No. 19-71

In the Supreme Court of the United States

FNU TANZIN, *et al., Petitioners,*

v.

MUHAMMED TANVIR, *et al., Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF FOURTEEN RELIGIOUS-LIBERTY SCHOLARS, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, AND CHRISTIAN LEGAL SOCIETY AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether money damages, subject to the defense of qualified immunity, are "appropriate relief," under the Religious Freedom Restoration Act, in suits against federal employees acting under color of law.

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INTEREST OF *AMICI*

The individuals joining this brief are Douglas Laycock, Michael W. McConnell, Helen M. Alvaré, Thomas C. Berg, Nathan S. Chapman, Elizabeth Clark, Robert F. Cochran, Jr., Teresa S. Collett, W. Cole Durham, Jr., Carl H. Esbeck, Richard W. Garnett, Christopher C. Lund, Michael P. Moreland, and Michael Stokes Paulsen. They are law professors who have taught and published for many years about law and religion in general, and the Religious Freedom Restoration Act in particular. Collectively, they have published hundreds of articles and thirty-nine books in the field, with three more in press. Professor Laycock has also taught and published for many years about the law of remedies.

The Baptist Joint Committee for Religious Liberty chaired the Coalition for the Free Exercise of Religion, which successfully urged Congress to pass RFRA. The Christian Legal Society helped lead the Coalition. Both organizations work to ensure that the Act is properly interpreted and enforced.[1]

SUMMARY OF ARGUMENT

I. "Appropriate relief" under the Religious Freedom Restoration Act meant the remedies long available for civil-liberties violations under 42 U.S.C. §1983.

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[1] This brief was prepared and funded entirely by *amici* and their counsel. No other person contributed financially or otherwise. The individual *amici* file in their individual capacities; their universities take no position on this case. All parties have consented in writing to this brief.

A. Petitioners ignore the essential context in which RFRA was enacted. RFRA originally applied to the states, and state and local governments were the source of most of the cases. Existing remedies for most free-exercise violations were therefore under §1983.

RFRA paralleled §1983 in multiple ways. Both statutes protect important civil liberties. Both create an express cause of action against persons acting under color of law. Both applied to the states, the District of Columbia, Puerto Rico, and the federal territories. Prevailing parties under either can recover attorneys' fees under 42 U.S.C. §1988.

B. The law of remedies under §1983 was well developed when RFRA was enacted. It included sovereign immunity, official-capacity suits for injunctions, and personal-capacity suits for damages, subject to the qualified-immunity rules.

C. RFRA did not initially distinguish the federal government from the states. Both were subjected to the same obligations and the same provision for "appropriate relief." The provisions that treated the federal government separately addressed exclusively federal issues, such as the status of the territories and the power of subsequent Congresses. One such provision actually subjected federal agencies to greater liability for attorneys' fees than state agencies.

D. In 2000, Congress amended RFRA to exclude the states from coverage and to strengthen the substantive standard with a new definition of "exercise of religion." It did not amend the provision for "appropriate relief" or indicate any intention to change the available remedies.

E. Congress often explicitly excludes or limits damage remedies, especially in statutes authorizing litigation against government defendants. Given the long history of damage remedies for civil-liberties violations, Congress would have excluded such remedies if that were what it meant. It would have been easy to say "appropriate equitable relief."

F. Congress copied RFRA's authorization of "appropriate relief" into the Religious Land Use and Institutionalized Persons Act. Both the committee report and the final section-by-section analysis explained that the provision for "appropriate relief" was taken from RFRA and that it authorized damages, injunctions, attorneys' fees, and a defense to liability.

II. Petitioners claim that they are not part of the government under RFRA, that RFRA authorizes relief only against government, and therefore, that it does not authorize relief against them. Every step of this argument is mistaken.

A. RFRA expressly defines government officials and persons acting under color of law as government. "[U]nder color of law" has always referred to persons who may be sued in a personal capacity for acts committed in an official capacity. There is nothing novel about that meaning in RFRA.

B. Only government, as defined, can violate RFRA. That is why affirmative relief is generally available only against government defendants.

The phrase "appropriate relief against a government" served a different purpose. The drafting history is reasonably clear that this meant "*including* against a government," not "*only* against a govern-

ment." The explicit authorization of relief against a government does not limit the right to assert a RFRA violation "as a claim or defense in a judicial proceeding."

III. Damages are an essential remedy in a limited number of cases that Congress intended to reach.

A. Unnecessary autopsies in violation of religious beliefs were an important example. Autopsies are often conducted before the family has time to object. In these cases that Congress clearly cared about, it is often damages or nothing.

B. Government destruction of religious property, and bodily invasions such as blood transfusions, usually happen without advance notice. RFRA violations may be imposed on students without warning, or the student may graduate or transfer, making injunctive claims moot. Persons confined by federal authority may be released or transferred, mooting their injunctive claims. In all these cases, damages are the only meaningful remedy.

IV. Even so, RFRA damage claims against federal officers are rare. Most RFRA violations impose no tangible harm. Emotional distress is hard to prove and often of nominal value to factfinders. Prisoners generally cannot sue for emotional distress at all. Qualified immunity is a huge barrier to liability. In the rare case in which a federal employee is held liable for damages, the government nearly always indemnifies him. Petitioners do not need an absolute rule that they can never be sued for damages, no matter how outrageous their behavior.

ARGUMENT

I. The Model for "Appropriate Relief" Under the Religious Freedom Restoration Act Was the Body of Remedies Law Under 42 U.S.C. §1983.

A. Section 1983 Provided the Existing Remedies for Most Free-Exercise Violations and Is Analogous to RFRA in Many Ways.

Congress did not need to enact detailed remedies provisions in the Religious Freedom Restoration Act. A well-developed body of law spelled out the existing remedies for enforcing civil liberties, including religious liberty. The model for "appropriate relief" under RFRA is the law of remedies that this Court had developed under 42 U.S.C. §1983.

Petitioners begin their argument by urging the Court to consider the statutory provision for "appropriate relief" in context. Pet. Br. 17. They continue that theme throughout, using forms of the word "context" thirty-three times. *Id.* at 9, 11, 13, 15, 17-18, 21-22, 24, 30, 32-33, 35-37, 39-40, 44-46, 48. Yet they wholly ignore the actual context in which RFRA was enacted.

The essential context is that as originally enacted, RFRA applied to state and local governments as well as the federal government. It was reasonable to anticipate that state and local governments would account for a substantial majority of the cases. There are vast numbers of state and local governments. A substantial majority of the free-exercise cases discussed in the RFRA debates involved such governments, including the three highest profile cases, cited in the statutory text. 42 U.S.C. §§ 2000bb(a)(4), 2000bb(b)(1), citing *Employment Division v. Smith*, 494 U.S. 872 (1990);

Wisconsin v. Yoder, 406 U.S. 205 (1972); and *Sherbert v. Verner*, 374 U.S. 398 (1963). Section 1983 provided the existing remedy for most of what the bill would cover; it was the most relevant model.

A statute is interpreted according to its "'ordinary meaning … at the time Congress enacted the statute.'" *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (ellipsis in original) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). When RFRA was enacted, it applied to the states.

The many parallels between RFRA and §1983 are apparent. RFRA protects an important civil right; §1983 protects an important set of civil rights.

RFRA expressly creates a cause of action; a victim of a violation "may assert that violation as a claim or defense in a judicial proceeding." §2000bb-1(c). Section 1983 expressly creates a cause of action; a violator "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

RFRA's cause of action runs against "a government," §2000bb-1(c), which included (and still includes) any "person acting under color of law." Pub. L. 103-141 §5(1), 107 Stat. 1488; 42 U.S.C. §2000bb-2(1).[2] Section 1983's cause of action runs against any person acting 'under color of any statute, ordinance, regulation, custom, or usage," which this Court had

[2] We cite sections from the original Public Law for provisions that do not appear verbatim in the current codification. All codified sections cited are from 42 U.S.C. unless otherwise indicated.

long paraphrased as "under color of law."[3] RFRA used the familiar shorthand instead of the complete phrase from §1983.

RFRA initially applied to officials of any federal, state, or local government, the District of Columbia, Puerto Rico, and any territory or possession of the United States. §§ 5(1), 5(2). Section 1983 applies to any person acting under color of the law of any "State or Territory or the District of Columbia." Puerto Rico is included in this set of categories. *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976).

Petitioners make much of their claim that §1983 does not apply to federal defendants and that the only remedy is under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Pet Br. 21. But as the statutory text makes clear, §1983 does apply to many federal defendants: to employees of the District of Columbia, Puerto Rico, and other federal territories.

A prevailing plaintiff under RFRA, and a prevailing plaintiff under §1983, may each recover attorneys' fees under the Civil Rights Attorney's Fees Award Act, 42 U.S.C. §1988.

Apart from attorneys' fees, which always require explicit authorization, neither statute says much about remedies. Section 1983 authorizes actions at law, suits in equity, or a "proper proceeding for redress." RFRA authorizes "appropriate relief." Petitioners make much of §1983's reference to "action at law." Pet. Br. 28-29. But Congress was not obliged to use the language of 1871, when the forms of action

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[3] *E.g.*, *Wyatt v. Cole*, 504 U.S. 158, 161-64, 169 (1992); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150, 163-66 (1970).

prevailed, federal courts had a law side and an equity side, and the two sides were understood as rigidly separate. The first RFRA bill in 1990 used the modern phrase, "civil action,"[4] and later versions substituted the near equivalent, "judicial proceeding." §2000bb-1(c).

By the time of RFRA, the law of remedies for civil-liberties violations was well developed. There was no need for Congress to codify that law in RFRA, and a risk of introducing unintended ambiguity or change if it tried.

The free-exercise rights that RFRA was restoring had always been enforced, in most cases, under §1983. Restoration of free-exercise rights included preservation of these established remedies. "Appropriate relief" under RFRA was the relief that this Court had held appropriate under §1983.

B. RFRA Remedies Modeled on §1983 Include Damages Against Individual Officers, Subject to the Qualified-Immunity Rules.

The law of remedies for civil-liberties claims against officials acting under color of law was well developed in 1993. That law is familiar in its broad outlines and need not be reviewed in detail here. For greater detail, see Douglas Laycock & Richard L. Hasen, *Modern American Remedies* 484-623 (5th ed. 2018).

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[4] "A person aggrieved by a violation of this section may obtain appropriate relief (including relief against a government) in a civil action." S.3254 §2(c), 101st Cong. (1990). *Compare* Fed. R. Civ. P. 2: "There is one form of action—the civil action."

It was settled that individuals cannot sue a sovereign government for any form of relief. *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989) (holding that §1983 does not override sovereign immunity).

Sovereign immunity is why damages against a sovereign were not "appropriate relief" under the identical language of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc-2(a). *Sossamon v. Texas*, 563 U.S. 277 (2011). Petitioners claim that "[t]his Court has held that damages are not 'appropriate relief'" under RLUIPA, Pet. Br. 35, but that claim is exaggerated nearly to absurdity. *Sossamon* involved sovereign immunity and the clarity required to extract a waiver of that immunity. The Court said that "[t]he context here—where the defendant is a sovereign—suggests, if anything, that monetary damages are not 'suitable' or 'proper.'" 563 U.S. at 286.

Individual defendants and sovereign defendants are, and always have been, subject to fundamentally different rules. This is why the Office of Legal Counsel, in an opinion shortly after RFRA was enacted, said that RFRA did not authorize damage suits against the United States or state governments, but that it did authorize damage suits against government employees and against local governments. *Availability of Money Damages Under the Religious Freedom Restoration Act*, 18 U.S. Op. Off. of Legal Counsel 180 (1994). Petitioners cannot reason from *Sossamon* to this case.

In 1993, as today, plaintiffs alleging violations under color of law could sue local governments, but

only for their illegal policies or customs and not for violations by their employees.[5]

Plaintiffs alleging violations under color of law could sue government officials in their official capacities for injunctions ordering them to comply with federal law in the future. *Ex parte Young*, 209 U.S. 123 (1908). But such plaintiffs could not sue for money out of the state treasury to compensate for past wrongs. *Edelman v. Jordan*, 415 U.S. 651 (1974).

Finally, and most relevant here, plaintiffs alleging violations committed under color of law could sue the responsible government employees in their personal capacities. *Monroe v. Pape*, 365 U.S. 167 (1961). Such plaintiffs could recover damages, but only if defendants violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This was the defense of qualified immunity.

There were many additional details, but this was the core: sovereign immunity, official-capacity injunctions, personal-capacity damages, and qualified immunity. Congress did not attempt to codify all this. But by authorizing "appropriate relief," it adopted the remedies that this Court had held appropriate for civil-liberties violations committed under color of law.

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[5] *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978) (holding municipalities to be persons under §1983, but not liable in *respondeat superior*); *Lincoln County v. Luning*, 133 U.S. 529 (1890) (holding that local governments do not have sovereign immunity).

C. RFRA as Originally Enacted Did Not Distinguish Federal Defendants from State Defendants.

Nothing in the text or legislative history of the original RFRA indicated any distinction between state and federal defendants. Occasional references to the federal government in RFRA either treated it exactly like state governments or addressed specific federal issues that could not easily be avoided.

Thus the definition of "government" included "the United States, a State, or a subdivision of a State." §5(1). Then the Act specified that this definition "includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States," §5(2), making clear that these federal entities were covered.

The Act applied "to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act." §6(a). And then, because Congress cannot bind its successors, the Act said (and still says) that it applies to all later-enacted federal statutes "unless such law explicitly excludes such application" by referring to RFRA. §6(b), §2000bb-3(b). This provision did not apply to state legislation, because unlike future Congresses, state legislatures have no power to override federal law.

RFRA inserted "the Religious Freedom Restoration Act" into 5 U.S.C. §504, which authorizes awards of attorneys' fees in federal agency proceedings. §4(b). There is no parallel provision for state agency proceedings, perhaps because Congress lacked sufficient

information about the great variety of state agencies or because it lacked any relevant statutory model.

Inserting RFRA into §504 subjects federal defendants to greater liability than that imposed on state defendants under §1983. Defendants in federal civil-rights and civil-liberties litigation are generally not liable for fees incurred before administrative agencies unless plaintiffs were required to exhaust the agency remedy, *and* unless they did not get complete relief before the agency, so that they had to sue in court on the merits.[6] Greater liability for federal defendants on this point is at least in tension with petitioners' claim that federal defendants were silently exempted from a key remedy long available against state defendants.

Congress subjected all defendants—federal, state, and local—to fee awards under §1988. It did not place state defendants in §1988 and federal defendants in the less generous Equal Access to Justice Act, 28 U.S.C. §2412, which applies to much other litigation against federal defendants.

Most important, Congress did not distinguish state and federal governments in the provision authorizing "appropriate relief." "[A]ppropriate relief" appeared only once, and it had the same meaning for each. There was no indication that personal-capacity suits were completely barred against federal officers when they were authorized against state officers.

Similarly in the legislative history, nothing in either committee report suggested any difference

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[6] *See North Carolina Department of Transportation v. Crest Street Community Council, Inc.*, 479 U.S. 6, 11-15 (1986) (reviewing cases).

between the treatment of state and federal defendants. Senate Report No. 103-111, *Religious Freedom Restoration Act of 1993* (July 27, 1993) (hereinafter Senate Report); House Report No. 103-88, *Religious Freedom Restoration Act of 1993* (May 11, 1993) (hereinafter House Report).

D. Later Amendments Did Not Change the Available Remedies.

This Court held RFRA unconstitutional as applied to the states. *City of Boerne v. Flores*, 521 U.S. 507 (1997). Congress responded with the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc *et seq*.

RLUIPA amended RFRA to conform to the Court's decision in *Boerne*. All references to state law were deleted; RFRA now applies only to federal law. §2000bb-3(a). "[G]overnment" is defined to include only the many components of the federal government. §2000bb-2(1), 2(2).

This Court has long adhered to a strong presumption against repeals by implication. *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). If damage actions were authorized by the original Act in 1993, they were not implicitly repealed by a later amendment that dealt only with the states and on its face changed nothing about RFRA remedies or RFRA and the federal government.

RLUIPA also amended RFRA substantively, inserting a new definition of "exercise of religion." Pub. L. 106-274, §7(a)(3), 114 Stat. 803 (2000). RFRA now protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." §2000bb-2(4), incorporating the RLUIPA

definition from §2000cc-5(7)(A). This definition responded to lower-court decisions that had mistakenly imposed compulsion or centrality requirements under RFRA.[7] This amendment shows Congress strengthening RFRA, not weakening RFRA, as it applied to the federal government.

This amendment also shows that Congress considered the need for RFRA amendments beyond just complying with *Boerne*. But Congress did not amend the remedies provision in response to the elimination of state and local governments from coverage. It did not shift the model for remedies from §1983 to the emerging cases confining the scope of *Bivens*. "Appropriate relief" remained what it had been under the original RFRA, when states were covered and §1983 was the obvious model. Section 1983 remained the relevant model after the amendments as it had been before.

E. If Congress Had Meant to Exclude Damage Remedies, It Would Have Said So.

When RFRA was enacted, §1983 had provided the remedies for a substantial majority of the cases that RFRA would cover. Those remedies had always included damages against individual officers, subject to the qualified-immunity rules. In light of that, if Congress had meant to exclude damage remedies—to depart from the law it was restoring—it should have said so.

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[7] *The Religious Liberty Protection Act of 1998: Hearing Before the Senate Committee on the Judiciary on S. 2148, 105th Cong.* 62-63 (June 23, 1998) (statement of Douglas Laycock, describing the reasons for this definition), *reprinted in* Douglas Laycock, 4 *Religious Liberty: Federal Legislation After the Religious Freedom Restoration Act, with More on the Culture Wars* 105, 127-28 (2018).

And we have every reason to believe that it would have said so.

Congress often excludes or limits damage remedies, especially when authorizing litigation against governments. The Administrative Procedure Act waives sovereign immunity in any action "seeking relief other than money damages." 5 U.S.C. §702. The Home Owners' Loan Act provides that the Comptroller of the Currency "shall be subject to suit (other than suits on claims for money damages)" by a savings association or its officers or directors. 12 U.S.C. §1464(d)(1)(A).

Congress excludes damages by authorizing only equitable remedies. The Employee Retirement Income Security Act authorizes plan participants to sue for injunctions or "other appropriate equitable relief." 29 U.S.C. §1132(a)(3). The Securities and Exchange Act authorizes the SEC to sue for injunctions, 15 U.S.C. §78u(d)(1), civil penalties, §(d)(3), writs of mandamus, §(e), and "any equitable relief that may be appropriate or necessary," §(d)(5), but not for compensatory damages.

The Oil Pollution Act elaborates: "nothing in this Act shall be construed to authorize or create a cause of action against a Federal officer or employee in the officer's or employee's personal or individual capacity." 33 U.S.C. §2718(d).

Another common drafting technique is to authorize some elements of damages but omit or explicitly exclude others. The Federal Deposit Insurance Corporation Act authorizes "actual direct compensatory damages," which are defined to exclude punitive damages, pain and suffering, and "damages for lost profits

or opportunity." 12 U.S.C. §1821(e)(3). The Back Pay Act provides that wrongfully discharged or demoted federal employees may recover back pay and attorneys' fees, but not (by obvious omission) emotional distress, harm to reputation, or other consequential damages. 5 U.S.C. §5596. The Prison Litigation Reform Act provides that prisoners may not recover for "mental or emotional injury" "without a prior showing of physical injury or the commission of a sexual act." 42 U.S.C. §1997e(e).

In some contexts, Congress should authorize damages explicitly. If it means to override sovereign immunity, it *must* authorize damages explicitly. But in RFRA, Congress authorized "appropriate relief" in a context where the details of appropriate relief had been determined by a large body of law that had long applied to the majority of cases that the proposed statute would cover. That relief included damages against officers in their personal capacities, subject to the qualified-immunity rules. In such a context, if Congress meant to exclude damages from "appropriate relief," it would have said so.

It would have been easy to say "appropriate equitable relief" if that were what Congress meant. But it was not what Congress meant, and it is not what Congress said.

F. Congress Explained That Identical Language in RLUIPA Tracked the Remedies from §1983.

Congress briefly explained its understanding of "appropriate relief" in the committee report on the identical language in the bill that led to RLUIPA:

> Sections 4(a) and (b) track RFRA, creating a private cause of action for damages, injunction, and declaratory judgment, and creating a defense to liability, and providing for attorneys' fees. These claims and defenses lie against a government, but the Act does not abrogate the Eleventh Amendment immunity of states. In the case of violation by a state, the Act must be enforced by suits against state officials and employees.

House Report No. 106-219, *Religious Liberty Protection Act of 1999*, at 29 (July 1, 1999). Section 4(a) is now 42 U.S.C. §2000cc-2(a); §4(b) (later §4(d)) inserted RLUIPA into the authorization of attorneys' fees in §1988. This explanation was repeated, nearly verbatim, in the section-by-section analysis of the final bill. 146 Cong. Rec. 19123-24 (Sept. 22, 2000).

Why is there no similar explanation in the legislative history of RFRA? RFRA passed unanimously in the House,[8] and 97-3 in the Senate.[9] Despite this overwhelming support, RFRA took three-and-a-half years to enact, principally because it became entangled in controversies over abortion, tax exemptions, and aid to religious schools. Senate Report 12-13; House Report 8-9; Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 236-39 (1994). Most of the debate focused on these side issues; the bill's uncontroversial basics received much less attention.

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[8] 139 Cong. Rec. 9687 (May 11, 1993); Linda Feldmann, *Congress to Boost Freedom of Religion*, Christian Science Monitor (May 17, 1993).

[9] 139 Cong. Rec. 26416 (Oct. 27, 1993).

In the debates that led to RLUIPA, opposition emerged on the merits, everything was debated more thoroughly, and RLUIPA was what survived from a broader bill that could not be passed.[10] In this environment, the committee and sponsors produced more detailed explanations, including explanations of the language taken verbatim from RFRA. These explanations are one more piece of evidence about the original meaning of RFRA.

II. RFRA's Authorization of "Relief Against a Government" Does Not Limit the Scope of "Appropriate Relief."

Petitioners claim that persons acting under color of law are not "government," in the teeth of a statutory definition that explicitly says they are. *Compare* Pet. Br. 39-40 *with* §2000bb-2(1). And petitioners assert that RFRA authorizes relief "only if it runs 'against a government.'" Pet. Br. 13-14. They assume this proposition throughout, but never explain or defend it.

These points are connected. Petitioners say that officials and others acting under color of law are not government; "appropriate relief" is available only against government; therefore, relief is not available against them. Petitioners are wrong at every step.

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[10] *See* 146 Cong. Rec. 16702 (July 27, 2000) (remarks of Senator Reid, regretting loss of the broader bill); Laycock, *supra* note 7, at 1-295 (reviewing debates on the broader bill, the proposed Religious Liberty Protection Act).

A. Officials, and Other Persons Acting Under Color of Law, Are "Government" for Purposes of RFRA.

RFRA expressly provides that "government" includes any "person acting under color of law." §2000bb-2(1). This phrase is taken from the law of §1983, which imposes personal monetary liability on individuals acting under color of law, and which does *not* impose monetary liability on state governments or on any state official or employee in his official capacity. Petitioners' elaborate attempt to claim that "person acting under color of law" should be confined to such persons in their official capacity simply ignores the history and context of the phrase.

Petitioners' analysis on this point is misplaced for another reason. They say that only "government" can violate RFRA, citing the substantive prohibition in §2000bb-1(a). Pet. Br. 42. Therefore, they say, a government employee acting in a purely personal capacity cannot violate RFRA. *Ibid.* So far, so good.

Then they say that therefore, remedies should also run only against employees in their official capacity. "[T]here is no basis for adopting one reading of 'official' under RFRA's substantive prohibition and another under its remedial provision." *Ibid.* This claim is an utter non sequitur.

Government employees sued for violations under color of law always acted in their official capacity. That is what it means to act under color of law. Neither RFRA nor §1983 applies if a person who happens to be a government employee acts in a purely personal capacity.

But while such defendants *acted* in their official capacity, they are *sued* for these acts in either their official or personal capacities, depending on the facts and the relief sought, with different rules applying to different kinds of lawsuits. "Official" and similar words *always* mean something different at the remedies stage of personal-capacity suits than at the liability stage. There is nothing the least bit odd about saying that a government employee may be sued in a personal capacity for violations committed in an official capacity. Such lawsuits proceed in federal court every day.

All this is too well settled and understood to generate much litigation or many explicit holdings. But in *Hafer v. Melo*, 502 U.S. 21, 27 (1991), the Court explicitly *rejected* the argument that "officials may not be held liable in their personal capacity for actions they take in their official capacity." *See also Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017) ("Personal-capacity suits, on the other hand, seek to impose *individual* liability upon a government officer for actions taken under color of state law.") (emphasis in original). Petitioners here are potentially liable in their personal capacities for their alleged misconduct in their official capacities; that is what personal-capacity suits do.

B. The Phrase "Relief Against a Government" Does Not Limit Remedies or Defenses.

The assumed but undefended half of petitioners' argument fares no better. Petitioners say without analysis that "relief is 'appropriate' only if it runs 'against a government,'" citing §2000bb-1(c). Pet. Br. 13-14. But subsection 1(c) is not the reason why

affirmative relief is generally available only against government defendants.

The true reason is that only governments can violate the statute. §2000bb-1(a); *see supra* 19. And unsurprisingly, a cause of action under RFRA is explicitly tied to the existence of a violation. §2000bb-1(c) (victim of violation "may assert that violation as a claim or defense in a judicial proceeding"). A private citizen not acting under color of law, or a government employee acting in a wholly personal capacity, cannot violate RFRA. But if such a citizen or employee acts under color of law, he becomes part of government for this purpose. §2000bb-2(1).

The phrase "appropriate relief against a government" was drafted for a different reason. The drafting history is reasonably clear that "appropriate relief against a government" means "*including* against a government." It does not mean "*only* against a government." The right to assert a RFRA violation "as a claim or defense in a judicial proceeding" is a free-standing right; it is supplemented, not limited, by the immediately following right to "obtain appropriate relief against a government."

"[A]gainst a government" was an inept attempt to address this Court's cases requiring explicit statutory text to override sovereign immunity and perhaps, some drafter appears to have thought, to authorize any relief against governments at all. As noted *supra* 8, congressional attempts to codify this Court's remedies law risked unintended ambiguity, and "against a government" achieved that ambiguity. The drafting history is reviewed in Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides a Defense*

in Suits by Private Plaintiffs, 99 Va. L. Rev. 343, 351-55 (2013).[11]

The first version of RFRA to be introduced said: "A person aggrieved by a violation of this section may obtain appropriate relief (including relief against a government) in a civil action." S.3254 §2(c), 101st Cong. (1990). The House version was identical except that it said "party aggrieved" instead of "person aggrieved," and "governmental authority" instead of "government." H.R. 5377 §2(c), 101st Cong. (1990).

When the bills were reintroduced in 1991, the new versions authorized a defense as well as a cause of action. They said that a person whose RFRA rights had been violated "may assert that violation as a claim or defense in a judicial proceeding." S.2969 §3(c), 102d Cong. (1991); H.R. 2797 §3(c), 102d Cong. (1991).

This revision triggered further changes. It may have seemed redundant to say that a person with a claim in a judicial proceeding may obtain relief; relief naturally follows if the claim is successful.

But relief does not naturally follow against a government with immunity defenses. It was still thought necessary to specify that claimants could obtain relief against a government. But in the new language ("may assert that violation as a claim or defense in a judicial proceeding"), there was no longer any word or phrase to which a parenthetical about "including relief against a government" could easily be attached. So

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[11] It is important to read this Note in hard copy or in a source such as HeinOnline that preserves graphics. Westlaw does not reproduce the insertions and deletions in drafts of the bills.

the authorization for relief against a government became an independent verb rather than a participial phrase modifying "relief." The result is that we get two verbs and two rights: 1) "assert that violation as a claim or defense in a judicial proceeding," and 2) "obtain relief against a government."

This drafting history matters here because petitioners' mistaken reading of "against a government" as a limiting phrase is a step in their larger argument. "[A]gainst a government" does not limit the scope of "appropriate relief." The limitation to "government" appears in the substantive rule in §2000bb-1(a); only government can violate the Act. The remedies provision in §2000bb-1(c) makes clear that RFRA's cause of action extends to government defendants. It is not a second limitation to government, duplicating the limitation in the substantive rule. And petitioners are clearly "government" for purposes of the substantive rule. Otherwise, government could not violate RFRA at all, because government cannot act except through its officers and employees.

III. Damages Are an Essential Remedy in a Limited Number of Religious-Liberty Contexts in Which Congress Intended to Provide a Remedy.

There have been few damage suits against federal officers under RFRA, and there will never be many. *Infra* 31-32. But damages are essential in certain situations.

Some of the examples below involve state or local defendants no longer subject to RFRA. But as noted *supra* 5-6, these cases remain relevant to how Congress understood "appropriate relief." If Congress

in 1993 intended to provide a remedy for a category of violations, whether state or federal, and if damages were the only practical, effective, or meaningful remedy for that category of violations, then Congress must necessarily have intended damages to provide the remedy.

A. Religiously Prohibited Autopsies Were Among the Core Cases That Motivated RFRA's Enactment, and Damages Are Often the Only Available Remedy.

The clearest example is unauthorized autopsies in violation of decedent's or his family's religious belief that an autopsy defiles the body or condemns the soul to suffering in the afterlife. These cases played a central role in Congress's judgment that RFRA was needed. And Congress was aware that damages were indispensable in these cases, because other remedies were often unavailable. If damages were not "appropriate relief" under RFRA, there would have been no effective remedy in one of the situations that Congress most wanted to remedy.

1. The autopsy cases. As this Court recognized, "[m]uch of the discussion" about the need for RFRA "centered upon anecdotal evidence of autopsies performed on Jewish individuals and Hmong immigrants in violation of their religious beliefs." *Boerne*, 521 U.S. at 530-31. The Court cited four witness statements in the House, three in the Senate, and both committee reports. *Id.* at 531. So many witnesses invoked this example because it was accurately perceived to be powerfully effective.

In the case Congress discussed most, a medical examiner performed an autopsy on a young Hmong man

without notice to his family. The family sued for emotional-distress damages. The district court held, under the free-exercise standard then governing, that the examiner had not shown a compelling interest to justify the burden on the family's beliefs. *Yang v. Sturner*, 728 F. Supp. 845 (D.R.I. 1990) ("*Yang I*"). Then this Court decided *Employment Division v. Smith*, 494 U.S. 872 (1990), leading the district judge to reverse himself because the statute authorizing the autopsy was a generally applicable law. *Yang v. Sturner*, 750 F. Supp. 558, 559-60 (D.R.I. 1990) ("*Yang II*").

Congress was also told that *Smith* had barred relief for a Jewish parent after an unnecessary autopsy performed on her son. He died in an automobile accident, so the cause of death was obvious.[12]

These cases, and *Yang* in particular, became prominent for two reasons. First, William Yang, the decedent's uncle, gave poignant testimony about the family's distress and their belief that they were cursed for allowing mutilation of the body. *Senate Hearing* 5-6; *House Hearings* 107-08 (both *supra* note 12). "[I]t was plain to anyone who attended the hearings in either house that the committee members were moved by

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[12] *Religious Freedom Restoration Act of 1991: Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary on H.R. 2797*, at 81, 122, 158 (May 13-14, 1992) (hereinafter House Hearings) (three witness statements citing *Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990), *aff'd mem.*, 940 F.2d 661 (6th Cir. 1991)); *The Religious Freedom Restoration Act, Hearing Before the Senate Committee on the Judiciary on S. 2969*, at 9, 50, 159, 193 (Sept. 18, 1992) (hereinafter Senate Hearing) (four witness statements citing *Montgomery*).

these cases and meant to subject them to the Act." Laycock & Thomas, 73 Tex. L. Rev. at 229. The district judge had also expressed "the deepest sympathy for the Yangs," "moved by their tearful outburst" and "the depth of the Yangs' grief." *Yang II*, 750 F. Supp. at 558.

Second, the judge's reversal of his initial ruling dramatized the effect of *Smith* and thus the need for RFRA. He expressed "profound regret" even as he said that *Smith* "constrained" him to reject plaintiffs' claims. *Id.* at 559.

The House committee report cited *Yang* as the first of four cases showing that "facially neutral and generally applicable laws have and will, unless the Religious Freedom Restoration Act is passed, continue to burden religion." House Report 5-6 & n.14. *See also* Senate Report 8 & n.13 (citing *Yang* as first example of how, "[b]y lowering the level of constitutional protection for religious practices, the [*Smith*] decision has created a climate in which the free exercise of religion is jeopardized"). Senator Hatch, the lead Republican sponsor, told the Senate that RFRA "is important because it restores protection to individuals like the Yangs and others who have suffered needlessly." 139 Cong. Rec. 26181 (Oct. 26, 1993). Representative Edwards, the subcommittee chair and an original co-sponsor, listed autopsies as the first example in explaining to the House why RFRA "is a very, very important bill." 139 Cong. Rec. 9681 (May 11, 1993).

Most government autopsies are performed under state law, but they remain relevant to what "appropriate relief" meant in 1993, when states were covered. Moreover, RFRA still applies to autopsies performed

under federal law, as in the District of Columbia, the territories, and the military.

2. Damages or nothing. Congress was also informed that in the autopsy cases, injunctive relief would often be unavailable. The autopsies occurred before family members could object, and the violation was unlikely to recur for the same family.

At the House hearing, after William Yang described his family's suffering, the subcommittee chair questioned Robert Peck, an attorney who accompanied Mr. Yang to the hearing. Peck testified that injunctions would give no relief:

> Mr. EDWARDS. And I suppose, Mr. Peck, you are going to say that if this law had been in effect that we are considering today that the Yang family could have gone to court and stopped the autopsy from taking place. Is that correct?
>
> Mr. PECK. They could not have stopped the autopsy because it occurred too quickly, without their knowledge. The medical examiner undertook it on his own without notifying them to do the autopsy. So they brought an action in Federal court in Rhode Island asking for declaratory relief against this kind of practice over sincere religious objections in the future, as well as damages under the *Bivens* doctrine.

House Hearings 111. Mr. Peck followed the district court in his reference to *Bivens*; the court had misread a recent decision and erroneously attributed the damage claim against state officials to *Bivens* instead of to §1983. *Yang I*, 728 F. Supp. at 847-52. This error does

not affect the point at issue here: damages were the only effective remedy.

The district court in *Yang I* had also found that "the alternative remedies available to the Yangs fall far short of providing the compensation and protection of a damage suit." 728 F. Supp. at 850.

> As for Walter Bivens, for the Yangs "it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring). … [T]he Yangs did not and would not have the chance to rush to a court for an injunction to stop an autopsy.

Id. at 851.

In short, if damages were not considered "appropriate relief" under RFRA, Congress would have denied the only meaningful relief in a context where it was most concerned to provide relief.

B. Damages Are Important in Other RFRA Contexts as Well.

Damages in religious-freedom cases are often small, nominal, or most commonly, not sought. But sometimes damages are important, usually because of factors such as those in the autopsy cases. Damages are available, at least in theory, when a religious believer has suffered a cognizable harm, which can include mental or emotional distress. *See Memphis Community School District v. Stachura*, 477 U.S. 299, 307 (1986); *Carey v. Piphus*, 435 U.S. 247, 263-64 (1978).

Damages become indispensable if prospective relief is impossible, as when the harm is imposed suddenly and the believer cannot anticipate it in time to get an injunction, or when harm already suffered is

unlikely to recur. These situations can arise in other categories of cases in which Congress likely intended RFRA to provide a meaningful remedy.

1. Destruction of religious property. Sometimes the burden on religion is the destruction of religious property. In such cases, there is a tangible consummated harm for which compensatory relief is clearly "appropriate." Injunctive relief is likely to be impractical, because the victim is generally unaware of the impending harm before it happens. Thus, damages are important when prison guards damage, seize, or destroy an inmate's religious books. *See DeMarco v. Davis*, 914 F.3d 383, 390 (5th Cir.) (prison guard allegedly seized and destroyed inmate's Bible and other religious books, "leaving damages as his only recourse"), *cert. denied*, 140 S. Ct. 250 (2019); *Harris v. Escamilla*, 736 F. App'x 618 (9th Cir. 2018) (prison guard allegedly threw down inmate's Quran and stomped on it, rendering it unusable).

2. Bodily invasions. The same problem arises if the substantial burden on religion involves a battery or physical invasion of the person in violation of her beliefs. Such harm is fully consummated and cannot be remedied by injunctions. As in the autopsy cases, the claimant may have no advance notice of the invasion and thus cannot seek prospective relief. *See John F. Kennedy Memorial Hospital v. Heston*, 279 A.2d 670 (N.J. 1971) (upholding blood transfusion to an unconscious Jehovah's Witness), *overruled*, *Matter of Conroy*, 486 A.2d 1209, 1224 (N.J. 1985).

3. Students. RFRA's legislative record contains numerous references to public-school students' religious-freedom claims that would be barred, unjustifiably in Congress's view, by *Employment Division v.*

Smith. Examples included claims to avoid wearing immodest gym clothing, *Senate Hearing* 144 (Rev. Forest D. Montgomery), *House Hearings* 18 (Robert P. Dugan, Jr.); to wear a yarmulke or other religious garb, *Senate Hearing* 7 (Sen. Hatch), 144 (Montgomery), *House Hearings* 17 (Dugan); or to opt out of sex-education classes, *Senate Hearing* 144 (Montgomery), *House Hearings* 18 (Dugan), 149 (Prof. Edward M. Gaffney). It seems likely that Congress intended effective relief for these students.

Damages are the only possible relief for many student claims. Students subject to school discipline may be forced to submit before they can consult parents, let alone an attorney. Or a student may graduate or transfer during the litigation, meaning that he can no longer claim prospective relief. *See Ceniceros v. Board of Trustees*, 106 F.3d 878, 879 n.1 (9th Cir. 1997) (because student had graduated, "her claims for injunctive and declaratory relief are moot, and only her claim for monetary damages survives").

In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), this Court held that "appropriate relief" is available in Title IX cases, *id.* at 66-73, and that damages were "appropriate relief," *id.* at 75-76. Among the Court's reasons was that, because the plaintiff "no longer attends a school in the Gwinnett system, prospective relief accords her no remedy at all." *Id.* at 76.

4. Temporary confinements. Even when claims by prisoners or detainees involve continuing rather than one-time harms, prospective relief may be unavailable because the plaintiff has been released or transferred—sometimes transferred for the very purpose of mooting the claim. In *Jama v. United*

States Immigration and Naturalization Service, 343 F. Supp. 2d 338 (D.N.J. 2004), refugees detained at a facility operated by an INS contractor alleged that personnel had seized their Qurans and Bibles, prevented them from praying, prevented Muslims from performing ritual ablutions, and refused to provide meals without pork or adjust meal times for Ramadan. *Id.* at 378.

The court interpreted RFRA to authorize claims for money damages against individual defendants. *Id.* at 371-76. The court also said that if the choice of remedy had been a matter of judicial discretion, damages "would be the only appropriate relief." *Id.* at 376 n.30. Because "none of the Plaintiffs remain in custody …, injunctive and declaratory relief clearly would be inadequate for Plaintiffs." *Ibid.* Another example is *Harris*, 736 F. App'x at 621 (dismissing claims for prospective relief as moot, because inmate "has been moved to another prison facility" and "does not allege any statewide policy impacting his religious activities").

IV. Petitioners' Fears of Over-Deterrence Are Greatly Exaggerated.

There have never been many damage claims under RFRA. Respondents report that in the statute's 26-plus years of operation, only two courts of appeals and six district courts have decided whether damages are authorized against federal employees. Op. Cert. 15-16 & n.15. Petitioners addressed this point without disputing respondents' count of the cases. Cert. Reply 3.

The first of these decisions came more than fifteen years ago, with an elaborate opinion. *Jama*, 343 F. Supp. 2d at 371-76. The first court of appeals decision

came early in 2016, nearly four years ago. *Mack v. Warden Loretto FCI*, 839 F.3d 286, 301-04 (3d Cir. 2016). There is no basis for petitioners' speculation, Cert. Reply 3, that there may suddenly be a surge of cases, or that the word about RFRA damage claims is just now getting out.

There are many reasons why there are so few cases. Most RFRA violations inflict no tangible harm. Emotional distress is hard to prove and often not severe enough to be worth suing for. Prisoners, the most prolific litigators, cannot sue for emotional distress at all unless they suffered physical injury or a sexual assault. 42 U.S.C. §1997e(e). Neither is a common incident of RFRA violations.

Beyond these serious issues, qualified immunity is a huge barrier to liability. As this Court has repeatedly said, qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). And qualified immunity has become steadily more protective since the Court first said this. "[E]xisting precedent must have placed the statutory or constitutional question beyond debate." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018). Given lawyers' capacity for debate, this is an incredibly protective standard—an excessively protective standard if taken at all literally. Employees who violate this standard *should* be deterred, and their victims should be compensated.

But even these incompetent or malicious employees are protected in fact, because empirical study shows that the government nearly always indemnifies them. James E. Pfander, Alexander E. Reinert, & Joanna C. Schwartz, *The Myth of Personal Liability:*

Who Pays When Bivens Claims Succeed, 72 Stan. L. Rev. __ (2019), https://ssrn.com/abstract_id=3343800, at 18-23.

Even the employing agency doesn't pay. When there is sufficient risk of liability that the government settles a case against an employee, it does so on terms that allow it to pay from the Judgment Fund, not from the agency's budget. *Id.* at 23-32.

Petitioners claim that all these stringent and multi-layered protections are not enough. They want an absolute rule: no damage claims ever, no matter how outrageous their conduct, no matter how severe the harm they inflict, no matter how useless any other remedy may be. Nothing in policy or experience shows any need for such sweeping protection.

More important, there is no basis for such absolute protection in the statute. "Appropriate relief" for civil-liberties violations has always included damages against officers, and RFRA is no exception.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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