No. 16-36056

# In the United States Court of Appeals for the Ninth Circuit

TERRY PAUL HEDIN,

*Plaintiff-Appellant*,

*v.*

JAUN D. CASTILLO, MARION FEATHER, RICHARD KOWALCZCK, AND DANIEL WILLIAMS,

*Defendants-Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
CASE NO. 3:14-CV-01504

**BRIEF OF *AMICUS CURIAE***
**THE BECKET FUND FOR RELIGIOUS LIBERTY**
**IN SUPPORT OF APPELLANT AND REVERSAL**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(4)(A), *amicus* The Becket Fund for Religious Liberty states that it does not have a parent corporation and does not issue any stock.

July 13, 2017

/s/ *Eric S. Baxter*

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## INTEREST OF THE AMICUS[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm that protects the free expression of all religious faiths. Becket has represented agnostics, Buddhists, Christians, Hindus, Jains, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

Becket has represented several successful parties at the United States Supreme Court, including in cases regarding prisoners' right to exercise religion. *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (9-0 ruling upholding Muslim prisoner's right to wear beard). And in lower courts it has represented the interests of Catholic, Greek Orthodox, Jewish, Muslim, Protestant, and Sikh prisoners in matters resolved both prior to and during litigation.

Becket submits this brief to explain how RFRA's authorization of individual-capacity damages is not only unambiguous, but also critical to achieving the statute's goals. Without the possibility of damages,

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[1] The parties have consented to the filing of this brief. As required by Rule 29(a)(4)(E), *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *Amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

prisoners are left at the mercy of prison systems, which can (and do) easily moot meritorious claims by providing temporary religious accommodations. And the potential for damages also creates an incentive for prison officials to take care in considering prisoners' requests for religious accommodation. Recognizing the availability of damages under RFRA in this lawsuit will have a profound effect on the fundamental rights RFRA was designed to protect.

## SUMMARY OF THE ARGUMENT

The text of the Religious Freedom Restoration Act (RFRA) unambiguously allows damages against government officials in their individual capacities for violating the law. Every court to consider the issue except one—in a decision that is now on appeal—has agreed.

Moreover, individual-capacity damages play a critical role under RFRA in protecting religious liberty, especially for vulnerable populations such as prison inmates. It is not uncommon for prison officials to moot claims for injunctive relief by offering a religious accommodation at the eleventh hour or by transferring prisoners to new facilities where they must re-start the prison procedures for requesting an accommodation. A damages claim prevents this type of

gamesmanship, allowing courts to reach the merits of RFRA claims and preventing similar RFRA violations in the future. The potential for personal liability also helps to deter government officials from violating individuals' clearly established rights to exercise their faith in the first place.

## ARGUMENT

### I. RFRA's text authorizes individual-capacity damages.

RFRA was enacted "to provide greater protection for religious exercise than is available under the First Amendment." *Holt v. Hobbs*, 135 S. Ct. 853, 859-60 (2015). As part of that protection, RFRA provides that any person whose rights under the Act are violated may obtain "appropriate relief" against any "official (or other person acting under color of law) of the United States." 42 U.S.C. §§ 2000bb-1(c), 2000bb-2(1). These phrases unambiguously confirm that plaintiffs injured under RFRA are entitled to seek damages against government officials in their individual capacities.

#### A. The phrase "appropriate relief" presumptively includes damages.

In *Franklin v. Gwinnett County Public Schools*, the Supreme Court emphasized the "longstanding rule" that once Congress has created a

cause of action, courts "may order any appropriate relief," even if Congress was "silent" as to the specific remedies. 503 U.S. 60, 66, 69 (1992). Thus, rather than looking for what Congress has approved, the Court "*presume[s]* the availability of *all* appropriate remedies unless Congress has expressly indicated otherwise." *Id.* at 66 (emphases added).

"This principle has deep roots in [the Court's] jurisprudence" and is "necessary" to the proper "separation of powers." *Id.* at 66, 74. On one hand, it serves as a "safeguard against abuses of legislative and executive power" and "ensure[s] an independent Judiciary." *Id.* at 74 (citing *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838)) (denying government official's discretion to ignore court-awarded relief). On the other hand, it deprives judges "the power to render inutile causes of action authorized by Congress[,] through a decision that *no* remedy is available." *Id.* at 74 (emphasis in original). In short, the presumption that *all* "appropriate relief" is available, unless Congress specifically states otherwise, ensures that "where there is a legal right, there is also a legal remedy." *Id.* at 66.

That this presumption extends to both damages and equitable relief is undeniable. "[I]t is axiomatic that a court should determine the adequacy

of a remedy in law *before* resorting to equitable relief. Under the ordinary convention, the proper inquiry would be whether monetary damages provided an adequate remedy, and *if not*, whether equitable relief would be appropriate." *Id.* at 75-76 (emphasis added). Limiting "appropriate relief" under RFRA to equitable relief alone would turn this bedrock principle of remedies law on its head. To be sure, damages are often an inadequate remedy for restrictions on a person's exercise of religion, and injunctive relief is therefore "appropriate" in many RFRA cases. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). But this means only that equitable remedies are available *in addition* to damages, not in lieu of them. When a plaintiff has suffered monetarily compensable harm or, if no compensable injury has occurred, wishes to "vindicate[]" his or her violated rights through nominal damages, *Carey v. Piphus*, 435 U.S. 247, 266 (1978), RFRA provides for damages against officers in their individual capacities.

*Franklin*'s presumption in favor of damages applies with full force here. Congress enacted RFRA just months after the *Franklin* decision was handed down and used the Supreme Court's own term—"appropriate

relief"—to describe the scope of available remedies. Congress's reuse of the term without qualification was not accidental, but instead demonstrates an intent to make a broad range of remedies available. *Mack v. Warden Loretto FCI*, 839 F.3d 286, 302-03 (3d Cir. 2016); *see also Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation.").

To overcome the *Franklin* presumption in favor of damages, RFRA would have to include "clear direction" that Congress wanted to restrict the range of available remedies. *Franklin*, 503 U.S. at 70-71. Congress knows how to exclude damages as a form of appropriate relief when it chooses. *See* 15 U.S.C. § 797(b)(5) (authorizing "a civil action for appropriate relief," but stating that "[n]othing in this paragraph shall authorize any person to recover damages"); 42 U.S.C. § 6395(e)(1) (same). But RFRA contains nothing of the sort—quite the opposite, in fact. Congress explicitly provided that RFRA should be construed "in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g). An unduly narrow interpretation of "appropriate relief," entirely

unsupported by the text, would contravene Congress's stated purpose and undermine this broad protection for religious liberty.

### B. The phrase "person acting under color of law" extends the presumption for damages to individual-capacity damages.

Congress did not write on a clean slate when it used the language "person acting under color of law" to define who could be liable under RFRA. *See* 42 U.S.C. §§ 2000bb-1(c); 2000bb-2(1). Instead, Congress borrowed the phrase from part of the Civil Rights Act of 1871 referred to as "Section 1983," which creates a cause of action against a "person" acting "under color of any [state] statute, ordinance, regulation, custom, or usage." 17 Stat. 13, § 1979, *codified at* 42 U.S.C. § 1983. By tracking this language, Congress ensured that RFRA would provide individual-capacity damages against officials who violate clearly established rights. *See Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834-35 (9th Cir. 1999) (noting the similarity and relying on Section 1983 precedents to interpret scope of RFRA liability).

When Congress adopted this language into RFRA, Section 1983 had long been understood to impose personal liability on government officials who violate clearly established rights. *See, e.g.*, *Hafer v. Melo*, 502 U.S.

21, 27 (1991); *Monroe v. Pape*, 365 U.S. 167, 187, 204 (1961), *overruled on other grounds by Monell v. Dep't Soc. Servs. of N.Y.C.*, 436 U.S. 658 (1978). And "[w]hen a legislature borrows an already judicially interpreted phase from an old statute to use it in a new statute, it is presumed that the legislature intends to adopt not merely the old phrase but the judicial construction of that phrase." *Sutton*, 192 F.3d at 834-35 (quoting *Long v. Director, Office of Workers' Comp. Programs*, 767 F.2d 1578, 1581 (9th Cir. 1985)). Thus, "the judicial interpretation of the phrase 'acting under color of law,' as used in . . . § 1983, applies equally" in RFRA actions. *Id.* at 835. It follows, then, that RFRA—just like Section 1983—creates an individual-capacity damages remedy.

## II. The case law interpreting RFRA overwhelmingly supports individual-capacity damages.

Courts widely agree that RFRA authorizes individual-capacity damages. And cases addressing *official*-capacity damages raise entirely distinct sovereign immunity questions that are inapplicable here.

### A. Nearly every court to consider the issue has agreed.

With only one exception (in a decision that is now on appeal), every court to consider whether RFRA authorizes individual-capacity damages has agreed that it does. The Third Circuit—the only appellate court to

address the issue—has held that "federal officers who violate RFRA may be sued in their individual capacity for damages." *Mack v. Warden Loretto FCI*, 839 F.3d 286, 304 (3d Cir. 2016). The court relied on the same logic that *Amicus* has presented here: The *Franklin* presumption in favor of damages applies—all the more because Congress used *Franklin's* exact language. *Id.* at 302-03. And RFRA tracks language from § 1983, which makes government officials personally liable for their unlawful conduct. *Id.* at 301-03 & nn.87-88 (citing *Sutton*, 192 F.3d at 834-35).

At least four federal district courts—including two in the Ninth Circuit—have likewise recognized the availability of individual-capacity damages under RFRA. *See Patel v. Bureau of Prisons*, 125 F. Supp. 3d. 44, 49-54 (D.D.C. 2015): *Padilla v. Yoo*, 633 F. Supp. 2d. 1005 (N.D. Cal. 2009), *rev'd on other grounds*, 678 F.3d 748 (9th Cir. 2012); *Lepp v. Gonzales*, No. C-05-0566, 2005 WL 1867723, at *8 (N.D. Cal. Aug. 2, 2005), *aff'd*, 265 Fed. App. 461 (9th Cir. 2008); *Jama v. U.S. Immigration & Naturalization Serv.*, 343 F. Supp. 2d 338, 371-76 (D.N.J. 2004).

Only one district court has concluded otherwise, relying on a narrow view of RFRA that the Supreme Court has explicitly rejected. *See Tanvir v. Lynch*, 128 F. Supp. 3d 756 (S.D.N.Y. 2015), *appeal docketed sub nom.*

*Tanvir v. Tanzin*, No. 16-1176 (2d. Cir. Apr. 18, 2016).[2] *Tanvir*'s reasoning can be summarized in a simple—yet fatally flawed—syllogism:

- Major premise: RFRA merely codified the Supreme Court's pre-*Smith* jurisprudence—"no more, no less." *Tanvir,* 128 F. Supp. 3d at 780.
- Minor premise: Prior to *Smith*, the Supreme Court had not recognized a *Bivens* claim for Free Exercise Clause violations, and damages from federal officials were therefore unavailable. *Id.*
- Conclusion: Damages are therefore unavailable under RFRA. *Id.*

*Tanvir* is wrong because the major premise is wrong: RFRA did more than simply return legal protections for the free exercise of religion to the pre-*Smith* status quo. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761, 2772-73 (2014); *Mack*, 839 F.3d at 304 n.101 (rejecting *Tanvir*'s reasoning because it is inconsistent with *Hobby Lobby*). Indeed, the Supreme Court said it would be "absurd" to think that "RFRA merely restored this Court's pre-*Smith* decisions in ossified form." *Hobby Lobby*, 134 S. Ct. at 2773. Rather, "[RFRA] provided even broader protection for

[2] The Second Circuit heard oral argument in *Tanvir* on March 1, 2017. *Tanvir v. Tanzin*, No. 16-1176, ECF No. 81 (2d. Cir. Mar. 1, 2017). On July 6, 2017, it called for supplemental briefing on whether the government officials would be entitled to qualified immunity "assuming *arguendo* that RFRA authorizes suits against officers in their individual capacities." *Id.*, ECF No. 83 (2d Cir. July 7, 2017). As of the filing of this brief, the Second Circuit had not issued its decision.

religious liberty than was available under those decisions." *Id.* at 2761. The scope of "appropriate relief" under RFRA thus does not depend on whether *Bivens* permits a suit for damages under the Free Exercise Clause. As explained above, *see* Part I, RFRA's text and history show that damages are available.[3]

### B. Sovereign immunity cases are irrelevant.

This conclusion is unaffected by cases holding that RFRA and RLUIPA do not waive sovereign immunity to authorized damages against state or federal governments. *See, e.g., Sossamon v. Texas*, 563 U.S. 277 (2011); *Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829 (9th Cir. 2012). Government officials sued in their individual capacities do not enjoy sovereign immunity to begin with. *Alden v. Maine*, 527 U.S. 706, 756-57 (1999). In contrast, sovereign entities like the United States

[3] Whether a *Bivens* claim exists for violations of the Free Exercise Clause is beyond the scope of this brief. The point here is that RFRA creates a damages remedy whether or not *Bivens* does. Furthermore, to condition the existence of damages under RFRA on the availability of a *Bivens* claim would make the reasoning entirely circular: Part of the *Bivens* analysis asks whether an "alternative, existing process"—in this case, RFRA—"provide[s] adequate protection" for the plaintiff's asserted rights. *Minneci v. Pollard*, 565 U.S. 118, 120-21, 123 (2012). The existence of RFRA cannot justify denying a *Bivens* claim, and then the non-existence of that *Bivens* claim be used to restrict the scope of RFRA.

and the individual States themselves cannot be sued without their consent. *Alden*, 527 U.S. at 715. And suits against federal or state government officials in their official—as opposed to individual—capacities are tantamount to suits against the sovereign itself. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). Thus, without a waiver of sovereign immunity, damages are not available against the federal or state governments.

Waivers of sovereign immunity must be "unequivocally expressed in the statutory text." *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (internal quotations marks omitted). Statutory waivers are "strictly construed, in terms of [their] scope, in favor of the sovereign," and "a waiver of sovereign immunity to other types of relief does not waive immunity to damages." *Sossamon*, 563 U.S. at 285 (quoting *Lane v. Peña*, 518 U.S. 187, 192 (1996)).

The Supreme Court held in *Sossamon* that term "appropriate relief" in RLUIPA "does not so clearly and unambiguously waive sovereign immunity to private suits for damages that we can be certain the State in fact consent[ed] to such a suit" by accepting the federal funds that trigger RLUIPA's coverage. *Id.* (quotation and citation omitted). RLUIPA

thus does not authorize suits against state officials in their *official* capacities. *Id.* In *Oklevueha Native American Church*, this Court followed *Sossamon*'s logic to conclude that the identical phrase in RFRA was not an "unequivocal expression" of Congress's internet to waive the federal government's sovereign immunity. 676 F.3d at 841 (citation omitted).

These cases, however, have no bearing on whether RFRA creates personal liability for federal officials sued in their *individual* capacities. Interpreting a statutory waiver of sovereign immunity is fundamentally different than determining what remedies are available in suit against an individual: "The presumption in *Franklin* . . . is *irrelevant* to construing the scope of an express waiver of sovereign immunity." *Sossamon*, 563 U.S. at 288 (emphasis added). In fact, the "general rule" described in *Franklin* is effectively reversed: "The question [in a case against the sovereign] is not whether Congress has given clear direction that it intends to *exclude* a damages remedy, *see Franklin*, *supra*, [503 U.S.] at 70-71, but whether Congress has given clear direction that it intends to *include* a damages remedy." *Sossamon*, 563 U.S. at 289 (emphasis in original). But individual-capacity suits are not suits against the sovereign. *See Alden*, 527 U.S. at 756-57 ("[A] suit for money damages

may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself."). Consequently, the *Franklin* presumption in favor of damages—not the sovereign immunity presumption against them—applies.

The Department of Justice's Office of Legal Counsel reached the same conclusion shortly after Congress enacted RFRA. *See Availability of Money Damages Under the Religious Freedom and Restoration Act*, 18 Op. O.L.C. 180, 183 (1994). Relying on the "strict standard" for waiving sovereign immunity, OLC concluded that "RFRA's reference to 'appropriate relief' is not sufficiently unambiguous to . . . waive sovereign immunity for damages." *Id.* at 180-81. By contrast, OLC noted that the "unequivocal expression" standard does not apply to suits against non-sovereigns like government officials sued in their individual capacities. *Id.* at 182. "When sovereign immunity concerns are removed from the equation, . . . the interpretive presumption is reversed: as against entities unprotected by sovereign immunity, Congress must provide 'clear direction to the contrary' if it wishes to make money damages unavailable in a cause of action under a federal statute." *Id.* at 182-83 (quoting

*Franklin*, 503 U.S. at 70-71). "Because RFRA's reference to 'appropriate relief' does not clearly exclude money damages," OLC concluded that "there is a strong argument" under *Franklin* that RFRA authorizes damages against officials sued in their individual capacities. *Id.* at 183.[4]

## III. RFRA's purpose favors including individual-capacity damages.

RFRA was enacted "to provide very broad protection for religious liberty." *Hobby Lobby*, 134 S. Ct. at 2760. Yet for many plaintiffs—and especially for prisoners—foreclosing an individual-damages remedy will in many instances make RFRA's promise to protect their religious liberty little more than a dead letter. Without a damages claim, government defendants can often moot meritorious suits for injunctive relief by

[4] Like the sovereign immunity cases, the recent Ninth Circuit case holding that RLUIPA does not permit individual-capacity damages has no bearing on the availability of damages under RFRA. *See Wood v. Yordy*, 753 F.3d 899 (9th Cir. 2014). Congress passed the prison provisions of RLUIPA pursuant to the Spending Clause. *Id.* at 902-03. Because Spending Clause legislation functions like a contract, only the recipients of the funds—the government entities and not the officials in their personal capacities—can be bound by its terms. *Id.* at 903-04. Thus the Ninth Circuit held that it was compelled by the Spending Clause to read RLUIPA to exclude individual-capacity damages. *Id.* at 904. "RFRA, by contrast, was enacted pursuant to Congress's powers under the Necessary and Proper Clause and thus does not implicate the same concerns." *Mack*, 839 F.3d at 303.

granting last-minute relief or transferring prisoners to a different facility where they must re-start the process of obtaining a religious accommodation. Also, the potential for personal liability serves to deter government officials from violating the religious liberty rights of some of society's most vulnerable.

### A. Damages protect religious liberty by preventing the government from gaming RFRA by voluntarily mooting suits for injunctive relief.

The government can voluntarily moot a suit that is likely to succeed by changing a challenged policy or transferring a prisoner just before the court reaches an adverse decision and enjoins the illegal behavior. Without a claim for damages to keep the suit alive, the victim gets no relief and the government can again violate the victim's religious liberty in the future.

Mootness is a particularly serious issue in prisoner cases. States may provide or deny inmates religious accommodations at will, and may transfer inmates among units with different rules and accommodations at almost any time. *See, e.g.*, *Meachum v. Fano*, 427 U.S. 215, 228 (1976). This makes it very easy for a defendant government to moot a prisoner case. Releasing a prisoner from custody, transferring him to a new unit,

or temporarily granting a religious accommodation can all moot a prisoner's case.

Moreover, the typical exceptions to the mootness doctrine—"voluntary cessation" and "capable of repetition but evading review"—are much weaker in the prison context. Ordinarily, a defendant's voluntary cessation of unlawful conduct does not moot a case unless the defendant bears the "heavy burden" of showing that "the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000). But courts routinely relax this requirement when the government asserts mootness, being "more apt to trust public officials than private defendants to desist from future violations." 13C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3533.7 (3d ed. 2008); *accord America Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1179-80 (9th Cir. 2010) ("[U]nlike in the case of a private party, we presume the government is acting in good faith."). Thus, when it comes to prisoner litigation, the doctrine of voluntary cessation has proven to be an inadequate check on government gamesmanship.

The same is true of assertions that a claim is not moot because the government's conduct is "capable of repetition, yet evading review." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735 (2008). This exception applies where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Id.* (internal quotation omitted). Inmates have a particularly difficult time satisfying this test because the government controls every condition of their confinement. Inmates cannot prove that a last-minute religious accommodation is temporary or that a violation is likely to recur. Thus, this exception to mootness offers even less protection than does the doctrine of voluntary cessation.

Many prisoners' RFRA claims are left unheard because of such gamesmanship. In one such case, a Muslim prisoner filed suit in the Southern District of Illinois against prison officials claiming he was impermissibly forbidden to gather with other prisoners for congregational prayer. *Chesser v. Walton*, No. 12-cv-1198, 2016 WL 6471435, at *1, *4 (S.D. Ill. Nov. 2, 2016). When prison officials transferred him from a federal prison in Illinois to another prison in

Colorado, he filed a similar suit that was transferred to the District of Colorado. *Chesser v. Dir. Fed. Bureau of Prisons*, No. 15-cv-1939, 2016 WL 1170448, at *1 (D. Colo. Mar. 25, 2016). The Colorado court dismissed his RFRA claims because they were "duplicative" of his pending claims in the Illinois suit. *Id.* at *2-4. The Illinois court then dismissed the RFRA claims as moot because the prisoner had been transferred to Colorado. *Chesser v. Walton*, at *4 (finding RFRA claim moot because prisoner could not show he would likely "face the same conditions" despite his allegation that he was subject to the same conditions in Colorado).

Another Muslim inmate likewise challenged prison officials' refusal to allow him to engage in group prayer. *Johnson v. Killian*, 2009 WL 1066248 at *1 (S.D.N.Y. April 21, 2009). A few days later he was transferred to another federal prison, mooting his RFRA claim. *Id.*

In *Guzzi v. Thompson*, 470 F. Supp. 2d 17 (D. Mass. 2007), Massachusetts denied a *pro se* inmate kosher food because he was not certified as Jewish, and the district court ruled in favor of the State. *Id.* at 19-20. On appeal, *Amicus* became involved as an *amicus curiae* arguing the case in lieu of the plaintiff. After oral argument in the First Circuit, the State abruptly reversed course and decided to provide kosher

food. *Guzzi* v. *Thompson*, No. 07-1537, 2008 WL 2059321, at *1 (1st Cir. May 14, 2008). It then moved to moot the appeal before any decision could issue. See Notice to the Court Regarding Equitable Relief, *Guzzi v. Thompson*, No. 07-1537 (1st Cir. Apr. 18, 2008). The First Circuit agreed, dismissing the appeal as moot and vacating the decision below. *Guzzi*, 2008 WL 2059321, at *1.

A claim for damages—even nominal damages—would have preserved these claims. Without a damages remedy, the government can undermine RFRA's protections for religious liberty by selectively mooting RFRA claims. Damages are thus a necessary component of "appropriate relief" to prevent this sort of gamesmanship.

### B. Personal liability discourages federal officials from violating clearly-established rights to exercise religion.

In addition to preserving claims, the possibility of personal financial liability helps to deter federal officials from violating individuals' religious liberty in the first place. Such "controls on government" are necessary because "angels [do not] govern men." The Federalist No. 51 (James Madison). The Supreme Court has recognized that "the damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future." *City of Riverside v. Rivera*, 477 U.S. 561,

575 (1986). And deterring future violations is one of the important purposes of civil rights statutes like RFRA. *Cf. Owen v. City of Independence*, 445 U.S. 622, 651 (1980) ("Moreover, § 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well.").

Individual-capacity damages deter violations of rights by making officials internalize the costs of their illegal activity rather than forcing their victims to bear it. *See* John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 Va. L. Rev. 47, 72 (1998). Faced with the choice between respecting someone's religious liberty and risking liability by violating it, officials are more likely to follow the law. This deterrence is especially important for prisoners, minorities, and the poor, who are less politically powerful and often unable to access other redress. *See* Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 Colum. L. Rev. 247, 283 (1988). Individual-capacity damages will thus protect the religious liberty of society's most vulnerable.

Qualified immunity ensures that the benefits of deterrence do not impose unreasonable costs. The doctrine "balances two important

interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shied officials from harassment, distraction, and liability when they perform their duties responsibly." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). By immunizing officials from liability for all but violations of "clearly established" rights, *id.*, qualified immunity allows officials to make difficult choices without fearing litigation at every turn. *See Richardson v. McKnight,* 521 U.S. 399, 407-08 (1997) (qualified immunity protects "government's ability to perform its traditional functions"); *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974) (qualified immunity protects officials who exercise discretion and encourages them to exercise good judgment).

Recognizing a damages remedy under RFRA, then, would not place an unreasonable burden on government officials. Only the worst actors—those who take action that a reasonable person would know to be unlawful—will be liable. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Ignoring the damages remedy altogether would upset the balance that qualified immunity already strikes between government efficiency and RFRA's protection for religious liberty.

## IV. The district court ignored the availability of individual-capacity damages under RFRA.

In this case, Terry Hedin alleges that prison officials have violated RFRA by substantially burdening his ability to live his Asatru faith. ER 147-49, ¶¶ 25-37. According to his complaint, the Defendants seized and destroyed ceremonial items and educational material required for the practice of his faith and limited his ability to celebrate the twelve days of Yule, Asatru's high holy days. *Id.* Among other relief, Mr. Hedin has requested an award of damages against each defendant in his or her individual capacity. ER 151 ¶¶ 38(iv)-(vii).

The District Court rejected this claim in a footnote, stating that "RFRA does not waive the federal government's sovereign immunity" and "[t]herefore, a plaintiff may only proceed on a RFRA claim for injunctive relief." ER 12 n.3 (magistrate judge's report and recommendation); ER 3 (District Court adopting report and recommendation without change).

The District Court erred by not considering that Mr. Hedin clearly requested an award of damages against the four prison officials in their individual—not official—capacities. ER 151. As discussed above, government officials sued in their individual capacities do not have sovereign immunity. *See Alden*, 527 U.S. at 756-57.

The District Court should have concluded, along with nearly every other court to consider the issue, that "appropriate relief" under RFRA includes suits for damages against federal officials in their individual capacities. Only this interpretation squares with RFRA's text and its broad purpose to protect religious liberty.

## CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the District Court.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 4773 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Century Schoolbook 14-point typeface.

July 13, 2017

/s/ *Eric S. Baxter*
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## CERTIFICATE OF SERVICE

I certify that on July 13, 2017, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

July 13, 2017

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