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IN THE SUPREME COURT OF THE UNITED STATES

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FNU TANZIN, ET AL.,)

Petitioners,)

v.) No. 19-71

MUHAMMED TANVIR, ET AL.,)

Respondents.)

- - - - -

Washington, D.C.

Tuesday, October 6, 2020

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:15 a.m.

APPEARANCES:

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on behalf of the Respondents.

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P R O C E E D I N G S

(11:15 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 19-71, *Tanzin versus Tanvir*.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER
ON BEHALF OF THE PETITIONERS

MR. KNEEDLER: Mr. Chief Justice, and may it please the Court:

In enacting RFRA, Congress did not subject federal employees throughout the government to a new cause of action for damages in their personal capacity.

RFRA's remedy section provides only for appropriate relief against the government. Damages against an individual employee in his personal capacity are not relief against the government.

At the same time, where a suit is brought against the federal government, including against a federal official in his official capacity, as RFRA provides for, money damages are not appropriate relief.

Prior to this Court's decision in

1 Smith and the passage of RFRA, injunctive relief
2 against a federal agency or official was the
3 only appropriate relief for an asserted free
4 exercise violation. This Court had not
5 recognized a personal damages action under
6 Bivens for a violation of the Free Exercise
7 Clause, and it has not done so since.

8 Moreover, prior to RFRA, Congress had
9 enacted the Westfall Act, which adopted a broad
10 bar to tort suits against federal employees to
11 prevent the chilling effects for the executive
12 branch from the prospect of personal liability
13 and protracted litigation for its employees.
14 Congress has only very rarely departed from that
15 general rule and subjected federal employees to
16 personal damage suits. When it has, it has done
17 so expressly, which it did not do in RFRA.

18 When Congress enacted RFRA to restore
19 the substantive standard for free exercise
20 claims to what it was prior to Smith, it did not
21 at the same time significantly depart from the
22 established remedial scheme.

23 This Court should not now read into
24 the text of RFRA, which provides only for relief
25 against the government, a sweeping new

1 Bivens-style cause of action against federal
2 employees in their personal capacity for
3 damages.

4 CHIEF JUSTICE ROBERTS: Mr. Kneedler,
5 you rely in your -- in your brief on a -- a
6 clear statement rule about the liability that's
7 at issue here. But what -- what is your best
8 case for the proposition that a clear statement
9 rule applies when the question is whether
10 individuals can be liable in their personal
11 capacity rather than in an official capacity?

12 MR. KNEEDLER: I -- I think the -- I
13 -- I think the principle derives from the point
14 I just made about the Westfall Act and what --
15 and, more generally, Congress's practice with
16 respect to establishing private damage remedies
17 against federal employees.

18 The general rule is that -- statutory
19 rule is that there is not, and when Congress has
20 departed, it has done so expressly in the few
21 examples cited in the brief. So I think it --
22 it derives from what Congress itself had done.

23 And -- and because of respect for the
24 executive branch, Congress should not lightly be
25 taken to have intruded upon the executive branch

1 by creating damage remedies against federal
2 employees who are charged with executing the
3 laws. And I think that's specifically or
4 especially so under RFRA, which is principally
5 designed to create exemptions from generally
6 applicable laws, and a damage action doesn't --
7 isn't well suited to that sort of situation
8 because an employee is in the position of having
9 to decide, maybe on the spot, whether to create
10 an exemption from the generally applicable rule
11 or statute he's charged with implementing.

12 CHIEF JUSTICE ROBERTS: I think, or I
13 meant to anyway if I didn't, ask for a
14 precedent, and I didn't hear a case name in your
15 answer.

16 MR. KNEEDLER: I'm sorry. No, I -- I
17 don't think the Court has specifically addressed
18 it, but it -- it has done something analogous
19 with respect to statutes affecting state
20 administration. And the -- the Court's Sossamon
21 decision, I think, is instructive on that -- in
22 that regard with respect to whether the parallel
23 language in RLUIPA waives sovereign immunity of
24 a state.

25 And the Court, out of deference to the

1 state and under our federalism, concluded that
2 that language is ambiguous and doesn't
3 sufficiently establish a cause of action against
4 a state. And the lower courts have uniformly
5 not applied -- not allowed damage actions
6 against state employees under RLUIPA as well.

7 And we think the respect for the
8 executive branch that is reflected in the
9 statutes Congress has passed calls for a
10 parallel rule of deference, parallel to that of
11 the -- of the federalism deference in Sossamon.

12 CHIEF JUSTICE ROBERTS: Thank you.

13 Justice Thomas.

14 JUSTICE THOMAS: Thank you, Chief
15 Justice.

16 Mr. Kneedler, let's assume you take
17 this out of the context of the government and
18 you simply have a private cause of action that
19 provides for appropriate relief.

20 Would money damages be available then?

21 MR. KNEEDLER: I don't think it's
22 possible to give an across-the-board answer to
23 that question. In -- in Franklin, the Court was
24 dealing with a situation where the cause of
25 action itself was implied by the Court at a time

1 when the courts were allowed to create causes of
2 action under their -- their general
3 jurisdictional power. And in that situation, it
4 was part of the package that the courts could
5 develop whatever remedies they wanted.

6 But, in a -- in a statute, context
7 matters. You start -- you don't start with a
8 presumption that damages are available; you
9 start with the text that Congress has enacted,
10 and the text has to be interpreted in context.

11 So it would depend on the particular
12 statute in which that language may appear. And,
13 here, of course, the context is suits against
14 federal employees in the federal government.

15 JUSTICE THOMAS: Let's take this
16 statute and instead of having appropriate --
17 merely appropriate relief, we say -- we include
18 -- we -- the statute authorizes money damages,
19 with all the other language remaining the same.

20 Would that be enough?

21 MR. KNEEDLER: It -- it might be. I
22 mean, I -- I guess it would because, if the --
23 damages were available against the government
24 and the statute refers to damages or relief
25 against the government, if Congress provided for

1 damages against the government, there would be,
2 I think, a pretty good argument that it would be
3 applicable to employees who were included in the
4 government.

5 But, here, we -- here, we have the
6 opposite, no clear statement imposing damages
7 against the government, and -- and government
8 officials are covered only to the extent they're
9 included within the government, to the extent
10 they're part of the government.

11 JUSTICE THOMAS: So, historically --
12 and I'm just curious -- have suits against
13 postmasters or custom agents -- have those --
14 has -- have -- has the relief there been limited
15 by the -- the availability of relief against the
16 government?

17 MR. KNEEDLER: Well, initially,
18 damages actions used to be brought against
19 custom officers, as I recall, but Congress
20 really substituted suits against the government
21 like for tax refunds, rather than suits against
22 the collector, in order to make the government
23 the responsible one and not the -- not the
24 individual.

25 And I think the Westfall Act clears

1 out a lot of that by saying, as a general
2 matter, ordinary tort suits can't be brought
3 against the government because Congress was
4 concerned about -- about the effect on employee
5 morale and chilling their conduct.

6 So I -- I -- I think the statutory
7 pattern especially in recent times has been
8 suits -- suits against the government itself.
9 And, again, that's especially appropriate under
10 RFRA.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Breyer.

14 JUSTICE BREYER: I have one question.
15 What is your best argument, in your opinion,
16 against what I think is the other side's
17 argument, we're looking at the statute, the
18 relevant words since "government" is a defined
19 term, the statute authorizes appropriate relief
20 against any official or other person acting
21 under color of law, all right? That's the
22 relevant words.

23 And there's lots of cases that say --
24 many cases that appropriate relief can, in
25 appropriate cases, include monetary relief. Of

1 course, if the person has sovereign immunity of
2 some kind, then you can't sue them. That's
3 Sossamon. But there's no sovereign immunity
4 here. End of case, all right.

5 Now what's your best answer to that,
6 in your opinion?

7 MR. KNEEDLER: This -- the operative
8 term in RFRA is "government," and that's not
9 just in the remedial provision, that's in the
10 substantive provision, which says the government
11 shall not substantially burden a person's
12 exercise, and then the exception to that is, if
13 government demonstrates the application of the
14 burden to the person, it furthers a compelling
15 interest. All the way through, the statute
16 speaks to the government.

17 "Government" is the operative word.
18 It's true that "government" is defined to
19 include official, but it -- it includes
20 "official" after a whole series of entities that
21 are undoubtedly people acting and would be sued
22 in their official capacity, a department or an
23 agency.

24 And so reading the -- the term
25 "official" consistent with that in the

1 definition, we think that "official" is official
2 capacity. And, again, officials are -- are
3 included only because they're included as part
4 of the government, and so they can violate RFRA
5 and be sued under RFRA only insofar as they are
6 included within the government in their official
7 capacity. And there is no money damages against
8 the government or its constituent parts for
9 money damages.

10 JUSTICE BREYER: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice Alito.

12 JUSTICE ALITO: Let me pick up on what
13 you just said. The term "government" is defined
14 to include an official but also "other person
15 acting under color of law."

16 And you say that a person who is
17 exercising -- a private entity or a private
18 person exercising government authority would
19 constitute a person acting under color of law,
20 such as the operator of a -- a private company
21 operating a -- a prison.

22 So, if a person acting under -- a
23 person acting under color of law who is not a
24 government official can only be sued in a
25 personal capacity, and if that person can be

1 sued in a personal capacity, why should we infer
2 that an official can only be sued in an official
3 capacity and not a personal capacity?

4 MR. KNEEDLER: Well, I think the basic
5 point is that the statute calls for injunctive
6 relief, not damages. And when you have a
7 private person, for example, not all operators
8 of private prisons are government actors, but
9 let's take one who is, the substantive provision
10 of -- of RFRA refers to what government can do.
11 Government shall not substantially burden.

12 And that is -- that -- that means that
13 this private person would be acting in a
14 governmentally-conferred capacity, in that
15 sense, an official capacity or -- or the
16 functional equivalent of an official capacity
17 for a -- a government officer.

18 And then, if such entity is sued, we
19 think that it is like -- likewise sued in the
20 parallel official capacity that such a private
21 person would have by virtue of having the
22 governmental power bestowed upon it.

23 So we think reading -- that is, after
24 all, in a -- in a residual parenthetical phrase.
25 It is not the principal operative provision in

1 the definition, which traces back to agency,
2 department, et cetera.

3 But we think reading that clause as a
4 whole and how it plugs into the statute, that's
5 referring to the sort of capacity for which
6 injunctive relief is the only proper relief
7 against the government.

8 JUSTICE ALITO: And one -- one other
9 question. Respondent emphasizes the fact that
10 if it -- if it prevails, federal officials who
11 are sued in a personal capacity would be able to
12 assert a defense of qualified immunity.

13 Now, if -- if we -- if that is right,
14 if we say that in the opinion, how will the
15 federal government be harmed?

16 MR. KNEEDLER: Well, qualified
17 immunity is not automatic. And the -- and the
18 -- what -- what Congress has determined, again,
19 in the Westfall Act and -- and this Court's
20 hesitation in recognizing new Bivens causes of
21 action, there is qualified immunity as in --
22 under statutory causes of action, where they do
23 exist, and under Bivens, where it does exist,
24 and yet the Court has cut off the cause of
25 action at the outset because the very prospect

1 of being subject to suit and the protracted
2 litigation that can ensue, even with qualified
3 immunity, is thought to create the potential for
4 chilling federal employees in their work.

5 JUSTICE ALITO: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor.

8 JUSTICE SOTOMAYOR: As I read the
9 briefs on both sides, each of you rely on
10 legislative history to some extent. And I know
11 some of my colleagues don't believe in doing
12 that. But assume -- humor me, please. You
13 don't have to make a disclaimer about its use.

14 One of the things that concerns me
15 greatly is that RFRA was very concerned, at
16 least Congress was, with the many families whose
17 loved ones were being subjected to autopsies, in
18 violation of their religious beliefs, and, in
19 fact, there was a lot of testimony before
20 Congress about the fact that injunctive relief
21 would not help those families.

22 So, if that was one of the concerns of
23 this legislation, as is many other actions by
24 government officials that might violate
25 religious beliefs, why do you think Congress

1 would have intended to preclude money damages
2 against individual actions that violated
3 religious belief?

4 MR. KNEEDLER: Several things. I -- I
5 think the focus on the autopsy situation, for
6 example, was primarily in the substantive rule,
7 and it -- I mean, it arose in the context of a
8 -- of a damage action.

9 But Congress was focused on not the
10 individual situation but lifting burdens imposed
11 by generally applicable rules. That is the --
12 that is the overall thrust of RFRA, as reflected
13 in the text of RFRA.

14 JUSTICE SOTOMAYOR: Mr. Kneedler,
15 isn't the overall thrust to give a cause of
16 action a claim and a remedy? That's the stated
17 purpose of the Act under the terms of the Act.

18 Why would Congress take away from
19 appropriate relief the only relief that could
20 help some people for the --

21 MR. KNEEDLER: Well -- -

22 JUSTICE SOTOMAYOR: -- violation of
23 their rights?

24 MR. KNEEDLER: -- I don't think it --
25 I don't think it's a matter of taking away. If

1 there was some remedy available under some other
2 scheme, under 1983 for a statute or if the -- if
3 the Court might have come to recognizing a
4 Bivens cause of action under the Constitution
5 for a free exercise claim, those would -- those
6 would be -- those would still be available.

7 Now, of course, this Court has not
8 done that under the Free Exercise Clause. The
9 question is what Congress intended to do in RFRA
10 itself. And with that, we have a textual answer
11 where it refers to relief against -- against the
12 government. And, again, equitable relief --

13 JUSTICE SOTOMAYOR: By the way --

14 MR. KNEEDLER: -- is appropriate --

15 JUSTICE SOTOMAYOR: -- Mr. Kneedler,
16 by the way, is it your argument that if a court
17 orders injunctive relief against a private
18 government contractor, that that relief runs
19 against the United States Government itself?

20 MR. KNEEDLER: No. It runs -- it runs
21 against the named entity. It -- it runs against
22 that person acting under -- under color of law.

23 My point is -- is -- is -- is really
24 that -- the substantive one, if you will, that
25 entity has violated the substance of -- of RFRA,

1 and the remedy should be the same as with all
2 others who are part of the government for these
3 purposes.

4 An injunction -- an injunction against
5 that operator, that's who would be -- that's who
6 would be named.

7 JUSTICE SOTOMAYOR: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice Kagan.

9 JUSTICE KAGAN: Mr. Kneedler, when
10 Congress passed RFRA, the legislation applied to
11 states and localities, as well as to the federal
12 government. We changed that, this Court did, in
13 -- in Boerne. But it was clear in the original
14 legislation that Congress meant it to apply to
15 states and localities.

16 And I think nobody disputes that prior
17 to Smith, private citizens could seek damages
18 under 1983 against state and local officials in
19 their personal capacity for violating the Free
20 Exercise Clause.

21 So, under the law as originally
22 enacted, do you think that plaintiffs could sue
23 state and local officials in their personal
24 capacities for damages?

25 MR. KNEEDLER: Not under -- not under

1 RFRA. RFRA would not have displaced a
2 constitutional remedy under 1983 that might have
3 existed before RFRA was enacted, but we think
4 the application to the state would -- state and
5 state employees or officials would -- would be
6 the same for the federal government.

7 Again, the -- the definition was --
8 was sustained. The operative term is
9 "government," not -- not -- not "official" or
10 "employee" or "person acting under color of
11 law." So we think that a parallel answer would
12 follow.

13 JUSTICE KAGAN: So doesn't that seem
14 odd to you, Mr. Kneedler? Because now you're
15 saying that Congress passed this law that
16 actually contained fewer remedies against state
17 and local officials than the pre-Smith law did.
18 And I thought that the whole point of RFRA was
19 essentially to expand protection for religious
20 liberty. Now you're saying that, in this
21 provision, it effectively contracted it.

22 MR. KNEEDLER: No, I -- what -- what
23 -- what -- Congress's focus was expanding and
24 restoring to prior law the pre-Smith substantive
25 standard, but the text of RFRA gives no

1 indication that Congress intended to greatly
2 expand relief, appropriate relief, to make
3 personal damages available under RFRA, again,
4 not under 1983, under RFRA, for individual
5 government employees.

6 And as -- as I said before, the
7 context of RFRA, which is lifting burdens from
8 generally applicable laws, I think, further
9 weighs against Congress having done so because
10 the individual employee is in the position of
11 deciding whether to create an exemption, maybe
12 on the spot, from generally applicable law, and
13 damage actions could put the -- could put the
14 employee in a difficult -- in a difficult bind.

15 So, with respect to the self-contained
16 system of -- of RFRA, we think it -- we think
17 there's no reason to think that Congress would
18 have wanted to do that.

19 JUSTICE KAGAN: Thank you,
20 Mr. Kneedler.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch.

23 JUSTICE GORSUCH: Good morning,
24 Mr. Kneedler. I am --

25 MR. KNEEDLER: Good morning.

1 JUSTICE GORSUCH: -- struggling with
2 the language of -- of the definitional provision
3 that's most immediately before us. As I
4 understand it, the government has agreed, albeit
5 on page 41-42 in Footnotes 6 and 7 of its brief,
6 that the phrase "other person acting under color
7 of law" does permit suits for damages against
8 private persons, like the government contractor.
9 Is that right?

10 MR. KNEEDLER: Yes.

11 JUSTICE GORSUCH: Okay. And if that's
12 the case, why wouldn't the same be true of
13 "officials," the -- the last antecedent that
14 that parenthetical clause appears to modify?

15 I understand the government's argument
16 that "department, agencies, and
17 instrumentalities" are before -- earlier in --
18 in -- in the line. But, of course, none of
19 those involves an individual who could even
20 possibly be sued in an individual capacity. The
21 only one that might is "official." And -- and
22 that's the one that's right before the modifying
23 clause in the parenthetical. Help me with that.

24 MR. KNEEDLER: Now, when I said that
25 the prison operator or private contractor could

1 be subject to suit, if one uses the phrase
2 "personal capacity" that's often understood to
3 be synonymous with damages, that was not what I
4 meant to say, and I don't think that's the sense
5 of the statute.

6 The -- the private person could be
7 sued because the statute deems him to be part of
8 the government for purposes of this statute.
9 But the sort of relief that is available, that
10 would be available against the government is
11 only injunctive relief.

12 And because an official, just like an
13 agency, and also a contractor is included in the
14 definition of "government" with the operative
15 term in the statute, then the sort of relief
16 available against the government is --

17 JUSTICE GORSUCH: But, Mr. Kneedler,
18 I'm sorry, I wish to redirect you back to the
19 question, which is, as I understood it, the
20 government agrees that a private contractor can
21 be sued for damages, right?

22 MR. KNEEDLER: No. Oh, no. No, we do
23 not.

24 JUSTICE GORSUCH: Oh, you don't agree
25 with that? Okay.

1 MR. KNEEDLER: No.

2 JUSTICE GORSUCH: Nobody can -- nobody
3 can be sued for damages in -- in your view?

4 MR. KNEEDLER: Right. That's what I
5 -- that's what I meant to be saying, yes, that
6 the --

7 JUSTICE GORSUCH: Okay.

8 MR. KNEEDLER: -- that the -- the
9 operative relief is injunctive relief --

10 JUSTICE GORSUCH: And that's because
11 --

12 MR. KNEEDLER: -- against the
13 government.

14 JUSTICE GORSUCH: -- so that -- that
15 has nothing to do with the definitional phrase.
16 That argument, as I understand it, must hinge on
17 -- on the word "appropriate," is that right?

18 MR. KNEEDLER: Well, I think both --
19 both inform that, but I -- but I -- it does --
20 it does tie to the definition in this way. The
21 operative term is "government." And then the
22 definition is what's included in government.

23 JUSTICE GORSUCH: Yeah, but -- but --
24 but that definitional section doesn't speak to
25 the nature of relief at all. You'd agree with

1 that?

2 MR. KNEEDLER: No, I think it -- I
3 think it does because the --

4 JUSTICE GORSUCH: Where?

5 MR. KNEEDLER: Well, I mean, not in so
6 many words, but -- but --

7 JUSTICE GORSUCH: Okay, all right. So
8 we're back to "appropriate." And for there, I
9 guess I just want to follow up quickly on -- on
10 Justice Breyer's question, which is I understand
11 that back in the day when there were forms of
12 action, they came with limited kinds of relief,
13 but with the merger of law and equity some time
14 ago, courts have been allowed to provide any
15 kind of relief available, appropriate to the
16 circumstances.

17 And I don't think the government's
18 arguing that Congress meant to ever allow or
19 might allow inappropriate relief to the
20 circumstances. So how does that word carry all
21 the weight you want it to?

22 MR. KNEEDLER: Well, "appropriate" --
23 may I finish?

24 CHIEF JUSTICE ROBERTS: Yes.

25 MR. KNEEDLER: "Appropriate" in this

1 context has to take account of context, which is
2 a suit against federal employees, and Congress
3 has only rarely ever provided for suits against
4 federal employees for -- for money damages.

5 I also want to say that our point is
6 not just limited to "appropriate;" it's also
7 limited to "government." This Court has said
8 that the meaning of a definitional phrase can
9 take -- can be informed by the term that's being
10 defined. And, here, the term that's being
11 defined is "government," which we think lends
12 support to the conclusion that "official" means
13 official capacity person in the relief section.

14 JUSTICE GORSUCH: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Kavanaugh.

17 JUSTICE KAVANAUGH: Thank you, Mr.
18 Chief Justice.

19 Good morning, Mr. Kneedler.

20 In thinking about what the text means
21 here, I look at the words but also look at the
22 words that aren't there. And this is a
23 relatively short and heavily-focused-upon
24 statute by Congress at the time. And when it
25 says "appropriate relief," it does not, of

1 course, say appropriate injunctive relief. And
2 it's hard to imagine that that didn't escape the
3 attention of the members of Congress who were
4 focused on this.

5 What -- what do you say in response to
6 that argument about the missing words after
7 "appropriate" that would have limited it in the
8 way that Justice Gorsuch was just asking about
9 as well?

10 MR. KNEEDLER: Well, I -- I -- I think
11 the -- the missing words, money damages, are --
12 are -- are really critical because the statute
13 reads "appropriate relief against the
14 government." And I think Congress would have
15 understood, because it's a -- it's a clearly
16 established principle, that appropriate relief
17 against the government does not include money
18 damages unless something expressly so provides.
19 And -- and nothing here expressly so provides.

20 And, again, officials are included
21 only as part of the government for purposes of
22 this statute, both the substantive provision and
23 the remedial provision, and also, tellingly, the
24 provision that requires the government to
25 demonstrate a compelling interest if there's a

1 substantial burden.

2 And that doesn't fit very well with a
3 personal damages action against an individual
4 employee because he -- he may not have the
5 information about what informs what's a
6 compelling interest. He may not have
7 information about the government's broader
8 operations plan.

9 And so that it's the government that
10 should be coming forward with a compelling
11 interest, for example, and the government that
12 violates the statute and, therefore, the
13 government and the relief appropriate to the
14 government that RFRA has now provided.

15 JUSTICE KAVANAUGH: Okay. How do the
16 F -- FBI special agents in cases like this --
17 how will they pay for the damages?

18 MR. KNEEDLER: Well, it oftentimes --
19 I mean, if they were held liable, the -- the
20 government might indemnify them. There's no --
21 certainly no guarantee of indemnification.

22 And that -- that, of course, will come
23 at the end of a -- of a -- of litigation that
24 may be protracted, and in the meantime, the
25 employee would have been exposed to, in fact, a

1 judgment of -- of liability under your hypo --

2 JUSTICE KAVANAUGH: Is there anything

3 --

4 MR. KNEEDLER: -- and if they're here

5 to --

6 JUSTICE KAVANAUGH: -- in the record
7 or -- or anything in the record or in any public
8 documents that would suggest how regularly FBI
9 special agents are indemnified in circumstances
10 like this?

11 MR. KNEEDLER: I -- I don't -- I don't
12 think the government has produced any statistics
13 that I -- that I know of on that. I -- I would
14 point out that you mentioned the FBI in this
15 context.

16 Personal damage actions are especially
17 concerning in the national security context,
18 where the -- the President and the Executive
19 have special responsibilities under -- under
20 Article II and have sensitivities within those
21 by lists, and litigation like this can present
22 special problems beyond simply the ERISA --
23 excuse me, RFRA -- the normal problem of suits
24 against the government.

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Mr. Kneedler,
2 take a minute to wrap up.

3 MR. KNEEDLER: Thank you, Mr. Chief
4 Justice.

5 We think all the pertinent factors to
6 look at here strongly indicate that personal
7 damages actions are not available. The text is
8 clear, providing for relief only against the
9 government, which doesn't include monetary
10 damages.

11 The context, we think, is significant
12 because suits against the government for --
13 government employees for personal damages have
14 only rarely been permitted. The only time that
15 they would have been permitted were under --
16 would have been under Bivens, and this Court has
17 never recognized a cause of action under Bivens
18 under the Free Exercise Clause.

19 And in terms of precedent, this Court
20 in Sossamon held that appropriate relief did not
21 include damages against a state. We think a
22 comparable principle of deference to the
23 operation of the executive branch and not
24 chilling federal employees, as reflected in the
25 Westfall Act, leads to a similar conclusion

1 here, where there is no express authorization of
2 personal damages actions.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Kassem.

6 ORAL ARGUMENT OF RAMZI KASSEM
7 ON BEHALF OF THE RESPONDENTS

8 MR. KASSEM: Thank you, Mr. Chief
9 Justice, and may it please the Court:

10 This Court noted in City of Boerne
11 that leading up to RFRA, Congress focused on
12 autopsies performed on Hmong and Jewish people,
13 in violation of their religious beliefs. Those
14 were consummated injuries that only damages
15 could remedy. Yet Petitioners' interpretation
16 of RFRA would leave those families with no
17 claim.

18 And there are other situations where
19 damages are the only appropriate relief. A
20 Jewish student in a D.C. school who is compelled
21 by a gym teacher to wear immodest clothing or a
22 federal inmate whose hand-annotated Bible is
23 destroyed by a guard. Injunctions would be
24 useless against these one-time harms, leaving
25 damages as the only remedy.

1 To be sure, such cases are hard to
2 win. Qualified immunity will shield all but
3 those who defy clearly established law. But
4 there is no basis for categorically excluding
5 damages where they are warranted and essential
6 to providing meaningful relief to victims.
7 There was no clear statement rule in 1993.

8 And, here, federal agents put my
9 clients on the No Fly List because they refused
10 to spy on innocent co-religionists, in violation
11 of their Islamic beliefs. My clients lost
12 precious years with loved ones, plus jobs and
13 educational opportunities.

14 It was only days before oral argument
15 on Petitioners' motion to dismiss that the
16 government confirmed my clients could fly,
17 mooted out any injunctive claim. Without
18 damages as a deterrent, Petitioners and other
19 agents remain free to repeat what they did here:
20 flout RFRA until challenged in court and then
21 back off.

22 The Justice Department's Office of
23 Legal Counsel concluded shortly after RFRA's
24 passage that damages are available in personal
25 capacity suits. But, under the Department's

1 current interpretation, this Court would have to
2 read "appropriate relief" to mean appropriate
3 equitable relief, although Congress did not
4 include that modifier as it did in ERISA, for
5 example.

6 And the Court would have to hold that
7 both the term "official" and the phrase "other
8 person acting under color of law" exclude
9 personal capacity suits, although Congress
10 enacted no such limitation and although there is
11 no such thing as an official capacity suit
12 against a private person.

13 The Court should not diminish RFRA by
14 taking away a -- a claim that Congress provided.
15 I welcome your questions.

16 CHIEF JUSTICE ROBERTS: Well, counsel,
17 would you still have a argument under the
18 definition provision here if the parenthetical
19 language wasn't in there?

20 MR. KASSEM: Your Honor, if -- if --
21 if the definitional provision in RFRA only
22 stated "official" without including "or other
23 person acting under color of law," then, yes, we
24 would still have a claim because the term
25 "official," using no fewer than three modes of

1 statutory interpretation that the Court has
2 employed, the ordinary meaning of the term
3 "official" embraces both personal capacity suits
4 as well as -- as official capacity suits,
5 because, of course, an official is a person and
6 a person can be sued personally. And when that
7 person happens to be an official, they can be
8 sued in an official capacity as well.

9 CHIEF JUSTICE ROBERTS: Well, just to
10 -- just to interrupt you briefly there, I think
11 the argument against that, again, putting the
12 parenthetical to one side, is that the term
13 being defined is "the government," and the list
14 of entities you have there leading up to
15 "official" are all governmental entities:
16 branch, department, agency, instrumentality.

17 So I think, again, without the
18 parenthetical, it's almost -- there's a very
19 compelling case for the idea that the official
20 there is subject to suit in his official
21 capacity.

22 MR. KASSEM: Well, Your Honor,
23 respectfully, the real defining trait shared by
24 all the words in the list is that these are all
25 the ways in which government exercises power and

1 might violate RFRA.

2 So, you know, it includes collective
3 entities as well as individual officials. The
4 common denominator here is not that they're all
5 only capable of being sued for injunctive
6 relief, no more than it is that they are all
7 collective entities. An official, under its
8 ordinary dictionary meaning, is an individual, a
9 person who holds an office. And as a person
10 that can be sued personally because they happen
11 to be an official, they can also be sued in an
12 official capacity.

13 That statutory term embraces both
14 possibilities, and Congress, even though it
15 knows how to exclude personal capacity suits, it
16 did that in the Oil Pollution Act, it did that
17 in the Mandamus and Venue Act. It said, you
18 know, you can only go after officials in an
19 official capacity. But it did not do so here in
20 RFRA.

21 And if there's any doubt, then the
22 parenthetical which is in the statute clarifies
23 and dispels --

24 CHIEF JUSTICE ROBERTS: I -- I --

25 MR. KASSEM: -- any doubt.

1 CHIEF JUSTICE ROBERTS: -- I -- I
2 think that the two statutory examples you gave
3 are pretty obscure, if that's the strong basis
4 you have for Congress knowing how to make that
5 distinction across the board. What -- what were
6 they again? The Oil --

7 MR. KASSEM: Your Honor, the Mandamus
8 and Venue Act refers to a civil action in which
9 a defendant is an official acting in an official
10 capacity and so it excludes personal capacity
11 suits. The Oil Pollution Act -- and these
12 are -- these are only two examples -- also says,
13 you know, it does not authorize a cause of
14 action in a federal officer's personal capacity.

15 So Congress knows how to do this.
16 And, here, emphatically, it did not, Your Honor.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Justice Thomas.

20 JUSTICE THOMAS: Thank you, Mr. Chief
21 Justice.

22 Counsel, I'm curious whether or not
23 there's any sort of mens rea requirement in
24 these cases and whether or not the official has
25 to intend to burden someone's free exercise

1 rights.

2 MR. KASSEM: Your Honor, RFRA only
3 requires that a burden on religious exercise be
4 substantial, not intentional. And, of course,
5 in this case, however, we believe that the
6 agents -- and we've alleged in our allegation
7 have to be taken as true -- that the agents knew
8 or should have known of the substantial burden.

9 This is a clear prohibition in the
10 Islamic faith. These agents are tasked with
11 recruiting informants to spy in the Islamic
12 faith in the Islamic community. And so we
13 believe the agents knew or should have known,
14 and we've said as much.

15 But, again, under RFRA, the burden
16 need only be substantial and not intentional.

17 JUSTICE THOMAS: How would a person
18 know whether or not the -- that the burden
19 they're imposing is the least restrictive means
20 of furthering a governmental interest?

21 MR. KASSEM: Well, Your Honor, that
22 is, of course, an argument among the very many
23 arguments that Petitioners could have presented
24 in the motion to dismiss qualified immunity --
25 the qualified immunity defense that they made at

1 the motion to dismiss stage, as Justice Alito
2 said.

3 They actually did present that
4 defense. And they would be able to argue not
5 only that there was no burden, that the burden
6 was insubstantial, they'd be able to argue that
7 there was a compelling government interest, and
8 they'd be able to say that whatever they did was
9 the least restrictive means, and had Petitioners
10 accepted remand from the Second Circuit to the
11 district court, those are precisely the
12 questions that would have been adjudicated on
13 remand.

14 Instead, of course, they sought cert,
15 and -- and -- and here we are. But those are
16 all questions that would come up immediately on
17 remand, because there was a motion to dismiss
18 based on qualified immunity that was brought in
19 this case. It just wasn't taken up on appeal.

20 JUSTICE THOMAS: Thank you.

21 MR. KASSEM: Or wasn't ruled upon by
22 the district court. I'm sorry, Your Honor.

23 JUSTICE THOMAS: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Breyer.

1 JUSTICE BREYER: I -- I have one
2 question about one of your opponent's arguments.
3 Look at the phrase "person acting under color of
4 law."

5 Now that's the key phrase for you,
6 certainly. That suggests, particularly if you
7 look back to similar language in 1983, that a
8 personal action lies. But this whole statute,
9 RFRA, is really an effort to put into statutory
10 form a certain kind of constitutional
11 interpretation that Smith, in fact, rejected.
12 And there was a lot of concern in Congress.
13 There would have been no personal action if they
14 had maintained the older interpretation of the
15 First Amendment.

16 So why would Congress want to have the
17 personal action here when they never could have
18 had it if what Congress would have thought was
19 the right view of the -- of the religious Free
20 Exercise Clause had been maintained in -- in the
21 Constitution?

22 In other words, this is like a
23 constitutional statute. No Bivens action then.
24 Why should there be one now?

25 MR. KASSEM: Well, Your Honor, simply

1 for the -- for the reasons that this Court has
2 restated numerous times in -- in City of Boerne
3 in '97 and again in Hobby Lobby, that Congress,
4 with RFRA, went beyond the constitutional
5 baseline. It did something more than merely
6 restore free exercise claims as they existed
7 under jurisprudence pre-Smith. The Court said
8 that clearly in -- in Hobby Lobby, that Congress
9 knows how to -- how to tether congressional
10 statutes to specific jurisprudence. It did not
11 do that here.

12 It -- it -- it -- it not only restored
13 but provided a claim, and -- and the net result
14 is a very broad protection for religious freedom
15 that goes beyond the constitutional baseline.
16 If there's any doubt about that, one need only
17 look to the amendments that RLUIPA brought to
18 RFRA, further untethering RFRA from that
19 constitutional baseline, protecting any exercise
20 of religion and not merely the exercise of
21 religion under First Amendment jurisprudence,
22 which was in the text when RFRA was originally
23 enacted.

24 JUSTICE BREYER: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice Alito.

1 JUSTICE ALITO: Suppose that this key
2 provision of RFRA did not include the term
3 "appropriate." Would -- would anything change?
4 So the statute would authorize -- would -- would
5 say that a person may assert that a -- a claim
6 or a defense in a judicial proceeding and obtain
7 relief against the government. Wouldn't talk
8 about appropriate relief. Would that make a
9 difference?

10 MR. KASSEM: Well -- well, Your Honor,
11 it might make a difference because, of course,
12 the -- the phrase "appropriate relief" bespeaks
13 discretion, and, in fact, it bespeaks a very
14 familiar type of judicial discretion. That
15 phrase comes up very frequently in free exercise
16 jurisprudence under Section 1983, including
17 cases that have awarded damages.

18 I think we cited a couple of those
19 cases for illustrative purposes on page 37 of
20 our brief, where, you know, the courts of appeal
21 acknowledge that damages are available and
22 remand for a determination of appropriate
23 relief, including damages.

24 So I think, you know, without the
25 phrase "appropriate," which bespeaks the sort of

1 wide discretion in that familiar judicial
2 exercise of determining which species or
3 combination of declaratory, injunctive, and
4 monetary relief might be appropriate in any
5 particular case, so the -- so the word
6 "appropriate" --

7 JUSTICE ALITO: Well, who's exercising
8 -- who is to exercise this discretion? Could
9 the district court in -- in your case or in any
10 other case say, in the exercise of my
11 discretion, I think that damages should not be
12 available in a case like this, and, therefore,
13 I'm not going to allow the jury -- I'm not going
14 to submit that question to the jury?

15 MR. KASSEM: Well, Your Honor, a
16 district court judge would be, of course, free
17 on the facts of a given case to make a
18 determination that damages are not particularly
19 suitable, which is the meaning of "appropriate,"
20 or to decide that compensatory damages but not
21 punitive damages would be appropriate. But that
22 would be on a case-by-case and not a categorical
23 basis.

24 There is no categorical basis to
25 judicially exclude damages under this statute.

1 It allows for appropriate relief without
2 limitation. It allows for that relief against
3 officials or other persons without limitation to
4 official capacity suits only.

5 And so this Court and other courts
6 should honor the statute that Congress actually
7 enacted. And, of course, you know, the
8 defendants here, the Petitioners, they are
9 individuals, but they come to court armed with a
10 powerful shield of qualified immunity, which
11 protects all but the plainly incompetent or
12 those who flout clearly established law.

13 JUSTICE ALITO: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Sotomayor.

16 JUSTICE SOTOMAYOR: Counsel,
17 Petitioners argue that you haven't identified
18 any statute in which the phrase "appropriate
19 relief" was interpreted to include a damages
20 remedy against federal officials, absent some
21 extra text making the availability of damages
22 explicit. Is that right?

23 And if it is, can you theorize for me
24 why that's so? Is it because courts have held
25 the opposite, because courts haven't considered

1 the question, or because there just aren't that
2 many statutes that authorize appropriate relief
3 against federal government -- officials?

4 MR. KASSEM: Your Honor, ordinarily,
5 Congress -- you know, we've cited statutes where
6 Congress has expressly included damages against
7 federal officials, and we've cited statutes
8 where Congress has expressly excluded damages
9 against federal officials. And, of course, it
10 did neither here.

11 But RFRA is no ordinary law. This
12 Court, as recently as *Bostock*, described it as a
13 super-statute. RFRA reflected a very ambitious
14 goal that Congress had to regulate the number of
15 federal, state, and local actors, and it did so
16 with the most practical language it could think
17 of.

18 If -- if, for example, Congress had
19 said something along the lines of appropriate
20 relief, including money damages, well, that
21 could have been mistaken for an intention to
22 pierce the sovereign immunity of the states and
23 the federal government against damages. And no
24 one contends that that was Congress's goal with
25 RFRA.

1 And so, with appropriate relief
2 against the government as defined in the
3 statute, Congress chose the most practical terms
4 to achieve its ambitious purpose.

5 JUSTICE SOTOMAYOR: I'm sorry. Are
6 you taking the position that Congress didn't
7 intend, by using appropriate relief, to include
8 -- before Sossamon -- to include states and
9 their -- their -- their officials? I mean,
10 there were private causes of action under 1983
11 for damages against the state government and its
12 officials. Why would Congress not have wanted
13 to pierce sovereign immunity with respect to
14 states and their officials back then?

15 MR. KASSEM: Forgive me, Justice
16 Sotomayor. Let me clarify my -- my answer.

17 Congress, of course, intended to
18 pierce and pierce sovereign immunity with
19 respect to injunctive relief. What happened in
20 Sossamon was that the plaintiffs were suing the
21 State of Texas and officials, prison officials,
22 of the State of Texas in their official
23 capacity, not in their personal capacity. So
24 the plaintiffs in Sossamon sued officials in an
25 official capacity for damages, which is

1 basically a suit for damages against the state
2 itself.

3 And that was barred by sovereign
4 immunity. Had they -- had they sued those state
5 prison officials in their personal capacity for
6 damages, there would not have been a sovereign
7 immunity bar, just like there is no sovereign
8 immunity bar here in this case against these
9 individual capacity Petitioners.

10 JUSTICE SOTOMAYOR: Thank you,
11 counsel.

12 CHIEF JUSTICE ROBERTS: Justice Kagan.

13 JUSTICE KAGAN: Mr. Kassem, if I could
14 just follow up on Justice Sotomayor's first
15 question. As I understood your answer, you said
16 well, RFRA is a very special statute, a
17 super-statute.

18 But assume that I don't think that for
19 the moment. Assume that I don't think that RFRA
20 has any special interpretive rules attached to
21 it, that I think it should be interpreted the
22 same way other statutes are.

23 And then I come back to what Justice
24 Sotomayor said, which is that we don't see any
25 statutes, and, certainly, we haven't interpreted

1 any statutes, with this little specificity to
2 permit damages against federal employees
3 personally.

4 So the question is, why shouldn't we
5 take that as -- as signaling what we should do
6 here, that we should say, you know, Congress
7 really has to be clear to do this, and Congress
8 hasn't been so clear?

9 MR. KASSEM: Well, Justice Kagan,
10 there are a few reasons.

11 First, when Congress acted in 1993, it
12 acted against the backdrop where the sort of
13 relief at issue in this case was not foreclosed.

14 As was noted earlier, there were free
15 exercise cases under Section 1983 allowing
16 damages. There were Bivens cases assuming the
17 availability of free exercise damages at that
18 time. And there was even a case, Dellums v.
19 Powell in 1977 out of the D.C. Circuit, awarding
20 damages against a federal officer, the chief of
21 the U.S. Capitol Police, on a First Amendment
22 Bivens theory, although that was a speech and
23 assembly theory, not a free exercise theory.

24 And the last and most important part
25 of the backdrop against which Congress acted was

1 the Franklin decision. Franklin came down in
2 1992, and it spelled out a traditional -- it
3 restated, really, a traditional rule that
4 presumes that where there is a cause of action,
5 whether it's express or implied, all damages --
6 all -- all appropriate relief is available,
7 including damages, and it spells out a
8 methodology for, you know, figuring out whether
9 -- what remedies are available if a statute is
10 silent as to remedies or if it's ambiguous as to
11 remedies.

12 JUSTICE KAGAN: Well, if I could
13 interrupt you on that point. I mean, I -- I --
14 definitely the first, but I thought that
15 Franklin was really limited to where Congress
16 was silent on the question of remedies.

17 Congress is not silent on the question
18 of remedies here. We have a question about how
19 to interpret what it said about remedies, but it
20 specifically spoke to remedies.

21 So why is Franklin at all applicable?

22 MR. KASSEM: Well, Your Honor, I'd
23 like to try to clarify that. You know, the
24 question under the rule -- so the presumption is
25 agreed, all appropriate remedies unless Congress

1 expressly states otherwise.

2 The question under Franklin is always
3 whether Congress intended to limit application
4 of this general principle. Where you have an
5 implied cause of action, the usual recourse to
6 text and history is not possible, and so
7 Congress -- sorry, the Court looks to the state
8 of the law.

9 But the -- the principle holds even if
10 the cause of action or the remedy is expressed,
11 but it's ambiguous. And you need only look to
12 Franklin itself for that explanation and for an
13 illustration, in fact, of that methodology,
14 because Franklin looked at the 1986
15 Rehabilitation Act amendment, which had an
16 explicit provision of remedy, and then it
17 applied the usual recourse, the usual way of
18 reading that text, which is absent any contrary
19 indication in the text or the history of that
20 statute, Franklin presumed that Congress acted
21 with a traditional rule in mind, affording
22 damages.

23 And so --

24 JUSTICE KAGAN: Thank you, Mr. Kassem.

25 MR. KASSEM: Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Justice
2 Gorsuch.

3 JUSTICE GORSUCH: Good morning. I --
4 I'd like to follow up on Justice Kagan's line of
5 questioning. I guess I'm -- I'm equally
6 befuddled by the reliance on Franklin and a lot
7 of the Bivens line of cases involving
8 implications and presumptions.

9 Here, Congress expressly stated that
10 appropriate relief may be awarded, spoke
11 directly to remedies. And I -- I would have
12 thought there might have been an argument along
13 the lines of that -- that language refers courts
14 to the law of remedies.

15 And since the merger of law and
16 equity, we don't have causes of action that are
17 limited in the nature of their remedies to
18 specific forms of relief.

19 Could you comment on that?

20 MR. KASSEM: Your Honor, our position,
21 of course, is that the text is clear and that
22 the statute on its own gets us to the outcome
23 that my clients seek.

24 Franklin is not necessary to that
25 outcome. Franklin, of course, formed a backdrop

1 to congressional action in 1993, but Congress
2 acted very clearly in the -- in the text of the
3 statute itself for the reasons that we -- we've
4 been discussing.

5 And to the extent there's any concerns
6 or Bivens-type concerns here, I would like to
7 emphasize that we are simply not in a Bivens
8 universe. You know, this is not a judicially
9 implied cause of action to enforce a
10 constitutional provision that's silent, nor even
11 a statutory provision that's silent.

12 Here, we have an express right. We
13 have a -- an explicit right of action. We have
14 a provision for appropriate relief with no
15 limitation against officials or other persons,
16 with no limitations in the text.

17 And -- and when we're in that realm,
18 Franklin actually noted that there is no
19 expansion of judicial power here, where the
20 Court is simply determining what remedies are
21 available.

22 And, again, on a categorical basis,
23 there is no reason to judicially at this point
24 limit or exclude damages. Justice Scalia's
25 concurrence in Franklin said as much. It's too

1 late in the day once Congress has acted for the
2 judiciary to cabin remedies and exclude -- or
3 imply an exclusion of damages.

4 JUSTICE GORSUCH: So it would be
5 sufficient for your purposes to, if we wrote an
6 opinion, simply say we're not relying on any
7 presumptions of any kind anywhere. We're
8 looking at the text, the text refers us to the
9 law of remedies, the law of remedies today is a
10 distinct area of transsubstantive law, it's
11 unhinged from any particular form or cause of
12 action the way it used to be, and it allows the
13 courts discretion to form sufficient relief to
14 make a person whole.

15 MR. KASSEM: Justice Gorsuch, as long
16 as that opinion concludes with "and we affirm,"
17 absolutely.

18 (Laughter.)

19 JUSTICE GORSUCH: Naturally. I -- I
20 -- I would assume no less. Thank you, counsel.
21 I'm -- I'm finished.

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh.

24 JUSTICE KAVANAUGH: Thank you, Mr.
25 Chief Justice.

1 And good morning, Mr. Kassem.

2 MR. KASSEM: Good morning.

3 JUSTICE KAVANAUGH: The first problem
4 I have here, a concern, is just the mismatch
5 between RFRA and the kind of suits we're talking
6 about.

7 You're suing, I think, still up around
8 15 special agents of the FBI. There's no mens
9 rea requirement, as you indicated to Justice
10 Thomas. And they can be subject to liability
11 under RFRA in -- under your theory for enforcing
12 a generally applicable law and subject to
13 damages liability in their individual
14 capacities.

15 That seems an -- just an odd mismatch,
16 no mens rea, generally applicable law, damages
17 in their individual capacities, and we're
18 talking about FBI special agents here.

19 What's your response to that concern?

20 MR. KASSEM: Well, Justice Kavanaugh,
21 I -- I begin with the statute itself. The
22 statute states -- prohibits the government from
23 substantially burdening religious exercise, even
24 if the burden results from a rule of general
25 applicability.

1 The statute does not say only if the
2 burden results from a -- a -- a rule of general
3 applicability, and it does not even say merely
4 if it results from a general rule. And so --

5 JUSTICE KAVANAUGH: Right. But they'd
6 be covered -- we're trying to figure out what
7 the term "appropriate" means. And thinking
8 about "appropriate," I think we think about what
9 are the circumstances here. And it's very odd,
10 I think, without a mens rea that it encompasses
11 generally applicable and subjects, you know,
12 career FBI agents to life-altering damages
13 remedies.

14 And there -- and just to be clear, I
15 know there's strong interests on both sides
16 here. I'm just trying to make sure we cover
17 what will happen to the special agents as well.

18 MR. KASSEM: Yes, Your Honor. And,
19 Justice Kavanaugh, the law already accounts for
20 the difference that you're highlighting, that
21 these are not ordinary individual defendants,
22 they are officials, they're FBI agents.

23 And the law accounts for that
24 difference due to a well-established and robust
25 doctrine of qualified immunity. And this Court

1 actually held as much in 1991 in *Hafer v. Melo*,
2 where the exact same arguments were presented by
3 the state official capacity defendants in that
4 case about chilling of governmental function and
5 whatnot.

6 And -- and the Court responded --
7 JUSTICE KAVANAUGH: I -- yeah -- I'm
8 sorry to interrupt. I think that's a -- I mean,
9 that's a good answer about qualified immunity.

10 I want to ask one other question,
11 which is going to the text. It's not clear, the
12 text, on what's encompassed -- encompassed
13 within "appropriate relief." The question's
14 whether does that include damages or not include
15 damages. It doesn't say appropriate injunctive
16 relief. It doesn't refer specifically to
17 damages.

18 So we have to figure out what the
19 silence means. And on -- in thinking about
20 that, not only do I think about the
21 circumstances I just mentioned, but every
22 statute authorizing damages actions against
23 federal employees or officers in their personal
24 capacities does so expressly and mentions
25 damages.

1 I think this would be a first or among
2 a very small handful where damages were awarded
3 against federal officers in their individual
4 capacities without the statute explicitly saying
5 so.

6 MR. KASSEM: Justice Kavanaugh, you're
7 correct, that ordinarily, you know, Congress
8 includes or excludes personal capacity damages
9 of this sort.

10 The only reason or one of the main
11 reasons I can think of why Congress might not
12 have wanted to do that here, again, is that if
13 it had said appropriate relief, including money
14 damages, that could have been mistaken for an
15 intention to pierce the sovereign immunity of
16 the federal government itself, the federal
17 treasury, or -- or of state governments at the
18 time, pre-Boerne.

19 And so it -- you know, there's no
20 contention that Congress wanted to allow that.
21 And that -- that may be why they left out an
22 explicit mention of -- of money damages.

23 And, of course, at the time, there was
24 no magic words requirement. And so these were
25 the most practical terms that Congress could

1 find to affect the broad protection for
2 religious freedom that it intended to affect
3 through RFRA.

4 JUSTICE KAVANAUGH: Thank you.

5 CHIEF JUSTICE ROBERTS: Mr. Kassem,
6 you have three minutes remaining.

7 MR. KASSEM: Thank you, Mr. Chief
8 Justice.

9 I guess -- I guess I'll -- I'll just
10 conclude by saying, Your Honor, that there --
11 and -- and maybe this is where you started, Mr.
12 Chief Justice, there -- there was no magic words
13 requirement in 1993 when it came to imposing
14 damages on non-sovereign parties.

15 RFRA's text does that clearly by
16 providing for appropriate relief against
17 officials or other persons acting under color of
18 law, without limiting either the remedy or the
19 capacity in which these defendants can be sued.

20 The result my clients seek would not
21 give the statutory text two meanings. Clark v.
22 Martinez itself explains that sovereign immunity
23 barring relief in one circumstance does not
24 remotely establish that a statute has two
25 meanings. It just indicates that the single and

1 unchanging meaning of the statute does not apply
2 against sovereigns.

3 And Petitioners' concerns about
4 damages potentially chilling executive function
5 are identical to those raised in *Hafer v. Melo*.
6 And what the Court held there is true here.
7 Qualified immunity properly addresses those
8 concerns.

9 As for the separation of powers, Your
10 Honor, that would only arise in this case if
11 this Court were to exclude damages where
12 Congress provided them. If, instead, this Court
13 allows executive officials to be held to
14 legislative command, then that would be the
15 separation of powers at work fulfilling the
16 constitutional design.

17 The Court should affirm the decision
18 below and remand for adjudication of the
19 qualified immunity defense.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Kneidler, three minutes for
24 rebuttal.

25

1 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER
2 ON BEHALF OF THE PETITIONERS

3 MR. KNEEDLER: Thank you, Mr. Chief
4 Justice.

5 First, we think the text of the -- of
6 RFRA's remedies provision answers this question
7 by providing for appropriate relief against the
8 government. And money damages are not
9 appropriate relief against the government, at
10 least in the absence of something expressly so
11 providing. And we don't have it here.

12 Justice Gorsuch raised the question of
13 whether the phrase "appropriate relief" refers
14 to the general law of remedies. That's -- the
15 -- the Court in Franklin invoked that when the
16 Court was completely free to -- to devise
17 remedies for a cause of action that it had
18 itself created.

19 In this context, the law of remedies,
20 though, includes important other limitations,
21 including the sovereign immunity of the
22 sovereign, which is what renders money damages
23 not appropriate relief against the government,
24 and individual government officials are included
25 only insofar as they are part of the government

1 under RFRA's definition.

2 In addition, as Justice Kagan pointed
3 out, there -- there are reasons beyond that to
4 expect Congress to be especially clear if it was
5 subjecting federal employees to personal money
6 damages under a statute, after all, that applies
7 throughout the government, anytime there is a
8 statute of general applicability, for example,
9 that an employee is charged with administering.

10 And, in fact, we know that Congress
11 rarely provides or allows private damages
12 actions against the federal government. That's
13 the background principle of -- of the -- the
14 Westfall Act. And when Congress has allowed
15 personal damage actions, it has done so
16 expressly. And we have nothing express here.

17 And that's further supported by, I
18 think, the point that Justice Kavanaugh was
19 making, which is that there's an odd fit here
20 beyond the general concern about chilling
21 government employees, especially in this
22 national security context, that RFRA is directed
23 at statutes and rules of general applicability,
24 and yet -- and is designed to allow exemptions
25 from that.

1 But this is putting a government
2 employee in the position, perhaps on the spot,
3 of deciding whether to create an exemption to a
4 particular governmental interest. And beyond
5 that, RFRA itself provides that it's the
6 government that must provide or furnish --
7 establish that there's a compelling interest,
8 and these are the least restrictive means for
9 doing it.

10 And often the individual government
11 employee wouldn't have access even to the
12 information necessary to -- to make that defense
13 and would need to -- discovery against --
14 against the government.

15 So even looking at what the
16 appropriate remedies are, they aren't available.
17 And RFRA contains nothing like the action at law
18 under 1983, which is what gives rise to damages
19 there, to the extent RFRA was patterned after
20 1983.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 General Kneedler. The case is submitted.

23 (Whereupon, at 12:16 p.m., the case
24 was submitted.)

25

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