

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

BRIEF AND SPECIAL APPENDIX 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

This lawsuit challenges the Federal Bureau of Investigation's ("FBI") unconstitutional abuse of the No Fly List to coerce law-abiding American Muslims into spying on their religious communities. Each of the Plaintiffs-Appellants, Muhammad Tanvir, Jameel Algibhah, and Naveed Shinwari (hereinafter "Plaintiffs"), was either placed on the List and told he could only get off it by serving as a spy on his religious community, or was asked to serve and, when he refused, found himself on the List. Prior to this and other lawsuits, the United States government ("government") refused to confirm or deny that an individual was on the List, and provided nothing even approaching a meaningful process for removal from the List, leaving the watchlisting process ripe for such abuses.

In 2013, Plaintiffs brought suit against high-level federal government officials in their official capacity, challenging the absence of meaningful process to identify whether an individual is on the List or to contest the propriety of having been placed on the List. The suit also brought claims against numerous FBI agents in their individual capacity under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, for abusing the apparently unbounded discretion federal officials have in placing individuals on the List.

Only five days before oral argument on the government's motions to dismiss all of Plaintiffs' claims, the government informed all of the Plaintiffs that they

were no longer on the List, substantiating Plaintiffs' belief that their placement was not based on a concern for aviation safety or any other bona fide or neutral law enforcement criteria. They continued to pursue their damages claims. Judge Ronnie Abrams of the United States District Court for the Southern District of New York ("District Court") dismissed Plaintiffs' RFRA claims against the individual FBI agents, holding that RFRA does not authorize a damages remedy against federal officials. Plaintiffs pursue this appeal to vindicate their rights under RFRA and to ensure that they and future victims of government abuses will have a remedy for violations of their religious freedoms.

JURISDICTION

Plaintiffs assert claims against officers and employees of the United States under 28 U.S.C. § 1331 and RFRA. Jurisdiction over Plaintiffs' appeal is based on 28 U.S.C. § 1291. This appeal is taken from the final judgment in favor of Defendants issued on February 17, 2016, terminating the action below and disposing of all claims. Special Appendix ("SPA") 41. Plaintiffs filed their Notice of Appeal on April 18, 2016. Joint Appendix ("JA") 326.

ISSUE PRESENTED

Whether RFRA permits the recovery of money damages against federal government officials, agents, and employees in their individual capacities for violations of the law's substantive protections of religious belief.

STATEMENT OF THE CASE

Plaintiffs Tanvir, Algibhah, and Shinwari brought this suit to remedy violations of their constitutional and statutory rights by, among others, Defendants-Appellees (hereinafter “Defendants”).¹ Each Plaintiff is either a citizen or a lawful permanent resident of the United States, and each is Muslim. As the government effectively conceded when taking them off the No Fly List days before a hearing in this case, Plaintiffs do not pose, have never posed, and have never been accused of posing a threat to aviation safety or national security. Despite this, two Plaintiffs, Tanvir and Algibhah, found themselves on the No Fly List after refusing requests by FBI agents to spy on their communities, and were then told by Defendants that they could get off the List if they agreed to become informants. The other Plaintiff, Shinwari, was approached by FBI agents named as Defendants in this case shortly after finding himself unable to fly, and these agents told him that he would be removed from the List if he agreed to work as an informant for the FBI. Defendants Francisco Artusa and John Doe 5, who had been pressuring Algibhah to become an informant, told him that his correspondence with his elected representa-

¹ Defendants are FBI special agents FNU Tanzin, Sanya Garcia, John LNU, Francisco Artusa, John C. Harley III, Steven LNU, Michael LNU, Gregg Grossoehmig, John Doe 1, John Doe 2, John Doe 3, John Doe 4, John Doe 5, and John Doe 6, FBI Special Agent in Charge Weysan Dun, and FBI Assistant Special Agent in Charge James C. Langenberg.

tives would be futile because “we’re the only ones who can take you off the list.” JA 88 (Am. Compl. ¶ 131).

Each Plaintiff was denied a boarding pass on at least one occasion, and eventually told by government officials or airline employees that he was on the No Fly List. Plaintiffs suffered tangible as well as intangible harms; some were unable to visit beloved family members who live abroad, while some were unable to pursue job opportunities. To redress this violation of their rights, Plaintiffs filed suit.²

Plaintiffs sought relief on two bases. First, they sought injunctive and declaratory relief against all defendants in their official capacities pursuant to the First and Fifth Amendments of the Constitution, the Administrative Procedure Act, 5 U.S.C. §§ 702, 706, and RFRA. These claims alleged that high-level government officials in the Department of Justice and Department of Homeland Security (“DHS”) failed their constitutional obligation to provide notice and an opportunity to challenge an individual’s placement on the No Fly List, given the attendant liberty deprivations such designations impose. Plaintiffs’ official-capacity claims were stayed by the District Court on June 10, 2015, after the government advised Plaintiffs that, following additional review under “revised procedures” put in place after this litigation commenced, it knew of “no reason” why they would be unable

² One of the plaintiffs below, Awais Sajjad, did not bring a claim under RFRA and, therefore, is not joining this appeal.

to fly in the future. On December 28, 2015, after Plaintiffs determined that, following the government's notice, they were in fact able to fly on commercial air flights, they voluntarily dismissed their official-capacity claims.

Plaintiffs also sought compensatory and punitive damages from Defendants, individual FBI and DHS agents, in their personal capacities. Plaintiffs argued that they were entitled to such monetary relief under the First Amendment and RFRA. Defendants moved to dismiss these claims and, on September 3, 2015, the District Court, per Judge Ronnie Abrams, granted their motion, ruling that money damages against them were not available under either the First Amendment or RFRA. *Tanvir v. Lynch*, 128 F. Supp. 3d 756 (S.D.N.Y. 2015) (SPA 1-36). The clerk entered final judgment on February 17, 2016. SPA 41.

A. The No Fly List

The No Fly List is a watchlist created and maintained by the government's Terrorist Screening Center ("TSC") of people who are prohibited from boarding aircraft for flights that originate from, terminate in, or pass over the United States. JA 68 (Am. Compl. ¶ 44). Since 2009, the List has grown from roughly three thousand names to in excess of eighty thousand. JA 69 (Am. Compl. ¶ 47); Eric

Lichtblau, *After Orlando, Questions Over Effectiveness of Terrorism Watch Lists*, N.Y. TIMES (June 22, 2016).³

The FBI is the principal agency that administers the TSC. JA 67 (Am. Compl. ¶ 40). The TSC, in turn, develops and maintains the Terrorist Screening Database (“TSDB”), the government’s repository of information about individuals who are supposedly known to be or reasonably suspected of being involved in terrorist activity. JA 67 (Am. Compl. ¶ 40). The No Fly List, a subset of the TSDB, is among the watchlists administered by the TSC.⁴ JA 67 (Am. Compl. ¶ 40).

While the TSC maintains and distributes the No Fly List, it does not, on its own, generate the names on the List. Rather, it relies on “nominations” from agencies with investigative functions—primarily, the FBI. JA 68 (Am. Compl. ¶ 41). Although the TSC is expected to review each nomination to ensure that the derogatory information satisfies the No Fly List’s already thin placement criteria, in practice the TSC rarely rejects any of the names that FBI agents nominate to the No Fly

³ Available at http://www.nytimes.com/2016/06/23/us/politics/after-orlando-questions-over-terrorism-watch-lists.html?_r=2.

⁴ The government also utilizes another list, the Selectee List, as a means to subject thousands of individuals to extensive pre-boarding physical screening to ensure they are not a risk to aviation security. Nevertheless, despite this available safety protocol, the government’s use of the No Fly List reflects an overbroad and unnecessarily punitive belief that no degree of pre-boarding screening and inspection would be sufficient to address perceived threats those on the List supposedly pose. JA 68 (Am. Compl. ¶ 45).

List: fewer than one percent of all nominees were *not* placed on the watchlists for which they were nominated. JA 69 (Am. Compl. ¶ 47); JA 178-179. Nor does the Transportation Security Administration (“TSA”) play any role in deciding who should be placed or kept on the No Fly List. The TSA and airline representatives are simply given access to the No Fly List and coordinate with the TSC to screen individual passengers before boarding aircraft. JA 67 (Am. Compl. ¶ 40).

Notwithstanding the onerous burden that placement on the No Fly List imposes on an individual’s ability to travel domestically and abroad, the standard for inclusion on the List is opaque. The relevant statute requires that the individual “be a threat to civil aviation or national security.” 49 U.S.C. § 114(h)(3)(A). The government’s court filings in other cases that have challenged placement on the No Fly List have stated vaguely that an individual must be a “known or suspected terrorist” and there must be some additional “derogatory information” that demonstrates that the individual “pose[s] a threat of committing a terrorist act with respect to an aircraft.” JA 68 (Am. Compl. ¶ 42); JA 210-11; JA 231.

When this lawsuit was brought, procedural safeguards pertaining to the No Fly List were nonexistent. There was no notice of placement, no way to learn the factual basis for placement on the No Fly List, no disclosure of the criteria or evidentiary standards used in determining whether to place an individual on the List,

and no meaningful opportunity to be heard or to challenge that placement.⁵ The government categorically refused to confirm or deny whether any individuals, even United States citizens, were on the No Fly List. Individuals on the List typically only discovered that fact when they were denied boarding passes and prevented from boarding aircraft. JA 70 (Am. Compl. ¶¶ 52-54).

The only program to provide any theoretical redress to individuals erroneously or inappropriately placed on the No Fly List is the DHS Traveler Redress Inquiry Program (“TRIP”).⁶ If the name of the individual seeking redress is on the No Fly List, DHS transfers the TRIP inquiry to the TSC. The TSC then “coordinates with” the agency that originally nominated the individual to the No Fly List, usually the FBI. JA 68, 71 (Am. Compl. ¶¶ 41, 58). At the time this lawsuit was brought,⁷ individuals requesting redress through TRIP received no information about the basis for their placement on the No Fly List, who placed them on the

⁵ There is no formal process for seeking a waiver to allow an individual on the No Fly List to fly. On occasion, United States citizens and lawful permanent residents stranded abroad after a denial of boarding have been granted permission to board a single flight to return to the United States. JA 71 (Am. Compl. ¶ 55).

⁶ Limited review by a Court of Appeals may be available from TRIP determinations. *See* 49 U.S.C. § 46110(a). *But see Arjmand v. U.S. Dep’t of Homeland Sec.*, 745 F.3d 1300, 1302 (9th Cir. 2014) (stating that original jurisdiction over broad constitutional challenges to adequacy of TRIP process lies in district courts).

⁷ A revised TRIP process has been implemented in response to this and other lawsuits. *See infra* pp. 26-27.

List, what the applicable criteria for inclusion or evidentiary standards were, or any detail regarding the agencies' review of their request. Such individuals did not receive any determination of their status, any clear statement about whether they remained on the List, and no opportunity to contest their listing. JA 71-72 (Am. Compl. ¶¶ 58-59). For many of these reasons, a district court found "the absence of any meaningful procedures to afford [listed individuals] the opportunity to contest their placement on the No-Fly List violates [their] rights to procedural due process." *Latif v. Holder*, 28 F. Supp. 3d 1134, 1161 (D. Or. 2014).

B. The FBI's Abuse of No Fly Listing Authority to Pressure Plaintiffs to Become Informants

While the details of each of the three Plaintiffs' experiences with their placement and retention on the No Fly List are different, the broad contours are strikingly similar. Each was born into the Muslim faith abroad, where at least some of their family remains. Each immigrated legally to the United States relatively early in life, and each has flown on commercial aircraft many times without incident. None poses, has ever posed, or has ever been accused of posing a threat to aviation security. *See, e.g.*, JA 74, 82, 84, 92, 98 (Am. Compl. ¶¶ 68, 108, 118, 145, 166).

Nonetheless, each Plaintiff found himself on the No Fly List. Throughout most of the pendency of this case, the government refused to even confirm that

they were on the No Fly List, tell them why they were on the List, or give them a meaningful opportunity to refute the purported bases for that designation. They all were prohibited from flying, sometimes when they were en route to visit loved ones or to start a new job.

The individual agents who are Defendants in this appeal abused their broad, discretionary power to place or maintain individuals on the No Fly List and through those actions violated Plaintiffs' constitutional rights. Each Plaintiff was approached by FBI special agents for the purpose of pressuring them to become sources of general information on their own Muslim communities. The FBI has come to rely increasingly on infiltration and informants in their counterterrorism operations, and considerable pressure exists within the agency to cultivate such resources in American Muslim communities. JA 66, 73 (Am. Compl. ¶¶ 36-37, 64-66). The relentless concerted insistence of the FBI agents who pressed Plaintiffs was not a product of the fact that they themselves, or their friends, associates, or family, were suspected of involvement in crime or terrorism. Indeed, quite the opposite: by all appearances, the agents sought to force Plaintiffs to serve as spies on their general community simply because they were Muslim and their entire religion was under suspicion. JA 74, 85-86, 93, 95-97 (Am. Compl. ¶¶ 70, 120-122, 148, 156-161).

Each Plaintiff answered the agents' specific questions truthfully when he was initially approached, but none wanted to serve as an informant on his Muslim community, in part because to do so violated his religious beliefs. Rather than accepting that refusal, the FBI agents persisted, in some instances threatening individual Plaintiffs with deportation and arrest and in other instances offering financial incentives and assistance with family members' immigration to the United States. JA 75-76, 85, 95, 96-97 (Am. Compl. ¶¶ 74-79, 121, 156, 161). In each case, the agents turned to what they assumed would be the irresistible coercive pressure of placement on the No Fly List—causing each Plaintiff to be placed on the List and then either threatening to keep him on the List for refusing to accede to the FBI's demands, or offering the incentive of being removed from the List in exchange for services as an FBI informant.

The details of the abuse of each Plaintiff through the collective actions of, and steps taken by, particular FBI agents are set forth below.

1. Plaintiff Muhammad Tanvir

Muhammad Tanvir is a lawful permanent resident of the United States and a Muslim. JA 74 (Am. Compl. ¶ 68). Originally from Pakistan, where his parents still reside, Tanvir is married with one child. JA 74 (Am. Compl. ¶ 68). He has never been convicted of a crime or arrested. JA 74 (Am. Compl. ¶ 68). He does

not pose, has never posed, and has never been accused of posing a threat to aviation security. JA 74, 82 (Am. Compl. ¶¶ 68, 108).

Tanvir was first approached by Defendants Tanzin and John Doe 1 in February 2007, when they arrived unannounced at Tanvir's workplace to question him about an old acquaintance.⁸ JA 74 (Am. Compl. ¶ 69). Two days later, Agent Tanzin contacted Tanvir again, by phone, and asked broad and general questions concerning what Tanvir knew about topical discussions within the American Muslim community. JA 74 (Am. Compl. ¶ 70).

Tanvir first experienced trouble traveling in December 2008, when he returned to New York after visiting his wife and family in Pakistan. Tanvir was escorted off his flight by government agents and detained for five hours at the airport. His passport was confiscated. JA 74-75 (Am. Compl. ¶ 71). He was eventually told that he would have to pick up his passport from DHS at the airport several weeks later. JA 74-75 (Am. Compl. ¶ 71).

Shortly before that appointment, Agents Tanzin and Doe 2 arrived unannounced at Tanvir's workplace and asked Tanvir to come with them to the FBI's

⁸ Seventeen of the 25 individual Defendants are identified in the Amended Complaint with a first name unknown ("FNU") or last name unknown ("LNU") or by a "John Doe" pseudonym (collectively, the "John Doe Defendants"). The government identified 14 of the 17 John Doe Defendants. JA 116. Plaintiffs and Defendants stipulated that the names of the John Doe Defendants would not be disclosed until the resolution of Defendants' motions to dismiss. JA 117-18.

offices in Manhattan. JA 75 (Am. Compl. ¶ 73). He complied. JA 75 (Am. Compl. ¶ 74). At the FBI's offices, he was asked to work as a government informant in Pakistan, in exchange for financial and immigration assistance for his family; later, the same two agents asked him to work in Afghanistan. He declined both proposals. JA 75-76 (Am. Compl. ¶¶ 75-78). Agents Tanzin and Doe 2 then threatened him with deportation if he tried to pick up his passport as scheduled. JA 76 (Am. Compl. ¶¶ 77, 79). When he went to pick up his passport, he was told by DHS officials that it had been withheld due to a now-cleared investigation, and Tanvir was given the passport. JA 76-77 (Am. Compl. ¶ 80). Agent Tanzin called the next day and told Tanvir that he had authorized the release of the passport because of Tanvir's cooperation with the FBI. JA 77 (Am. Compl. ¶ 81).

In the months that followed, Agents Tanzin, Doe 1, and Doe 2 repeatedly called Tanvir, dropped in unannounced at his workplace, and threatened to arrest him, seeking to pressure him into becoming an FBI informant on his ethnic and religious community, despite Tanvir's repeated and consistent refusal to do so. JA 77-78 (Am. Compl. ¶¶ 82-87). Tanvir's refusals were made in part because of his sincerely held religious views and his unwillingness to engage with his community in a deceptive manner. JA 77-78 (Am. Compl. ¶ 84).

In July 2009, Tanvir traveled to Pakistan to visit his wife and family and returned to the United States in January 2010. JA 78-79 (Am. Compl. ¶¶ 88-89).

Upon his return, he found work as a long-haul truck driver, a job which required him to drive for long distances and then fly home to New York. JA 79 (Am. Compl. ¶ 89). In October 2010, Tanvir purchased a ticket to travel home from Atlanta. At the Atlanta airport, airline officials told Tanvir that he was not allowed to fly. JA 79 (Am. Compl. ¶ 91). Two unknown FBI agents then approached Tanvir at the airport and told him that he should contact the FBI agents in New York with whom Tanvir had originally spoken. JA 79 (Am. Compl. ¶ 91). He subsequently called Agent Tanzin, who explained that he was no longer assigned to Tanvir's case but that Tanvir would soon be contacted by other FBI agents in New York. JA 79 (Am. Compl. ¶ 92).

Unable to fly, Tanvir took a 24-hour bus ride home to New York. JA 79 (Am. Compl. ¶ 93). He eventually had to give up his job as a truck driver in part because he was unable to fly back to New York from the various destinations on his routes. JA 80 (Am. Compl. ¶ 95). In addition to sustaining economic injuries, Tanvir's placement on the No Fly List also prevented him from seeing his ailing mother in Pakistan—all of which caused him and his family great distress. JA 82 (Am. Compl. ¶ 109).

Two days after Tanvir returned to New York, Agent Sanya Garcia called him. JA 80 (Am. Compl. ¶ 94). Agent Garcia told Tanvir that she could help him have his name removed from the No Fly List if he spoke with her and answered

her questions. Tanvir told her that he had already repeatedly answered the FBI's questions and did not want to speak to the FBI. JA 80 (Am. Compl. ¶ 94).

In the fall of 2011, Tanvir purchased tickets for a November 3, 2011 Pakistan International Airlines flight from New York to Pakistan for himself and his wife, so that they could visit his sick mother. JA 80 (Am. Compl. ¶ 98). However, the day before the flight he received a phone call from Agent Garcia, who told him that he would not be allowed to fly the next day because he had refused to speak with her 13 months earlier, and that he would only be able to fly if he met with her and answered her questions. JA 80 (Am. Compl. ¶¶ 99-100).

Believing that he had to do so to be permitted to fly, Tanvir met Agents Garcia and John LNU. JA 80 (Am. Compl. ¶ 100). They repeated the questions about Tanvir's family, religion, and politics that he had been asked many times before by Agents Tanzin, Doe 1, and Doe 2. JA 81 (Am. Compl. ¶ 101). Agent Garcia told Tanvir that because he answered their questions, she would try to obtain a one-time waiver to allow him to fly to Pakistan, but that he would be required to speak with her again upon his return to the United States. JA 81 (Am. Compl. ¶ 101-02). On the day of the flight, however, Agent Garcia called to tell him that he would not be permitted to fly that day, and her prior offer of a one-time waiver was now contingent on his taking a polygraph examination. JA 81 (Am. Compl. ¶ 104). Tanvir

cancelled his ticket and his wife flew to Pakistan alone. JA 81 (Am. Compl. ¶ 104). Tanvir did not hear from Agent Garcia again.

Tanvir filed a TRIP complaint on September 27, 2011. JA 80 (Am. Compl. ¶ 97). Seven months later he received a response which neither confirmed nor denied that Tanvir was on the No Fly List but stated that “no changes or corrections are warranted at this time.” JA 83 (Am. Compl. ¶ 110). Tanvir filed an appeal of this TRIP determination. JA 83 (Am. Compl. ¶ 112).

In November 2012, Tanvir was again denied boarding for a flight to Pakistan at Kennedy Airport, and afterwards was approached by Agent Janet Ambrisco, who told Tanvir and his counsel that he had to meet with Agent Garcia in order to be removed from the No Fly List. JA 83 (Am. Compl. ¶ 113).

On March 28, 2013, Tanvir received a letter in response to his TRIP appeal. The letter, which did not confirm or deny whether Tanvir was on the No Fly List, stated that the government had “made updates” to its records and that Tanvir’s experience “was most likely caused by a misidentification against a government record or by random selection.” JA 83-84 (Am. Compl. ¶ 114). Notably missing from the TRIP letter was any reference to Tanvir’s multiple coercive interactions with FBI agents. Tanvir purchased another ticket and was permitted to fly to Pakistan on June 27, 2013. JA 84 (Am. Compl. ¶ 115).

2. Plaintiff Jameel Algibhah

Jameel Algibhah is a United States citizen and a Muslim. His wife and their three daughters currently live in his native country of Yemen. JA 84 (Am. Compl. ¶ 118). Algibhah does not pose, has never posed, and has never been accused of posing a threat to aviation safety. JA 84 (Am. Compl. ¶ 118).

Algibhah was first approached by FBI Agents Francisco Artusa and John Doe 4 in December 2009, when they arrived unannounced at Algibhah's uncle's store, where he had previously worked, and asked to speak with him. JA 85 (Am. Compl. ¶ 119). Algibhah came to the store after receiving a call from his father. Agents Artusa and Doe 4 escorted Algibhah to their van, where they questioned him about his Muslim friends and acquaintances, as well as his religious practices and work history. JA 85 (Am. Compl. ¶ 120). After Algibhah answered their questions, Agents Artusa and Doe 4 asked him to work for the FBI as an informant, specifically requesting that Algibhah infiltrate a mosque in Queens, act like an "extremist" in online Islamic forums, and serve as an informant on his religious community in his own Bronx neighborhood. JA 85 (Am. Compl. ¶¶ 120-122). Algibhah declined because doing so violated his sincerely held personal and religious beliefs and would require him to act in a deceptive manner in his community. JA 85-86 (Am. Compl. ¶¶ 121-122). The agents did not take his "no" for an answer, pressing Algibhah to inform on members of his community, and offering him

money and assistance with bringing his family in Yemen to the United States. JA 85-86 (Am. Compl. ¶¶ 121-122). Algibhah again told them that he would not work as an informant for the FBI. JA 85-86 (Am. Compl. ¶¶ 121-122).

Albighah believes that he was placed on the No Fly List shortly after this encounter. JA 86 (Am. Compl. ¶ 124). Prior to these attempts to recruit him, Algibhah was able to visit his family in Yemen at least once a year. JA 91 (Am. Compl. ¶ 143). In May 2010, in his first attempt to fly since meeting with the two agents, Algibhah went to Kennedy Airport to fly to Yemen to visit his wife and daughters, but airline personnel at the check-in counter refused to give him a boarding pass. JA 86-87 (Am. Compl. ¶ 125). He was then surrounded by government officials, who told him that he would not be permitted to fly. JA 86-87 (Am. Compl. ¶ 125).

Algibhah filed a TRIP complaint after this experience, but received no response from DHS. JA 87 (Am. Compl. ¶¶ 126-127). Algibhah purchased another ticket to Yemen for September 19, 2010, but was again denied boarding. JA 87 (Am. Compl. ¶¶ 126-127). On October 28, 2010, DHS sent Algibhah a letter in response to his TRIP complaint stating that “no changes or corrections are warranted at this time.” JA 87 (Am. Compl. ¶ 128). The letter did not provide any information about whether or not Algibhah was on the No Fly List, the reason why restrictions had been placed on his ability to travel, or the coercive interactions he

had with the FBI. JA 87 (Am. Compl. ¶ 128). Algibhah submitted a request for releasable materials to DHS, which would allow him to file an informed appeal, but never heard back from DHS about this request. JA 87 (Am. Compl. ¶¶ 129-130).

Years passed. Frustrated with the lack of response from DHS, Algibhah reached out to Representative Jose Serrano and Senator Charles Schumer, whose offices corresponded with the TSA on Algibhah's behalf in January 2012. JA 87 (Am. Compl. ¶ 130). His elected representatives' efforts did not generate a response from the TSA. In June 2012, Agents Artusa and Doe 5 paid Algibhah an unannounced visit and told him that "Congressmen can't do shit for you; we're the only ones who can take you off the list." JA 88 (Am. Compl. ¶ 131). Agent Artusa told Algibhah that he would have to answer additional questions and, if he cooperated, he would be taken off the No Fly List. JA 88 (Am. Compl. ¶ 131). Believing that he had to answer these questions to be removed from the No Fly List, Algibhah answered Agent Artusa and Doe 5's questions about his family, community, religious practices, and politics. JA 88 (Am. Compl. ¶ 132).

Once they had finished probing Algibhah on those topics, Agents Artusa and Doe 5 renewed the demand that Algibhah work for the FBI as an informant, telling him that they wanted him to go on Islamic websites and "act extremist." JA 88 (Am. Compl. ¶ 133). Algibhah, understanding this to be part of an essential condi-

tion for his removal from the No Fly List, told Agents Artusa and Doe 5 that he needed time to consider whether he could work for them as an informant, and asked to be taken off the No Fly List. JA 88-89 (Am. Compl. ¶ 134). Agent Artusa told Algibhah that he could be removed from the No Fly List in as little as a week. JA 88-89 (Am. Compl. ¶ 134). In a call ten days later, Agent Artusa said that he was working on removing Algibhah from the No Fly List, but that it would take a month or more, and reiterated that only the FBI could remove his name from the List. JA 88-89 (Am. Compl. ¶ 134).

After this recruitment attempt, Algibhah retained counsel, who contacted Agent Artusa later in June 2012. JA 89-90 (Am. Compl. ¶ 136). Agent Artusa confirmed to Algibhah's counsel that he could assist in removing Algibhah's name from the No Fly List, but wanted Algibhah to go on Islamic websites to look for "extremist" discussions, and perhaps undertake more "aggressive information gathering." JA 89-90 (Am. Compl. ¶ 136).

Algibhah's counsel informed Agent Artusa in November 2012 that Algibhah would not speak to the FBI further unless he was removed from the No Fly List and allowed to visit his family in Yemen. JA 90 (Am. Compl. ¶ 138). Agent Artusa said he would look into the possibility, but did not further respond to Algibhah's counsel. JA 90 (Am. Compl. ¶ 138). In May 2013, Agent Artusa called Algibhah directly to ask for a meeting about getting off the No Fly List. JA 90

(Am. Compl. ¶ 139). Algibhah directed Agent Artusa to his counsel; after an initial exchange with counsel, Agent Artusa has not contacted either Algibhah or his counsel. JA 90-91 (Am. Compl. ¶¶ 139-141).⁹

As a result of his placement on the List, Algibhah suffered economic losses and was unable to visit his wife and daughters for many years. JA 91-92 (Am. Compl. ¶ 144).

3. Plaintiff Naveed Shinwari

Naveed Shinwari is a lawful permanent resident of the United States and is a Muslim. His wife resides in his native country of Afghanistan. JA 92 (Am. Compl. ¶ 145). Shinwari has never been arrested or convicted of a crime. JA 92 (Am. Compl. ¶ 145). He does not pose, has never posed, and has never been accused of posing a threat to aviation security. JA 92, 98 (Am. Compl. ¶¶ 145, 166).

On February 26, 2012, Shinwari and his mother were travelling from Kabul, Afghanistan to Omaha, Nebraska, where he was living at the time. JA 92 (Am. Compl. ¶ 146). While in transit through Dubai, United Arab Emirates, they were prevented from boarding their flight to Houston, Texas, and Shinwari was in-

⁹ In October 2015, approximately six weeks after the District Court dismissed Plaintiffs' individual capacity claims, an FBI agent matching Agent Artusa's description appeared at Algibhah's former place of employment and asked his relatives for Algibhah's phone number in Yemen and how long he planned to stay there, and made a comment regarding recent activity on Algibhah's Facebook account.

formed that he would need to contact the United States consulate in Dubai before he could fly. JA 92 (Am. Compl. ¶ 146).

Shinwari and his mother obtained temporary visas to stay in Dubai and checked into a hotel. JA 92-93 (Am. Compl. ¶ 147). Summoned to the United States consulate the next day, Shinwari met with Agents Steven LNU and John C. Harley III, who took him into an interrogation room and questioned him for over three hours, asking whether he had visited any training camps during his trip to Afghanistan and whether he was associated with any “bad guys.” JA 92-93 (Am. Compl. ¶¶ 147-148). They also asked direct questions about the mosque Shinwari attended, his religious activities, and his personal background. JA 93 (Am. Compl. ¶ 148). The agents repeatedly asked Shinwari to take a polygraph test, saying that doing so would help him return home to the United States; Shinwari declined. JA 93 (Am. Compl. ¶ 149).

At the end of their interrogation, Agents Steven LNU and Harley told Shinwari that they would need to speak to “higher-ups” in Washington, D.C. before allowing him to fly. JA 93-94 (Am. Compl. ¶ 150). Two days later, Agent Harley emailed Shinwari stating that he could return to the United States if he purchased a new ticket on a United States-based airline. JA 94 (Am. Compl. ¶ 151). Shinwari did so, and he and his mother flew on American Airlines from Dubai to Dulles Airport in Virginia on March 1, 2012. JA 94 (Am. Compl. ¶ 151).

When they landed, Shinwari was met by FBI Agents Michael LNU and Gregg Grossoehmig, who interrogated Shinwari for two hours, telling him they needed to “verify” everything Shinwari had previously told Agents Steven LNU and Harley in Dubai. JA 94 (Am. Compl. ¶¶ 152-153). Shinwari again answered the agents’ questions truthfully, but was told that he would be visited by FBI agents when he arrived home in Omaha. JA 94 (Am. Compl. ¶¶ 152-153). The agents escorted Shinwari to the gate for the final leg of his trip, permitting him to fly home to Omaha with his mother, arriving six days later than planned. JA 95 (Am. Compl. ¶ 154).

In mid-March 2012, Agents Michael LNU and John Doe 6 appeared at Shinwari’s home. JA 95 (Am. Compl. ¶ 155). They questioned him again about the same topics that had been raised in prior interrogations: Shinwari’s religion and personal background. Shinwari again answered the questions truthfully. During this third interrogation, Agents Michael LNU and John Doe 6 told Shinwari that they knew that he was unemployed and that they were willing to pay him to be an informant on his own religious community for the FBI. JA 95 (Am. Compl. ¶ 156). Shinwari declined based on his personal and religious objections, believing that what he was being asked to do would require him to act in a deceptive manner in his own religious community. JA 95-96 (Am. Compl. ¶¶ 156-157).

Shortly after this conversation, on March 11, 2012, Shinwari attempted to board a flight from Omaha to Orlando, where he had obtained temporary employment. JA 96 (Am. Compl. ¶ 158). He was denied a boarding pass at the airport. JA 96 (Am. Compl. ¶ 158). An airline agent told Shinwari that his ticket could not be processed, and police officers then approached Shinwari at the ticket counter and told him that he was on the No Fly List. JA 96 (Am. Compl. ¶ 158). The officers escorted Shinwari out of the airport. JA 96 (Am. Compl. ¶ 158).

Shinwari's placement on the No Fly List meant that he could not take the job in Orlando, causing him significant financial hardship. It also meant he was not able to visit his wife and family in Afghanistan or his father in Virginia. JA 96 (Am. Compl. ¶ 160). Greatly distressed by learning that he had been placed on the No Fly List, Shinwari emailed Agent Harley on March 12, 2012, asking for help. JA 96-97 (Am. Compl. ¶ 161). Although Harley did not respond, the next day, Agents Michael LNU and Doe 6 returned unannounced to Shinwari's home in Omaha, where they again asked Shinwari to become an FBI informant. JA 96-97 (Am. Compl. ¶ 161). The agents offered Shinwari both financial compensation and other assistance if he agreed to work as an FBI informant, telling Shinwari that his helping the FBI would mean that the FBI could help him. JA 96-97 (Am. Compl. ¶ 161). Shinwari again declined, even though he understood the agents to be offering to remove him from the No Fly List. JA 96-97 (Am. Compl. ¶ 161).

In mid-March 2012, Shinwari and his counsel met with FBI Agents Weysan Dun and James C. Langenberg at the FBI's offices in Omaha. JA 97 (Am. Compl. ¶ 162). The agents offered Shinwari no explanation for his inability to fly and did not confirm or deny that Shinwari was on the No Fly List, much less agree to remove him from the List, but discussed the possibility of giving Shinwari a one-time waiver to fly in case of an emergency. JA 97 (Am. Compl. ¶ 164). Agents Dun and Langenberg asked Shinwari a number of questions, including questions about religious sermons that Shinwari watched online. Shinwari answered their questions truthfully. JA 97 (Am. Compl. ¶ 163). On March 18, 2013, Shinwari emailed Agent Langenberg to inquire about obtaining a one-time waiver to fly to Afghanistan. JA 97 (Am. Compl. ¶ 165). Agent Langenberg never replied. JA 97 (Am. Compl. ¶ 165).

Shinwari filed a TRIP complaint on February 26, 2012. JA 98 (Am. Compl. ¶ 167). On June 4, 2013, DHS responded to Shinwari's TRIP complaint, neither confirming nor denying that Shinwari was on the No Fly List, and stating that "no changes or corrections are warranted at this time." JA 98 (Am. Compl. ¶ 167). Shinwari filed a second TRIP complaint on December 9, 2013. JA 98 (Am. Compl. ¶ 168). He received a response on December 24, 2013 stating that the Government had "made updates" to its records, but again neither confirming nor denying that Shinwari was on the No Fly List or containing any reference to the

coercive interactions he had with the FBI. JA 98 (Am. Compl. ¶ 168). In March 2014, Shinwari purchased a round-trip ticket to Connecticut and flew there and back. JA 99 (Am. Compl. ¶ 169).

As a result of his time on the No Fly List, Shinwari was prevented from seeing his wife and family in Afghanistan, lost a job, was caused serious economic and emotional distress, and became reluctant to attend religious services. JA 99 (Am. Compl. ¶¶ 170-171).

C. Revised Procedures and Reconsideration of Plaintiffs' TRIP Requests

Starting in November 2014, in a succession of individual No Fly List¹⁰ cases, the government implemented a new policy under which U.S. persons¹¹ who were denied boarding on a flight to, from, or over the United States and filed a DHS TRIP inquiry would be informed of their placement on the No Fly List and could then request and receive the “specific criteria or criterion under which the person has been included on the list,” and afforded limited additional procedures for challenging the designation. *See* Cross-Motion for Summary Judgment at 9-12,

¹⁰ To Plaintiffs' knowledge, this process has never been codified in the Federal Register or otherwise announced as a rule of general application; instead, it was rolled out case by case as it was applied in individual challenges to No Fly List designations and policies.

¹¹ The notice of revised TRIP procedures did not define “U.S. persons.” *See* Notice of Revised Redress Procedures, *Tanvir v. Lynch*, No. 13-cv-06951-RA, (S.D.N.Y. May 4, 2015), ECF No. 85.

Latif v. Holder, No. 3:10-cv-750-BR (D. Or. May 28, 2015), ECF No. 251. Plaintiffs in this matter were afforded the opportunity to have their DHS TRIP inquiry (or inquiries) reopened and reconsidered under the revised procedures. *See* Notice of Revised Redress Procedures, *Tanvir v. Lynch*, No. 13-cv-06951-RA, (S.D.N.Y. May 4, 2015), ECF No. 85. All availed themselves of this opportunity, and on June 8, 2015, each Plaintiff received a letter stating that “[a]t this time, the U.S. Government knows of no reason you should be unable to fly.” Letter from Robert N. Schwartz to Judge Ronnie Abrams, *Tanvir*, No. 13-cv-06951-RA, ECF No. 92.

SUMMARY OF ARGUMENT

The District Court’s ruling that RFRA does not authorize the recovery of money damages against government employees sued in their individual capacities should be reversed because it disregarded the principle of statutory construction that when Congress creates a statutory remedy, all remedies—including money damages—are presumed to be available absent an express indication to the contrary. In the case of RFRA, Congress authorized courts to provide “appropriate relief” and did not expressly exclude money damages. The legislative history of RFRA and its companion statute, the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), 42 U.S.C. § 2000cc *et seq.*, further supports the conclusion that Congress did not intend to exclude damages from the ambit of “appropriate relief.”

The District Court’s ruling is the only decision to hold that RFRA does not permit the recovery of money damages, contradicting the rulings of several other courts. The District Court ruling also did not address the fact that since RFRA clearly permits individual capacity suits, it necessarily follows that “appropriate relief” encompasses money damages.

STANDARD OF REVIEW

This Court reviews *de novo* a district court decision dismissing a complaint pursuant to Fed. R. Civ. P. 12(b)(1) or 12(b)(6), “construing the complaint in plaintiff’s favor and accepting as true all material factual allegations contained therein.” *Donoghue v. Bulldog Investors Gen. P’ship*, 696 F.3d 170, 173 (2d Cir. 2012).¹² Where the district court’s disposition “presents only a legal issue of statutory interpretation . . . [an appeals court] review[s] *de novo* whether the district court correctly interpreted the statute.” *White v. Shalala*, 7 F.3d 296, 299 (2d Cir. 1993).

ARGUMENT

The express language of RFRA coupled with principles of statutory interpretation compel the conclusion that, by allowing claimants to obtain “appropriate relief” and not explicitly excluding damages from the relief that can be awarded, Congress intended for damages to be available. Every court other than the District Court that has faced this precise issue has adopted the interpretation Plaintiffs urge

¹² The District Court did not specify whether its dismissal was based on Fed. R. Civ. P. 12(b)(1) or 12(b)(6).

here. That interpretation is consistent with Congress’s intent that RFRA and RLUIPA 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). The legislative history of RFRA and its companion statute, RLUIPA, are also consistent with Plaintiffs’ interpretation of the statute. Additionally, because RFRA unambiguously permits individual capacity suits, “appropriate relief” must encompass money damages since, outside exceptional cases, damages are the sole form of relief available against federal officers in individual capacity suits.

POINT I

RFRA’s Text Makes Money Damages Available Against Defendants

RFRA’s allowance of “appropriate relief” includes money damages because there are no express indications in the statute that Congress intended to exclude money damages, and the availability of damages is consistent with RFRA’s purpose.

Congress’s stated purpose in enacting RFRA was both to overturn *Employment Division v. Smith*, 494 U.S. 872 (1990), and to provide relief for aggrieved persons:

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its applica-

tion in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb. RFRA’s judicial relief provision is couched in broad terms:

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

42 U.S.C. § 2000bb-1(c). RFRA’s definitions section 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” 42 U.S.C.

§ 2000bb-2(a). A plain reading of this text in light of applicable judicial presumptions, the weight of case law authority, and the legislative history all strongly suggest that Plaintiffs’ reading of the statute is correct.

A. The *Franklin* Presumption that Damages Are Available Applies to RFRA

RFRA does not define “appropriate relief”; Congress left the term “open-ended and ambiguous about what types of relief it includes.” *Sossamon v. Texas*, 563 U.S. 277, 286 (2011) (interpreting identical phrase under RLUIPA). Under *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), when courts are faced with “the question of what remedies are available under a statute that provides a private right of action,” they must “presume the availability of all appropri-

ate remedies”—including, at least at times, damages—“unless Congress has expressly indicated otherwise.” *Id.* at 66, 76; *see also Carey v. Piphus*, 435 U.S. 247, 255 (1978) (damages available under Section 1983 even though Congress did not “address directly the question of damages”). *See generally Bell v. Hood*, 327 U.S. 678, 684 (1946).

RFRA allows plaintiffs to “obtain appropriate relief against a government,” and contains no “express[] indicat[ion]” that damages are prohibited. 42 U.S.C. § 2000bb-1(c); *Franklin*, 503 U.S. at 66. Thus, “under the presumption articulated in *Franklin*, RFRA authorizes damages when that form of relief is ‘appropriate.’” *Patel v. Bureau of Prisons*, 125 F. Supp. 3d 44, 53 (D.D.C. 2015) (Moss, J.).

Finding RFRA’s plain text “wanting in clarity,” the District Court examined RFRA’s purpose and sparse and unclear legislative history to determine whether damages were available. SPA 27. Yet the *Franklin* presumption is itself designed to deal with any such perceived absence in clarity and directs the opposite result from that reached by the District Court. Because RFRA provided a private right of action and because Congress had not “expressly indicated” in the statute that damages were *not* available, the District Court should have presumed that damages were available, and ended its inquiry.

The District Court distinguished *Franklin* on the ground that the Supreme Court had “interpret[ed] the scope of an *implied* statutory right of action,” whereas

with RFRA, Congress had established an express private cause of action, the meaning of which “must be discerned using the traditional tools of statutory construction.” SPA 33. Judge Abrams’s distinction between implied causes of action at issue in *Franklin* and express remedies at issue here does not find support in the case law. The *Patel* court, for example, applied the *Franklin* presumption to RFRA to hold that “appropriate relief” included damages, since the language “does nothing more than authorize what courts applying *Franklin* presume, and it falls far short of an ‘express [] indicat[ion]’ that damages are prohibited.” *Patel*, 125 F. Supp. 3d at 53 n.1 (alterations in original). *Franklin* itself relied in part on *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838), in which the Court determined that a statute provided for damages when the statute *expressly* provided a right of action but failed to specify available remedies. *Franklin*, 503 U.S. at 67. *Franklin*’s reliance on *Kendall* makes clear that the Court did not intend to limit its holding to implied rights of action.

Patel’s application of the *Franklin* presumption to find that RFRA provides for damages has been cited favorably by other district courts. See *Davilla v. Watts*, No. 2:15-CV-171, 2016 WL 1706172, at *6 & n.5 (S.D. Ga. Apr. 28, 2016) (allowing plaintiff’s RFRA claims for damages to proceed), *report and recommendation adopted*, No. 2:15-CV-171, 2016 WL 3453430 (S.D. Ga. June 17, 2016); *Rezaq v. Fed. Bureau of Prisons*, No. 13-CV-00990-MJR-SCW, 2016 WL 97763, at *9, *10

(S.D. Ill. Jan. 8, 2016) (allowing plaintiff’s RFRA individual-capacity damages suit against prison official to proceed to trial).

The Department of Justice, which would be defending RFRA suits, studied the new statute in 1994 and, applying the *Franklin* presumption, also found that RFRA likely made money damages available in personal capacity suits. In a formal memorandum, the Office of Legal Counsel (“OLC”) concluded that “[b]ecause RFRA’s reference to ‘appropriate relief’ does not clearly exclude money damages, there is a strong argument that under the *Franklin* standard money damages should be made available to RFRA plaintiffs in suits against non-sovereign entities.” Walter Dellinger, Availability of Money Damages Under the Religious Freedom Restoration Act, 18 Op. O.L.C. 180, 182-83 (1994) (available on Westlaw).

Several courts of appeals have applied the *Franklin* presumption to express private rights of action—further contradicting Judge Abrams’s ruling that *Franklin* does not apply in such cases. *See, e.g., Francisco v. Susano*, 525 F. App’x 828, 833 (10th Cir. 2013) (applying *Franklin* presumption to conclude that “damages” under Trafficking Victims Protection Act (“TVPA”) included punitive damages and compensatory damages beyond promised wages); *Ditullio v. Boehm*, 662 F.3d 1091, 1098 (9th Cir. 2011) (finding punitive damages available under TVPA and noting that “[w]e follow the ‘general rule’ that we should award ‘any appropriate relief in a cognizable cause of action brought pursuant to a federal statute’” (quot-

ing *Franklin*, 503 U.S. 60, 71 (1992)); *Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1191 (1st Cir. 1994) (applying *Franklin* presumption to hold that “all appropriate relief” under section 11 of Occupational Safety and Health Act (“OSHA”) encompassed monetary damages).

Reich is instructive because the First Circuit addressed head-on the argument that *Franklin* was cabined to implied rights of action, which the District Court relied on to reject *Franklin*’s application. In holding that “‘all appropriate relief’ under section 11(c) includes ‘monetary damages’ as specifically held in *Franklin*,” the *Reich* court noted:

The instant case differs from *Franklin* in that we are here construing *Congress’s* meaning when, in creating an express cause of action for the Secretary of Labor to institute on behalf of an aggrieved employee, it licensed courts to “order all appropriate relief.” In *Franklin*, “all appropriate remedies” were the Court’s words, not Congress’s. Nonetheless, the parallel is unmistakable. It is hard to believe that the Supreme Court—having presumed that an implied private right of action included “all appropriate remedies” or “any appropriate relief,” and having construed remedies so described to include “monetary damages” and “any of the procedures or actions normally available . . . according to the exigencies of the particular case,” would construe less generously Congress’s similar phrase, “all appropriate relief.”

26 F.3d at 1191 (quoting *Franklin*, 503 U.S. at 68). The First Circuit’s rationale applies with equal force to RFRA. Section 11 of OSHA, like RFRA, provides for an express right of action, but specifies the ambiguous remedy of “all appropriate

relief.” The only distinctions between the statutes are OSHA’s use of the word “all” and its inclusion of two examples of appropriate remedies. Those minor differences are immaterial here. First, the absence of examples of “appropriate relief” in RFRA strengthens the case for applying the *Franklin* presumption because Congress did not indicate that the “appropriate relief” should be limited to certain types of remedies. Second, with respect to the inclusion of “all” in OSHA, the court in *Reich* did not place special emphasis on that term in interpreting the statutory language, but instead applied the *Franklin* presumption to rule that Congress had not indicated that any remedies were excluded from the ambit of OSHA’s remedies. *See id.* at 1191-93. The omission of “all” from RFRA hardly qualifies as the “clear direction” by Congress necessary to overcome the *Franklin* presumption. *See id.* at 1191.

The Tenth Circuit’s ruling in *Francisco* is also instructive here. The TVPA, 18 U.S.C. § 1595, expressly provides for “damages and reasonable attorneys’ fees” as a civil remedy for trafficking victims. In *Francisco*, the district court had held that “damages” under the TVPA did not include punitive damages or compensatory damages beyond promised wages. 525 F. App’x at 830. Reversing that ruling, the Tenth Circuit held that the remedy Congress expressly specified—“damages”—was ambiguous and that the *Franklin* presumption therefore applied. *See id.* at 833. Given this ambiguity, the *Francisco* court ruled that punitive and

compensatory damages were available under the TVPA because “the onus is on negation, not affirmation: traditional remedies are available ‘*absent clear direction to the contrary* by Congress.’” *Id.* (emphasis added) (quoting *Franklin*, 503 U.S. at 70-71). RFRA’s provision for “appropriate relief” is even more open-ended than the TVPA’s provision for “damages,” so the argument for applying the *Franklin* presumption to RFRA is even stronger.

The District Court did not explain why the phrase “appropriate relief” was clear enough as to provide for equitable relief, but too ambiguous with respect to damages. In light of general remedies principles—which provide that damages are the “ordinary remedy” and equitable relief is the exception, *see Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 395 (1971)—the presumption should be the reverse. *See also Franklin*, 503 U.S. at 76 (“Under the ordinary convention, the proper inquiry would be whether monetary damages provided an adequate remedy, and if not, whether equitable relief would be appropriate.”).

B. The Availability of Damages Is Consistent with the Purpose of RFRA

Even if the *Franklin* presumption did not apply here, Plaintiffs’ reading of the statute is fully consistent with Congress’s intent in drafting RFRA. “The purpose and history of the statute elucidate the meaning of [an] ambiguous phrase.” *United States v. Tohono O’Odham Nation*, 563 U.S. 307, 324 (2011) (Sotomayor,

J., concurring); *see also King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) (“A fair reading of legislation demands a fair understanding of the legislative plan.”). Congress enacted RFRA and RLUIPA 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 court in *Jama v. United States Immigration and Naturalization Service*, 343 F. Supp. 2d 338 (D.N.J. 2004), for example, did not apply the *Franklin* presumption to RFRA but still reached the same conclusion as *Patel*, reasoning that “Congress enacted RFRA because it wanted to re-invigorate protection of free exercise rights after the Supreme Court in *Smith* diluted the standard used to evaluate claimed violations of those rights.”¹³ *Id.* at 374; *see also Lepp v. Gonzales*, No. C-05-0566 VRW, 2005 WL 1867723, at *8 (N.D. Cal. Aug. 2, 2005) (ruling that “RFRA ‘allow[s] for individual capacity suits for money damages’ against federal officers” (quoting *Jama*, 343 F. Supp. 2d at 374)), *aff’d sub nom. Harris v. Mukasey*, 265 F. App’x 461 (9th Cir. 2008).

¹³ *Patel* addressed the conclusion in *Jama* that the *Franklin* presumption was inapplicable to RFRA. *See Jama*, 343 F. Supp. 2d at 375-76. *Patel* found that *Jama*’s “reading of *Franklin* is too narrow.” *Patel*, 125 F. Supp. 3d at 53 n.1.

The District Court ruled that Congress enacted RFRA to restore the pre-*Smith* compelling interest test by which Free Exercise claims were adjudicated, but did not intend to expand the scope of remedies available where an individual's religious freedom is abridged. SPA 30. The District Court found that "a *Bivens* action would have provided the only potential path for an individual seeking personal capacity damages from a federal official for violation of the Free Exercise Clause at the time of RFRA's enactment," and noted that "the Supreme Court has never recognized a *Bivens* remedy for violations of the Free Exercise Clause." SPA 30-31.

Yet the District Court put forth an incomplete picture of the legal landscape at the time Congress enacted RFRA, and did not credit the contemporaneous availability of damages in Free Exercise cases brought against federal and state officials. As the *Jama* court observed, it is "unlikely that Congress would *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." *Jama*, 343 F. Supp. 2d at 374-75.

When Congress drafted RFRA, for instance, it intended for it to apply to both federal *and* state governments and officials. *See City of Boerne v. Flores*, 521 U.S. 507, 516 (1997) (noting that RFRA, at the time, applied to any "State, or . . . subdivision of a State" (citing 42 U.S.C. § 2000bb-2(1))). The natural model for

relief against state officials was the Civil Rights Act of 1871, 42 U.S.C. § 1983, and it was clear at the time that damages could be obtained under Section 1983 against state officials for violations of Free Exercise rights. *See, e.g.*, SPA 32 n.21; *Soc’y of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1209, 1218 (5th Cir. 1991); *Hunafa v. Murphy*, 907 F.2d 46, 48-49 (7th Cir. 1990). It was also well-established that Section 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.” *See, e.g., Kletschka v. Driver*, 411 F.2d 436, 442, 448-49 (2d Cir. 1969). Only in *Boerne* was RFRA’s applicability confined to federal government actions, *see* 521 U.S. at 535-36, and Congress did not revisit the relief provisions of the statute after *Boerne*.

When Congress intends to exclude damages from the remedies available to statutory claimants, it does so clearly. *See* 5 U.S.C. § 702 (providing that, under APA, “relief other than money damages” is available against federal agency to remedy “legal wrong”);¹⁴ 42 U.S.C. § 6395(e)(1) (providing cause of action for “appropriate relief,” but specifying that “[n]othing in this subsection shall author-

¹⁴ The APA expressly excludes “money damages” from the “relief” available against the United States, suggesting that Congress understands the term normally to encompass monetary relief even when the defendant otherwise enjoys sovereign immunity. *See* 5 U.S.C. § 702; *Bowen v. Massachusetts*, 487 U.S. 879, 891-92 (1988) (noting that § 702 waives the United States’ sovereign immunity to suit).

ize any person to recover damages”); 15 U.S.C. § 797(b)(5) (similar). On other occasions, Congress has deemed it necessary to specify that “relief” *includes* injunctive and other equitable relief. *See* 16 U.S.C. § 973i(e) (authorizing Attorney General to “commence a civil action for appropriate relief, including permanent or temporary injunction”); *see also* 52 U.S.C. § 30109(a)(6)(A)-(B); 8 U.S.C. § 1324a(f)(2); 12 U.S.C. § 1715z-4a(b); 15 U.S.C. § 6309(a). If the term “relief” already connotes equitable relief—and *only* equitable relief—additional explication would be redundant.

The District Court’s reading of RFRA would categorically deny monetary relief to plaintiffs who prevail on the merits of their RFRA claims. As such, numerous plaintiffs would be denied any redress in those instances 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 otherwise unlawful conduct from judicial review.

Although Plaintiffs’ reading of the statute would make individuals the only class of defendants subject to damages suits under RFRA, that is not an anomalous result. Because Congress did not expressly waive sovereign immunity, damages are not an “appropriate” remedy against the government itself or federal officials sued in their official capacity. But because Congress did not expressly prohibit suits for damages, they are an “appropriate” remedy against individual-capacity

defendants. That is why *Patel* ruled that “a reading [of] RFRA that allows damages claims against officials in their individual capacities but not against the federal government itself is not at all self-contradictory.” *Patel*, 125 F. Supp. 3d at 54.

Damages are “appropriate” 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 vindicate their statutory rights. 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.

POINT II

Legislative History Supports the Conclusion that RFRA Allows for Money Damages

RFRA’s text is clear as to its purpose: not just to overturn *Smith* but also to provide a “claim” and allow “appropriate relief” against “official[s] . . . of the United States.” 42 U.S.C. § 2000bb, 2000bb-1(c), 2000bb-2(a). The legislative history of RFRA itself adds little that is directly relevant to the question of the availability of damages. However, the legislative history of RFRA’s companion statute, RLUIPA (passed in the wake of *Boerne*, the Supreme Court’s 1997 decision excluding the states from RFRA’s ambit) specifically references a private cause of action for damages in the context of RFRA.

The District Court relied extensively on RFRA’s legislative history in reaching the conclusion that Congress did not intend for “appropriate relief” to include damages. As described above, the District Court should not have skipped past *Franklin* to investigate RFRA’s legislative history. *See supra* p. 31. In any event, RFRA’s legislative history does not clearly support the District Court’s view.

To begin, RFRA’s legislative history does not expressly state that money damages are unavailable in individual capacity suits. The legislative history of RFRA’s companion statute, RLUIPA—which shares RFRA’s remedial language and purpose—does, however, provide support for Plaintiffs’ reading of the statute.¹⁵ A House report for a precursor to RLUIPA states that Section 4 of the statute, which provides that a “person may assert a violation of this Act . . . and obtain appropriate relief against a government”—language that mirrors RFRA—creates a private right of action for damages. H.R. REP. NO. 106-219, at 29 (1999). The House report provides in pertinent part:

Section[] 4(a) . . . track[s] RFRA, creating a private cause of action for damages These claims and defenses lie against a government, but the Act does not abrogate the Eleventh Amendment immunity of states. In the case of a violation by a state, the Act must be enforced by suits against state officials and employees.

¹⁵ Before the District Court, Defendants conceded that RFRA and RLUIPA “share the same purpose and language” and “[a]s a result, they should be interpreted similarly.” Mem. Supp. Defs.’ Mot. to Dismiss at 29, *Tanvir*, No. 13-cv-6951, ECF No. 39.

Id. This language makes clear that Congress intended “appropriate relief” to include actions for damages. Legal analysis presented to both the House and Senate committees that ultimately passed RLUIPA confirms this construction: “[a]ppropriate relief includes declaratory judgments, injunctions, and damages” *Hearing on H.R. 1691, The Religious Liberty Protection Act of 1999: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 111 (1999) (statement of Douglas Laycock, University of Texas Law School).

The District Court relied extensively on the following language from RFRA’s legislative history for its conclusion that RFRA does not allow money damages:

To be absolutely clear, the act does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Courts’s [*sic*] free exercise jurisprudence under the compelling governmental interest test prior to *Smith*.

SPA 31-32 (citing S. REP. NO. 103-111, at 12 (1993)). The District Court interpreted this language to assert that since the purpose of RFRA was to restore the Free Exercise Clause jurisprudence before *Smith*, and since the Supreme Court had never recognized a damages remedy under the Free Exercise Clause, Congress did not intend to create a remedy not previously recognized. SPA 31-32.

The District Court's interpretation of this language is off the mark. First, in addition to overturning *Smith*, Congress expressly indicated that it wanted to "provide a claim . . . to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb.

Second, the language cited by the District Court appears in a section titled "No Relevance to the Issue of Abortion," explaining that RFRA would have no impact on abortion rights. S. REP. NO. 103-111, at 12; *see also* H.R. REP. NO. 103-88, at 8 (1993) (including essentially identical language in paragraph on abortion). Against that contextual background, the language merely states that RFRA would not impact available remedies to vindicate abortion rights, and not for the broader interpretation suggested by the District Court.

Third, although the District Court is correct that the Supreme Court has not held that a *Bivens* remedy is available for Free Exercise Clause violations, congressional hearings relating to a previous version of RFRA, H.R. 2797, contain testimony detailing an instance in which courts had ruled that damages were available. *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) (statement of William Yang accompanied by Robert Peck, Legislative Counsel, American Civil Liberties Union) (discussing *You Vang Yang v. Sturner*, 728 F. Supp. 845 (D.R.I.), *withdrawn*, 750 F. Supp. 558 (D.R.I.

1990)). The testimony describes how *Yang* had held that the defendant was liable for damages for conducting an autopsy over the plaintiff's religious objections. *Id.* at 111-12. During the damages portion of that trial, *Smith* was decided, and the court withdrew its prior opinion. *Id.* The court, however, noted that at the time of its original decision, it "believe[d] that [it] was on solid ground in ruling for the [plaintiffs]." *Id.* at 112-13.

Finally, when Congress drafted RFRA, it intended for it to apply to both state and federal governments and officials.¹⁶ The natural model for relief against state officials was 42 U.S.C. § 1983, which provides for money damages in actions alleging a violation of the Free Exercise Clause. Tellingly, Congress placed the attorneys' fees provision for RFRA violations not in 28 U.S.C. § 2412(b), the Equal Access to Justice Act, which provides for fees in actions "brought by or against the United States or any agency or any official of the United States acting in his or her official capacity," but rather in 42 U.S.C. § 1988(b), which provides for attorneys' fees under a number of the Civil Rights Acts, including Section 1983.

¹⁶ *See supra* pp. 38-39.

POINT III

“Appropriate Relief” Against Individual Capacity Defendants Under RFRA Can Only Mean Money Damages

Claimants who establish a RFRA violation are entitled to “appropriate relief” under the statute. The statute plainly allows individual capacity suits, and since injunctive or declaratory relief cannot generally be sought against federal officers in individual capacity suits, for the term “appropriate relief” to carry any meaning at all, money damages must be available against such defendants.

A. RFRA Unambiguously Allows Individual Capacity Suits

The plain meaning of RFRA’s text, its similarity to other statutes permitting individual capacity claims, and the fact that RFRA does not exclude individual capacity suits, all confirm that individual capacity suits are available under RFRA.

A plain reading of the statute confirms that RFRA envisions individual capacity suits. RFRA authorizes individuals to “obtain appropriate relief against a government.” 42 U.S.C. § 2000bb-1(c). RFRA defines “government” as including “a branch, department, agency, instrumentality, and official (*or other person acting under color of law*) of the United States” 42 U.S.C. § 2000bb-2(1) (emphasis added).

The addition of “other person acting under color of law” contemplates that persons “other” than officials may be sued under RFRA. *See Patel*, 125 F. Supp. 3d at 50. It would have been superfluous to include “or other person acting under

color of law” in addition to specifying “official” if only official capacity suits were available. Persons who are not officials can only be sued in their individual capacities—anyone who is not a government official has no “official capacity” in which to be sued. *See* 42 U.S.C. § 2000bb-2(1); *see also Jama*, 343 F. Supp. 2d at 378 (holding that contractor who held detainees in private facilities for INS was suitable individual capacity defendant under RFRA).

The statute’s plain meaning is further confirmed by the similarity of RFRA’s language to 42 U.S.C. § 1983, a statute authorizing “redress” against a “person . . . under color of any statute,” which has long been interpreted to permit an action for damages against state officials (and federal officials, when they act in concert with state officials) in their individual capacities. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991) (holding that Section 1983 permits individual capacity suits for money damages against state officials). The similarity between the two statutes is so striking, in fact, that the Seventh and Ninth Circuits have held that the “judicial interpretation of the phrase ‘acting under color of law,’ as used in 42 U.S.C. § 1983, applies equally in [a] RFRA action.” *Sutton v. Providence St. Joseph Med’l Ctr.*, 192 F.3d 826, 834-35 (9th Cir. 1999); *see also Listecky v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 738 (7th Cir. 2015); *Roman Catholic Diocese of Rockville Centre v. Inc. Vill. of Old Westbury*, No. 09 CV 5195, 2011 WL 666252, at *10 (E.D.N.Y. Feb. 14, 2011) (“RFRA’s ‘acting under color

of law’ phrase has been interpreted in the same way as that phrase is used under Section 1983.”). Because Congress “used the key phrase [in RFRA]—‘acting under color of law’—before in . . . § 1983,” *Sutton*, 192 F.3d at 834, it follows 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. Isr. Disc. Bank*, 199 F.3d 99, 104 (2d Cir. 1999) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 626 (1998)).

Also significant is RFRA’s use of the term “person.” In interpreting identical language in Section 1983, the Supreme Court found that

[O]fficers sued for damages in their official capacity are not “persons” for purposes of the suit because they assume the identity of the government that employs them. By contrast, officers sued in their personal capacity come to court as individuals. A government official in the role of personal-capacity defendant thus fits comfortably within the statutory term “person.”

Hafer, 502 U.S. at 27. Congress’s use of “person” in RFRA, paralleling the use of the term in Section 1983, signals Congress’s unmistakable intent to make federal officials liable in personal capacity suits, just as state officials are liable in their individual capacities under Section 1983 for violating a person’s right to free religious exercise.

RFRA’s companion statute, RLUIPA, uses a similar definition of “government” to authorize individual capacity suits. *See* 42 U.S.C. § 2000cc-5(4) (“The

term ‘government’ means . . . any other person acting under color of state law; and . . . any other person acting under color of Federal law.”). Courts that have considered RLUIPA’s language have ruled that the statute allows individual capacity suits. *See Lovelace v. Lee*, 472 F.3d 174, 194 (4th Cir. 2006) (holding that state prison officials sued only in their individual capacity met definition of “government” under RLUIPA); *Orafan v. Goord*, No. 00 cv 2022, 2003 WL 21972735, at *9 (N.D.N.Y Aug. 11, 2003) (“Clearly the Act contemplates individual liability”).

Finally, Congress knows how to explicitly exclude individual capacity suits. *See, e.g.*, 28 U.S.C. § 1391(e) (“A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity . . . may . . . be brought . . .”). RFRA does not contain any such explicit exclusion of individual capacity suits.

B. Money Damages Are the Predominant Form of Relief Available Against Individual Capacity Defendants

Since RFRA unambiguously allows “appropriate relief” against individual capacity defendants, and damages are the sole form of relief generally available against federal officers in individual capacity suits, then damages must be available against Defendants here.

Outside of the exceptional case, money damages are the sole form of relief available in individual capacity suits against federal officers.¹⁷ Because RFRA unambiguously allows individual capacity suits, it “follows that Congress also intended to permit individual capacity suits *for damages*.” *Patel*, 125 F. Supp. 3d at 53. Plaintiffs are restricted to injunctive and declaratory relief in official capacity suits because in those cases “the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, if the effect of the judgment would be to restrain the Government from acting or compel it to act.” *Id.* (citing *Hatfill v. Gonzales*, 519 F. Supp. 2d 12, 24 (D.D.C. 2007)). “The only significant purpose for an individual-capacity claim, then, would be to bring damages—damages that are unavailable in RFRA actions against the sovereign.” *Id.*

This logic is not limited to RFRA—it applies to other individual capacity suits generally. *See Hatfill*, 519 F. Supp. 2d at 24 (federal officials); *Ameritech Corp. v McCann*, 297 F.3d 582, 586 (7th Cir. 2002) (state officials).¹⁸ RLUIPA,

¹⁷ Plaintiffs have found only one case where claimants were permitted to seek prospective injunctive relief against individual-capacity defendants. *See Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Acad.*, 788 F. Supp. 2d 950 (D. Minn. 2011). The court’s ruling was rooted in allegations that the defendants had engaged in acts “both within and outside the scope of their official duties” as public charter school directors to control organizations that influenced the school’s promotion and endorsement of religion, in violation of the Establishment Clause. *Id.* at 959.

¹⁸ Even under *Ex Parte Young*, 209 U.S. 123 (1908), which permits individuals to seek injunctive relief against state officials, such relief can only be granted

RFRA's companion statute, further confirms this logic. RLUIPA claimants may seek money damages through individual capacity suits under 42 U.S.C. § 2000cc(a)(2)(B), which provides that RLUIPA applies in any case in which "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes."¹⁹ See *El-Badrawi v. United States*, No. 07-cv-1074, 2011 WL 13086946, at *16 (D. Conn. May 16, 2011) (holding that RLUIPA claimant could seek money damages against prison's warden and director of religious services in their individual capacities). The interpretation of "appropriate relief" in RLUIPA to encompass money damages means that the identical language in RFRA should receive the same interpretation.

through official capacity suits. The distinction between official capacity suits and individual capacity suits is not "a mere pleading device" but rather turns on the capacity in which the official is sued, and not "the capacity in which the state official acted at the time of the alleged violation." *Hafer*, 502 U.S. at 25.

¹⁹ Individual capacity suits are, however, unavailable under a separate section of RLUIPA, 42 U.S.C. § 2000cc(a)(2)(A). See *Wood v. Yordy*, 753 F.3d 899, 904 (9th Cir. 2014) (holding that individual capacity defendants cannot be held liable under RLUIPA because they are not the recipients of federal funds); *Washington v. Gonyea*, 731 F.3d 143, 145-46 (2d Cir. 2013) (same).

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: July 29, 2016
New York, New York

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,628 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: July 29, 2016

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC-SDNY
DOCUMENT
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DATE FILED: 09/03/2015

MUHAMMAD TANVIR, JAMEEL
ALGIBHAH, NAVEED SHINWARI, and
AWAIS SAJJAD,

Plaintiffs,

v.

LORETTA E. LYNCH, Attorney General,
JEH C. JOHNSON, Secretary of Homeland
Security, JAMES COMEY, Director, Federal
Bureau of Investigation, CHRISTOPHER M.
PIEHOTA, Director, Terrorist Screening
Center, FNU TANZIN, SANYA GARCIA,
FRANCISCO ARTUSA, JOHN LNU,
MICHAEL RUTOWSKI, WILLIAM
GALE, JOHN C. HARLEY III, STEVEN
LNU, MICHAEL LNU, GREGG
GROSSOEHMIG, WEYSAN DUN,
JAMES C. LANGENBERG, and
JOHN DOES 1-13

Defendants.

No. 13-CV-6951 (RA)

OPINION & ORDER

RONNIE ABRAMS, United States District Judge:

Plaintiffs Muhammad Tanvir, Jameel Algibbah, Naveed Shinwari, and Awais Sajjad bring this suit to remedy alleged violations of their constitutional and statutory rights. Each is either a lawful permanent resident or citizen of the United States, and each is Muslim. They claim that as part of the U.S. Government's efforts to bolster its intelligence gathering in the aftermath of the terrorist attacks of September 11, 2001, they were asked to become informants by agents of the Federal Bureau of Investigation (FBI). When they refused because, among other things, serving as informants would contradict their sincerely held religious beliefs, they say the Government retaliated against them by placing or maintaining their names on its "No Fly List," even though

they posed no threat to aviation security. Since then, each Plaintiff claims to have been denied a boarding pass on at least one occasion, leaving him unable to visit loved ones who live abroad. To redress this alleged violation of their rights, Plaintiffs filed a Complaint against numerous federal officials, including Attorney General Loretta E. Lynch, Secretary of Homeland Security Jeh C. Johnson, FBI Director James B. Comey, and 25 named and unnamed FBI and Homeland Security agents.

Plaintiffs seek relief on two bases. First, they seek injunctive and declaratory relief against all of the defendants in their official capacities. These claims arise under the First and Fifth Amendments of the Constitution, the Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 706, and the Religious Freedom Restoration Act (RFRA), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.* Plaintiffs assert that these constitutional and statutory provisions entitle them to an order from this Court requiring the Government to halt its alleged investigative tactics and to create fair procedures governing who is placed on the No Fly List and how such individuals may contest their inclusion. Second, Plaintiffs also seek compensatory and punitive damages from each of the individual agent defendants in their personal capacities. They argue that they are entitled to such monetary relief under the First Amendment and RFRA.

As explained in further detail below, the official capacity claims were stayed at the request of the parties on June 10, 2015, two days after the Government advised Plaintiffs that it knew of “no reason” why they would be unable to fly in the future. The personal capacity claims, however, remain active. This opinion concerns only those claims and, more specifically, resolves a motion brought by all but two of the individual agents (“Agents”), who seek to dismiss the personal capacity claims against them.¹ The Agents argue, among other things, that the remedy Plaintiffs

¹ Pursuant to the Stipulation and Order filed July 24, 2014, *see* Dkt. 30, Defendants FNU (*i.e.*, first name unknown) Tanzin, John LNU (*i.e.*, last name unknown), Steven LNU, Michael LNU and John Does 1–6 and 9–13 are

seek from them—money damages from each of the agents personally—is unavailable as a matter of law. For the reasons that follow, the Court agrees and will grant the Agents’ motion.

BACKGROUND²

A. Plaintiffs’ Factual Allegations

Plaintiffs claim that they are “among the many innocent people” who have been “swept up” in the years since 9/11 by the U.S. Government’s “secretive watch list dragnet.” ¶ 4. Although they acknowledge that the No Fly List is a critical national security tool meant to ensure that individuals believed to be threats to aviation security are not allowed to board airplanes, ¶¶ 2, 40, Plaintiffs argue that the process for placing individuals on the No Fly List is “shrouded in secrecy and [thus] ripe for abuse,” ¶ 63. Plaintiffs contend their names are on the No Fly List only because they are the victims of abusive—and illegal—investigative tactics. And they say that they were unable to do anything about their unjust inclusion because of the pervasive secrecy surrounding the List.

The No Fly List is a database compiled and maintained by the Terrorist Screening Center (TSC), an agency within the FBI. ¶ 40. Federal agencies may “nominate” individuals for inclusion in the Government’s various terrorist databases, including the No Fly List, if there is a “reasonable suspicion” that they are “known or suspected terrorist[s].” ¶ 41. An individual should only be placed on the No Fly List if there is additional “derogatory information” showing that he “pose[s]

currently proceeding under the pseudonyms specified in the First Amended Complaint, Dkt. 15. John Doe 2 is currently proceeding as John Doe 2/3. This motion is not brought by John Does 7 and 8 because the Government to date has not been able to identify those Defendants and, accordingly, they have not been served. On December 18, 2014, the Court extended Plaintiffs’ time to serve John Does 7 and 8 through 30 days after a decision on this motion. See Dkt. 78.

² The facts as alleged by Plaintiffs are drawn from their Complaint. All citations in this opinion preceded by “¶ ” or “¶¶ ” refer to paragraphs of the Complaint. For purposes of this motion, the Court must accept Plaintiffs’ allegations as true. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

a threat of committing a terrorist act with respect to an aircraft.” ¶ 42. Anyone whose name is on the list is barred from boarding a flight that starts or ends in the United States, or flies over any part of the country. ¶ 44. Beyond this, however, little is known about the No Fly List. ¶ 43. Although they do not have information about its exact size, Plaintiffs assert that the List has grown more than six times over from roughly 3,400 names in 2009 to over 21,000 in 2012. ¶ 47. The TSC itself has found that “many” of these thousands of individuals were placed on the No Fly List even though they did not qualify. ¶ 48. For example, a federal district court in California recently concluded that a Muslim doctoral student at Stanford was placed on the No Fly List because an FBI agent checked the wrong boxes on a nominating form. ¶ 49 (*citing Ibrahim v. Dep’t of Homeland Sec.*, 62 F.Supp.3d 909, 916 (N.D. Cal. 2014)).

Plaintiffs claim that each of the federal agents named in this suit, instead of utilizing the No Fly List based on legitimate information for legitimate purposes, have “exploited the significant burdens imposed by the No Fly List, its opaque nature and ill-defined standards, as well as its lack of procedural safeguards, in an attempt to coerce Plaintiffs into serving as informants within their American Muslim communities and places of worship.” ¶ 8. Plaintiffs further allege that higher-level officials—including the Attorney General, Secretary of Homeland Security, and Director of the FBI—“promulgated, encouraged and tolerated a pattern and practice of aggressively recruiting and deploying informants in American Muslim communities.” ¶ 67.

Although the details of each of the four Plaintiffs’ experiences with the No Fly List are different, they follow the same broad contours. Each man was born into the Islamic faith in a foreign country where at least some of his family members remain. Each legally immigrated to this country and is now lawfully present here, either as a citizen or permanent resident. Each claims he was asked to become an informant for the FBI and to share what he learned by, for

example, traveling abroad to Pakistan or Afghanistan, participating in online Islamic forums, or attending certain mosques. Each declined to do so. Each was placed or kept on the No Fly List and thus was unable to fly for sustained periods over several years, unable to see loved ones. Yet each asserts that he does not—and has never—posed a threat to aviation security. Rather, each maintains that the Agents worked together to add or keep his name on the No Fly List because he refused to serve as an informant for the FBI.

In light of the manner in which the Court resolves this motion, the specific details of each Plaintiff's claims need not be discussed in detail. Some discussion, however, is warranted, and Tanvir's story is illustrative. He is a lawful permanent resident who presently lives in Queens, New York. ¶ 68. His wife, son, and parents remain in Pakistan. *Id.* In February 2007, Tanvir alleges that FBI Special Agents FNU Tanzin and John Doe 1 approached him at the dollar store in the Bronx where he then worked. ¶ 69. He was questioned for roughly 30 minutes about an old acquaintance whom the agents believed had entered the country illegally. *Id.* Nothing else about that interaction appears to have been remarkable. Two days later, however, Tanvir heard again from Agent Tanzin, who asked whether there was anything he “could share” with the FBI concerning the American Muslim community. ¶ 70. Tanvir alleges that he told Tanzin that he knew nothing that would be relevant to law enforcement. *Id.*

Fast-forward more than a year later to July 2008. After returning from a trip in Pakistan to visit his family, Tanvir asserts that he was detained for five hours by federal agents at John F. Kennedy International Airport in New York. ¶ 71. Although he was not interviewed, his passport was confiscated and he was given an appointment to pick it up on January 28, 2009, nearly six months later. *Id.* Two days before that appointment—and almost two years since they had last been in contact—Tanvir heard again from Agent Tanzin, this time joined by FBI Special Agent

John Doe 2/3,³ who visited him at his new workplace. ¶ 73. The agents asked him to accompany them to the FBI's New York field office in Manhattan. *Id.* Tanvir agreed, and once there, he was questioned for about an hour. ¶¶ 74–75. Among other things, he was asked about terrorist training camps near the village in Pakistan where he was raised and whether he had any Taliban training. ¶ 75. Tanvir denied knowledge of or attendance at any such training camps. *Id.*

Toward the end of the hour, Agents Tanzin and John Doe 2/3 told Tanvir that they recognized he was “special,” “honest,” and “hardworking,” and that they wanted him to work as an informant for the FBI. ¶ 76. Specifically, he asserts that they asked him to travel to Pakistan and report on what he learned. *Id.* They offered to facilitate visits to the United States for his family, and to provide financial assistance for his parents in Pakistan to travel to Saudi Arabia for a religious pilgrimage. *Id.* Tanvir reiterated his earlier position: He did not want to work as an informant. ¶ 77. But the agents purportedly persisted, warning him that he would not receive his passport and that he would be deported to Pakistan if he failed to cooperate. *Id.*

Tanvir claims to have pleaded with the agents not to deport him because his family depended on him financially. ¶ 78. He also said that he feared for his safety in Pakistan if he went there as an American informant. *Id.* When the agents suggested he could work in Afghanistan instead, he responded that that too would be dangerous. *Id.* (Although Tanvir also asserts that serving as a government informant would violate the tenets of his Muslim faith, ¶ 84, he does not appear to assert that he said as much to the agents.) At the conclusion of the meeting, the agents advised Tanvir to keep thinking, and cautioned him not to discuss their conversation with anyone. ¶ 78. The next day, Agent Tanzin called Tanvir to ask whether he had changed his mind. ¶ 79.

³ With respect to John Doe 2/3's pseudonym, *see supra* note 1.

Tanvir claims that Agent Tanzin reiterated that he would be deported if he failed to cooperate. *Id.* Tanvir again declined. *Id.*

On January 28, 2009, Tanvir went to JFK Airport to retrieve his passport, as previously instructed. ¶ 80. Department of Homeland Security (DHS) officials advised him that his passport had been withheld for an investigation that had since been completed, and they returned the document to him without incident. *Id.* The next day, however, Agent Tanzin called Tanvir and told him that his passport had been returned to him because he—Agent Tanzin—had instructed DHS officials to release the passport in recognition of the fact that Tanvir was being “cooperative” with the FBI. ¶ 81.

The Complaint alleges that the FBI agents’ attempts to persuade Tanvir to become an informant continued over the next three weeks. He received multiple telephone calls and visits from Agent Tanzin and John Doe 2/3 at his workplace. ¶¶ 82–83.⁴ Eventually, Tanvir stopped answering their calls, and when Agents Tanzin and John Doe 2/3 visited him at his workplace to ask why, he told them that he no longer wished to speak with them. ¶ 86. They then asked him to take a polygraph. ¶ 87. When he refused, they threatened to arrest him, but did not do so once Tanvir said he would hire an attorney if they did. *Id.* Roughly six months later, in July 2009, Tanvir traveled to Pakistan to visit his wife and parents. ¶ 88. While he was abroad, Agents Tanzin and John Doe 2/3 visited his sister at her workplace in Queens and inquired about Tanvir’s travel plans. *Id.* She was uncomfortable talking to the agents. *Id.*

Tanvir returned to the United States in January 2010, at which time he took a job as a long-haul trucker. ¶ 89. His new job involved driving across the country and then taking a return flight to New York. *Id.* In October 2010, while Tanvir was in Atlanta for work, he received word that

⁴ Plaintiffs advise that the Complaint “may” have incorrectly identified John Doe 2/3 as John Doe 1 in these paragraphs of the Complaint. *See* Pls. Mem. at 10 n.6.

his mother was visiting New York from Pakistan. ¶ 91. He booked a flight back to New York, but was advised by an airline agent at the check-in counter in Atlanta that he was not allowed to fly. *Id.* Two unknown FBI agents approached Tanvir at the airport and advised him to contact the agents who had spoken to him in New York. *Id.* They then drove him to a nearby bus station. *Id.* While waiting for a bus to New York, Tanvir called Agent Tanzin, who advised Tanvir that he was no longer assigned to Tanvir. ¶ 92. Agent Tanzin told him, however, that other agents would be contacting him soon and that he should “cooperate.” *Id.* These interactions led Tanvir to believe that Agents Tanzin and John Doe 1–3 placed him on the No Fly List “at some time during or before October 2010 because he refused to become an informant against his community and refused to speak or associate further with the agents.” ¶ 90. His bus trip home to New York took approximately 24 hours. ¶ 93.

Two days after he returned to New York from Atlanta, the Complaint alleges that FBI Special Agent Sanya Garcia contacted Tanvir, telling him that she would assist him in getting off the No Fly List if he met with her and answered her questions. ¶ 94. Tanvir told Garcia that he had already answered the FBI’s questions and declined to meet with her. *Id.* Recognizing that he was still unable to fly, Tanvir eventually quit his job as a truck driver because he could no longer take a flight back to New York after completing his deliveries. ¶ 95. On September 27, 2011, he filed a complaint with the DHS Traveler Redress Inquiry Program (TRIP). ¶ 97. This program provides an administrative mechanism for removing one’s name from the No Fly List. ¶¶ 21, 57–61.

The month after filing his TRIP complaint, Tanvir purchased tickets for a flight to Pakistan in November 2011. ¶ 98. The day before his flight, Agent Garcia called Tanvir and told him he would not be allowed to fly unless he met with her. ¶ 99. Tanvir agreed because he needed to

return to Pakistan to visit his ailing mother. ¶ 100. At that meeting, he was asked the same questions that Agents Tanzin and John Doe 2/3 had asked previously. ¶ 101. He answered them because he wanted to see his mother. *Id.* After the meeting, the agents told him that they would obtain a one-time waiver for him to fly, but that it would take several weeks to process. ¶ 102. Tanvir begged Agent Garcia to let him fly the next day. ¶ 103. She said it might be possible, but she changed her mind the next day. ¶¶ 103–104. When they spoke the next day, Agent Garcia told Tanvir that he would not be able to fly until he submitted to a polygraph. ¶ 104. Tanvir cancelled his flight, obtaining only a partial refund from the airline. *Id.* He also hired a lawyer, whom the agents referred to the FBI’s lawyers, who in turn told Tanvir’s lawyer to contact TRIP. ¶¶ 105, 107. Tanvir again purchased a flight to Pakistan for travel in December 2011 in the hopes of visiting his mother, whose health continued to deteriorate. ¶ 109. He was denied boarding at the airport—the third time he was unable to fly. *Id.*

On April 16, 2012, Tanvir received a response to his TRIP complaint, about six months after having filed it. ¶ 110. The letter did not confirm that he was on the No Fly List, but stated only that “no changes or corrections are warranted at this time.” *Id.* On May 23, 2012, he appealed that determination and asked the Government to provide him with the information on which it had based the determination that he could not be allowed to fly. ¶ 112.

In November 2012, Tanvir purchased another ticket to Pakistan and was again denied boarding at JFK Airport—the fourth time he was unable to fly. ¶ 113. The Complaint alleges that Tanvir and his lawyer, who had accompanied him to the airport, were approached by an FBI agent at the check-in counter, who informed them that Tanvir would not be removed from the No Fly List until he met with Agent Garcia. *Id.*

On March 28, 2013, ten months after he had filed his TRIP appeal—and well over two years after he was first denied boarding in October 2010—Tanvir received a letter from DHS superseding its initial determination of April 16, 2012. ¶ 114. The letter stated, in part, that Tanvir’s experience “was most likely caused by a misidentification against a government record or by random selection,” and that the Government had “made updates” to its records. *Id.* Tanvir decided to try flying again and purchased another ticket. *Id.*

On June 27, 2013, in what was his fifth attempt to fly since being denied boarding in October 2010, Tanvir successfully boarded a flight and flew to Pakistan. ¶ 115. He does not know whether he was able to fly as a result of a one-time waiver provided by the agents or whether he had been removed from the No Fly List. *Id.* Tanvir asserts that his placement on the No Fly List forced him to quit his job as a truck driver, prevented him from visiting his sick mother in Pakistan when he wished to, and resulted in financial losses, including lost income and expenses related to airline tickets. ¶¶ 116–17. He says that he also continues to fear harassment by the FBI, which causes him and his family great distress. ¶ 116.

As noted previously, Algibhah’s, Shinwari’s, and Sajjad’s allegations, including the nature of their interactions with the FBI, largely track those of Tanvir. *See generally* ¶¶ 118–96. As of the time this action was commenced, Algibhah had not flown since the spring of 2009, which was then the last time he saw his wife and daughters, who live in Yemen. ¶ 143. He has attempted to fly home twice since then and was denied boarding each time. *Id.* Algibhah asserts that several of the Agents kept his name on the No Fly List even after they determined he posed no threat to aviation security so they could retaliate against him for his refusal to become an informant. ¶ 135. Shinwari was able to fly domestically in March 2014 after first being denied boarding in March 2012 while returning from Afghanistan, although he believed his name was still on the No Fly List

until he was advised otherwise in June 2015. ¶ 169. He too claims that he was denied the ability to fly because he refused to become an informant. ¶ 159. Sajjad was first denied boarding in September 2012 while attempting to visit his family in Pakistan and, as of the time this motion was briefed, had not attempted to fly again since, believing his name remained on the No Fly List. ¶¶ 173, 196. Sajjad asserts that his name was kept on the No Fly List even after several of the Agents determined he had been wrongfully included as retaliation for his refusal to serve as an informant. ¶ 195.

B. Procedural History

Plaintiffs brought this action on October 1, 2013 and filed their operative Complaint on April 22, 2014. *See* Dkt. 15. On July 28, 2014, two separate motions to dismiss were filed. The first, on behalf of the Government, sought to dismiss all official capacity claims. *See* Dkt. 34.⁵ The second, on behalf of the Agents, sought to dismiss all personal capacity claims. *See* Dkt. 38. After briefing was completed, oral argument was scheduled for June 12, 2015.

On June 1, 2015, the Government moved to stay the official capacity claims. *See* Dkt. 89. As the Government explained, it had revised the redress procedures available through TRIP as a result of the decision in *Latif v. Holder*, 28 F.Supp.3d 1134 (D. Or. 2014), which held various aspects of the TRIP process inadequate under the Fifth Amendment's Due Process Clause and the APA. *See also* *Mohamed v. Holder*, No. 1:11-CV-50 AJT/MSN, 2015 WL 4394958 (E.D. Va. July 16, 2015) (same); Dkt. 85 (notice from Government describing revised TRIP procedures). Plaintiffs elected to avail themselves of these revised procedures. And because Plaintiffs did so, the Government argued a stay of Plaintiffs' official capacity claims was warranted, as those claims,

⁵ In light of the discussion below regarding the distinction between official and personal capacity claims, *see infra* at 12–14, the Court refers to the defendants sued in their official capacity as “the Government.”

which primarily challenge the original TRIP procedures, were or were likely to become moot in light of the revised TRIP procedures.

Plaintiffs initially resisted the Government's request for a stay. *See* Pls. Letter of June 3, 2015, Dkt. 91. But on June 8, 2015—less than a week before oral argument—Plaintiffs each received a letter from DHS advising them that: “At this time the U.S. Government knows of no reason you should be unable to fly. This determination, based on the totality of available information, closes your DHS TRIP inquiry.” *See* Pls. Letter of June 10, 2015, Dkt. 92. In light of that development—apparently indicating that Plaintiffs are not now on the No Fly List—Plaintiffs consented to a stay of their official capacity claims. *Id.* The Court ordered such a stay and administratively terminated the official capacity motion to dismiss. *See* Dkt. 93. Only Plaintiffs' claims against the Agents in their personal capacities remain active at this time.

DISCUSSION

A. Introduction

The difference between official capacity claims, which are not at issue in this motion, and personal capacity (sometimes called “individual” capacity claims), which are, has long been a source of confusion, *see generally Kentucky v. Graham*, 473 U.S. 159, 163–68 (1985), and some background is appropriate given the centrality of those distinctions to the claims made here. The starting point is that “[a]bsent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.” *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). In other words, the Government cannot be sued without its consent. That rule may bar a suit even when an action is commenced against an individual government official instead of a governmental agency “if the decree would operate against the latter,” *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (*per curiam*), as is usually the case when a plaintiff seeks an order in the form of an injunction commanding or

preventing some action. Such a suit is known as an “official” capacity claim because it is effectively a suit against the Government, regardless of the named party.⁶

In 1976, Congress amended the APA to include a formal waiver of the United States’ sovereign immunity from claims “seeking relief other than money damages” against “an agency or an officer or employee thereof ... in an official capacity or under color of legal authority.” 5 U.S.C. § 702; *see also B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 723–25 (2d Cir. 1983) (describing Congress’s intention with the APA amendments to “eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity”) (quotation omitted). As a result, sovereign immunity does not pose a barrier to claims seeking injunctive or declaratory relief against the Government and its officers when they are sued in their official capacities.

Significant for present purposes, however, neither the APA nor any other statute relevant in this context waives the Government’s immunity (or the immunity of its officers sued in their official capacity) from damages claims.⁷ There is no disagreement among the parties on this point. *See* Pls. Mem. at 84; Defs. Reply at 1 n.1. But this is the significance of suits against government officials in their “personal” capacities: Where an official is sued in his or her personal capacity,

⁶ The Supreme Court has explained that the Government is the real party in interest “if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.” *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (quotations omitted). That approach reflects the commonsensical observation that the Government can act only through agents and thus, for example, “when the agents’ actions are restrained, the sovereign itself may, through [the agents], be restrained.” *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949). As a result, where the effect of a judgment would operate against the Government, a suit against a named federal officer “is not a suit against the official [personally] but rather is a suit against the official’s office.” *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71 (1989). Because these suits are really suits against the Government, when officials sued in their official capacity die or leave office, their successors automatically assume their roles in the litigation, as Attorney General Loretta E. Lynch did in this case for former Attorney General Eric J. Holder. *See* Fed. R. Civ. P. 25(d)(1); Dkt. 93 (order substituting Lynch for Holder).

⁷ The United States has, however, waived its immunity from damages in other contexts. *See, e.g.*, the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491 (certain contracts claims); *see also United States v. Mitchell*, 463 U.S. 206, 212–16 (1983) (recounting history of the Federal Government’s waiver of immunity from suits for damages).

sovereign immunity does not apply. Unlike official capacity suits, “[p]ersonal-capacity suits ... seek to impose *individual* liability upon a government officer for actions taken under color of [federal] law.” *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (emphasis added). Because any award of money damages in such a suit (theoretically) comes from the official’s own pocket, there is no concern about sovereign immunity.⁸ The common-law cause of action first recognized in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and 42 U.S.C. § 1983 are two mechanisms that may provide for personal capacity damages actions in the constitutional context against federal and state officers, respectively, while several federal statutes may provide for such damages in other contexts.⁹

Here, Plaintiffs seek injunctive and declaratory relief against Defendants sued in their official capacities and money damages from a subset of Defendants—namely, the Agents—in their personal capacities. *See* Pls. Mem. at 49 n.24. As resolution of the official capacity claims has been left for another day by consent of the parties, this opinion addresses only whether the specific theories by which Plaintiffs seek to recover damages from the Agents in their personal capacities are legally viable. Plaintiffs advance arguments under both *Bivens* and RFRA, a federal statute that provides for “appropriate relief” in certain situations where an individual’s ability to freely exercise his faith has been substantially burdened by the Government or its agents. 42 U.S.C. § 2000bb-1(c). For the reasons that follow, neither of these two arguments ultimately succeeds.¹⁰

⁸ As a practical matter, the Government almost always indemnifies its officials from such suits and provides representation through lawyers from the Department of Justice. *See* 28 C.F.R. § 50.15. Indeed, that is true for the Agents’ representation in this case.

⁹ For examples of such statutes, *see infra* at 32.

¹⁰ The Agents also argue pursuant to Fed. R. Civ. P. 12(b)(2) that the Court lacks personal jurisdiction over multiple Agents. *See* Defs. Mem. at 61–66. After submissions from the parties concerning Plaintiffs’ request for limited jurisdictional discovery in order to oppose that aspect of the Agents’ motion, the Court accepted the Agents’ suggestion to defer consideration of that aspect of their motion to dismiss until the balance of the motion was resolved. *See* 09/16/2014 Tr. 36, Dkt. 69. Given the holdings in this opinion, the personal jurisdiction arguments are now moot.

B. *Bivens* Is Unavailable in This Context

In *Bivens*, the Supreme Court “recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen’s constitutional rights.” *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001). Although initially predicated on the traditional understanding that the existence of a right must imply a remedy, *see Bivens*, 403 U.S. at 397 (*citing Marbury v. Madison*, 1 Cranch 137, 163 (1803)), the Supreme Court has since “rejected the claim that a *Bivens* remedy should be implied simply for want of any other means for challenging a constitutional deprivation in federal court,” *Malesko*, 534 U.S. at 69. Thus, although sometimes described as “the federal analog to suits brought against state officials under [42 U.S.C. § 1983],” *Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006), *Bivens* is far more limited than § 1983 because “a *Bivens* remedy is not available for all who allege injury from a federal officer’s violation of their constitutional rights,” *Turkmen v. Hasty*, 789 F.3d 218, 234 (2d Cir. 2015). Indeed, a *Bivens* action “is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances ... a *Bivens* remedy [is] unjustified.” *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

A federal court asked to imply a *Bivens* remedy in 2015 must approach that task with circumspection. Although the Supreme Court has twice implied *Bivens* actions since *Bivens* itself was decided, *see Davis v. Passman*, 442 U.S. 228 (1979) (employment discrimination in violation of Due Process Clause); *Carlson v. Green*, 446 U.S. 14 (1980) (Eighth Amendment violation by prison officials), in the more than three decades since the last of the *Bivens* trilogy was decided, the Supreme Court has “consistently refused to extend *Bivens* liability to any new context or new category of defendants,” *Malesko*, 534 U.S. at 68; *accord Arar v. Ashcroft*, 585 F.3d 559, 571 (2d

Finally, the Agents have argued that the claims against John Does 1 and 2/3 are time-barred. *See* Defs. Mem. at 66–69. The Court need not reach that argument in light of its conclusion that no relief is available against them.

Cir. 2009) (*en banc*) (“[T]he *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in new contexts.”) (internal quotation marks omitted).

The Supreme Court’s refusal to recognize a new *Bivens* action since 1980 is not for want of opportunity. *See, e.g., Bush v. Lucas*, 462 U.S. 367 (1983) (federal employee’s claim that his federal employer dismissed him in violation of the First Amendment); *Chappell v. Wallace*, 462 U.S. 296 (1983) (claim by military personnel that military superiors violated various constitutional provisions); *United States v. Stanley*, 483 U.S. 669 (1987) (similar); *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (claim by recipients of Social Security disability benefits that benefits had been denied in violation of the Fifth Amendment); *Meyer*, 510 U.S. 471 (former bank employee’s suit against a federal banking agency, claiming that he lost his job due to agency action that violated the Fifth Amendment’s Due Process Clause); *Malesko*, 534 U.S. 61 (prisoner’s Eighth Amendment-based suit against a private corporation that managed a federal prison); *Wilkie*, 551 U.S. 537 (ranch owner’s claim for harassment and intimidation against federal land management officials under Fourth and Fifth Amendments); *Minnecci v. Pollard*, 132 S. Ct. 617 (2012) (prisoner’s Eighth Amendment-based claim against employees of privately-operated federal prison).

Although the Court has on each of these occasions explained its refusal to extend *Bivens* with reasons specific to the particular context, this generation of *Bivens* jurisprudence appears rooted in the more fundamental judgment that “‘Congress is in a far better position than a court to evaluate the impact of a new species of litigation’ against those who act on the public’s behalf.” *Wilkie*, 551 U.S. at 562 (*quoting Bush*, 462 U.S. at 389); *see also* E. Chemerinsky, *Federal Jurisdiction* § 9.1, p. 633 (6th ed. 2011) (“There is no way to understand the law concerning *Bivens* suits except in the context of how the Court’s attitudes toward such claims has changed.”). Indeed,

one Justice has observed that it is “doubtless correct that a broad interpretation of [*Bivens*] rationale *would* logically produce [its] application [in more contexts],” but noted that he was “not inclined (and the Court has not been inclined) to construe *Bivens* broadly.” *Malesko*, 534 U.S. at 75 (Scalia, J., concurring) (emphasis in original). As a consequence, “[w]hatever presumption in favor of a *Bivens*-like remedy may once have existed has long since been abrogated.” *Vance v. Rumsfeld*, 701 F.3d 193, 198 (7th Cir. 2012) (*en banc*).

Against that background, the Second Circuit’s recent decision in *Turkmen*, which was handed down only days after oral argument on this motion, is instructive—and, indeed, dispositive. As in this case, *Turkmen* raised “a difficult and delicate set of legal issues concerning individuals who were caught up in the post–9/11 investigation even though they were unquestionably never involved in terrorist activity.” 789 F.3d at 224. The plaintiffs in *Turkmen* were eight Muslim or Arab non-citizens who were detained by the federal government in the aftermath of 9/11. *Id.* While detained, they were, among other things, allegedly subjected to frequent physical and verbal abuse, denied copies of the Koran for weeks or months after requesting them, denied the Halal food required by their Muslim faith, and mocked by prison officials while they prayed. *Id.* at 227–28. For these alleged injuries, the plaintiffs sought, among other things, a *Bivens* remedy against various government officials under the First, Fourth, and Fifth Amendments. *Id.* at 225.

In light of the Supreme Court’s—and the Second Circuit’s—repeated admonitions against extending *Bivens* to new contexts, *Turkmen* carefully analyzed the context of the claims asserted by the plaintiffs there. The panel majority looked to “both the rights injured and the mechanism of the injury.” *Id.* at 234; *accord Arar*, 585 F.3d at 572 (defining context as “a potentially recurring scenario that has similar legal and factual components”). It explained that the rights injured were those secured by the First Amendment’s Free Exercise Clause, the Fifth Amendment’s Due

Process Clause, and the Fourth Amendment’s prohibition against unreasonable searches, *id.* at 235–37, while the mechanism of injury involved “punitive conditions [of confinement in a federal facility in the custody of federal officials] without sufficient cause,” *id.* at 235. Significant for present purposes, although the panel determined that the combination of rights injured and mechanism of injury “st[ood] firmly within a familiar *Bivens* context” with respect to the *Turkmen* plaintiffs’ Fourth and Fifth Amendment claims, *see id.* at 235, 237 (collecting cases), that was not so with respect to their First Amendment claim. With respect to that claim, “it [was] the right injured—Plaintiffs’ free exercise right—and not the mechanism of injury that place[d] Plaintiffs’ claims in a new *Bivens* context.” *Id.* at 236. As the panel majority explained, “the Supreme Court has ‘not found an implied damages remedy under the Free Exercise Clause’ and has ‘declined to extend *Bivens* to a claim sounding in the First Amendment.’” *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)); *accord id.* at 268 n.3 (Raggi, J., concurring in part and dissenting in part) (“[T]he Supreme Court [has] consistently declined to extend a *Bivens* remedy to a First Amendment claim in *any* context.”) (emphasis in original); *Reichle v. Howards*, 132 S. Ct. 2088, 2093, n.4 (2012) (“We have never held that *Bivens* extends to First Amendment claims.”). Indeed, *Turkmen* leaves no doubt that recognizing a “free exercise claim would require extending *Bivens* to a new context”—“a move [the panel] decline[d] to make absent guidance from the Supreme Court.” 789 F.3d at 237. In so concluding, the panel explicitly reversed the holding of the district court. *See Turkmen v. Ashcroft*, 915 F.Supp.2d 314, 352 (E.D.N.Y. 2013) (“*Bivens* should be extended to afford the plaintiffs a damages remedy if they prove the alleged violation of their free exercise rights.”).

In supplemental briefing, Plaintiffs seek to distinguish *Turkmen* by arguing that its holding is limited to free exercise claims, not the panoply of other rights under the First Amendment. *See*

Pls. Letter of July 14, 2015 at 1–2, Dkt. 97. To that end, Plaintiffs assert that their *Bivens* claim is grounded not merely in the Free Exercise Clause, but in several other First Amendment rights, including “the freedom of speech ... and the closely-intertwined right of free association.” *Id.* at 2.¹¹ Although Plaintiffs are no doubt correct that the *Turkmen* plaintiffs’ First Amendment claim was limited to the Free Exercise Clause, they overlook the fact that *Turkmen* itself is unambiguously predicated on the understanding that the Supreme Court has never recognized a *Bivens* claim in the First Amendment context at all. *See* 789 F.3d at 236 (noting the Supreme Court has “declined to extend *Bivens* to a claim sounding in the First Amendment” (quoting *Iqbal*, 556 U.S. at 675)). That understanding is sufficient to conclude that the relief Plaintiffs seek here requires extending *Bivens* to a new context, whether the right injured is freedom of speech, religion, or association. In other words, while *Turkmen* plainly forecloses a *Bivens* remedy for free exercise claims, the decision at a minimum also reiterates the Supreme Court’s own pronouncements that *any* claim sounding in the First Amendment would require extending *Bivens* to a new context.¹²

¹¹ Although the First Amendment’s text explicitly safeguards the freedom to speak and to worship (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech ...”), the Supreme Court has “long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Whether Plaintiffs’ allegations sufficiently make out a First Amendment retaliation claim—under free exercise, speech, or association theories, *see* ¶¶ 200–01, 203—is an important question that the Court need not, and does not, reach in light of its conclusion that *Bivens* is unavailable in this context and the fact that the Agents have not raised the issue here. Indeed, the Agents do not argue that Plaintiffs fail to state a First Amendment claim because, for example, Plaintiffs’ refusal to cooperate is not protected speech or protected associational activity under the First Amendment, or that the Agents’ alleged conduct could not infringe Plaintiffs’ free exercise rights. Rather, their argument appears to be limited to the claim that “Plaintiffs fail to allege that each Agent defendant was a proximate cause of, or personally involved in, Plaintiffs’ alleged inclusion on the No Fly List,” Defs. Mem. at 39, and that “the alleged First Amendment rights at issue were not clearly established,” *id.* at 51; *see also* Defs. Reply at 34–37. *But see Ayala v. Harden*, No. 1:12-CV-00281-AWI, 2012 WL 4981269, at *2 (E.D. Cal. Oct. 17, 2012) (concluding in summary fashion that “[r]efusal to become an informant is not a protected First Amendment activity”).

¹² Although Plaintiffs cannot be faulted for pointing to a sentence in the Supreme Court’s decision in *Hartman* suggesting the availability of a *Bivens* remedy in the anti-retaliation context, *see* Pls. Mem. at 39–40, the Court has resolved any ambiguity created by *Hartman* in subsequent decisions by at least twice reiterating that it has never recognized a *Bivens* claim in the First Amendment context. *See Iqbal*, 556 U.S. at 675 (“[W]e have declined to extend

Even assuming, however, that the right at issue did not place Plaintiffs' claims in a new context, the mechanism of injury in this case surely does. Although Plaintiffs argue that the FBI agents' use of the No Fly List to retaliate against them merely represents "a new tool [that] does not transform a familiar pattern of misconduct into a novel context for purposes of recognizing a *Bivens* claim," Pls. Mem. at 43, *Turkmen* makes plain that this view is mistaken. A distinct mechanism of injury—such as the extraordinary rendition alleged in *Arar*—can "present[] a new

Bivens to a claim sounding in the First Amendment."); *Reichle*, 132 S. Ct. at 2093 n.4 ("We have never held that *Bivens* extends to First Amendment claims.")

The Supreme Court granted certiorari in *Hartman* to determine whether plaintiffs in retaliatory-prosecution suits bear the burden of showing a lack of probable cause. See 547 U.S. at 255–56. At the time, the D.C. Circuit, from where *Hartman* emerged, had long recognized a *Bivens* action in the First Amendment context, see, e.g., *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977) (*Bivens* available for false arrest of Vietnam War protestors on U.S. Capitol steps), and specifically for retaliatory prosecution, see, e.g., *Haynesworth v. Miller*, 820 F.2d 1245, 1274 (D.C. Cir. 1987). The petitioners in *Hartman* did not seek review—nor did the Supreme Court grant review—on the predicate question of whether *Bivens* was available for First Amendment retaliation. It was against that background that Justice Souter, in an introductory paragraph of his opinion, observed that "[w]hen the vengeful [prosecutor] is [a] federal [officer], he is subject to an action for damages on the authority of *Bivens*," and cited *Bivens* without further analysis. *Id.* at 256.

But in light of *Hartman*'s posture—and the careful consideration that the Supreme Court has given to the availability of *Bivens* in each context where it has recognized *Bivens*' availability—that single sentence simply cannot bear the weight Plaintiffs would put on it. *Bivens*' availability "was not at issue" in *Hartman*, "the point ... was not then fully argued," and the Court "did not canvas the considerations" it invariably does in such cases. *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1368 (2013). As such, *Hartman* is better read as assuming—not deciding—the question of *Bivens*' availability in the First Amendment retaliation context. See, e.g., *Wood v. Moss*, 134 S. Ct. 2056, 2066 (2014) (observing eight years after *Hartman* was decided that "we have several times assumed without deciding that *Bivens* extends to First Amendment claims"). Indeed, *Iqbal* explicitly noted that "[t]he legal issue decided in *Hartman* concerned the elements a plaintiff 'must plead and prove in order to win' a First Amendment retaliation claim." *Iqbal*, 556 U.S. at 673 (quoting *Hartman*, 547 U.S. at 257 n.5). And while the Court has cited *Hartman* on five occasions—including significant discussions in *Iqbal* and *Reichle*—not once has it suggested *Hartman* decided the availability of a *Bivens* remedy for First Amendment retaliation.

Plaintiffs also correctly note that the Second Circuit once described *Hartman* as "reiterat[ing] the general availability of a *Bivens* action to sue federal officials for First Amendment retaliation." See *M.E.S., Inc. v. Snell*, 712 F.3d 666, 675 (2d Cir. 2013). But even assuming that is a fair characterization of *Hartman*, *Snell* distinguished *Hartman* and declined to imply a *Bivens* remedy for alleged First Amendment retaliation, *id.*; no other decision of the Second Circuit has relied on *Snell* or *Hartman* for the proposition that *Bivens* is available for a First Amendment anti-retaliation claim; and the author of the *Snell* opinion was a member of the more recent *Turkmen* panel and agreed with the panel majority that "the Supreme Court [has] consistently declined to extend a *Bivens* remedy to a First Amendment claim in any context," 789 F.3d at 268 n.3 (Raggi, J., concurring in part and dissenting in part) (emphasis in original). As such, *Snell* offers Plaintiffs little support for the proposition that a *Bivens* claim already exists for anti-retaliation claims. The other out-of-circuit cases cited by Plaintiffs overread *Hartman* for the reasons discussed above. See, e.g., *George v. Rehiel*, 738 F.3d 562, 585 n.24 (3d Cir. 2013).

context for *Bivens*-based claims.” *Turkmen*, 789 F.3d at 234.¹³ Here, Plaintiffs cannot point to any case recognizing a *Bivens* remedy for a federal officer’s retaliation against an individual by placing or maintaining that individual’s name on the No Fly List or, more generally, any government watch list. Nor can Plaintiffs point to a case recognizing a *Bivens* action where the mechanism of injury was the imposition of a substantial burden on an individual’s ability to travel. Thus, whether viewed through the lens of the rights injured or the mechanism of injury, Plaintiffs ask this Court to extend *Bivens* to a new context.

Given the current state of *Bivens* jurisprudence, the conclusion that Plaintiffs seek to extend *Bivens* to a new context could end the inquiry. Indeed, in *Turkmen*, the court declined to “extend[] *Bivens* to a new context ... absent guidance from the Supreme Court,” without undertaking any additional analysis of whether *Bivens* might be appropriate in that context. *Id.* at 237; *see also Iqbal*, 556 U.S. at 675 (observing that the Court’s “reluctance [to extend *Bivens* since 1980] might well have disposed of respondent’s First Amendment claim of religious discrimination”). That said, after concluding a given claim involves extending *Bivens* to a new context, a court should generally consider “(a) whether there is an alternative remedial scheme available to the plaintiff, and, even if there is not, (b) whether special factors counsel hesitation in creating a *Bivens* remedy.” *Turkmen*, 789 F.3d at 234 (quotations omitted). The Court will do so here.

¹³ *Turkmen* emphasizes the right at issue and the mechanism of injury in determining whether a claim presents a new context. When confronted with a new *Bivens* context, a court must assess whether an alternative remedial scheme exists before recognizing a *Bivens* remedy. *Turkmen*, 789 F.3d at 234 (citing *Arar*, 585 F.3d. at 572). That inquiry ensures, among other things, that a court does not imply a remedy for an injury when an alternative scheme to remedy that injury already exists. A court need not consider alternative remedial schemes, however, where a claim arises in an existing context, since the determination of whether or not *Bivens* is available in that context—and whether an alternate remedial scheme is available—has already been made. *Id.* at 237 n.17. Taking these two rules together makes clear that a failure to also consider the injury in determining whether a claim presents a new context would short-circuit the *Bivens* analysis because it risks ignoring a remedial scheme addressing *that very injury*. Thus, the upshot of Plaintiffs’ favored approach, which would appear to ignore the particular form of injury as nothing more than a “new tool,” would be the expansion of *Bivens* based solely on the right at issue without regard for remedial schemes that may exist—a result plainly contrary to the Supreme Court’s contemporary *Bivens* jurisprudence.

The existence of a system of administrative and judicial remedies for individuals who have been improperly included on the No Fly List—the precise mechanism of injury in this case—is sufficient to conclude that *Bivens* should not be extended to this context. Specifically, Congress has directed the TSA to “establish a timely and fair process for individuals identified [under the TSA’s passenger prescreening function] to appeal to the [TSA] and correct any erroneous information.” 49 U.S.C. § 44903(j)(2)(G)(i). The TSA is also required to “establish a procedure to enable airline passengers, who are delayed or prohibited from boarding a flight because the advanced passenger prescreening system determined that they might pose a security threat, to appeal such determination and correct information contained in the system.” § 44903(j)(2)(C)(iii)(I). Congress also mandated that “[t]he Secretary of Homeland Security shall establish a timely and fair process for individuals who believe they have been delayed or prohibited from boarding a commercial aircraft because they were wrongly identified as a threat under the regimes utilized by the [TSA],” § 44926(a), and that the Secretary “shall establish” procedures “to implement, coordinate, and execute the process” for redress, § 44926(b)(1). These legislative directives have resulted in the DHS TRIP program. *See* 49 C.F.R. § 1560.201 *et seq.* The TSA is also required to maintain records for individuals whose information has been corrected through its redress process. *See* §§ 44903(j)(2)(G)(ii), 44926(b)(2). Finally, Congress has provided for judicial review of orders pertaining “to security duties and powers designated to be carried out by” the TSA. § 46110(a). The bottom line, then, is that Congress has crafted a remedial scheme for individuals to challenge their inclusion on the No Fly List and to judicially appeal an adverse determination.¹⁴

¹⁴ In their official capacity claims, Plaintiffs argue that this scheme of judicial review is not exclusive and that they have recourse in this Court under the APA for their claims concerning “the constitutional ‘adequacy’ of No Fly List placement, redress, and removal procedures.” *Pls. Mem.* at 25. Two courts of appeal have agreed with this argument, albeit in the context of the original TRIP regime, not the revised one. *See Ibrahim v. Dep’t of Homeland*

Plaintiffs respond that this remedial scheme does not provide for damages from the Agents personally and, “[a]s such, TRIP and § 46110 are incapable of providing remedies for the constitutional violations that the Special Agent Defendants committed.” Pls. Mem. at 45. The remedies Congress has chosen to provide, however, “need not be perfectly congruent,” *Minnecci*, 132 S. Ct. at 625, and they need not even “provide complete relief,” *Bush*, 462 U.S. at 388. Indeed, although there can be no dispute here that the scheme created by Congress does not provide relief in the form of compensatory or punitive damages from the Government or the Agents, “[i]t does not matter that the creation of a *Bivens* remedy would obviously offer the prospect of relief for injuries that must now go unredressed.” *Hudson Valley Black Press v. I.R.S.*, 409 F.3d 106, 110 (2d Cir. 2005) (quotation marks and alterations omitted). “That a particular plaintiff might suffer ‘unredressed’ injuries were a court not to recognize a new type of *Bivens* action may be a hard truth but it is a truth nonetheless and one to which the Supreme Court has alerted potential litigants.” *Aryai v. Forfeiture Support Associates*, 25 F.Supp.3d 376, 395 (S.D.N.Y. 2012) (Preska, C.J.). The Court’s jurisprudence instructs that the salient point, rather, is that Congress has provided “what *it* considers adequate” for the relevant injury. *Chilicky*, 487 U.S. at 431 (1988) (emphasis added).¹⁵ “So long as the plaintiff[s] ha[ve] an avenue for *some* redress, bedrock

Sec., 538 F.3d 1250 (9th Cir. 2008); *Latif v. Holder*, 686 F.3d 1122 (9th Cir. 2012); *Arjmand v. U.S. Dep’t of Homeland Sec.*, 745 F.3d 1300 (9th Cir. 2014); *Ege v. U.S. Dep’t of Homeland Sec.*, 784 F.3d 791 (D.C. Cir. 2015). The Fourth Circuit has also adopted that reasoning in an unpublished opinion. See *Mohamed v. Holder*, No. 11-1924, slip op. at 4–6 (4th Cir. May 28, 2013). Were the official capacity claims to proceed and were this Court to accept Plaintiffs’ argument, Plaintiffs would thus have a further remedial path that may be sufficient to preclude the availability of a *Bivens* remedy. See, e.g., *Western Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1123 (9th Cir. 2009) (“[T]he APA leaves no room for *Bivens* claims based on agency action or inaction.”); *Sinclair v. Hawke*, 314 F.3d 934, 940 (8th Cir. 2003) (“[T]he existence of a right to judicial review under the Administrative Procedure Act is sufficient to preclude a *Bivens* action.”); *Miller v. U.S. Dep’t of Agr. Farm Servs. Agency*, 143 F.3d 1413, 1416 (11th Cir. 1998) (“[T]he existence of a right to judicial review under the APA is, alone, sufficient to preclude a federal employee from bringing a *Bivens* action.”).

¹⁵ Analysis at this stage “include[s] an appropriate judicial deference to indications that congressional inaction has not been inadvertent.” *Chilicky*, 487 U.S. at 423. And as Plaintiffs’ themselves concede, “[t]he legislative history of the No Fly List remedial scheme shows that Congress considered, and struck down, an amendment that would create a civil remedy against the Government if, following the TRIP review process, the TSC decided not to remove the complainant from the No Fly List.” Pls. Mem. at 47 n.3. See H.R. Rep. No. 108-724, pt. 5, at 270–71

principles of separation of powers foreclose[] judicial imposition of a new substantive liability.” *Malesko*, 534 U.S. at 69 (emphasis added). Indeed, it appears that the alternative remedial scheme here is far more comprehensive—and effective—than that available to the *Turkmen* plaintiffs. *Cf. Turkmen*, 915 F.Supp.2d at 353.

Nor is it relevant that Congress may not have had constitutional violations of the sort alleged here—as opposed to administrative errors—in mind when crafting the administrative and judicial review scheme it did. *See* Pls. Mem. at 44. The Supreme Court has explicitly rejected the argument that a remedy is inadequate because claimants “merely received that to which they would have been entitled had there been no constitutional violation.” *Chilicky*, 487 U.S. at 427. In both *Bush* and *Chilicky*, the Court rejected claims that a *Bivens* remedy was necessary because the statutory schemes did not provide for relief specifically intended to compensate a constitutional violation (First Amendment retaliation and Due Process violations, respectively) as opposed to the denial of a statutory right. “In neither case ... [did] the presence of alleged unconstitutional conduct that is not *separately* remedied under the statutory scheme imply that the statute has provided ‘no remedy’ for the constitutional wrong at issue.” *Id.* at 427–28 (emphasis in original). As Justice O’Connor explained in *Chilicky*, “the harm resulting from the alleged constitutional violation can in neither case be separated from the harm resulting from the denial of the statutory right.” *Id.* at 428. The same is true here. The crux of Plaintiffs’ injury is their improper inclusion on the No Fly List as a result of the Agents’ alleged retaliation. And whether that injury resulted

(2004). Plaintiffs seek to sidestep this legislative history because it concerns “a remedy against the Government, not individual nominating agents.” Pls. Mem. at 47 n.3. But nowhere has the Supreme Court suggested that courts should look only to whether Congress has considered the specific question of damages against federal officers in their personal capacity. Here, Plaintiffs agree that Congress considered the question of what remedies would be appropriate in the context of the No Fly List and specifically rejected the option of a civil remedy. “Congress’s pronouncements in the relevant context [thus] signal that it would not support ... a damages claim,” *Lebron v. Rumsfeld*, 670 F.3d 540, 548 (4th Cir. 2012) (Wilkerson, J.), and reinforce the conclusion that a *Bivens* remedy is inappropriate here.

from administrative error, a constitutional violation, or both, the dispositive point is that Congress' remedial scheme addresses precisely that injury.

In concluding that the remedial scheme crafted by Congress forecloses the recognition of a *Bivens* action, the Court does not overlook the fact that Plaintiffs in their official capacity claims challenge the procedural adequacy of that scheme. This Court does not today consider whether the TRIP process is constitutionally or otherwise deficient. Because the official capacity claims are now stayed, the procedural adequacy of that scheme, including the TRIP process, is a question for another day. For purposes of assessing the viability of a *Bivens* claim, however, it is enough to recognize that an alternative remedial process is available. Indeed, Plaintiffs have availed themselves of that process and now have assurances from the Government that they are not presently on the No Fly List. That is more than enough to conclude that the creation of a *Bivens* remedy is inappropriate in these circumstances.¹⁶

C. RFRA Does Not Provide for Damages Against The Agents

Plaintiffs also seek damages against the Agents pursuant to RFRA. Section 3 of that statute, which creates a private right of action and provides for judicial remedies to enforce that right, states, in pertinent part, that:

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

¹⁶ Because an alternative remedial scheme is available in this context, the Court need not proceed to the second stage of inquiry and consider the applicability of any additional special factors, including the parties' divergent arguments concerning the national security implications of recognizing a *Bivens* action in this context. *See* Defs. Mem. at 18–22; Pls. Mem. at 48–52.

42 U.S.C. § 2000bb-1(c). The principal question that divides the parties here is the meaning of “appropriate relief.” Specifically, does the notion of “appropriate relief” encompass money damages against government officials in their personal capacities?¹⁷

“Statutory construction begins with the plain text and, if that text is unambiguous, it usually ends there as well.” *United States v. Gayle*, 342 F.3d 89, 92 (2d Cir. 2003). This is not the usual case, however, because the plain text of RFRA merely raises, rather than answers, the critical question. As the Supreme Court has recognized with respect to RFRA’s companion statute, which includes identical language in this respect, the phrase “‘appropriate relief’ is open-ended and ambiguous about what types of relief it includes.” *Sossamon v. Texas*, 131 S. Ct. 1651 (2011).¹⁸ Indeed, “[f]ar from clearly identifying money damages, the word ‘appropriate’ is inherently context-dependent.” *Id.* “In some contexts, ‘appropriate relief’ might include damages.” *Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006). But “another plausible reading is that ‘appropriate relief’ covers equitable relief but not damages.” *Id.* While the Supreme Court has acknowledged the availability of injunctive relief under RFRA, *see Gonzales v. O Centro*

¹⁷ The parties also dispute whether federal officials in their personal capacities are included within RFRA’s definition of “government” and thus amenable to suit under the statute at all. At least two courts appear to have concluded that RFRA applies to personal capacity claims against federal officials. *See United Elmaghraby v. Ashcroft*, No. 04-CV-1809 (JG), 2005 WL 2375202, at *30 n.27 (E.D.N.Y. Sept. 27, 2005), *aff’d in part, rev’d in part and remanded sub nom., Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev’d and remanded sub nom., Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Solomon v. Chin*, No. 96-CIV-2619 (DC), 1997 WL 160643, at *5 (S.D.N.Y. Apr. 7, 1997). At least one other court, however, has expressed some doubts about such a conclusion, at least in the national security context. *See Lebron*, 670 F.3d at 557. This Court need not address the issue, however, in light of its conclusion that money damages are unavailable under RFRA because, even assuming the Agents may be sued in their personal capacities, Plaintiffs’ RFRA claim against the Agents in their personal capacities here is limited to money damages. *See Pls. Mem.* at 49 n.24.

¹⁸ When the Supreme Court held RFRA unconstitutional as applied to state and local governments because it exceeded Congress’ power under § 5 of the Fourteenth Amendment, *see City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (“Congress does not enforce a constitutional right by changing what that right is.”), Congress responded by enacting the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U.S.C. § 2000cc *et seq.*, pursuant to its Spending Clause and Commerce Clause authority. *See Sossamon*, 131 S. Ct. at 1656. “RLUIPA borrows important elements from RFRA ... includ[ing] an express private cause of action that is taken from RFRA.” *Id.* at 1656. For that reason, courts often apply “case law decided under RFRA to issues that arise under RLUIPA” and vice-versa. *Redd v. Wright*, 597 F.3d 532, 535 n.2 (2d Cir. 2010).

Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 425–30 (2006), neither the Supreme Court nor any of the thirteen courts of appeals has held that RFRA provides for money damages.¹⁹ The question, then, remains: Does “appropriate relief” in the context of RFRA encompass such damages? The answer is no.

Although the statute’s plain text is wanting in clarity, “[t]he purpose and history of the statute elucidate the meaning of this ambiguous phrase.” *United States v. Tohono O’Odham Nation*, 131 S. Ct. 1723, 1736 (2011) (Sotomayor, J., concurring); *see also King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) (“A fair reading of legislation demands a fair understanding of the legislative plan.”). Indeed, Congress included detailed findings and an unambiguous statement of the law’s purpose in the statute itself. Section 2 of RFRA, codified at § 2000bb(b), provides that:

The purposes of this Act are—

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

¹⁹ Three courts of appeals have held that RFRA does not provide for money damages against the United States (or its agents acting in their official capacities) on the basis that “appropriate relief” cannot include damages because the language does not amount to an unambiguous waiver of sovereign immunity. *See Webman*, 441 F.3d at 1026; *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 841 (9th Cir. 2012); *Davila v. Gladden*, 777 F.3d 1198, 1210 (11th Cir. 2015). Although the Second Circuit has not addressed the issue, Plaintiffs agree with that conclusion, *see* Pls. Mem. at 84, and instead bring this case focusing on the remaining gap in the RFRA jurisprudence: whether a damages action exists against federal officials in their personal capacities. Because these decisions (and *Sossamon*) are grounded in principles of sovereign immunity, they are of limited assistance in addressing the question of damages against those who “come to court as individuals,” *Hafer*, 502 U.S. at 27. At most, they may counsel caution in concluding that the same term—even one as malleable as “appropriate relief”—can include damages as applied to one class of defendants but not another.

The Court has also considered the Agents’ argument concerning *Washington v. Gonyea*, 731 F.3d 143 (2d Cir. 2013), which held that RLUIPA does not provide for damages against state officials in their personal capacities. As the panel explained, RLUIPA “was enacted pursuant to Congress’ spending power, *see* 42 U.S.C. § 2000cc–1(b)(1), which allows the imposition of conditions, such as individual liability, only on those parties actually receiving the state funds.” *Id.* at 145. Because the parties receiving the federal funds were state prison institutions, not state prison officials, *Gonyea* concluded “as a matter of statutory interpretation and following the principle of constitutional avoidance” that RLUIPA did not create a personal capacity damages action. *Id.* at 146. RFRA, by contrast, “was authorized by the Necessary and Proper Clause.” *Hankins v. Lyght*, 441 F.3d 96, 106 (2d Cir. 2006). As such, the doctrinal concerns underlying the conclusion in *Gonyea* do not assist here.

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

RFRA was enacted three years after the Supreme Court's watershed decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which, as the Act itself recounts, "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." § 2000bb(a)(4). Prior to *Smith*, the Supreme Court had employed a balancing test that took into account whether the challenged state action imposed a substantial burden on the right to free exercise of religion, and if it did, whether that action was necessary to serve a compelling government interest. Applying this test, the Court held in *Sherbert* that an employee who was fired for refusing to work on her Sabbath could not be denied unemployment benefits. 374 U.S. at 408–409. And applying a similar approach, the Court held in *Yoder* that Amish children could not be required by state law to remain in school until the age of 16 over the objection of their parents, who viewed such education "as an impermissible exposure of their children to a 'wordly' influence in conflict with their beliefs." 406 U.S. at 210–211, 234–236.

The plaintiffs in *Smith* were two individuals who had been fired from their jobs at a drug rehabilitation center because they had ingested peyote as part of a religious ceremony of the Native American Church, of which they were both members. 494 U.S. at 874. They were subsequently denied state unemployment benefits after being found ineligible because of their discharge for work-related "misconduct." *Id.* Citing Supreme Court precedent, including *Sherbert*, the Oregon Supreme Court concluded that "the state could not, consistent with the First Amendment, deny unemployment compensation to petitioners." *Smith v. Employment Div.*, 307 Or. 68, 71 (1988). The Supreme Court reversed.

In his opinion for the closely divided Court, Justice Scalia noted that its decisions "have consistently held that the right of free exercise does not relieve an individual of the obligation to

comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” *Smith*, 494 U.S. at 879 (quotation omitted). Indeed, *Smith* cautioned that “a private right to ignore generally applicable laws” would prove “a constitutional anomaly.” *Id.* at 886. In so concluding, *Smith* distinguished the Court’s earlier decisions in *Sherbert* and *Yoder*, confining the former to its facts, *see id.* at 884–85, and holding that the latter involved more than just the free exercise of religion, *see id.* at 881 (discussing “the Free Exercise Clause in conjunction with other constitutional protections,” such as the right of parents to direct the education of their children). Notable for present purposes, *Smith* did not change the remedies available for a successful claim under the Free Exercise Clause. Indeed, it says nothing about remedies at all.

Congress responded to *Smith* by affording greater statutory protection than the Court in *Smith* had held the Constitution offered.²⁰ Specifically, it concluded that “the compelling interest test as set forth in prior Federal court rulings”—that is, in *Sherbert* and *Yoder*—offered “a workable test for striking sensible balances between religious liberty and competing prior governmental interests.” § 2000bb(a)(5). As a result, in enacting RFRA, Congress sought “to restore the compelling interest test as set forth” in those earlier cases. § 2000bb(b). The Act thus

²⁰ While some have spoken of RFRA “overturning” *Smith*, “a statute cannot either enlarge or contract the Constitution.” *Mack v. O’Leary*, 80 F.3d 1175, 1181 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997). That Congress would seek to create a new statutory right that exceeded constitutional baselines, however, is not remarkable. “Indeed, Congress has often provided statutory protection of individual liberties that exceed the Supreme Court’s interpretation of constitutional protection.” *Hankins*, 441 F.3d at 107 (quotation omitted). In that respect, one aspect of RFRA’s test is significant. As noted in *City of Boerne*, “the Act imposes in every case a least restrictive means requirement—a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify.” 521 U.S. at 535. “On this understanding of [the Supreme Court’s] 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.” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 n.3 (2014). As discussed below, however, that breadth did not include expanding the scope of remedies available as compared with those previously available for constitutional violations.

created a new statutory right beyond the constitutional baseline articulated in *Smith* by providing that:

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest;
and

(2) is the least restrictive means of furthering that compelling governmental interest.

§ 2000bb–1. In order to ensure that this new statutory right (albeit one based in erstwhile constitutional doctrine) could be vindicated in the courts, Congress also created a private right of action in § 3 providing for “appropriate relief” against the Government.

Plaintiffs, however, see something more ambitious in RFRA. In addition to restoring the *standard* by which free exercise claims were adjudicated, Plaintiffs appear to argue the language in § 3 demonstrates Congress' intent to expand the scope of *remedies* available where an individual's religious freedom is abridged. But as Judge Posner persuasively noted shortly after RFRA became law, since the statute “says very little about remedies ... it is unlikely that Congress intended it to displace the existing remedial system for constitutional violations.” *Mack v. O'Leary*, 80 F.3d 1175, 1181 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997). Indeed, nothing in the Act's Congressional findings or statements of purpose says anything about changing the remedial scheme applicable to free exercise claims. And nothing on the face of the Act's substantive provisions outwardly suggests they do anything other than carry out the law's stated purpose—namely, restoring the compelling interest test as it existed before *Smith*. As noted in the discussion of official and personal capacity claims above, *see supra* 12–14, a *Bivens* action would have provided the only potential path for an individual seeking personal capacity damages

from a federal official for violation of the Free Exercise Clause at the time of RFRA's enactment. And as also discussed at length above, the Supreme Court has never recognized a *Bivens* remedy for violations of the Free Exercise Clause. *See supra* at 17–20. As a consequence, to interpret RFRA's reference to “appropriate relief” as contemplating a remedy then unknown to the law is, at the least, a stretch. Rather, the plain language of the statute read in the light of its stated purpose suggests the law changed the standard applicable to free exercise claims while retaining all remedies that were understood as “appropriate” for claims under the Free Exercise Clause—and nothing more.

The conclusion that RFRA did not displace the existing remedial scheme—whether by adding to or removing from it—is reinforced by the statute's legislative history. Indeed, both House and Senate committee reports, which are regarded as “the most authoritative and reliable materials of legislative history,” *Disabled in Action of Metro. New York v. Hammons*, 202 F.3d 110, 124 (2d Cir. 2000), evidence concern about the potential misinterpretation of RFRA's impact on existing law. For example, the Senate Judiciary Committee's report states that “[a]lthough the purpose of this act is only to overturn the Supreme Court's decision in *Smith*, concerns have been raised that the act could have unintended consequences and unsettle other areas of the law.” S. Rep. No. 103–111 (“S. Rep.”) at 12; *see also* H.R. Rep. No. 103–88 (“H.R. Rep.”) at 8 (including essentially identical language). In particular, the legislative history includes discussion of the bill's potential impact on abortion rights, the ability of religious organizations to participate in publicly funded social welfare and educational programs, and the availability of tax exemptions for such organizations. *See* S. Rep. at 12; H.R. Rep. at 8. Thus, the Senate Judiciary Committee's report states that:

To be absolutely clear, the act does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the

Supreme Courts's [*sic*] free exercise jurisprudence under the compelling governmental interest test prior to *Smith*.

S. Rep. at 12; *see also* H.R. Rep. at 8 (including essentially identical language). In view of such an understanding—and against a backdrop where the Supreme Court has never recognized a *Bivens* remedy under the Free Exercise Clause, whether before or after *Smith*—it would seem strange indeed for Congress to have employed a phrase as ambiguous as “appropriate relief” to *create* such a remedy where one was not previously recognized.

The contrast between the language in RFRA's remedial provision and every other federal statute identified by Plaintiffs as recognizing a personal capacity damages action against federal officers also points away from the conclusion they urge. Indeed, each of these four statutes includes specific reference to the availability of damages. Section 1985's remedial clause speaks of “an action for the recovery of damages.” 42 U.S.C. § 1985. The Foreign Intelligence Surveillance Act permits “recover[y] ... [of] actual damages ... [and] punitive damages.” 50 U.S.C. § 1810. The Telecommunication Acts provides that a court “may award damages.” 47 U.S.C. § 605(e)(3). And although the Federal Wiretap Act provides for “appropriate relief,” that term is specifically defined to include “damages ... and punitive damages in appropriate cases.” 18 U.S.C. § 2520(b). Because Congress knows how to create a personal capacity damages remedy (and because Plaintiffs have not pointed to a single statute where “appropriate relief” was interpreted to include such a remedy without an explicit definition to that effect), one might reasonably expect such language if Congress in fact intended to depart from the pre-*Smith* world in such a significant way.²¹

²¹ Plaintiffs correctly observe that 42 U.S.C. § 1983, although usually concerned with the activities of state officials, also provides for damages against a federal official in his personal capacity where “state and federal defendants conspire[] under color of state law to deprive plaintiff[s] of federally guaranteed rights.” *See Kletschka v. Driver*, 411 F.2d 436, 442, 448–49 (2d Cir. 1969). Even § 1983, however, is clear that appropriate relief under that

Nonetheless, Plaintiffs contend that Congress's reference to "appropriate relief" in RFRA's private right of action triggers the "ordinary convention" recognized in *Franklin v. Gwinnett Cnty. Pub. Sch.*, whereby courts "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." 503 U.S. 60, 76, 66 (1992); *see also Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here 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."). But whatever force of that rule in some contexts, it lacks any here. As noted in *Sossamon*, which interpreted this very statutory provision as borrowed in RFRA's companion statute,²² *Franklin* required the Supreme Court to interpret the scope of an *implied* statutory right of action. "With no statutory text to interpret, the Court 'presume[d] the availability of all appropriate remedies unless Congress ha[d] expressly indicated otherwise.'" *Sossamon*, 131 S. Ct. at 1660 (*quoting Franklin*, 503 U.S. at 66); *accord Landgraf v. USI Film Products*, 511 U.S. 244, 285 n.38 (1994). That is not the case here, however, as Congress has created "an express private cause of action" that provides for "appropriate relief." *Sossamon*, 131 S. Ct. at 1656. The *Franklin* presumption is thus inapplicable, and the meaning of "appropriate relief" must be discerned using the traditional tools of statutory construction. Those tools, as noted above, point

statute includes "an action at law," which is to say, damages. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710–11 (1999).

Plaintiffs also note that Congress has sometimes specifically excluded damages from their definitions of "appropriate relief" and that "numerous" federal statutes specifically include injunctive and other equitable relief within their definitions of "appropriate relief." *See* Pls. Mem. at 83–84 (*citing* 5 U.S.C. § 702; 42 U.S.C. § 6395(e)(1); 15 U.S.C. § 797(b)(5); 16 U.S.C. § 973i(e); 2 U.S.C. § 437g(a)(6)(A); 8 U.S.C. § 1324a(f)(2); 12 U.S.C. § 1715z–4a(b); 15 U.S.C. § 6309(a)). None of these statutes, however, concerns the creation of a damages remedy against federal officers in their personal capacities and, as such, the value of Plaintiffs' analogy is diminished. In any event, the Supreme Court has "several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (collecting cases).

²² *See supra* note 18.

to the conclusion that Congress did not intend to create a *Bivens*-type action with the language of “appropriate relief.”

Plaintiffs also seek support in *Jama v. U.S.I.N.S.*, 343 F.Supp.2d 338 (D.N.J. 2004), where the court determined that RFRA provides for personal capacity damages against federal officers. But that decision, and subsequent district court opinions adopting its reasoning,²³ rest on a crucial yet flawed premise—that “[c]ourts have *always* recognized § 1983 and *Bivens* claims for money damages against officials for violation of the Free Exercise Clause.” *Id.* at 374 (emphasis added). Setting aside the § 1983 cases, which have no bearing on whether a claim exists under *Bivens*, there is no question—in light of *Iqbal*, *Reichle*, and, most recently, *Turkmen*—that the Supreme Court has never recognized a *Bivens* remedy for violations of the Free Exercise Clause. *See supra* at 17–21.²⁴ Indeed, before RFRA was enacted in 1993, the Supreme Court’s only *Bivens* case in the First Amendment context came in the form of its refusal to recognize such an action in *Bush*—decided a full decade before RFRA became law.

²³ *See Lepp v. Gonzales*, No. C-05-0566 (VRW), 2005 WL 1867723, at *8 (N.D. Cal. Aug. 2, 2005); *Padilla v. Yoo*, 633 F.Supp.2d 1005, 1039 (N.D. Cal. 2009), *as amended*, (June 18, 2009), *rev’d on other grounds*, 678 F.3d 748 (9th Cir. 2012);

²⁴ *Jama*’s (and Plaintiffs’) sole citation to contrary authority is a single decision of the Sixth Circuit concerning a prisoner’s free exercise claim. In that case, *Jihaad v. O’Brien*, 645 F.2d 556 (6th Cir. 1981), the court adopted the holding of an earlier panel extending *Bivens* to the First Amendment as a whole—not merely to Free Exercise Clause, *see id.* at 558 n.1. That prior panel’s reasoning on this point was as follows: “We recognize that *Bivens* dealt with a Fourth Amendment violation, but its logic appears to us to be equally applicable to a First Amendment violation.” *Yiamouyiannis v. Chem. Abstracts Serv.*, 521 F.2d 1392, 1393 (6th Cir. 1975). Although such reasoning may have seemed perfectly reasonable in 1975 (shortly after *Bivens* was decided), it has become untenable in the years after 1980, as cases such as *Turkmen* ably demonstrate. Indeed, the Sixth Circuit itself recently expressed doubts about the availability of *Bivens* in the free exercise context, notwithstanding its earlier holdings in *Yiamouyiannis* and *Jihaad*. *See Meeks v. Larsen*, No. 14-1381, ___ F.App’x. ___, 2015 WL 2056346, at *9 (6th Cir. May 5, 2015) (observing that “there is a dearth of precedent applying *Bivens* to free-exercise claims” and quoting the Eighth Circuit’s conclusion that *Bivens*’ availability in such contexts is “doubtful”).

Plaintiffs also point to *Mack* for the proposition that at least one court of appeal has concluded that “appropriate relief” includes personal capacity damages. *See* Pls. Mem. at 85. But such reliance is difficult to justify because defendants there did not contest the availability of damages. As Judge Posner’s opinion in that case observed, they “d[id] not question the propriety of damages as a remedy for violations of the Act, even though [RFRA] says nothing about remedies except that a person whose rights under the Act are violated ‘may assert that violation as a claim or defense in a judicial proceeding and obtain *appropriate* relief against a government.’” 80 F.3d at 1177 (*citing* § 2000bb–1(c), emphasis added in *Mack*).

In the end, “the fundamental task for the judge is to determine what Congress was trying to do in passing the law.” R. Katzmann, *Judging Statutes* 31 (2014); *see also* *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2d Cir. 1914) (Hand, J.) (“[S]tatutes ... should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them.”) As explained, Congress’ intent in enacting RFRA could not be clearer: It was to restore Congress’ understanding of the compelling interest test as it existed before *Smith*—no more, no less. And “[b]ecause Congress enacted RFRA to return to a pre-*Smith* world, a world in which damages were unavailable against the government, ‘appropriate relief’ is most naturally read to exclude damages against the government.” *Webman*, 441 F.3d at 1028 (Tatel, J., concurring).²⁵ Plaintiffs’ argument to the contrary thus fails.²⁶

CONCLUSION

Although federal law imposes limits on the investigative tactics federal officials may employ in seeking to keep this nation safe, it also establishes limits on the manner in which an individual may vindicate his rights should those tactics cross the line. For the reasons stated, the law does not permit Plaintiffs to seek damages against the Agents in their personal capacities either under *Bivens* or RFRA. Accordingly, the Agents’ motion to dismiss is GRANTED and the claims


²⁵ RFRA provides only for relief “against the government,” which is defined to include “a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity.” 42 U.S.C. § 2000bb–2(1). As noted above, *see supra* note 17, the Court need not address the predicate question of whether “the government” includes federal officials sued in their personal capacity in light of its conclusion that “appropriate relief” does not encompass damages in any event.

²⁶ Plaintiffs’ argument might carry more weight were the Supreme Court eventually to recognize a *Bivens* remedy in the First Amendment context. The Supreme Court has observed, in a related context, that “[t]he meaning of the word ‘appropriate’ permits its scope to expand to include ... remedies that were not appropriate before ..., but in light of legal change ... are appropriate now.” *West v. Gibson*, 527 U.S. 212, 218 (1999) (holding that Title VII’s reference to “appropriate remedies” as passed in 1972 should be interpreted to include compensatory damages in light of subsequent legal developments in 1991). Thus, were the Supreme Court to recognize a *Bivens* remedy under the Free Exercise Clause, it might well be that “appropriate relief” under RFRA would be held to encompass personal capacity damages.

against FNU Tanzin, Sanya Garcia, Francisco Artusa, John LNU, Michael Rutowski, William Gale, John C. Harley III, Steven LNU, Michael LNU, Gregg Grossoehmig, Weysan Dun, James C. Langenberg, John Does 1–6 and 9–13 in their personal capacities are dismissed. The Court on its own motion also dismisses all personal capacity claims against John Does 7 and 8. *See Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 26 n.6 (2d Cir. 1990). As previously noted, this opinion does not address the viability of Plaintiffs’ official capacity claims and thus expresses no opinion on the merits of their arguments concerning the manner in which individuals are added to the No Fly List or the mechanisms for challenging such inclusion. The parties are directed to submit a joint letter to the Court within 30 days advising how they wish to proceed with respect to those claims.

SO ORDERED.

Dated: September 3, 2015
New York, New York



Ronnie Abrams
United States District Judge

SPA-37

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC-SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC#:
DATE FILED: 12/28/2015

MUHAMMAD TANVIR, JAMEEL
ALGIBHAH, AWAIS SAJJAD, and
NAVEED SHINWARI,

Plaintiffs,

v.

LORETTA E. LYNCH, Attorney General of
the United States, *et al.*,

Defendants.

No. 13-CV-6951 (RA)

ORDER

RONNIE ABRAMS, United States District Judge:

On September 3, 2015, the Court issued an Opinion and Order dismissing Plaintiffs' individual capacity claims against Defendants FNU Tanzin, Sanya Garcia, Francisco Artusa, John LNU, Michael Rutkowski, William Gale, John C. Harley III, Steven LNU, Michael LNU, Gregg Grossoehmig, Weysan Dun, James C. Langenberg, and John Does 1–13. *See* Dkt. 104. The Opinion also directed the parties to advise the Court as to how they wish to proceed with respect to Plaintiffs' official capacity claims against Defendants. *See id.* at 36.

On October 5, 2015, the parties submitted a joint letter in which they agreed "that Plaintiffs' official capacity claims for relief against Defendants should be dismissed without prejudice and entry of final judgment is appropriate." Dkt. 105. The letter indicated that the parties would submit a proposed order and judgment to the Court.

On December 18, 2015, the parties informed the Court that they could not agree to the language in a proposed order. *See* Dkt. 108. The parties submitted two proposed orders for the Court's review, one drafted by Plaintiffs and one drafted by Defendants. The only significant

difference between them is that Plaintiffs' proposed order recites what Plaintiffs describe as "basic procedural facts that led to the dismissal." *Id.* at 1. Plaintiffs seek to have "these facts be set forth in a judicially-issued document." *Id.* at 2. Plaintiffs also "advise the Court that, while they do not presently intend to seek attorneys' fees and costs, they do not wish to rule out the possibility of any such application entirely at this time." *Id.*

Defendants contend that Plaintiffs' proposed order "goes substantially beyond the terms agreed to by the parties" in their October 5 letter and that there is no need to include the additional information in that proposed order because "the chronology that Plaintiffs assert led to their withdrawing their claims will now be a matter of public record by virtue of [the December 18 letter]." *Id.* Defendants also argue that Plaintiffs "seek to transform an on-consent voluntary dismissal of their claims into a document intended to support a potential [attorneys'] fee application." *Id.* at 3. The parties do not appear to dispute that Defendants' proposed order "accurately reflects the terms that Plaintiffs outlined to the Court in their October 5, 2015 letter." *Id.*

The Court agrees with Defendants that Plaintiffs' proposed order is unnecessarily overinclusive. To the extent members of the public seek information regarding why Plaintiffs agreed to voluntarily dismiss their official capacity claims without prejudice, they may review the December 18 letter and other filings made in this lawsuit. The Court currently takes no position regarding the viability of Plaintiffs' possible motion for attorneys' fees and costs.

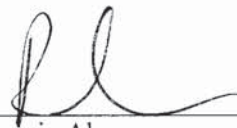
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Because the parties agree that Plaintiffs' official capacity claims against Defendants may be dismissed without prejudice, the Court so dismisses them. The Clerk of Court is respectfully directed to enter final judgment in favor of Defendants. Plaintiffs may have until January 29, 2016 to move for attorneys' fees and costs. If no motion is filed by that date, this action will be terminated on the docket.

SO ORDERED.

Dated: December 28, 2015
New York, New York



Ronnie Abrams
United States District Judge

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC-SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC#:
DATE FILED: 02/01/2016

MUHAMMAD TANVIR, JAMEEL
ALGIBHAH, AWAIS SAJJAD, and
NAVEED SHINWARI,

Plaintiffs,

v.

LORETTA E. LYNCH, Attorney General of
the United States, *et al.*,

Defendants.

No. 13-CV-6951 (RA)

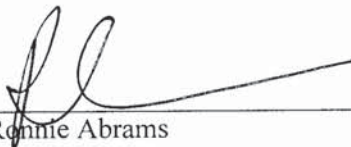
ORDER

RONNIE ABRAMS, United States District Judge:

On September 3, 2015, the Court dismissed Plaintiffs' individual capacity claims against Defendants FNU Tanzin, Sanya Garcia, Francisco Artusa, John LNU, Michael Rutkowski, William Gale, John C. Harley III, Steven LNU, Michael LNU, Gregg Grosseohmig, Weysan Dun, James C. Langenberg, and John Does 1–13. *See* Dkt. 104. On December 28, 2015, the Court—on consent of the parties—dismissed without prejudice Plaintiffs' remaining official capacity claims. *See* Dkt. 109. The December 28 Order noted that unless Plaintiffs moved for attorneys' fees and costs by January 29, 2016, "this action will be terminated on the docket." *Id.* at 3. On January 29, 2016, Plaintiffs informed the Court that they "will not seek an award of fees and costs at this stage of the litigation." Dkt. 110. The Clerk of Court is accordingly respectfully directed to enter final judgment in favor of Defendants and to terminate this action.

SO ORDERED.

Dated: February 1, 2016
New York, New York



Ronnie Abrams
United States District Judge

SPA-41

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

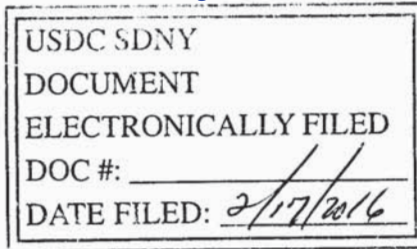
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MUHAMMAD TANVIR, JAMEEL
ALGIBHAH, AWAIS SAJJAD, and
NEVEED SHINWARI,

Plaintiffs,

-against-

LORETTA E. LYNCH, Attorney general of the
United States, et al.,

Defendants.
-----X



13 **CIVIL** 6951 (RA)

JUDGMENT

Whereas, on September 3, 2015, the Court dismissed Plaintiffs’ individual capacity claims against Defendants FNU Tanzin, Sanya Garcia, Francisco Artusa, John LNU, Michael Rutkowski, William Gaale, John C. Harley, III, Steven LNU, Michael LNU, Gregg Grossoehmig, Weysan Dun, James C. Langenberg, and John Does 1-13; on December 28, 2015, the Court — on consent of the parties — dismissed without prejudice Plaintiffs’ remaining official capacity claims; the December 29 Order noted that unless Plaintiffs moved for attorneys’ fees and costs by January 29, 2016, “this action will be terminated on the docket; on January 29, 2016, Plaintiffs having informed the Court that the “will not seek an award of fees and costs at this stage of the litigation, and the matter having come before the Honorable Ronnie Abrams, United States District Judge, and the Court, on February 1, 2016, having rendered its Order directing the Clerk to enter final judgment in favor of Defendants and to terminate this action, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order dated February 1, 2016, final judgment is hereby entered in favor of Defendants and the action is terminated.

Dated: New York, New York
February 17, 2016

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RUBY J. KRAJICK

Clerk of Court

BY: _____

Deputy Clerk

**THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON _____**