

United States Court of Appeals
For the Second Circuit

MUHAMMAD TANVIR, JAMEEL ALGIBAH,
NAVEED SHINWARI

	Docket No.
Petitioners	16-1176

-v-

AWAIS SAJJAD, et al.

Respondent

Oral Argument

March 1, 2017

1 **Judge Katzmann:** Hear the next case on the calendar. [PH] Tanver
2 versus Tansin? We'll wait for the court to clear and so... Another
3 group is coming in. Okay. Please begin.
4

5 **Ramzi Kassem:** Good morning, and may it please the court. Ramzi
6 Kassem from the CLEAR Project at CUNY School of Law for the
7 Appellant. In keeping with the, with its text purpose and
8 history, the Religious Freedom Restoration Act permits damages
9 against Federal officials in their individual capacity. That
10 outcome is consistent with both Franklin and Sossamon. Congress
11 enacted RFRA, providing appropriate relief one year after
12 Franklin used that very language to refer to any and all relief,
13 including individual capacity damages. The Office of Legal
14 Counsel agreed, in 1994, that individual capacity damages were
15 likely available under Franklin, and that was one year after
16 RFRA. And then Congress itself confirmed that RFRA "creates a
17 private cause of action for damages", and that's a quote, in
18 1999.

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20 That's in the legislative record for a precursor statute to [PH]
21 RLUIPA which was passed in 2000. The statute itself further
22 provides that Congress' purpose was not merely to restore the
23 compelling interest test, and overturn Employment Division v.
24 Smith, but also to provide a claim to persons whose religious
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1 exercise is substantially burdened by government. Its intent, at
2 the time -

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4 **Judge Katzmann:** If we had, if we go back to the Pre-employment
5 Division case, would you still be able to make the argument that
6 you're making? Because if you look at what was pre-employment,
7 it's not clear that you can assert that there is this capacity
8 for suits against individuals, in their individual capacity.
9 Because if we go, you know, we look at what the Supreme Court
10 did, you know, Congress passed, passed a law. And we go look at
11 pre, the pre-Congressional action, the pre-Supreme Court action,
12 and it's even the pre-Supreme Court action is not - or the pre-
13 Congressional action is not clear, that there are these suits in
14 individual capacity.

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16 **Ramzi Kassem:** Your Honor, the - prior to Smith, the outcome that
17 we're advocating here, Your Honor, is certainly consistent with
18 the Supreme Court's pre-Smith jurisprudence. Prior to Smith, it
19 was possible to - a number of courts assumed - that free
20 exercise, remedies, for example, under Bivens, were available.
21 We cited to some of these cases in our briefs. Cases like [PH]
22 Jihad v O'Brian. There is a case that we actually did not cite
23 in our briefs - Dellums v. Powell. It's a DC Circuit case from
24 1977 that actually awarded damages against a federal officer
25 under Bivens for a First Amendment violation.

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Judge Lynch: The time Congress acted here, that was before the Supreme Court shut down Bivens.

Ramzi Kassem: That's correct, Your Honor. But there's a really important point here, and I'm glad you raised the question, Judge Lynch. We are not in a Bivens universe. Courts have very consistently distinguished Bivens cases from cases where Congress has provided a cause of action. And that's for a very simple reason. Bivens is a Universe where the cause of action itself is entirely judicially constructed - it was implied, the cause of action was implied, by the Courts. We are in a world that is more closely akin to 1983. We have a Congressionally provided cause of action in RFRA. What's more, Congress provided for a remedy of appropriate relief.

Judge Lynch: Did Congress say that its purpose was to restore everything to the status quo ante Smith?

Ramzi Kassem: Your Honor, Congress' purpose in passing RFRA was two-fold. The first part of that purpose, of course, was to restore the pre-Smith jurisprudence.

Judge Lynch: To restore the compelling - the compelling interest test?

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Ramzi Kassem: That is absolutely correct, Your Honor.

Judge Lynch: Congress could have said, "Our purpose here is to make things exactly like they were the day before Smith was decided." But it didn't say that. Did it?

Ramzi Kassem: That's correct, Your Honor. Congress did not say that. What Congress said was, "We want to restore things to the pre-Smith world. And we want to provide a claim." And the Supreme Court, since RFRA was passed in '93, on two occasions, has stated very plainly that what Congress actually did with RFRA was to provide even broader protection for religious liberty than was available pre-Smith. And those two decisions are City of -

Judge Pooler: Didn't they also say that in Hobby Lobby? That it's broader?

Ramzi Kassem: That is absolutely correct, Your Honor. It was City of [INDISCERNIBLE] in 1997 and in Hobby Lobby in 2014, they said, "RFRA did more than merely restore the balancing test used in the Sherbet line of cases, it provided even broader protection for religious liberty." So Congress here has very clearly created a free exercise, cause of action.

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2 **Judge Katzmann:** But with respect to Smith itself, it didn't do
3 anything, did it? To alter the standard for establishing
4 impermissibly discriminatory conduct on the basis of religion?

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6 **Ramzi Kassem:** Your Honor, the - what... I think one way, perhaps,
7 to approach the question is to think about the different
8 possible options that Congress had in passing RFRA. And I guess
9 Congress had four options. It could have created a cause of
10 action. Sorry, it could have refrained from creating a cause of
11 action at all, and left the work to 1983 and to Bivens. That's
12 option one. Option two would have been for it to create a cause
13 of action, and limit it to injunctive relief explicitly, that's
14 option two. Option three would have been to do, I guess, what it
15 did here. Create the cause of action, and remain silent or
16 ambiguous as to the scope of the appropriate remedies. And then
17 option four would have been for Congress to be explicit and
18 provide far more explicitly for monetary relief as damages. Now,
19 if Congress' intention was as the defendants contend, then
20 Congress would have gone for options one or two, I suppose. But
21 Congress did not do that. Instead, Congress used under color of
22 law language that brings in 1983 jurisprudence and then I guess
23 that leaves the only question, which is at the heart of this
24 case, why was Congress not more explicit? And it's the question
25 that's centrally raised by the Defendants in their brief. Why

1 did Congress not opt for option four? Why did Congress not just
2 say that it wanted -

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4 **Judge Pooler:** What's your answer to that question?

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6 **Ramzi Kassem:** Well, Your Honor, the answer is very simple. We
7 believe that with RFRA, Congress actually found the most elegant
8 solution to a complicated problem. If Congress had gone with
9 option four, then that would have raised a host of
10 complications. There is a patchwork of different defendants,
11 with different issues here. Federal sovereign immunity issues.
12 State sovereign immunity issues - because you know, at the time
13 of RFRA's passage, the intent was to reach the states. Commerce
14 clause, versus spending clause issues. So, the only way for
15 Congress to legislate effectively in this area was to adopt, as
16 Sossamon put it, an open ended and context-dependent phrase,
17 like appropriate relief, in the wake of Franklin, knowing full
18 well that if it doesn't exclude damages, they are available
19 under Franklin. If it doesn't explicitly waive sovereign
20 immunity, as Sossamon held. Then the states are out of reach and
21 the federal government is out of reach. And the court, sorry,
22 Congress left to the courts the job of determining what is
23 appropriate relief, in particular context.

1 **Judge Katzmann:** So, I'm still having some trouble - you can
2 please help me. RFRA's purpose, generally speaking, was to
3 restore the substantial burden test for government policies and
4 customs [INDISCERNIBLE] to Smith.

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6 **Ramzi Kassem:** I'm sorry, Your Honor, I didn't hear you.

7
8 **Judge Katzmann:** If you look at RFRA's purpose, it seems that its
9 purpose was to restore the substantial burden test for
10 governmental policies and customs, prior to Smith. Is that -
11 would you agree with that?

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13 **Ramzi Kassem:** I would agree with that, and I would add, "and
14 also to provide a claim, to persons aggrieved."

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16 **Judge Katzmann:** And I mean, [PH] ultra-virus liability was not,
17 for example, an issue in Smith, right?

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19 **Ramzi Kassem:** That is correct, Your Honor. I believe.

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21 **Judge Katzmann:** So, RFRA is really getting to policy issues. How
22 does it leave you with the argument that there are certain
23 individual capacity when what RFRA was doing was trying to
24 restore the substantial burden test?

25

1 **Ramzi Kassem:** Well, Your Honor, in two ways. Through its use of
2 appropriate relief, as a phrase, and through its incorporation
3 of persons acting under color of law. Both of these get us to
4 individual capacity damages. Appropriate relief under Franklin,
5 and official or other person acting under a color of law,
6 because under this Circuit's precedent, Leonard v. Israel
7 Discount Bank for example, when Congress uses language from
8 another statute, then we have to presume that it intended to
9 incorporate the judicial interpretations of those terms. And
10 under color of law, at the time of RFRA's passage, under 1983,
11 it was possible to sue not only state officials, but also
12 Federal Officers acting in collusion with state officers to
13 violate certain rights.

14
15 **Judge Lynch:** And also there was lower court authority at least,
16 that federal officers could be sued under Bivens. The Supreme
17 Court hadn't spoken on that, but lower courts had.

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19 **Ramzi Kassem:** That's absolutely right, Judge Lynch, and the
20 Supreme Court had not foreclosed, had not shut the door, on this
21 species of relief. And as you've said, there were a number of
22 lower courts, including courts of appeals, that assumed the
23 availability of this sort of relief.

1 **Judge Katzmann:** Has there ever been a Bivens remedy for a free
2 exercise violation?

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4 **Ramzi Kassem:** Your Honor, no. But, but I mean, there are a
5 number of courts that assumed that that remedy would exist, like
6 Jihad v. O'Brien in the 6th Circuit, but I'd like to go back to
7 my point that we are not - this court is not in a Bivens type
8 exercise. We have a Congressionally provided cause of action.
9 And so the considerations that would normally counsel caution -
10 judicial caution - when it comes to extending a Bivens form of
11 relief, simply do not apply in this setting, where you have a
12 statute that is explicit as to the cause of action, and explicit
13 as to the provision of appropriate relief.

14
15 **Judge Lynch:** You say that, and it interests me that you say
16 that, because didn't you earlier say that Congress essentially
17 delegated to the courts deciding what is appropriate relief?
18 They sort of punted? And if that's true, then aren't we in a
19 position where we have to make some determinations of what is
20 appropriate?

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22 **Ramzi Kassem:** That's correct, Your Honor, but that's no
23 different from what the court did, for example, in Sossamon, or
24 what this Court did in Washington v. [PH] Ganie. In Sossamon,
25 the Supreme Court said, "Well, as against a sovereign, because

1 RFRA is not explicit enough in piercing sovereign immunity,
2 appropriate relief does not allow for damages. That's what the
3 Supreme Court did in Sossamon. And this Court, in Washington v.
4 Ganie, did the same thing, analyzing the reach of RLUIPA,
5 stemming from Congress' spending clause powers, avoiding the
6 constitutional question and saying, "Well, we're not going to
7 allow for RLUIPA to reach individual state defendants. Because
8 they're not recipients of funds.

9
10 **Judge Lynch:** [INDISCERNIBLE] understand your position, because I
11 thought you were saying that by using the language "appropriate
12 relief", Congress was essentially answering the question about
13 damages, because it used the precise language that the Supreme
14 Court had used in Franklin, for an implied cause of action. That
15 when it implies a cause of action, it ordinarily would, damages
16 would be there, because when a cause of action is implied, all
17 appropriate relief is available. Then Congress comes along and
18 creates a cause of action for all - for appropriate relief -
19 using the same terms. I thought your position was, "There's
20 nothing for us to answer." That sounds different than the
21 answer, "There is something for us to answer. We get to decide
22 what's appropriate in this context or not."

23
24 **Ramzi Kassem:** Well, thank you, Judge Lynch. Let me try to be
25 more clear. It's like there's a matrix here. And so, this

1 particular case, we believe, is clear, under Franklin, because
2 it involves individual capacity defendants, the statute provides
3 for appropriate relief, Franklin says that where there are no -
4 Franklin and Sossamon, in fact, taken together, say that where
5 there are no sovereign immunity issues, and there are none here,
6 appropriate relief is to be construed to include any and all
7 relief, including money damages. So this case is clear. Where
8 the Court retains its flexibility and why we believe that the
9 solution that Congress found was particularly neat and flexible
10 and adaptive, is that the term "appropriate relief" allows the
11 Court, in a different part of the matrix, in a different
12 quadrant, for example, a case that would raise federal sovereign
13 immunity issues, a case that would raise spending clause issues,
14 like Washington v. Ganie, Or a case that would raise commerce
15 clause issues, like the [PH] Abu Dhabi case in the District of
16 Connecticut. The courts retain flexibility in those sorts of
17 cases, that are in a very different quadrant of the matrix than
18 ours. Our case is very clear, and in fact, we're in an even
19 better position than the parties in Franklin, because Franklin
20 comes in the wake of [PH] Cannon. Cannon had read in a cause of
21 action, into Title 6. Franklin comes in and decides, well, what
22 is the scope of relief? We have a statute here that, unlike
23 Title 6, provides a cause of action. Unlike Title 6, provides
24 clearly for appropriate relief. The only question before this
25 Court is, what is the scope of that relief, and that question is

1 answered, in this case, involving an individual capacity
2 defendant, by Franklin. And if you look to under color of law
3 language and the statute itself, the inclusion of that language
4 is not gratuitous. Congress has to be assumed to have known what
5 it was doing, when it used the terms "appropriate relief" - when
6 it used the terms, "under color of law". It built into the
7 statute the judicial constructions of those terms.

8
9 **Judge Katzmann:** If RFRA's purpose was to restore the substantial
10 burden test, walk me through this.

11
12 **Ramzi Kassem:** Yes sir.

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14 **Judge Katzmann:** How would an officer, sued in an individual
15 capacity, defend the behavior if acting in accordance with a
16 governmental policy or a custom? In other words, how would the
17 officer know whether the government had a compelling interest,
18 and used the least restrictive means to possibly implement it?

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20 **Ramzi Kassem:** Your Honor, that is a question for a later date.
21 We believe that if this Court were to agree with us, and this
22 case were to be remanded, the individual defendants in this
23 case, who we have alleged very clearly, were acting ultra-virus
24 in placing our clients on the no-fly list, substantially
25 burdening the exercise of their Islamic faith, trying to coerce

1 them into becoming informants, but the defendants will have an
2 opportunity to raise qualified immunity defenses. They'll have
3 an opportunity to argue that the government interest was a
4 compelling government interest. They'll have all manner of
5 defenses available to them on remand. And whatever happens at
6 that stage is a completely different question, that is not
7 before the court right now.

8
9 **Judge Katzmann:** Are you concerned at all that the qualified
10 immunity test would possibly protect most actions taken by
11 officers where, because you would have any number of unique
12 situations, where there hadn't been a prior adjudication. Is
13 that a concern, as a practical matter?

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15 **Ramzi Kassem:** Well, Your Honor, we - we did brief and argue the
16 qualified immunity issues below. The Court did not rule on those
17 issues, so they were not raised on appeal. Even if the concern
18 that's being raised by Your Honor were true, and Chief Judge
19 Katzmann, I agree, I believe that, you know, the qualified
20 immunity issue is a complex issue. But even then, there's some
21 value in this litigation, moving forward. Because that takes us
22 one step towards establishing the law, so that future
23 defendants, future agents, will know not to overstep in the way
24 that these individuals defendants overstepped, abusing their
25 authority to place individuals on the no-fly list, in order to

1 coerce them into informancy. So even in that event, should we,
2 on remand, fail against a qualified immunity defense, there is
3 still significant value in advancing the statutes purpose
4 through allowing the litigation to move forward, past this
5 stage.

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7 **Judge Katzmann:** I haven't researched this, and I have no view.
8 But I was wondering if you did? Whether the Federal Tort Claims
9 Act would provide any avenue for your clients?

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11 **Ramzi Kassem:** That's a really good question, Your Honor. I'm not
12 sure I know the answer to that. But I will say this, that's the
13 sort of inquiry that would be appropriate, had this been a
14 Bivens case. Had this been a Bivens case, this Court would be
15 asking, "Is there some kind of alternative remedial scheme?" But
16 again, we're not in a Bivens universe here. We have a statute
17 that provides for relief. We have a statute that provides a
18 cause of action. The sorts of precautions that this Court would
19 need to take before extending the judicially constructed remedy
20 simply do not apply in the case at hand, where you have a
21 statute, and your task is a very limited, and in our view,
22 straightforward one.

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24 **Judge Lynch:** Even if you have - you don't have to comment on
25 this - huge qualified immunity problems, there presumably would

1 be cases where someone does act entirely inappropriately and if
2 we were to decide there's no cause of action, that would govern
3 that case as well. Qualified immunity is a defense and it saves
4 a lot of defendants in 1983 cases, but that doesn't mean 1983 is
5 not of value in the cases where qualified immunity doesn't
6 apply.

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8 **Ramzi Kassem:** Absolutely, Judge Lynch. Thank you.

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10 **Ellen Blaine:** May it please the Court. My name is Ellen Blaine.
11 I'm from the US Attorney's Office in the Southern District of
12 New York, and I represent the Defendants in this case. Your
13 Honor, precisely because we have a statute here, we need to look
14 to Congress' intent, in passing this statute in 1990... 1993. And
15 here, what do we have? We have Congress providing for
16 "appropriate relief against a government." This stands in
17 contrast to 1993 on which my colleague so heavily relies. 1993
18 says nothing about a government, but only says you can get
19 damages against a person.

20
21 **Judge Lynch:** But Congress defined government, right, to include
22 persons? It defines government to include an official or other
23 person acting under color of law. So I don't see where
24 government comes into play, because you would substitute the
25 defined - the definition for the defined term and say it's an

1 action to obtain appropriate relief against an official or other
2 person acting under color of law. Right?

3
4 **Ellen Blaine:** Your Honor, so two reasons. Number one, in 1983,
5 Congress only used the term "person" and did not otherwise use
6 entities like -

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8 **Judge Lynch:** Right, because Congress here was trying to reach
9 even more broadly and to provide a cause of action against the
10 government itself. It failed, because it was not specific
11 enough, or maybe it didn't perceive the sovereign immunity
12 issues. It didn't actually go that one step further, and waive
13 sovereign immunity. But I don't see why the fact that Congress
14 intended to go even beyond, and do something that turned out to
15 be unconstitutional for it to do, in providing a remedy, means
16 that we shouldn't take seriously what it said it was doing with
17 respect to officials and other persons acting under color of
18 law.

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20 **Ellen Blaine:** So, two reasons, again, Your Honor. One is because
21 Congress was looking at restoring, as Judge Katzmann was
22 pointing out, the compelling interest standard to laws -

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24 **Judge Lynch:** Yeah, why do you say that?

1 **Ellen Blaine:** Because - I'm sorry.

2

3 **Judge Lynch:** Is that something from the legislative history that
4 you're relying on?

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6 **Ellen Blaine:** So it's actually in the statute. 2000bb sub (b).
7 Which says the purpose of RFRA was, quote, "To restore the
8 compelling interest test, as set forth in Sherbert v. Verner,
9 and Wisconsin v. Yoder. And to guarantee its application in all
10 cases where free exercise of religion is substantially burdened.

11

12 **Judge Lynch:** Yes. Then you - what's the next word? After what
13 you read?

14

15 **Ellen Blaine:** "And to provide ..."

16

17 **Judge Lynch:** "And" is the next word. It had another purpose.
18 Right?

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20 **Ellen Blaine:** Yes. Yes. And -

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22 **Judge Lynch:** And does that purpose, the second purpose, use the
23 word "restore"?

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25 **Ellen Blaine:** No. That is also -

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Judge Lynch: It says, "Instead we are going to provide a claim or defense." Does that speak at all in terms of restoring a status quo ante?

Ellen Blaine: It doesn't. It clearly is providing something new.

Judge Lynch: Something new.

Ellen Blaine: A plan of defense. Yes.

Judge Lynch: So then - so, excuse me then - so just explain to me why you say that Congress is overriding exclusive purpose that should govern all of our interpretation of the rest of the statute stop at one of the two purposes that Congress explicitly said were its purpose?

Ellen Blaine: Oh, Your Honor, I'm sorry, to be clear, I don't urge the Court in any way to stop its analysis at part one of the compelling interest test or the purpose of RFRA. Instead, when the Court looks at what does Congress mean by "claim" or "defense" to a government that is substantially burdening someone's religious exercise? And the religious, the legislative history makes clear that Congress is not saying anything about remedies. It says a lot about the compelling interest test -

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2 **Judge Lynch:** Before we get to the legislative history, don't we
3 have to find some ambiguity in the language? What we've got here
4 is a purpose to provide a claim, to persons whose religious
5 exercise is substantially burdened. And when you say "against a
6 government" again, we're substituting how they defined
7 government. A cause of action against officials or other persons
8 acting under color of law - and it's said what that claim is
9 for. It's for appropriate relief, which the Supreme Court, just
10 a year or two before, had said is - how even when the Court is
11 making up an implied cause of action, that Congress didn't
12 provide, we assume it means appropriate relief, all appropriate
13 relief, and appropriate relief includes damages. So, why are we
14 trumping all of that with the fact that there was some earlier
15 committee report that said our primary goal here is, which I'm
16 sure it was, is to restore Sherbert against Verner rather than
17 Employment Division against Smith. They did more than that.

18
19 **Ellen Blaine:** So, first, at 2000bb-1 subpart C. Congress does
20 say that a person may assert that a violation - a violation of
21 RFRA - as a claim or defense in a judicial proceeding and obtain
22 appropriate relief against a government. Congress, of course,
23 then goes on to define government as a "list of entities that
24 clearly refer to a sovereign, as well as then, an official or
25 other person acting under color of law." And the question for

1 this court is, what did Congress mean by using the word
2 "official" or "other person acting under color of law"? And -

3
4 **Judge Lynch:** It didn't mean an official, or a person acting
5 under color of law?

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7 **Ellen Blaine:** It could. But those terms in and of themselves
8 don't always indicate monetary damages and that's for a few
9 reasons.

10
11 **Judge Lynch:** Well, those terms don't. "Appropriate relief" does.

12
13 **Ellen Blaine:** Well, "appropriate relief", Your Honor, the Court
14 in Sossamon - and this court again, in Washington versus [PH]
15 Goine - I hope I'm pronouncing that right - held that
16 appropriate relief is inherently ambiguous and context-
17 dependent. And so found that, in the context of sovereign
18 immunity, or the context of state immunity, that did not
19 indicate a clear intent to waive immunity. Now, appropriate
20 relief is therefore, has been held to be ambiguous. So, when
21 evaluating whether or not that phrase creates individual
22 capacity claims for money damages -

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24 **Judge Lynch:** With all respect, I mean, in Sossamon, the issue
25 was not does it intend damages. Because it sort of - I think it

1 does - but anyway, it was - if it does include damages, does it
2 waive sovereign immunity to permit damages against the
3 government? And that's a rather special thing. And the Court
4 concluded that Congress had not met the clear statement test
5 that's required to do that. Is there any clear statement test
6 that's required before Congress creates a cause of action among
7 individuals?

8
9 **Ellen Blaine:** Well, and every other statute in which there is an
10 individual capacity claim for money damages, Congress is
11 explicit. That's in 1985, that's in 1981a, that's in the Federal
12 Wiretapped Act. That's in FISA, that's in the Federal
13 Telecommunications Act, that's in an act dealing with
14 racketeering, it's in an act dealing with patent infringement.
15 And in every single one of those statutes, the only statute,
16 besides 1983, which again, is not a cause of action against
17 federal officials, of course, but that's - those are the only
18 statutes in which Congress has explicitly provided money damages
19 against individual federal employees acting in their personal
20 capacities, and that's vital. Because Congress and the Court - I
21 should say the Supreme Court - has repeatedly cautioned against
22 creating remedies against individual officials.

23
24 **Judge Lynch:** They cautioned, as Mr. Kassem suggested, they've
25 cautioned against our implying such things, or creating such

1 things. Have they cautioned against Congress creating such
2 things?

3
4 **Ellen Blaine:** Well, the principle is the same. The principle is,
5 this Court has to evaluate what does "appropriate relief" mean?
6 And because the statute is not clear, and the Supreme Court has
7 held that that phrase is not clear, then the Court needs to
8 evaluate, did Congress intend to include damages, because it's
9 not obvious in the text. The text nowhere says "damages."

10
11 **Judge Lynch:** I understand that argument, that we have to
12 determine what Congress meant. That's different than this sort
13 of free-floating policy sort of argument that you're making.

14
15 **Ellen Blaine:** Well, Your Honor, I'm sorry to call, you know,
16 because - simply because those cases were evaluated under the
17 Bivens rubric, doesn't mean that the principle doesn't still
18 apply. And the principle that applies is that there is a
19 "substantial societal cost" to recognizing or creating
20 individual causes of action against federal employees who act on
21 the public's behalf.

22
23 **Judge Lynch:** It comes back to what was Congress' intention,
24 because Congress is the appropriate body to weigh those issues.

1 **Ellen Blaine:** Yes. So when Congress intends to create individual
2 capacity claims, it does so by using language like, "action [PH]
3 at law", "damages" defines person -
4

5 **Judge Lynch:** I mean, in 1883, there was a division - at the time
6 that 1883 was enacted - not in 1883, in 1866 or 7, there was a
7 division between law and equity.
8

9 **Ellen Blaine:** So, Your Honor, correct. In 1871, actually when
10 1883, the precursor was passed, there was a division. But there
11 still remains today a division between damages and equitable
12 relief. And that's exactly what 1883 highlighted.
13

14 **Judge Lynch:** So, why does "appropriate relief" authorize only
15 equitable relief, which is a more extraordinary remedy most of
16 the time? Damages is the ordinary remedy when someone is given a
17 claim for essentially tortious conduct.
18

19 **Ellen Blaine:** Two reasons, Your Honor, in Alexander, the Supreme
20 Court said that it has long ago abandoned the practice of
21 looking beyond Congress' intent and creating a remedy wherever
22 there is a Congressionally created right. So -
23

24 **Judge Lynch:** I'm sorry, I didn't, I don't get that. We're not
25 talking about creating remedies. We're talking about

1 interpreting what Congress means when it says "appropriate
2 relief"? And I'm suggesting to you that it is odd to interpret
3 appropriate relief as meaning only equitable relief, when
4 equitable relief is the unusual remedy, not the usual remedy.

5
6 **Ellen Blaine:** Understood, Your Honor. The point I was getting at
7 is really two-fold. Number one, the court in Sossamon, and this
8 Court, and every other circuit, to have looked at the phrase
9 "appropriate relief against a government", in whatever context
10 it was evaluating it - every single court is held as a matter of
11 statutory interpretation. That phrase is ambiguous, and doesn't
12 necessarily mean money damages. Number two -

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14 **Judge Lynch:** Has any court ever, in any statute, that uses the
15 term "appropriate relief" held that it does not include money
16 damages?

17
18 **Ellen Blaine:** Your Honor, I'm not aware of any other statute
19 using the phrase "appropriate relief". And specifically, for
20 RFRA and RLUIPA, if this Court were to find that appropriate
21 relief could mean money damages, when applied against individual
22 federal employees - and I think this is crucial - that class of
23 defendant would be the only defendant that could be held liable
24 for money damages for a RFRA or RLUIPA violation.

1 **Judge Lynch:** Because there were constitutional obstacles to
2 sovereign immunity, which takes out the categories of
3 governments as such, or individuals acting in their official
4 capacities. And Congress, it is unconstitutional for Congress to
5 reach state officials under the Spending Power, which is what
6 they wound up with in RLUIPA because there were constitutional
7 problems with this. But I'm having trouble understanding why, if
8 Congress intends to - it's not a question of who's left, it's a
9 question of what did Congress mean? Congress meant to have
10 damages against all those people, and they were blocked, because
11 they exceeded their authority. But did they exceed their - would
12 they have exceeded their authority in creating a cause of action
13 for damages against Federal officials?

14
15 **Ellen Blaine:** No, Your Honor. If they had actually, explicitly
16 said you can sue an individual federal employee in an action at
17 law, to borrow 1983 or any other statute where Congress has more
18 recently created a right of action and a remedy in this way. You
19 know, for damages or penalties - compensatory damages - that
20 would have been clear. Congress' intent would have been clear,
21 and we wouldn't be here today. But Congress didn't say that.
22 Nowhere in the text does it say "damages." Nowhere in the text
23 does it say "individual capacity" -

24
25 **Judge Lynch:** Isn't -

1
2 **Ellen Blaine:** It says "appropriate." It says "appropriate
3 relief."

4
5 **Judge Lynch:** Isn't the default meaning of "appropriate relief"
6 includes damages. And you have any number of statutes, don't
7 you, which, in a sense, make that point by specifically
8 excluding monetary damages. So, for instance, you've got the
9 Administrative Procedure Act, which provides for relief other
10 than money damages.

11
12 **Ellen Blaine:** Well, the Administrative Procedure Act, Your
13 Honor, is an act against an agency action, and does not provide
14 for a cause of action against individual federal officials for
15 somehow violating an agency's process or the Constitution's
16 requirements under whatever agency reg we're evaluating. And
17 every action - I'm going to point the Court to 1985, the Wiretap
18 Act, FISA, Telecommunications Act. The Wiretap Act specifically
19 provides that any person whose communications were intercepted,
20 may, in a civil action, recover from the person engaged in that
21 violation, and defines "person" as, "an employee or agent of the
22 United States" and then does have the phrase "appropriate
23 relief" Your Honor, so to get back to Judge Lynch's question -
24 and defines appropriate relief to specifically include damages
25 and punitive damages in some cases. That's 18 USC, section 2520

1 sub B. Again, in FISA, it's crystal clear. It's - you can have a
2 cause of action against any person who committed that violation,
3 and recover "actual damages." As well as punitive damages, and
4 defines "person" to mean any individual, including any officer
5 or employee of the federal government. Telecommunications Act,
6 same thing. Congress knows how to do this. It provides that "any
7 person who willfully violates the act, shall be fined"

8
9 **Judge Pooler:** It doesn't have that language? It's not included?

10
11 **Ellen Blaine:** Your Honor, there is -

12
13 **Judge Pooler:** Isn't it presumption that it's included under
14 "appropriate relief"?

15
16 **Ellen Blaine:** Not when it's against individual actors, federal
17 employees, acting in their individual capacity. There is no case
18 the Plaintiffs cite, that provides, that states, in any way,
19 that Congress has to exclude those damages when it means to, and
20 every other statute that provides for that relief includes it.

21
22 **Judge Lynch:** What gives federal officers some exclusive immunity
23 from a cause of action that would require Congress to have a
24 special statement when it means to provide damages against
25 federal officials.

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Ellen Blaine: So, it's not special immunity, Your Honor, I would just caution the Court that that's not the government's position. Instead, we're looking to the Supreme Court's pronouncements in Wilkie, in Bush versus Lucas, and Harlow versus Fitzgerald, where the Court has found that courts should be reluctant to evaluate and create damages remedies because of the cost, the "cost".

Judge Lynch: Right, that's not the question I asked. The question I asked again is, what is the authority for assuming that when Congress says there's a cause of action against anybody for anything, that a special - they have to specially say "damages" if they mean that to apply to federal officials.

Ellen Blaine: Simply because of Congress' long history of passing statutes and those statutes that actually do provide for money damages against federal officials, specify that.

Judge Lynch: Did Congress intend, in RFRA, to have a cause of action for money damages against state officials?

Ellen Blaine: Your Honor, that's not clear at all, in the text. So, I would argue, although that's not before - it wasn't briefed in this case - but the Congress intended to restore the

1 compelling interest standard, pre the Smith case in 1990, and
2 pre the Smith case in 1990, there was no First Amendment Bivens
3 claim, against federal officials acting in their individual
4 capacity. Indeed, today, there still is not a First Amendment
5 Bivens claim. There as a 1983 claim against state actors for
6 violation of constitutional rights, but Congress said nothing
7 about changing any of that - changing any of the remedies
8 available to individuals whose rights had been burdened.
9 Instead, it provided a claim or defense to those individuals,
10 and said that they can get appropriate relief. Unlike, in any
11 other statute, in which the appropriate relief includes money
12 damages, Congress said nothing about damages. Appropriate relief
13 is inherently vague and as the Supreme Court has said,
14 repeatedly, to construe one phrase and one statute as meaning
15 one thing, when applied to one object, but as meaning a
16 different thing when applied to a second object, would be to
17 make the statute a chameleon. And relaying the [PH 00:38:02]
18 Santos case, on the Red case, on -

19
20 **Judge Lynch:** Why would we be interpreting it inconsistently
21 within the same statute? I don't follow.

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23 **Ellen Blaine:** Because, appropriate relief has already been
24 determined not to mean money damages, when applied to every
25 other class of defendant.

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Judge Lynch: Does it say - no, no one interpreted to say it doesn't mean money damages. It was interpreted to be unconstitutional to the extent it means money damages.

Ellen Blaine: So, the result - I'm sorry, Your Honor.

Judge Lynch: But that's different than trying to understand what Congress' intention was. Congress sometimes intends to do something that's unconstitutional.

Ellen Blaine: That's right. And the fact remains that courts have evaluated what appropriate relief means in every other context but this one. And in every other context, it has held, for whatever reason, and again, you know it can be on sovereign immunity, it can be based on the commerce clause, that appropriate relief cannot, constitutionally, mean money damages. Cannot! So, if this Court were to find -

Judge Lynch: And by "constitutionally" you mean money damages as to federal officials?

Ellen Blaine: And that would mean adopting a construction that would attribute different meanings to the same phrase, in the same sentence, depending on which object it is modifying. That

1 would be the result. And so, you would find that individual FBI
2 agents, or agents in any other federal agency, could be held
3 liable from their own pockets - again, this is not a lawsuit
4 against the government, as the Court well knows. It's not a
5 lawsuit against agencies. This is against individual law
6 enforcement officers, charged with trying to protect this nation
7 from terrorist attacks.

8
9 **Judge Lynch:** Who have qualified immunity to provide for - to
10 provide appropriate protection.

11
12 **Ellen Blaine:** Yes. But the point -

13
14 **Judge Lynch:** So, it's only - this cause of action would only
15 apply against federal officials who act in a way that any
16 federal official would understand to be a violation of people's
17 constitutional rights. If there's any ambiguity about that,
18 there is no liability.

19
20 **Ellen Blaine:** Yes, Your Honor, but there is still a cost to
21 bringing that claim, and a cost to the defendants, of defending
22 against that claim, even if the defendants were to succeed -
23 qualified immunity.

24
25 **Judge Lynch:** Those defendants are paying you?

1
2 **Ellen Blaine:** Well, substantial societal costs, Your Honor. And
3 the societal cost is diversion of resources, certainly is a
4 diversion of their resources. Diversion of you know, Court's
5 resources. It's a diversion of the executive branch resources.
6 It's a deterrent to individuals who would otherwise potentially
7 join public service, but are - would be fearful of being
8 subjected to private suit. And in particular, when individuals
9 are sued, in their individual capacity, they can get a judgement
10 against them, they have to disclose when they are sued in their
11 individual capacities. It's not - you know, it's not a claim
12 that has no repercussions. Even if they were ultimately to
13 prevail. Even at the initial stage of a motion to dismiss based
14 on qualified immunity, which I would argue is very hard to make
15 - normally you would have to go through discovery, which, again,
16 you know, subjects these officers and federal agencies and the
17 executive branch to significant costs, and then potentially
18 prevail at the end. That is a significant cost that the courts -
19 again, looking at Bivens, but the principle remains the same -
20 have suggested the courts should be wary of.

21
22 **Judge Lynch:** [INDISCERNIBLE] must be there if the claim were
23 only for equitable relief?
24
25

1 **Ellen Blaine:** Your Honor, but it wouldn't be cost against the
2 individual defendants, and if it [PH] were only equitable
3 relief.
4

5 **Judge Lynch:** It would still distract them and make them go
6 through discovery and all that stuff you just said, right?
7

8 **Ellen Blaine:** Well, I'm just relying on the Supreme Court's
9 rulings, Your Honor, and language, which is that when evaluating
10 individual capacity claims, this is a consideration. And yes, of
11 course we would distract. But that's what RFRA provided, Your
12 Honor. RFRA provided for injunctive relief against the
13 government. So, that is what Congress told us to do. We have to
14 defend, if we can, cases against federal officials in their
15 official capacity. Plaintiffs would have relief, they would have
16 the capacity to seek injunctive relief, declaratory relief, such
17 as, "Take me off the no-fly list. Declare that I shall never be
18 put on it again." That is the relief that Congress intended,
19 because it didn't explicitly say money damages, and it was
20 focused on laws and policies and actions allegedly neutral
21 towards religion, but nevertheless burdening individuals.
22

23 **Judge Lynch:** We've got the - there's the Franklin presumption,
24 right, which applies to implied rights of action where Congress
25 never expressly provided a right of action at all. So, why is -

1 and here, sovereign immunity isn't an issue. So why doesn't the
2 Franklin presumption apply?

3
4 **Ellen Blaine:** Because Franklin applies only to implied rights of
5 actions, Your Honor, where there is, "no statutory text to
6 interpret, no statutory history to look towards."

7
8 **Judge Lynch:** If it's going to apply to implied rights of action,
9 why wouldn't it also apply to express private rights of action?

10
11 **Ellen Blaine:** Because express private rights of action, the
12 court has as a benefit Congress' text, Congress' legislative
13 history, Congress' stated purpose. In this case, of course, RFRA
14 has a text. It has an express cause of action. It has an express
15 remedy, which is appropriate relief, as ambiguous as that is.
16 And so, the Franklin presumption only applies, for example, as
17 it did in Franklin, to Title 6, which says simply, "No person in
18 the US shall be denied the benefits of, or be subjected to
19 discrimination." It did not provide any cause of action, didn't
20 provide any claim or defense. And that's where the Franklin
21 presumption resides.

22
23 **Judge Pooler:** It doesn't make sense that the Franklin
24 presumption would apply when there was only an implied cause of
25

1 action, as opposed to a direct cause of action. It just doesn't
2 make sense, this interpretation.

3
4 **Ellen Blaine:** That Franklin wouldn't apply to express causes of
5 action?

6
7 **Judge Pooler:** Wouldn't apply here, where there's a cause of
8 action direct to the statute.

9
10 **Ellen Blaine:** Because, well, because the Sossamon court
11 emphasized -

12
13 **Judge Lynch:** Different statutory scheme.

14
15 **Judge Pooler:** Right.

16
17 **Ellen Blaine:** That Franklin address remedies under an implied -

18
19 **Judge Pooler:** Spending clause.

20
21 **Ellen Blaine:** Yes. And yes, and of course, the court in Sossamon
22 was evaluating the spending clause basis for RLUIPA. But the
23 principal is that in Franklin, and in the cases after Franklin,
24 like Gebser also evaluating Title 9 and other statutes related
25 to it, had no language in any of those statutes providing a

1 cause of action, having a legislative text, having a legislative
2 history. That's when Franklin applies. Here, you have a text.
3 You have an explicit cause of action. You have an explicit
4 purpose.

5
6 **Judge Pooler:** Franklin presumption, in this case, would imply
7 that appropriate relief covers every type of relief. That's
8 where it would apply.

9
10 **Ellen Blaine:** Well, Your Honor, it would only apply if there
11 were no texts to interpret. Just like in Title 9.

12
13 **Judge Pooler:** The text is appropriate relief.

14
15 **Ellen Blaine:** And so, appropriate relief can mean different
16 things and the question is - the question is -

17
18 **Judge Pooler:** And that's what the Franklin presumption says, it
19 means any kind of relief available.

20
21 **Ellen Blaine:** Well, Franklin, first of all, did not state a
22 blanket presumption that damages are always available. I just
23 want to be clear about that. In Gebser, decided after Franklin,
24 Supreme Court had an occasion again to evaluate Title 9 and the
25 implied right of action, and found that plaintiffs cannot always

1 get money damages against a defendant under Title 9. So, it is
2 not the case that appropriate relief always necessarily means
3 money damages, number one. Number two, again, Sossamon and the
4 District Court here, district courts around the country, other
5 circuits, have looked at Franklin and decided that Franklin
6 doesn't apply when there's an actual statutory text. Here you
7 have not just one, you have RFRA, you have a companion statute,
8 RLUIPA, you have legions of hearings and legislative history.
9 Franklin applies when there is an absence of that.

10
11 **Judge Lynch:** Thank you.

12
13 **Ellen Blaine:** Thank you, Your Honor.

14
15 **Judge Pooler:** Counsel, respond to this last argument, that
16 appropriate relief does not include, does not automatically
17 include damages.

18
19 **Ramzi Kassem:** Well, Your Honor, I'll respond to that argument by
20 also answering Judge Lynch's earlier question about whether or
21 not there were other statutes using the phrase "appropriate
22 relief". The Occupational Safety and Health Act uses the phrase
23 "all appropriate relief" and the First Circuit in Reich applied
24 the Franklin presumption to that statute, although it provided
25 an express cause of action. Which goes to your point, Judge

1 Pooler, that Franklin does not only apply to statutes with an
2 implied cause of action. And indeed, to your point, Chief Judge
3 Katzmann, that would make - it would make little sense for the
4 Court to be less generous where Congress has been more explicit.
5 And I will point out that when it comes to Reich and the statute
6 it was interpreting, OSHA, that statute provides for all
7 appropriate relief and it lists a couple of examples that are
8 both forms of injunctive relief, which goes back to Judge
9 Lynch's earlier point, that the norm in our system is money
10 damages. That the default is money damages, and the Supreme
11 Court in Franklin makes the same point; the Supreme Court in
12 Bivens makes the same point, that the default is money damages.
13 The only two additional points I'd like to make: Appropriate -
14 we are not at all shying away from the Sossamon decision. We
15 believe that the outcome we are asking this Court to hold is
16 completely consistent with Sossamon. Appropriate relief is, per
17 Sossamon, context dependent. And Sossamon explicitly was a case,
18 again, and this is a direct quote, "about construing the scope
19 of an express waiver of sovereign immunity". Those are the
20 Supreme Court's terms in Sossamon.

21
22 **Judge Lynch:** As you yourself said earlier, it is - Congress, in
23 choosing this language, may have punted something over to the
24 Courts. So, why wouldn't it be open to us to decide that damages
25 against federal officers are just not appropriate relief for all

1 the reasons that the District Court relied on in rejecting your
2 initial Bivens argument?

3
4 **Ramzi Kassem:** Simply, Your Honor, because there would be no
5 basis for it. When Congress enacted RFRA, it looked to 1983,
6 which allowed for individual capacity damages, including against
7 federal agents who colluded with state agents. And I will say
8 there is a point that my colleague, Ms. Blaine made, that is
9 inconsistent with how the Supreme Court says this Court is to
10 read statutes. I mean, as Judge Pooler pointed out, the Franklin
11 presumption here controls. But I would like to draw the Court's
12 attention to the case of Atlantic Cleaners and Dyers, 286 US
13 427. It's a 1932 case, where the Supreme Court said, "Where the
14 subject matter to which the words refer is not the same, in the
15 several places where they are used or the conditions are
16 different, or importantly, the scope of the legislative power
17 exercised in one case is broader than that exercised in another,
18 the meaning well may vary to meet the purposes of the law." So,
19 the outcome that we're advocating is not at all inconsistent
20 with the outcome in Sossaman. And it's entirely congruent with
21 the purpose of this statute. There is one more point I'd like to
22 make. The - Ms. Blaine listed a number of states, and I could
23 point out again, 1983, allowing for federal damages in certain
24 cases. But the main point here is that ultimately, Congress can
25 wield its pen however it pleases. Cases like Franklin govern

1 statutory interpretation, by courts like this one. And the
2 Defendants, out of convenience, are simply conjuring up a rule
3 out of thin air, to arbitrarily protect one class of individual
4 capacity defendants. As you pointed out, Judge Lynch, a class of
5 individual capacity defendants that already have the powerful
6 shield of qualified immunity, not to mention other defenses,
7 while leaving exposed private individuals, who do not have that
8 protection. And the government is trying to pull the court back
9 into a Bivens analysis that is completely inappropriate here.
10 And I will point to the Supreme Court's case in Correctional
11 Services Corporation v. Malesko, 534 US 61, which distinguishes
12 the judicially implied private right of action in Bivens, from
13 the 1983 context, which is more akin to ours, where, "Congress
14 already provides for liability." We are in a different universe
15 here. This Court should resist the Defendants' urging to go back
16 into a Bivens analysis which would be inappropriate in the RFRA
17 context. Thank you.

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19 **Judge Lynch:** Thank you both for your arguments. The Court will
20 reserve decision.

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