Prisons ("BOP"), seeking data regarding claims "that resulted in payments to plaintiffs," whether through settlements or judgments. *Id.* at 5. BOP produced information on "108 cases that included *Bivens* claims," and the authors were able to identify 63 more "successful *Bivens* cases brought against BOP officials." *Id.* at 5–6. They focused their analysis on these 171 cases in order to "determine whether individual defendants contributed any personal resources in the course of resolving the claims of misconduct." *Id.* at 6.[21]

Their results are striking: "the data reveal that individual government officials almost never contribute any personal funds to resolve claims arising from allegations that they violated the constitutional rights of incarcerated people." *Id.* Instead, the payments were made by the government.

Of the "171 successful cases" the authors analyzed, there were "only *eight* in which the individual officer or an insurer was required to make a compensating

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[21] The authors of the recent study submitted a brief this Term describing their methodology and results. *See* Brief of Douglas Laycock, James E. Pfander, Alexandra A. Reinert & Joanna C. Schwartz as Amici Curiae Supporting Respondents at 6–16, *Hernández v. Mesa*, No. 17-1678 (filed Aug. 9, 2019) (hereinafter Laycock et al. *Hernández* Br.). *Hernández v. Mesa* presents a question distinct from the question here, however: whether federal courts should recognize a damages claim under *Bivens* in the factual circumstances of that case.

payment to the claimant." *Id.* (emphasis added). And of the "more than $18.9 million paid to plaintiffs in these 171 cases," the employees or their insurers "were required to pay approximately $61,163—0.32% of the total." *Id.* Indeed, only "two BOP employees paid the entirety" of what the plaintiffs received. *Id.* at 20. The federal government thus "effectively held their officers harmless in over 95% of the successful cases brought against them, and paid well over 99% of the compensation received by plaintiffs in these cases." *Id.* at 6.

Importantly, the authors also concluded that, although the government made the vast majority of the payments to successful plaintiffs, "the employing agency, the BOP, was not held financially responsible." *Id.* at 31. Instead, "all available evidence suggests that the settlements were satisfied through the United States Judgment Fund, and that costs of settlements and judgments were not taken from the BOP's budget." *Id.*; *see* 31 U.S.C. § 1304 (appropriating money "to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law").

In short, in the limited areas where *Bivens* claims make individual monetary damages available to plaintiffs, "individual government officials almost never" ultimately pay judgments or settlements, and the individual agencies employing them have been "similarly protected from financial responsibility." *Myth of Personal Liability* 6–7. While the study at issue involved only BOP (in part because two other federal agencies declined to provide information to the authors, *see id.* at 59 n.46), there is "no reason to

believe that BOP is atypical in this regard." Laycock et al. *Hernández* Br. 9–10.

B. These empirical findings confirm that there is nothing "inappropriate" about individual monetary liability under RFRA.

The government relies on assumptions about individual liability's practical consequences to argue that "damages remedies against federal employees" are "inappropriate" and that the Court should require "that Congress use explicit language to authorize personal damages awards" above and beyond RFRA's already-clear text. Pet'rs' Br. 20, 29. It claims that the perceived "chilling effects" on the Executive Branch are so extensive that the Court must *presume* Congress did not authorize damages "absent a clear indication" to the contrary in the statute. *Id.* at 26, 31–32.

Yet the government cites no case applying such a clear-statement rule to RFRA, and doing so here would turn this Court's precedent "on its head," as Respondents explain. Resp'ts' Br. 47–48 (discussing *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) and *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838)). The government primarily relies on *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), arguing that "[t]he Court's stringent test for implying a *Bivens* remedy in new contexts . . . makes clear that a damages remedy against federal employees in their personal capacities is not appropriate here." Pet'rs' Br. 24 (citing *Abbasi*, 137 S. Ct. at 1855–58). But *Abbasi* dealt with the distinct question whether to recognize an implied cause of action under *Bivens* or whether the "decision [was] for the Congress to make."

Abbasi, 137 S. Ct. at 1856–57, 1861; *see also* Resp'ts' Br. 48–49. It did not purport to establish any clear statement rule regarding how to interpret whether Congress had provided for damages, under RFRA or elsewhere.

The government's interpretive canon is not only novel, but unnecessary. The empirical research discussed above casts serious doubt on the government's speculation regarding officials' fear of expansive, unwarranted liability—and demonstrates the government's failure to justify the creation of such a presumption in this case.

As noted above, for a RFRA claim even to proceed past the earliest stages of litigation, a plaintiff must defeat qualified immunity by demonstrating that a government official "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson,* 555 U.S. at 231 (2009) (internal quotation marks omitted). The government admits as much, but argues that officials nonetheless face the possibility of "*erroneous* damages liability" because courts will not apply qualified immunity "with perfect accuracy," and that "the expenses of litigation" are reason enough to conclude that damages are unwarranted. Pet'rs' Br. 33–34.

Neither argument withstands scrutiny in light of indemnification. Regarding the fear of erroneous damages liability, well-intentioned officials have little to fear given policy and practice that make indemnification the norm. Indeed, as the empirical research demonstrates, individual officials are exceedingly unlikely to pay a dime toward even a *successful* plaintiff. Indemnification is not guaranteed, of course—the federal government could

seemingly decline to follow its usual practice if it believes that the individual officer's conduct warrants it. And in such cases—where the officer's conduct not only warrants damages, but also results in the (exceedingly rare) conclusion that indemnification is not "in the interest of the United States," 28 C.F.R. § 50.15(c)(3)—the outcome is undoubtedly just and fair.

The practical result of this indemnification practice is not the chaos feared by the government. It is a well-calibrated—and adjustable—mechanism for compensation and deterrence. Well-intentioned officials need not be unduly concerned regarding their individual responsibility if they run afoul of the law, as they are unlikely to pay. And officials that need the threat of liability to prevent them from violating religious freedom rights will know that they *may* be personally responsible for a judgment or settlement, should the federal government decide not to indemnify them. In the unlikely event that the federal government perceives an overdeterrence problem, Executive Branch officials may adjust the mechanism to cure it. They have latitude to determine when indemnification is "in the interest of the United States," and thus can ensure that individual employees pay damages only when they engaged in misconduct that warrants deterrence.

As for the government's concern over the "expenses of litigation," the indemnification practice described above covers the costs of defense, which do not scale up until after qualified immunity is defeated in any event. Moreover, Respondents have rightly noted that these same concerns "would seemingly apply just as readily to claims for *injunctive* relief under RFRA, which no one argues is unavailable." Resp'ts' Br. in

Opp. 12. They thus do not support a clear-statement rule regarding the availability of another form of relief. The government's insight that the application of qualified immunity is conceptually distinct from "the remedies question" presented here is irrelevant. Pet'rs' Br. 33 (citing *Atwater*, 532 U.S. at 351 n.22). The fact that the "burdens of discovery" apply equally where plaintiffs seek injunctive relief makes it doubly clear that damages under RFRA will not open Pandora's box.

Importantly, the empirical research also shows that the routine practice of indemnification does not shift the "costs of 'defense and indemnification'" to the agencies that employ the officials, either. *Id.* at 30 (quoting *Abbasi*, 137 S. Ct. at 1856). In the sample dataset the researchers studied, for example, the "costs of settlements and judgments were not taken from the BOP's budget," but were instead "satisfied through the United States Judgment Fund." *Myth of Personal Liability* 31. Recognizing RFRA's authorization of money damages against individual officers will not generate the "disruption" the government asserts, either to "well-intentioned" officers and their retirement accounts, or to agencies and the missions they serve. Pet'rs' Br. 30, 32.

Finally, the fact that the vast majority of damages awards against individual officials are paid out of the Judgment Fund also undermines another of the government's statutory arguments. The government argues that "[d]amages awards against individual federal employees in their personal capacities—for which the employees, rather than the federal treasury, are responsible—are not 'against a government' in any real sense." *Id.* at 18 (quoting 42 U.S.C. § 2000bb-1(c)).

Respondents correctly explain how the RFRA-specific definition of "government"—which includes an "official"—compels rejection of the government's argument. *See* Resp'ts' Br. 17–20. But even on the argument's own terms, it is simply not the case that all, most, or even a significant minority of individual federal employees are ultimately "responsible" for judgments or settlements against them. To the contrary, it is the routine practice of the government to ensure that those payments *do* come from the Treasury, as just explained. Therefore, the vast majority of damages issued under RFRA will be "against a government" in the very real sense that the government will pay the damages.

CONCLUSION

The Court should affirm the judgment of the Second Circuit.

Respectfully submitted,

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