No. 19-71

IN THE

Supreme Court of the United States

FNU TANZIN, *et al.*,

Petitioners,

v.

MUHAMMAD TANVIR, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF *AMICUS CURIAE* THE SIKH COALITION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Sikh Coalition is a nonprofit and nonpartisan organization dedicated to ensuring that members of the Sikh community in America are able to practice their faith. With offices in New York, California, Illinois, and Washington, D.C., the Sikh Coalition is the largest Sikh civil-rights organization in the country. It defends the civil rights and civil liberties of Sikhs by providing direct legal services and advocating for legislative change, educating the public about Sikhs and diversity, promoting local community empowerment, and fostering civic engagement amongst Sikh Americans. The organization also educates community members about their legally recognized free-exercise rights and works with public agencies and officials to implement policies that accommodate their deeply held beliefs. The Sikh Coalition owes its existence in large part to the effort to combat uninformed discrimination against Sikh Americans after September 11, 2001.

The Sikh Coalition's interest in this case stems from its on-the-ground efforts over the past two decades. All too often, Sikhs suffer outrageous acts of oppression by government officials only to see such officials escape liability by resisting the damages remedy Congress sought to afford in the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C.

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[1] Counsel for *amicus* states no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to this brief. The parties have provided written or blanket consent for the filing of this brief.

§ 2000bb *et seq.* (2018). Whether in asylum detention or airport screening, for example, Sikhs are targeted and deprived of even minimum accommodation for their faith—to the point of significant pain and spiritual torment. The Sikh Coalition has tried working with many of its federal partners to resolve these challenges, but the problems persist.

The availability of money damages against federal officials under RFRA is therefore essential to the Sikh Coalition's justice-seeking and reform efforts. Indeed, Sikhs and other religious minorities often face discrimination in momentary or isolated contexts. They suffer grievous spiritual harm when, say, they are stripped of their turbans in an airport or are forced to choose between starvation and eating a forbidden diet in a detention center—both of which occur with disturbing regularity. In such cases, equitable relief would arrive too late to be of use. Money damages are the only means to both compensate victims and deter federal officials going forward. Depriving Sikhs and other religious minorities of this remedy would only add insult to injury.

SUMMARY OF ARGUMENT

The Religious Freedom Restoration Act ought to be interpreted according to its text and in light of its statutory history, the backdrop against which it was enacted, and the subject it was intended to address. All of these factors show Congress drafted RFRA to authorize money damages against federal officials sued in their individual capacity—particularly to protect religious minorities like Sikhs.

Moreover, Congress's decision to authorize money damages in RFRA suits was the right one.

Although injunctive relief will be the remedy in the mine-run of RFRA cases, the statute's grant of money damages in individual-capacity suits is essential for two reasons. First, injunctive relief cannot remedy past discrimination and is *de facto* unavailable to prevent future harms. The experiences of the Sikh faithful in immigration-detention centers and during TSA screening bear witness to this truth. Second, money damages compensate victims while deterring egregious violations of federal rights—even as immunity doctrines ensure RFRA suits do not unduly trammel executive decision-making.

This Court should affirm.

ARGUMENT

I. RFRA Authorizes Money Damages in Necessary Yet Limited Situations.

A. Congress passed RFRA to protect vulnerable religious minorities.

A bipartisan Congress enacted RFRA to repudiate *Employment Division v. Smith*, 494 U.S. 872 (1990), and restore the protection for religious believers that preceded that ruling. According to the statute's findings, *Smith* had, as a matter of constitutional interpretation, "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4). To correct what it saw as an unjust legal error, therefore, Congress sought to "restore" the compelling interest test from before *Smith* and, in so doing, make available "appropriate relief" against public officials. *Id.* §§ 2000bb(b)(1), 2000bb-1(c), 2000bb-2(1).

Because of the *Smith* Court's refusal to afford First Amendment protection from substantial burdens on religious exercise, the onus was on faith communities to secure accommodations in the legislature. *Smith*, 494 U.S. at 890. Unfortunately, unorthodox and unpopular faiths would be less likely to garner political majorities on their own. Absent comprehensive legislation, therefore, it was "unavoidable" religious minorities would suffer. *Id.*

When Congress held hearings to consider RFRA, a consistent theme was the danger of subjecting free-exercise protections to the vicissitudes of majoritarian politics. For example, legislators heard testimony about Frances Quaring, a Pentecostal Christian who refused to carry a driver's license with a photograph based on her interpretation of the biblical command against graven images. *See The Religious Freedom Restoration Act: Hearing on H.R. 2797 Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 339-40 (1992) [hereinafter *House RFRA Hearing*] (statement of Douglas Laycock, Professor, University of Texas School of Law) (citing *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984), *aff'd by an equally divided court*, 472 U.S. 478 (1985)). After *Smith*, Quaring would have had to seek an accommodation in the legislature, but, according to experts, it would have been "impossible for a legislature to know about a believer like Mrs. Quaring and enact an exemption for her." *Id.* at 340.

Precisely because minority faiths are unlikely to command legislative majorities, these communities suffered in the wake of *Smith*. *Id.* at 402-03 (statement of Wintley A. Phipps, President,

International Institute for Religious Freedom) (noting that Native Americans, Hmong, Mormons, Jehovah's Witnesses, and Muslims were "severely affected" by *Smith*). Local municipalities invoked neutral zoning laws "to exclude minority faiths such as Islam and Buddhism," and to prevent their houses of worship from being built. *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the Comm. on the Judiciary*, 102d Cong. 75 (1992) [hereinafter *Senate RFRA Hearing*] (statement of Douglas Laycock, Professor, University of Texas School of Law). States denied academic credit to students in religious homeschools. *See, e.g.*, *Vandiver v. Hardin Cty. Bd. of Educ.*, 925 F.2d 927, 929 (6th Cir. 1991). And even the federal government took actions uniquely burdening minority faiths, rescinding exemptions from OSHA regulations for religious headwear. *See House RFRA Hearing*, *supra*, at 122-23 (statement of Rep. Stephen J. Solarz).

It was in response to these and other incursions on the faithful that Congress enacted RFRA.

B. Congress explicitly considered *Smith*'s impact on suits for money damages.

For the legislators enacting RFRA, protecting religious minorities wasn't merely about restoring the pre-existing accommodation regime as a substantive matter. Rather, the statute's legislative history shows Congress presumed in its passage that litigants could recover money damages from public officials for free-exercise violations—at least where immunity would not otherwise attach.

Notably, both the House and Senate highlighted the case of *Yang v. Sturner*, 728 F. Supp. 845 (D.R.I. 1990), as a prime example of *Smith*'s harmful impact.

In *Yang*, two Hmong parents had sued Rhode Island's chief medical examiner for conducting an autopsy of their son in violation of their community's religious beliefs. *Id.* at 846-47. Shortly before *Smith*, the district court found liability and allowed the case to proceed to the damages phase, stressing it was "damages or nothing" since the son's body had already been desecrated. *Id.* at 850-51 (quoting *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring)).[2] But once *Smith* was issued, and while *Yang* was still in the damages stage, the district court withdrew its liability finding based on the neutrality of the autopsy law, leaving the family with nothing. *Yang v. Sturner*, 750 F. Supp. 558, 560 (D.R.I. 1990).

The House Judiciary Committee in fact invited the father in the case to testify. *House RFRA Hearing*, *supra*, at 107-10 (statement of William Nouyi Yang). And after Mr. Yang read from a prepared statement, Congressman Craig Washington directly addressed the damages claim: "I thought it was [] beautiful . . . when you find yourself to be at the end of a road and you find a wall in front of you that if you look . . . more often than not you can find another way . . . ." *Id.* at 116. In short, the Congressman "commend[ed]" the Yangs' lawyer on

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[2] The district court allowed the case to proceed as a free-standing constitutional tort action under *Bivens*. *Yang*, 728 F. Supp. at 849 (noting that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty" (quoting *Bivens*, 403 U.S. at 395)).

his pursuit of a damages remedy to vindicate the family's loss. *Id.*

The *Yang* case featured even more prominently in the Senate. In fact, the Senate Judiciary Committee's first witness was Mr. Yang. *Senate RFRA Hearing*, *supra*, at 5-6, 14-17 (statement of William Nouyi Yang). One of RFRA's principal sponsors, Senator Ted Kennedy, thanked Mr. Yang and asked his lawyer to share "how the *Smith* decision really affected Mr. Yang's situation." *Id.* at 9. The legislative record of that hearing thereafter contains the testimony from Mr. Yang and his lawyer, copies of the post-*Smith Yang* opinion, an eight-page appendix explaining the facts of the case, and a declaration from the Hmong-Lao Unity Association. *See id.* at 5-28. Then, when Senator Orrin Hatch, the other principal sponsor of RFRA, rose to speak during Senate debates on the bill, he called dismissal of the Yangs' damages action an "example of the devastation *Smith* continues to spread." 139 Cong. Rec. S14,353 (daily ed. Oct. 26, 1993). One of the chief virtues of RFRA, Senator Hatch stressed, was "it restore[d] protection to individuals like the Yangs." *Id.*

To suggest Congress never considered RFRA's impact on individual-capacity suits seeking damages is to blink at this history. Restoring protection to the Yangs could mean only one thing—"damages or nothing." *Yang*, 728 F. Supp. at 851 (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring)).

C. Congress thus authorized monetary relief, mindful it would arise only in extreme cases.

In passing RFRA, Congress authorized individuals to seek "appropriate relief" against an "official (or other person acting under color of law)" who substantially burdens the claimant's religious beliefs in a manner that fails strict scrutiny. 42 U.S.C. §§ 2000bb-1, 2000bb-2(1). That text, and its statutory context, indicate Congress intended to authorize damages remedies in individual-capacity suits against federal officials. So too does the state of damages law at the time RFRA was enacted. And, importantly, giving the statute this most natural reading would not work a sea change in federal-official liability, as the availability of damages is tempered by background immunity doctrines.

Start with the text. Congress used the phrase "appropriate relief," which incorporates a well-established common-law principle when it comes to money damages: absent clear direction to the contrary by Congress, federal courts may award damages to enforce a federal statute. *Franklin v. Gwinnet Cty. Pub. Sch.*, 503 U.S. 60, 70-71 (1992). Even the Department of Justice has previously conceded that, consistent with the *Franklin* presumption, there is a "strong argument" that money damages should be available under RFRA. Availability of Money Damages Under the Religious Freedom Restoration Act, 18 Op. O.L.C. 180, 183-84 (1994) (Walter Dellinger); *see also Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1190-92 (1st Cir. 1994) (citing *Franklin* presumption to

conclude that a statute providing "all appropriate relief" authorizes money damages).

Moreover, RFRA authorizes suits against an "official (or other person acting under color of law)." 42 U.S.C. § 2000bb-2(1). That parenthetical language was familiar to Congress; nearly identical words appear in Section 1983—the catch-all means for recovering monetary damages against state officials for civil-rights violations. *See* 42 U.S.C. § 1983 (2018) (providing that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State" deprives an individual of a federal right is liable to the party injured). No one disputes Section 1983 authorizes individual-capacity suits against such officials for money damages. *See, e.g.*, *Hafer v. Melo*, 502 U.S. 21, 31 (1991).

Petitioners suggest Congress's addition in RFRA of the word "official" before the phrase "(or other persons acting under color of law)" somehow limits potential actions to official-capacity suits—thereby precluding damages as a matter of federal sovereign immunity. Pet'rs' Br. 19. That's backwards. As the district court observed in *Patel v. Bureau of Prisons* on this very point, "by explicitly adding a term permitting suits against officials to language familiar from the § 1983 context, RFRA contemplates, if anything, that such suits will be more available." 125 F. Supp. 3d 44, 51 (D.D.C. 2015). The better reading of "official (or other person acting under color of law)" is one that accords with longstanding interpretations of Section 1983: RFRA authorizes individual-capacity suits for damages.

Additionally, the legal backdrop against which RFRA was enacted further evidences congressional

intent to authorize money damages. *Cf. Branch v. Smith*, 538 U.S. 254, 270-71 (2003) (relying on extant lower-court decisions to interpret Voting Rights Act). Prior to RFRA, courts had extended *Bivens* to First Amendment claims—including free-exercise claims—concluding damages were available against federal officials sued in their individual capacity. *See, e.g.*, *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1986); *Dellums v. Powell*, 660 F.2d 802 (D.C. Cir. 1981); *Jihaad v. O'Brien*, 645 F.2d 556 (6th Cir. 1981); *Paton v. La Prade*, 524 F.2d 862 (3d Cir. 1975); *Kenna v. U.S. Dep't of Justice*, 727 F. Supp. 64 (D.N.H. 1989). And even though this Court has since curtailed such a broad application of *Bivens* in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), that development was unknown to Congress when passing RFRA.[3]

In any event, Congress did not intend to radically expand federal government liability when providing money damages under RFRA. Rather, it ensured federal officials were liable only for egregious violations and only in their individual capacities. The statutory language does not "unambiguously waive sovereign immunity to authorize money damages" against the federal government. *Oklevueha Native Am. Church, Inc. v. Holder*, 676 F.3d 829, 840 (9th Cir. 2012); *accord Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006). Officials are thus absolutely immune from damages when sued in

[3] This Court's decision in *Bush v. Lucas*, 462 U.S. 367 (1983), was not a categorical rejection of *Bivens* in the First Amendment context. Rather, it was premised on the availability of administrative remedies to address the plaintiff's claims. *See id.* at 388.

their official capacity. *Patel*, 125 F. Supp. 3d at 54. So too is any "branch, department, agency, [or] instrumentality" of the government. *See Webman*, 441 F.3d at 1026. In other words, RFRA's money-damages remedy reaches only a limited set of cases where qualified immunity is unavailable: official conduct that is "plainly incompetent" or a knowing violation of federal free-exercise rights. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

In sum, Congress knew *Smith*'s impact would be felt most by minority-faith communities. And in drafting RFRA it focused heavily on how *Smith* had already precluded victims from recovering money damages for free-exercise violations. It's no surprise, then, that the best reading of the statute's text authorizes money damages in limited circumstances.

II. The Availability of Money Damages Is Essential to Protect Minority-Faith Communities Like the Sikhs.

A. Injunctive relief is often inadequate.

Although minority-faith communities face many of the same challenges in the practice of their faith as their more established counterparts, xenophobia and ignorance make them particularly vulnerable to free-exercise violations. *See* Eric Pruitt, Comment, Boerne *and Buddhism: Reconsidering Religious Freedom and Religious Pluralism After* Boerne v. Flores, 33 J. Marshall L. Rev. 689, 700-05 (2000). Even routine enforcement of a general policy without regard to its well-established impact on religious minorities can lead to egregious free-exercise violations. And these offenses can occur in finite, perhaps even momentary,

contexts. Detention in an immigration facility might last a few months. A search at the airport might take a few minutes. So where these abuses are significant, but not ongoing, injunctive relief is often of limited use. The promise and reality of RFRA damages is therefore indispensable to these communities.

Injunctive relief is meaningless for past harm in cases involving, say, forced hair-cutting, violative strip-searches, or destruction of property. As with the desecration of the young man's body in the *Yang* case, any relief is "damages or nothing." *Yang*, 728 F. Supp. at 851 (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring)). Moreover, when it comes to prospective injunctive relief, such relief is unavailable absent "any real or immediate threat that the plaintiff will be wronged again." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). In *Lyons*, this Court held that a plaintiff could make this showing only if he would in fact face the same harm again. *Id.* at 106-10. Consider an example. A Sikh lawyer who travels weekly and is often impermissibly forced by the TSA to remove his turban could secure relief against future intrusions only if all TSA screeners demand such removal, or they are required to do so every time. *See id.* at 105-06.

Damages, on the other hand, both compensate and deter. Regarding the former, even if money damages do not heal spiritual wounds or restore lost careers, they are the closest approximation we have in our legal system. And in most instances the calculation of such damages should be nothing unusual. In this case, for example, calculating the losses Mr. Tanvir sustained after being forced to quit his trucking job is a matter of basic math. *See, e.g.*,

2 Dan B. Dobbs, *Law of Remedies* § 7.4(3) (1993). And although emotional-distress relief can be subjective, it is available—and quantifiable—in other federal civil-rights contexts. *See, e.g.*, *Carey v. Piphus*, 435 U.S. 247, 263-64 & n.20 (1978) (allowing emotional-distress damages under Section 1983).

As for the deterrent effect of damages under RFRA, that more than anything else is essential to protecting religious minorities from egregious harm. As this Court has long recognized, the threat of individual-capacity damages deters federal officers from violating clearly established rights. *See, e.g.*, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001); *see also Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 485 (1994) ("It must be remembered that the purpose of *Bivens* is to deter *the officer*."). Even where officials are indemnified, deterrence flows from the "immense political costs . . . associated with a finding of liability and expos[ure] . . . to budgetary payouts." Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 Ga. L. Rev. 845, 854-55 (2001).

B. Monetary relief is particularly vital for the protection of the Sikh community.

Beyond the need for money damages under RFRA for religious minorities generally, such relief is particularly important for the Sikh community. In two contexts in particular, the absence of damages would leave Sikhs with no redress at all: asylum detention and airport screening.

Asylum Detention

As demonstrated by recent class actions involving Sikh asylees held in detention facilities run or contracted by U.S. Immigration and Customs

Enforcement (ICE), the availability of equitable relief as the sole RFRA remedy is insufficient to deter federal officials from violating Sikh religious beliefs.

Take the 2018 case of a group of Sikh asylum seekers who were detained for five months in an ICE-contracted federal prison in Sheridan, Oregon.[4] The group was held under conditions that violated their most closely held religious beliefs in ways that would qualify as reckless disregard for their civil rights even if they were prisoners—which they most certainly were not. This despite the fact these men had fled to America to escape religious persecution—a common plight for Sikhs. *See* David Kopf & Anders Hansen, *Sikhs, Genocide of*, *in* 2 *Encyclopedia of Genocide* 516, 516-17 (Israel W. Charny ed., 1999).

For starters, the men were refused the vegetarian meals required by their religious practice—a deprivation courts have held plainly violates RFRA's parallel statute for inmate religious exercise, the Religious Land Use and Institutionalized Persons Act (RLUIPA). *See Ford v. McGinnis*, 352 F.3d 582, 597 (2d Cir. 2003) (holding it "clearly established that a prisoner has a right to a diet consistent with his or her religious scruples").

Officials also stripped the Sheridan asylees of their turbans and did not allow them to cover their heads within the facility. This violated the *Rehit Maryada*, or Sikh code of conduct, which mandates that a Sikh must wear a turban. *Textual Sources for*

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[4] The details of the Sheridan case are taken from the Class Action Allegation Complaint, *Singh v. Trump*, No. 3:18-cv-01912-JR (D. Or. filed Nov. 1, 2018).

the Study of Sikhism 81 (W. H. McLeod ed. & trans., 1984). Worse yet, the men were forced to pray in the detention center's barbershop on a floor littered with hair clippings. This treatment was an affront to one of the central beliefs in the Sikh faith on the sacredness of unshorn hair. *See* 2 *The Encylopaedia of Sikhism* 466 (Harbans Singh ed., 2d ed. 2001) (explaining that failing to maintain unshorn hair is, for Sikhs, "the direst apostasy"). In light of this belief, being forced to pray among hair clippings was deeply offensive to the Sikh religious tradition and its practices.

In further degradation of their faith practice, the Sikh detainees at Sheridan were also denied the ability to wear their *karas*, or bracelets, imbued with deep religious significance. In the Sikh tradition, the wearing of this bracelet around the wrist is one of the five "articles of faith" and part of the "bedrock" of their beliefs. Patwant Singh, *The Sikhs* 56 (1999). It is mandatory for initiated members of the Sikh faith to wear a *kara* at all times as a reminder of the transcendent reality in the midst of everyday life, and as an external sign binding them together. Nikky-Guninder Kaur Singh, *Sikhism: An Introduction* 53 (2011). In addition to denying the ability to wear their *karas*, officials confiscated and never returned *karas* belonging to several Sheridan asylees that had been passed down for generations.

Unfortunately, the Sheridan tragedy is not an isolated tale. Officials at a federal detention facility in Victorville, California, recently engaged in similar

mistreatment of Sikh asylum seekers and refugees.[5] Specifically, Sikhs were forbidden from gathering for group worship, denied access to religious texts, and refused nutritionally adequate religious diets. As in Sheridan, the officials at Victorville also stripped Sikh inmates of their articles of faith, including turbans and *karas*, and refused to return them.

Likewise, Muslim asylum seekers in Florida experienced similar mistreatment.[6] The men there, for example, were denied access to religious texts and articles, including Qurans written in the original Arabic. *See The Oxford Dictionary of Islam* 256-57 (John L. Esposito ed., 2003) (explaining the Quran must be recited in Arabic during prayers and other devotional acts). The asylees were also forced to pray with no means to determine the proper cardinal direction for prayer—a critical requirement for the validity of their obligatory five-daily supplications. *Id.* at 275. In addition, they were refused an adequate religious diet, as well as access to prayer rugs, *kufi* head coverings, and prayer beads. And when asked why interested outside volunteers were prohibited from providing such articles and texts to the detainees, the facility's at-large chaplain responded: "Boy, you're in Glades County." *Abdulkadir* Complaint, *supra*, ¶¶ 58-59.

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[5] The details of the Victorville case are taken from the Complaint Class Action, *Teneng v. Trump*, No. 5:18-cv-01609-JGB-KK (C.D. Cal. filed Aug. 1, 2018).

[6] The details of the Glades County case are taken from the Plaintiff's First Amended Complaint for Damages, *Abdulkadir v. Hardin*, No. 2:19-cv-00120-SPC-MRM (M.D. Fla. filed Jan. 17, 2020) [hereinafter *Abdulkadir* Complaint].

And all this despite the fact that the officers involved were in many cases defying the stated policy of the federal government. ICE detention standards, for instance, provide that turbans are allowed in all areas of a facility, subject to safety considerations; a *kara* is permitted for most low- and medium-security detainees; facilities "shall designate adequate space for religious activities"; and staff shall make all reasonable efforts to meet dietary requirements. U.S. Immigration & Customs Enforcement, *Performance-Based National Detention Standards* 375-83 (2016). Furthermore, ICE detainees must be provided with reasonable language accommodation to ensure they can understand these rights. *Id.* at 375-76. Even the Federal Bureau of Prisons (BOP) Program Statement on Religious Beliefs and Practices authorizes Sikh individuals in BOP custody to wear religious items like a white turban with warden approval, and requires a "reasonable and equitable opportunity to observe their religious dietary practice." 28 C.F.R. §§ 548.16, 548.20 (2019).

In denying Sikh asylees these established rights, the offending federal officials engaged in precisely the kind of conduct RFRA was intended to reach. Even in the highly controlled detention context, RFRA forbids burdening religious minorities absent an urgent need. *See* 42 U.S.C. § 2000bb-1. And while these facilities have valid security concerns, the government's own policies demonstrate that on-the-ground officials could and should accommodate these practices without jeopardizing safety.

But without exposure to damage awards, federal officials have little external incentive to follow the rules. After all, under the *Lyons* standard, asylum

seekers cannot force conformity with federal policy through prospective injunctive relief without showing imminent abuse—a near-impossible task where detainees are typically held on a temporary basis. In short, reading damages out of RFRA will leave vulnerable populations powerless to challenge such mistreatment.[7]

That is surely not what Congress intended.

Airport Screening

The threat and reality of airport screenings burdening Sikh religious exercise also persist despite two decades of Sikh Coalition advocacy to remedy such abuses. Once again, therefore, absent the availability of monetary relief under RFRA, Sikhs are left with no legal remedy at all when faced with violative searches at the hands of TSA agents.

Before 2007, TSA policy required removal of religious headwear at an airport checkpoint—a clear substantial burden on the Sikh practice of wearing a turban. *Perspectives on TSA's Policies to Prevent Unlawful Profiling*: *Hearing Before the H. Comm. on Homeland Sec.*, 116th Cong. 20 (2019) [hereinafter *House TSA Hearing*] (statement of Sim J. Singh, Senior Manager of Advocacy and Policy, The Sikh Coalition). For a Sikh, forced public removal of the

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[7] ICE's contracting policies exacerbate this problem by creating barriers for the dissemination and enforcement of federal religious-accommodation policy. U.S. Comm'n on Civil Rights, *Enforcing Religious Freedom in Prison* 110 (2008). The Glades County case above, for example, occurred in a contracted county jail where local officials failed to follow established ICE policy. *Abdulkadir* Complaint, *supra*, ¶¶ 52, 78.

turban—considered by adherents as an extension of their body—is a humiliation equivalent to a strip search. *Id.* Even the touching of a turban with unclean hands or by non-believers is considered deeply hurtful to the faithful. *Id.*

Given the affront to one of the Sikh community's core religious practices, therefore, the Sikh Coalition advocated against TSA's headwear-screening policy. In response, TSA at least enacted a half measure allowing Sikh passengers to self-administer a pat down of their turbans followed by a test of their hands to detect explosives. And if further screening became necessary, any turban removal was supposed to be in a private room outside of public view. *See* Colleen Deal, Comment, *Faith or Flight?: A Religious Dilemma*, 76 J. Air L. & Com. 525, 555-57 (2011) (arguing that alternative screening procedures can represent a less restrictive means of pursuing government's interest in safety and security).

Despite the TSA's development of these national policies, however, it is not uncommon for on-the-ground officers to instead enforce harmful "local rules." *House TSA Hearing*, *supra*, at 21. These "local rules" can range anywhere from agents departing from the self pat-down policy and touching, or even removing, religious headwear—again, intrusions that can be highly offensive to Sikhs—to much more invasive and religiously burdensome searches. *Id.*

In 2016, for instance, local TSA agents required Jasmeet Singh, a Sikh passenger at San Francisco International Airport, to endure an "extra screening" in which he was denied a self pat-down and forced to remove his turban. Mike Moffit, *Sikh Comedian Forced to Remove Turban at SFO, Feels*

"Humiliated," S.F. Chron. (Feb. 24, 2016, 12:28 PM), https://bit.ly/2GWZ1g4. TSA officials then refused Mr. Singh's request for a mirror in the screening room to re-tie his turban, insisting he use a mirror in a public restroom instead. *Id.* This in particular violated the point of the TSA rule requiring a private room for further screening, as well as an additional TSA policy requiring mirrors in such rooms. *House TSA Hearing*, *supra*, at 29. Specifically, Mr. Singh was deeply humiliated as he walked through the airport with his hair exposed—an experience many Sikhs liken to feeling naked. *Id.* at 20; Moffit, *supra*.

In such situations where official policy is ignored or flouted, the harm to Sikhs (and those with similar beliefs) cannot be addressed absent monetary relief. Given how quickly invasive screening begins and ends, injunctive remedies offer no solace. *See, e.g.*, *Corbett v. Transp. Sec. Admin.*, 930 F.3d 1225, 1232-36 (11th Cir. 2019) (rejecting claim in TSA context under *Lyons* standard), *cert. denied*, No. 19-647, 2020 WL 129640 (U.S. Jan. 13, 2020). Under *Lyons*, to correct local abuses by injunction a plaintiff would need to prove that TSA employees inevitably burden every Sikh they screen—an impossible feat given the varied practices and levels of compliance with national TSA policy. *See* 461 U.S. at 108.

Ultimately, money damages are the only way to deter misconduct by local TSA officials, ensure victims receive compensation, and force compliance with the agency's own policies. Without them, Sikhs and others will continue to suffer.

C. Damages awards under RFRA reach egregious conduct, and rightly so.

Even with robust qualified immunity in place, money damages under RFRA are still available in cases where they are needed most: those involving blatant or willful violations that would otherwise go unpunished. Numerous courts, for example, have held officials are not entitled to qualified immunity in cases analogous to those described above. After all, qualified immunity may be pierced where law or policy would make a reasonable officer aware he was violating a federal right.

As an initial matter, courts do not grant qualified immunity where caselaw has clearly established the right that the federal official violated. This inquiry expands beyond a mechanistic search for cases with the same fact pattern, and extends to an application of general legal principles in that circuit. In *Ford v. McGinnis*, for instance, the Second Circuit rejected qualified immunity in the RLUIPA context for state prison officials who refused an inmate a communal holiday meal for the *Eid ul Fitr* feast, marking the end of Ramadan. 352 F.3d at 597-98. Similarly, in *Potts v. Holt*, the Third Circuit held that a right to meals compliant with one's religion—there, halal meals for a Muslim inmate—was clearly established for federal prisoners under RFRA. 617 F. App'x 148, 152 (3d Cir. 2015). These two cases strongly indicate that the detention officials in the Sheridan, Victorville, and Glades County lawsuits would not have been entitled to qualified immunity.

Courts have likewise held that immunity may be pierced where federal policy itself would have placed a reasonable officer on notice that his conduct

violated the plaintiff's rights. In *Jones v. Williams*, for example, the Ninth Circuit held that qualified immunity did not attach where prison officials violated the prison's disseminated policy allowing for a Muslim prisoner's requested accommodation. 791 F.3d 1023, 1034-35 (9th Cir. 2015). Accordingly, local TSA officials or the offending officers at the detention facilities described above would be subject to liability where stated TSA or ICE policy was to the contrary.

Notwithstanding the parade of horribles alleged by the Government, immunity will nevertheless be available to those faced with truly difficult decisions on whether to allow a religious accommodation. In *Davila v. Gladden*, for example, the Eleventh Circuit insulated federal officials from individual liability where the plaintiff's free-exercise rights were not clearly established—there, the possession of non-BOP-approved religious articles. 777 F.3d 1198, 1211-12 (11th Cir. 2015); *see also Romero v. Lappin*, No. 10-35-ART, 2011 WL 3422849, at *5 (E.D. Ky. Aug. 4, 2011) (noting in the context of a RFRA claim that "courts have developed the qualified immunity doctrine to provide federal officials with 'ample room for mistaken judgments'" (quoting *Humphrey v. Mabry*, 482 F.3d 840, 847 (6th Cir. 2007))). Qualified immunity thus provides federal employees room to maneuver within the putative "minefield of liability" the Government conjures. Pet'rs' Br. 31-32.

In sum, RFRA's grant of monetary damages does what injunctive relief cannot: it compensates victims while deterring egregious federal misconduct.

CONCLUSION

Based on the text, background, and legislative history of RFRA—and supported by the experience of the Sikh faithful—the Second Circuit's recognition of a money damages remedy should be affirmed.

Respectfully submitted,

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