

16-1176  
Tanvir v. Tanzin

1 UNITED STATES COURT OF APPEALS  
2  
3 FOR THE SECOND CIRCUIT  
4

5  
6 August Term, 2016  
7

8 (Argued: March 1, 2017

Decided: May 2, 2018)

9  
10 Docket No. 16-1176  
11  
12

13 MUHAMMAD TANVIR, JAMEEL ALGIBHAH,  
14 NAVEED SHINWARI,

15  
16 *Plaintiffs-Appellants,*  
17

18 v.  
19

20 FNU TANZIN, Special Agent, FBI; SANYA GARCIA, Special  
21 Agent, FBI; JOHN LNU, Special Agent, FBI; FRANCISCO  
22 ARTUSA, Special Agent, FBI; JOHN C. HARLEY III, Special  
23 Agent, FBI; STEVEN LNU, Special Agent, FBI; MICHAEL  
24 LNU, Special Agent, FBI; GREGG GROSSOEHMIG, Special  
25 Agent, FBI; WEYSAN DUN, Special Agent in Charge, FBI;  
26 JAMES C. LANGENBERG, Assistant Special Agent in Charge,  
27 FBI; JOHN DOE #1, Special Agent, FBI; JOHN DOE #2, Special  
28 Agent, FBI; JOHN DOE #3, Special Agent, FBI; JOHN DOE #4,  
29 Special Agent, FBI; JOHN DOE #5, Special Agent, FBI; JOHN  
30 DOE #6, Special Agent, FBI,  
31

1 *Defendants-Appellees.*<sup>1</sup>

2  
3 Before: KATZMANN, *Chief Judge*, POOLER and LYNCH, *Circuit Judges*.

4 Plaintiffs-Appellants Muhammad Tanvir, Jameel Algibah, and Naveed  
5 Shinwari (“Plaintiffs”) appeal from a February 17, 2016 final judgment of the  
6 United States District Court for the Southern District of New York (Abrams, J.),  
7 dismissing their complaint against senior federal law enforcement officials and  
8 25 named and unnamed federal law enforcement officers. The complaint alleged,  
9 inter alia, that in retaliation for Plaintiffs’ refusal to serve as informants, federal  
10 officers improperly placed or retained Plaintiffs’ names on the “No Fly List,” in  
11 violation of Plaintiffs’ rights under the First Amendment and the Religious  
12 Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* (“RFRA”).

13 The complaint sought (1) injunctive and declaratory relief against all  
14 defendants in their official capacities for various constitutional and statutory  
15 violations, and (2) compensatory and punitive damages from federal law  
16 enforcement officers in their individual capacities for violations of their rights  
17 under the First Amendment and RFRA. After the parties agreed to stay the

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<sup>1</sup> The Clerk of Court is respectfully directed to amend the official caption in this case to conform with the caption above.

1 official capacity claims, the district court dismissed Plaintiffs' individual capacity  
2 claims. As relevant here, the district court held that RFRA does not permit the  
3 recovery of money damages against federal officers sued in their individual  
4 capacities. Plaintiffs appeal that RFRA determination only.

5 Because we disagree with the district court, and hold that RFRA permits a  
6 plaintiff to recover money damages against federal officers sued in their  
7 individual capacities for violations of RFRA's substantive protections, we reverse  
8 the district court's judgment and remand for further proceedings.

9 REVERSED and REMANDED.

10

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11 RAMZI KASSEM, CLEAR Project, Main Street Legal  
12 Services, Inc., City University of New York School of  
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14 *Plaintiffs-Appellants*.

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17 *Plaintiffs-Appellants*.

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19 Constitutional Rights, New York, NY, *for Plaintiffs-*  
20 *Appellants*.

1 ELLEN BLAIN, Assistant United States Attorney (Sarah  
2 S. Normand, Benjamin H. Torrance, Assistant United  
3 States Attorneys, *on the brief*), for Joon H. Kim, Acting  
4 United States Attorney for the Southern District of New  
5 York, New York, NY, *for Defendants-Appellees*.

6 POOLER, *Circuit Judge*:

7 Plaintiffs-Appellants Muhammad Tanvir, Jameel Algibah, and Naveed  
8 Shinwari (“Plaintiffs”) appeal from a February 17, 2016 final judgment of the  
9 United States District Court for the Southern District of New York (Abrams, J.),  
10 dismissing their complaint against senior federal law enforcement officials and  
11 25 named and unnamed federal law enforcement officers. As relevant here, the  
12 complaint alleged that, in retaliation for Plaintiffs’ refusal to serve as informants,  
13 federal officers improperly placed or retained Plaintiffs’ names on the “No Fly  
14 List,” in violation of Plaintiffs’ rights under the First Amendment and the  
15 Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* (“RFRA”).

16 The complaint sought (1) injunctive and declaratory relief against all  
17 defendants in their official capacities for various constitutional and statutory  
18 violations, and (2) compensatory and punitive damages from federal law  
19 enforcement officers in their individual capacities for violations of their rights

1 under the First Amendment and RFRA. As relevant here, the district court held  
2 that RFRA does not permit the recovery of money damages against federal  
3 officers sued in their individual capacities. Plaintiffs appeal that RFRA  
4 determination only.

5 Because we disagree with the district court, and hold that RFRA permits a  
6 plaintiff to recover money damages against federal officers sued in their  
7 individual capacities for violations of RFRA’s substantive protections, we reverse  
8 the district court’s judgment and remand for further proceedings.

9 **BACKGROUND**

10  
11 On appeal from the district court’s dismissal of Plaintiffs’ complaint, we  
12 “accept[] as true factual allegations in the complaint, and draw[] all reasonable  
13 inferences in the favor of the plaintiffs.” *Town of Babylon v. Fed. Hous. Fin. Agency*,  
14 699 F.3d 221, 227 (2d Cir. 2012).

15 **I. Relevant Factual and Procedural Background**

16  
17 Plaintiffs are Muslim men who reside in New York or Connecticut. Each  
18 was born abroad, immigrated to the United States early in his life, and is now  
19 lawfully present here as either a U.S. citizen or as a permanent resident. Each has  
20 family remaining overseas.

1           Plaintiffs assert that they were each approached by federal agents and  
2 asked to serve as informants for the FBI. Specifically, Plaintiffs were asked to  
3 gather information on members of Muslim communities and report that  
4 information to the FBI.<sup>2</sup> In some instances, the FBI's request was accompanied  
5 with severe pressure, including threats of deportation or arrest; in others, the  
6 request was accompanied by promises of financial and other assistance.  
7 Regardless, Plaintiffs rebuffed those repeated requests, at least in part based on  
8 their sincerely-held religious beliefs. In response to these refusals, the federal  
9 agents maintained Plaintiffs on the national "No Fly List," despite the fact that  
10 Plaintiffs "do[] not pose, ha[ve] never posed, and ha[ve] never been accused of  
11 posing, a threat to aviation safety." App'x at 74, 84, 92 ¶¶ 68, 118, 145.

12           According to the complaint, Defendants "forced Plaintiffs into an  
13 impermissible choice between, on the one hand, obeying their sincerely held  
14 religious beliefs and being subjected to the punishment of placement or retention

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<sup>2</sup> Plaintiffs assert that they were caught up in a broader web of federal law enforcement mistreatment of American Muslims. They allege that, following the tragic attacks of September 11, 2001, "the FBI has engaged in widespread targeting of American Muslim communities for surveillance and intelligence-gathering." App'x at 66 ¶ 36. These law enforcement practices included "the aggressive recruitment and deployment of informants . . . in American Muslim communities, organizations, and houses of worship." *Id.*

1 on the No Fly List, or, on the other hand, violating their sincerely held religious  
2 beliefs in order to avoid being placed on the No Fly List or to secure removal  
3 from the No Fly List.” App’x at 109 ¶ 210. Plaintiffs allege that this dilemma  
4 placed a substantial burden on their exercise of religion.

5         Additionally, Defendants’ actions caused Plaintiffs to suffer emotional  
6 distress, reputational harm, and economic loss. As a result of Defendants’ actions  
7 placing and retaining Plaintiffs on the “No Fly List,” Plaintiffs were prohibited  
8 from flying for several years. Such prohibition prevented Plaintiffs from visiting  
9 family members overseas, caused Plaintiffs to lose money they had paid for  
10 plane tickets, and hampered Plaintiffs’ ability to travel for work.<sup>3</sup>

11         A.     *The “No Fly List”*

12         In an effort to ensure aircraft security, Congress directed the  
13 Transportation Security Administration (“TSA”) to establish procedures for  
14 notifying appropriate officials of the identity of individuals “known to pose, or

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<sup>3</sup> One Plaintiff, for example, had to quit a job as a long-haul trucker because that job required him to fly home after completing his route, while another declined temporary employment in Florida due to these travel restrictions. These same restrictions barred another Plaintiff from traveling to Pakistan to visit his ailing mother, and rendered yet another Plaintiff unable to see his wife or daughter in Yemen for many years.

1 suspected of posing, a risk of air piracy or terrorism or a threat to airline or  
2 passenger safety.” 49 U.S.C. § 114(h)(2). TSA was further instructed to “utilize all  
3 appropriate records in the consolidated and integrated terrorist watchlist  
4 maintained by the Federal Government” to perform a passenger prescreening  
5 function. 49 U.S.C. § 44903(j)(2)(C)(ii).

6 The “No Fly List” is one such terrorist watchlist and is part of a broader  
7 database developed and maintained by the Terrorist Screening Center (“TSC”),  
8 which is administered by the FBI. The TSC’s database contains information about  
9 individuals who are known or reasonably suspected of being involved in  
10 terrorist activity. The TSC shares the names of individuals on the “No Fly List”  
11 with federal and state law enforcement agencies, the TSA, airline representatives,  
12 and cooperating foreign governments.

13 Plaintiffs allege that federal law enforcement and intelligence agencies  
14 may “nominate” an individual for inclusion in the TSC’s database, including the  
15 “No Fly List,” if there is “reasonable suspicion” that the person is a “known or  
16 suspected terrorist.” App’x at 68 ¶ 41. In order for a nominated individual to be  
17 added to the “No Fly List,” there must be additional “derogatory information”  
18 showing that the individual “pose[s] a threat of committing a terrorist act with



1 respect to an aircraft.” App’x at 68 ¶ 42. Any person placed on the “No Fly List”  
2 is barred from boarding a plane that starts in, ends in, or flies over the United  
3 States.<sup>4</sup>

4 Plaintiffs claim that the federal agents named in the amended complaint  
5 “exploited the significant burdens imposed by the No Fly List, its opaque nature  
6 and ill-defined standards, and its lack of procedural safeguards, in an attempt to  
7 coerce Plaintiffs into serving as informants within their American Muslim  
8 communities and places of worship.” App’x at 59 ¶ 8. When rebuffed, the federal  
9 agents “retaliated against Plaintiffs by placing or retaining them on the No Fly  
10 List.” *Id.*

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<sup>4</sup> In their amended complaint, Plaintiffs decry the secrecy around the “No Fly List,” alleging that there is little public information about its size, the criteria for inclusion, the standards for “derogatory information,” or the adequacy of its procedural safeguards. Upon information and belief, Plaintiffs assert that the “No Fly List” burgeoned from 3,400 individuals in 2009 to over 21,000 individuals by February 2012.

1           *B.     Tanvir: An Illustrative Story*

2           As did the district court below, we present Tanvir’s story as illustrative of  
3 Plaintiffs’ experiences.

4           At the time the complaint was filed, Tanvir was a lawful permanent  
5 resident living in Queens, New York. Tanvir’s wife, son, and parents remain in  
6 Pakistan. In February 2007, Tanvir alleged that FBI Special Agents FNU Tanzin  
7 and John Doe 1 approached him at work and questioned him for 30 minutes  
8 about an acquaintance who allegedly entered the United States illegally. Two  
9 days later, Agent Tanzin called Tanvir and asked whether he had anything he  
10 “could share” with the FBI about the American Muslim community. App’x at 74  
11 ¶ 70. Tanvir said he told Agent Tanzin that he knew nothing relevant to law  
12 enforcement.

13           In July 2008, after returning home from a trip to Pakistan to visit his  
14 family, Tanvir was detained by federal agents for five hours at JFK Airport. His  
15 passport was confiscated and he was told he could retrieve it on January 28,  
16 2009, nearly six months later. Two days prior to that appointment, Agent Tanzin  
17 and FBI Special Agent John Doe 2 visited Tanvir at his new workplace and asked  
18 him to come to the FBI’s Manhattan field office. Tanvir agreed.

1           At the FBI field office, the federal agents questioned Tanvir for about an  
2 hour. The agents asked Tanvir whether he was aware of Taliban training camps  
3 near his home village in Pakistan and whether he had Taliban training. Tanvir  
4 denied knowledge of the camps or participation in such training.

5           After the questioning, Agents Tanzin and John Doe 2 complimented  
6 Tanvir and asked him to work as an informant for the FBI in Pakistan or  
7 Afghanistan. Tanvir alleged that they offered him various incentives, including  
8 facilitating visits for his family to the United States and paying for his parents'  
9 religious pilgrimage. Despite the offer, Tanvir declined, stating that he did not  
10 want to be an informant. The agents persisted, threatening Tanvir that his  
11 passport would not be returned and he would be deported if he failed to  
12 cooperate. Tanvir implored the agents not to deport him. At the meeting's end,  
13 the agents asked Tanvir to reconsider and to keep their conversation private.

14           The next day, Agent Tanzin asked Tanvir if he had reconsidered and  
15 would become an informant. Agent Tanzin threatened Tanvir with deportation if  
16 he did not cooperate. Again, Tanvir declined.

17           On January 28, 2009, Tanvir recovered his passport from Department of  
18 Homeland Security ("DHS") officers at JFK Airport without incident. The DHS

1 officers said his passport was withheld for an investigation, but that the  
2 investigation was complete. Nevertheless, the next day, Agent Tanzin called  
3 Tanvir and said that he asked for the release of Tanvir's passport because Tanvir  
4 was "cooperative" with the FBI. App'x at 77 ¶ 81.

5 The FBI agents continued to pressure Tanvir to work as an informant over  
6 the next few weeks. Tanvir received numerous calls and visits at his workplace  
7 from Agents Tanzin and John Doe 1. Tanvir stopped answering their phone calls  
8 and asked them to stop their visits. Later, the agents asked Tanvir to submit to a  
9 polygraph test, and when he declined, they threatened to arrest him. When Tanvir  
10 flew to Pakistan in July 2009 to visit his family, Agents Tanzin and John Doe 3  
11 questioned Tanvir's sister at her workplace about Tanvir's travel.

12 After Tanvir returned to the United States in January 2010, he took a job as  
13 a long-haul trucker. The job required him to drive across the country and fly  
14 back to New York after he had completed his route.

15 In October 2010, Tanvir heard that his mother was visiting New York from  
16 Pakistan. Tanvir, who had been in Atlanta for work, booked a flight back to New  
17 York. When he arrived at the Atlanta airport, an airline employee told Tanvir  
18 that he could not fly. At that time, two FBI agents approached Tanvir and told

1 him to call the agents who had previously spoken to him in New York. Tanvir  
2 contacted Agent Tanzin, who instructed that other agents would contact Tanvir  
3 and that he should “cooperate.” App’x at 79 ¶ 92. Unable to fly to New York,  
4 Tanvir traveled by bus—a 24-hour ride.

5 Two days later, FBI Special Agent Sanya Garcia contacted Tanvir. She told  
6 him that if he met with her and answered her questions, she would help remove  
7 his name from the “No Fly List.” Tanvir declined, saying that he had already  
8 answered the FBI’s questions. Because Tanvir believed he could no longer fly,  
9 and therefore could not return to New York after completing his one-way  
10 deliveries, he quit his job as a long-haul trucker.

11 On September 27, 2011, Tanvir filed a complaint with the DHS Traveler  
12 Redress Inquiry Program (“TRIP”), an administrative mechanism for filing a  
13 complaint about placement on the “No Fly List.”

14 The next month, Tanvir purchased tickets to Pakistan for himself and his  
15 wife so that they could visit his ailing mother. The day before his flight, Agent  
16 Garcia told Tanvir that he would not be able to fly unless he met with her and  
17 answered her questions. Because of his urgent need to travel, Tanvir agreed to do  
18 so. After answering the same questions that the other agents asked him

1 previously, Tanvir pleaded with Agent Garcia to allow him to fly to Pakistan the  
2 next day. The next day, Agent Garcia told Tanvir that he could not fly. Moreover,  
3 she stated that he could not fly in the future unless he submitted to a polygraph  
4 test. Tanvir cancelled his flight and received only a partial refund. His wife  
5 traveled alone to Pakistan.

6 After this incident, Tanvir hired counsel. Tanvir's counsel communicated  
7 with FBI lawyers. The FBI lawyers directed Tanvir's counsel to the TRIP process,  
8 even though Tanvir had already submitted a TRIP complaint and not yet  
9 received any redress.

10 Tanvir persisted, buying another plane ticket to Pakistan to visit his ailing  
11 mother. On December 11, 2011, however, he was denied boarding and told he  
12 was on the "No Fly List." This was the third time Tanvir was barred from  
13 boarding a flight for which he had purchased a ticket.

14 In April 2012, nearly six months after Tanvir filed his complaint with TRIP,  
15 he received a response. The response did not acknowledge that he was on the  
16 "No Fly List," but noted that "no changes or corrections are warranted at this  
17 time." App'x at 83 ¶ 110. Tanvir appealed this TRIP determination.

1           In November 2012, Tanvir purchased another ticket to Pakistan in an effort  
2 to visit his ailing mother. Again, Tanvir was denied boarding when he arrived  
3 for his flight. An FBI agent approached Tanvir and his counsel at the airport and  
4 told them that Tanvir would not be removed from the “No Fly List” until he met  
5 with Agent Garcia.

6           In March 2013, ten months after Tanvir appealed his TRIP determination,  
7 he received a letter from DHS overturning that earlier determination. The letter  
8 blamed Tanvir’s experience on probable “misidentification against a government  
9 record” or “random selection,” and stated that the government “made updates”  
10 to its records. App’x at 83 ¶ 114. Following this communication, Tanvir  
11 purchased a plane ticket to Pakistan for June 2013. On June 27, 2013, Tanvir  
12 successfully boarded a flight to Pakistan. By this time, over five years had passed  
13 since Tanvir was first contacted by the FBI.

14           Tanvir asserts that because the federal agents wrongfully placed his name  
15 on the “No Fly List,” Tanvir could not fly to visit his family in Pakistan, quit his  
16 trucking job, lost money from unused airline tickets, and feared additional  
17 harassment by the FBI.

18

1           C.     *Procedural History*

2           On October 1, 2013, Plaintiffs filed a complaint asserting that Defendants  
3 violated their constitutional and statutory rights by placing their names on the  
4 “No Fly List” –even though they posed no threat to aviation safety– in  
5 retaliation for their refusal to become informants for the government. On April  
6 22, 2014, Plaintiffs filed an amended complaint.

7           Plaintiffs sued Defendants in their official capacities under the First  
8 Amendment, the Fifth Amendment, the Administrative Procedure Act, 5 U.S.C.  
9 §§ 702, 706, and RFRA, 42 U.S.C. § 200bb *et seq.*, seeking injunctive and  
10 declaratory relief. Plaintiffs also sued the federal agents in their individual  
11 capacities, seeking compensatory and punitive damages under the First  
12 Amendment and RFRA.<sup>5</sup>

13           On July 28, 2014, the Defendants filed two separate motions to dismiss the  
14 amended complaint. One motion sought to dismiss Plaintiffs’ official capacity  
15 claims; the other sought to dismiss Plaintiffs’ individual capacity claims.

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<sup>5</sup> Plaintiffs and non-appealing plaintiff Awais Sajjad asserted a First Amendment retaliation claim against all 25 federal agents named as Defendants. Plaintiffs, excluding Sajjad, asserted a claim under RFRA against only the 16 federal agents named as Defendants that allegedly interacted with Plaintiffs.



1           On June 1, 2015, the government moved to stay Plaintiffs’ official capacity  
2 claims, arguing that it had revised the redress procedures available to challenge  
3 one’s designation on the “No Fly List,” and that Plaintiffs had availed themselves  
4 of those procedures. On June 8, 2015, Plaintiffs received letters from DHS  
5 informing them that the government knows of no reason why they would be  
6 unable to fly. On June 10, 2015, Plaintiffs consented to a stay of their official  
7 capacity claims. The district court stayed those claims and terminated the  
8 government’s related motion to dismiss. The parties continued to dispute  
9 Plaintiffs’ individual capacity claims.

10           D.     *District Court Opinion*

11           On September 3, 2015, the district court issued an opinion and order  
12 dismissing Plaintiffs’ individual capacity claims.

13           First, the district court dismissed Plaintiffs’ First Amendment retaliation  
14 claims, stating that the Supreme Court and this Court have “declined to extend  
15 *Bivens* to a claim sounding in the First Amendment.” *Tanvir v. Lynch*, 128 F.  
16 Supp.3d 756, 769 (S.D.N.Y. 2015) (quoting *Turkmen v. Hasty*, 789 F.3d 218, 236 (2d  
17 Cir. 2015), *rev’d in part and vacated and remanded in part sub nom. Ziglar v. Abbasi*,  
18 137 S. Ct. 1843 (2017)). Plaintiffs do not appeal that determination here.

1           Next, the district court held that RFRA does not permit the recovery of  
2 money damages from federal officers sued in their individual capacities. The  
3 district court determined that “Congress’ intent in enacting RFRA could not be  
4 clearer.” *Tanvir*, 128 F. Supp.3d at 780. Specifically, the court determined that  
5 Congress intended to restore the compelling interest test by which courts  
6 evaluated free exercise claims before the Supreme Court’s decision in  
7 *Employment Division, Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990). In  
8 doing so, it held that Congress did not express an intention to expand the  
9 remedies available to those individuals who asserted that their free exercise of  
10 religion was substantially burdened by the government.

11           The district court found this conclusion supported by the state of the law  
12 at the time RFRA was passed, and RFRA’s legislative history. With respect to the  
13 former, the district court stated that, at the time *Smith* was decided, the Supreme  
14 Court had not recognized a *Bivens* remedy for claims under the Free Exercise  
15 Clause, and to allow damages in this case against federal employees would  
16 expand, rather than restore, the remedies available prior to *Smith*. With respect to  
17 the latter, the district court identified congressional reports stating that Congress  
18 in RFRA did not intend to “expand, contract or alter the ability of a claimant to

1 obtain relief in a manner consistent” with the Supreme Court’s pre-*Smith* free  
2 exercise jurisprudence. *Tanvir*, 128 F. Supp.3d at 778 (quoting S. Rep. No. 103-111  
3 at 12).

4 Finally, the district court rejected Plaintiffs’ assertions with respect to  
5 *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60 (1992). In *Franklin*, the Supreme  
6 Court stated that “we presume the availability of all appropriate remedies unless  
7 Congress has expressly indicated otherwise.” *Id.* at 66. The district court  
8 nevertheless found that the traditional *Franklin* presumption did not apply here.  
9 In particular, the district court noted that “*Franklin* required the Supreme Court  
10 to interpret an *implied* statutory right of action,” and held that *Franklin’s*  
11 “ordinary convention” does not control where, as here, Congress created an  
12 express private right of action. *Tanvir*, 128 F. Supp.3d at 779.

13 Plaintiffs appeal the district court’s ruling that RFRA does not permit the  
14 recovery of money damages from federal officers sued in their individual  
15 capacities.<sup>6</sup> We agree with Plaintiffs, and reverse.

16

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<sup>6</sup> Plaintiffs voluntarily dismissed their official capacity claims on December 28, 2015, rendering the district court’s ruling on the individual claims a final appealable order. See *Tanvir v. Comey*, No. 1:13-cv-06951-RA (docs. 109, 111).

1 DISCUSSION

2  
3 I. Standard of Review

4 We review de novo a district court’s dismissal pursuant to Federal Rule of  
5 Civil Procedure 12(b)(6). *Town of Babylon*, 699 F.3d at 227. When reviewing the  
6 dismissal of a complaint for failure to state a claim, we accept as true the factual  
7 allegations in the complaint and draw all reasonable inferences in plaintiff’s  
8 favor. *ATSI Commc’ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). “To  
9 survive a motion to dismiss, a complaint must contain sufficient factual matter,  
10 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v.*  
11 *Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

12 The district court here held that RFRA does not permit a plaintiff to  
13 recover money damages against federal officers sued in their individual  
14 capacities. *Tanvir*, 128 F. Supp.3d at 775. Where, as here, the district court  
15 decision below “presents only a legal issue of statutory interpretation,” “[w]e  
16 review *de novo* whether the district court correctly interpreted the statute.” *White*  
17 *v. Shalala*, 7 F.3d 296, 299 (2d Cir. 1993).

## 1 II. Official Capacity and Individual Capacity Suits

2  
3 The district court held that RFRA does not permit the recovery of money  
4 damages against federal officers sued in their individual capacities. To frame our  
5 discussion, we briefly address the difference between official capacity suits and  
6 individual capacity suits.

7 The Supreme Court has stated that “official-capacity suits generally  
8 represent only another way of pleading an action against an entity of which an  
9 officer is an agent.” *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (citation and internal  
10 quotation marks omitted). In an official capacity suit, “the real party in interest  
11 ... is the governmental entity and not the named official.” *Id.* By contrast,  
12 individual capacity suits “seek to impose individual liability upon a government  
13 officer for [her] actions under color of [] law.” *Id.* Any damages awarded in an  
14 individual capacity suit “will not be payable from the public fisc but rather will  
15 come from the pocket of the individual defendant.” *Blackburn v. Goodwin*, 608  
16 F.2d 919, 923 (2d Cir. 1979).<sup>7</sup>

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<sup>7</sup> Suits against public officers that seek damages are directed at the particular officer whose allegedly unlawful actions are claimed to have caused damage to plaintiffs. In contrast, suits against officers in their official capacity, which generally seek injunctive relief, are directed at the office itself. *See Fed. R. Civ. P.*

1           This distinction proves important with respect to the recovery of damages.  
2    “Absent a waiver, sovereign immunity shields the Federal Government and its  
3    agencies from suit.” *Dep’t of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999)  
4    (citation omitted). Sovereign immunity does not, however, shield federal officials  
5    sued in their individual capacities. *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017)  
6    (“[S]overeign immunity does not erect a barrier against suits to impose  
7    individual and personal liability.”) (internal quotation marks omitted).

### 8    **III. Religious Freedom Restoration Act**

9           “As in any case of statutory construction, we start our analysis . . . with the  
10   language of the statute.” *Chai v. Comm’r of Internal Revenue*, 851 F.3d 190, 217 (2d  
11   Cir. 2017) (citation omitted). “Where the statutory language provides a clear  
12   answer, our analysis ends there.” *Id.* (citation and internal punctuation omitted).  
13   “[I]f the meaning of the statute is ambiguous, we may resort to canons of  
14   statutory interpretation to help resolve the ambiguity.” *Id.* (citation and brackets  
15   omitted). “The plainness or ambiguity of statutory language is determined by  
16   reference to the language itself, the specific context in which that language is

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17(d). As a result, if the defendant in an official capacity suit leaves office, the  
successor to the office replaces the originally named defendant. *See* Fed. R. Civ.  
R. 25(d).

1 used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*,  
2 519 U.S. 337, 341 (1997).

3 A. Statutory Text

4  
5 In 1993, Congress passed RFRA. 42 U.S.C. § 2000bb, *et seq.* Congress stated  
6 that its purposes in enacting RFRA were “to restore the compelling interest test”  
7 that been applied in cases where free exercise of religion was substantially  
8 burdened *and* “to provide a claim or defense to persons whose religious exercise  
9 is substantially burdened by government.” 42 U.S.C. § 2000bb(b). Through  
10 RFRA, Congress sought “to provide very broad protection for religious liberty.”  
11 *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2760 (2014).

12 RFRA provides that the “Government shall not substantially burden a  
13 person’s exercise of religion even if the burden results from a rule of general  
14 applicability” unless the “Government” can “demonstrate[] that application of  
15 the burden to the person—(1) is in furtherance of a compelling governmental  
16 interest; and (2) is the least restrictive means of furthering that compelling  
17 governmental interest.” 42 U.S.C. § 2000bb-1(a), (b).

18 In order to protect this statutory right, RFRA created an explicit private  
19 right of action. *Id.* § 2000bb-1(c). That section permits any “person whose

1 religious exercise has been burdened in violation of [the statute]" to "assert that  
2 violation as a claim or defense in a judicial proceeding and obtain *appropriate*  
3 *relief against a government.*" *Id.* § 2000bb-1(c) (emphasis added). RFRA defines the  
4 term "government," to include "a branch, department, agency, instrumentality,  
5 and official (or other person acting under color of law) of the United States." *Id.* §  
6 2000bb-2(1). RFRA does not define the term "appropriate relief."

7 In its decision below, the district court determined that the phrase  
8 "appropriate relief" did not include money damages from federal officials sued  
9 in their individual capacities. *See Tanvir*, 128 F. Supp.3d at 775. The district court  
10 did not address whether federal officers sued in their individual capacities are  
11 included within RFRA's definition of "government" and therefore amenable to  
12 suit under RFRA. *See id.* at 774 n. 17.

13 B. "Against a Government"

14  
15 On appeal, the parties disagree over whether RFRA authorizes individual  
16 capacity suits against government officials. In construing the meaning of the  
17 term "government" under RFRA, we begin by reviewing RFRA's plain language.  
18 *See Chai*, 851 F.3d at 217. Because RFRA's plain language "provides a clear



1 answer,” we conclude that RFRA authorizes individual capacity claims against  
2 federal officers. *Id.*

3 As discussed above, RFRA permits a plaintiff to assert a violation of the  
4 statute “as a claim or defense in a judicial proceeding and obtain relief against a  
5 government.” 42 U.S.C. § 2000bb-1(c). RFRA defines “government” to include “a  
6 branch, department, agency, instrumentality, and official (or other person acting  
7 under color of law) of the United States.” *Id.* § 2000bb-2(1). When we substitute  
8 that definition for the defined term, it is clear that a plaintiff may bring a claim  
9 for “appropriate relief against” either a federal “official” or “other person acting  
10 under color of [federal] law” whose actions substantially burden the plaintiff’s  
11 religious exercise. Therefore, RFRA, by its plain terms, authorizes individual  
12 capacity suits against federal officers.

13 Defendants argue, to the contrary, that the plain text of RFRA permits suits  
14 only against officers in their official capacities and not suits against federal  
15 officers in their individual capacities. Defendants argue that we: (1) should give  
16 the term “government” its most natural reading; (2) should understand the  
17 phrase “official” in the statutory definition of “government” as suggesting that  
18 only official capacity suits are permitted; and (3) should conclude that the phrase

1 “or other person acting under color of law” is not intended to permit  
2 government officers to be sued in their individual capacities. We disagree with  
3 each argument.

4 First, we refuse Defendants’ request to apply a natural reading of the term  
5 “government” in this case where RFRA includes an explicit definition of  
6 “government.” 42 U.S.C. § 2000bb-2(1). “When a statute includes an explicit  
7 definition, we must follow that definition.” *Stenberg v. Carhart*, 530 U.S. 914, 942  
8 (2000); *Upstate Citizens for Equality, Inc. v. United States*, 841 F.3d 556, 575 (2d Cir.  
9 2016) (“In general, statutory definitions control the meaning of statutory  
10 words.”) (internal quotation marks omitted). Further, the statute specifically  
11 defines ‘government’ to include officials and others acting under color of law.  
12 There would be no need to permit suits against government agents in their  
13 official capacity, since such a suit is simply a formal variant of an action that, in  
14 substance, runs against the government itself. *See Hafer*, 502 U.S. at 25.

15 Second, RFRA’s use of the word “official” in the statutory definition of  
16 “government” does not mandate that a plaintiff may only obtain relief against  
17 federal officers in official capacity suits. In ordinary usage, an “official” is  
18 generally defined simply as “one who holds or is invested with an office” and is

1 roughly synonymous with the term “officer.” Merriam-Webster Unabridged,  
2 <http://unabridged.merriam-webster.com/unabridged/official> (noun definition).  
3 There is no reason to think that, in using this ordinary English word, Congress  
4 intended to invoke the technical legal concept of “official capacity,” rather than  
5 simply to state that government “officials” are amenable to suit. Moreover, the  
6 statute permits suits against “officials (or other person[s] acting under color of  
7 law).” 42 U.S.C.A. § 2000bb-2(1). The specific authorization of actions broadly  
8 against “other person[s] acting under color of law,” undercuts the assertion that  
9 the term “official” was intended to limit the scope of available actions.

10 Further, a defendant’s status as a federal officer “is not controlling” in  
11 determining whether a suit is, in reality, against the government. *Stafford v.*  
12 *Briggs*, 444 U.S. 527, 542 n. 10 (1980) (citation omitted). Rather, “the dispositive  
13 inquiry is ‘who will pay the judgment?’” *Id.* A plaintiff may not sue a federal  
14 officer in her official capacity for money damages, because such suit seeks money  
15 from the federal government, and sovereign immunity would bar recovery from  
16 the federal government absent an explicit waiver. However, a plaintiff may sue a  
17 federal officer in her individual capacity without implicating sovereign

1 immunity concerns. *See Hafer*, 502 U.S. at 25-28. RFRA’s use of the word “official”  
2 does not alter that rule.

3 Third, we reject Defendants’ argument that the phrase “other person  
4 acting under color of law” authorizes only official capacity suits. Rather, that  
5 phrase “contemplates that persons ‘other’ than ‘officials’ may be sued under  
6 RFRA, and persons who are not officials may be sued *only* in their individual  
7 capacities.” *Patel v. Bureau of Prisons*, 125 F. Supp.3d 44, 50 (D.D.C. 2015) (citing  
8 *Jama v. INS*, 343 F. Supp.2d 338, 374 (D. N.J. 2004)) (emphasis added).

9 “Defendants’ interpretation would render the entire phrase surplage: once  
10 Congress authorized official-capacity suits against ‘officials,’ adding another  
11 term that allowed only official-capacity suits would have had no effect  
12 whatsoever.” *Id.*

13 Our conclusion that RFRA authorizes individual capacity claims against  
14 federal officers is consistent with the Supreme Court’s recognition of RFRA’s  
15 “[s]weeping coverage,” *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997), which  
16 “went far beyond what this Court has held is constitutionally required,” *Hobby*  
17 *Lobby*, 134 S. Ct. at 2767. RFRA’s reach “ensures its intrusion at every level of  
18 government, displacing laws and prohibiting official actions of almost every

1 description and regardless of subject matter.” *City of Boerne*, 521 U.S. at 532  
2 (further stating that RFRA’s restrictions “apply to every agency and official of the  
3 Federal ... Government[]”).

4 Moreover, we draw support for our conclusion from Congress’s use of  
5 comparable language in enacting 42 U.S.C. § 1983, which, long prior to RFRA’s  
6 enactment, had consistently been held to authorize individual and official  
7 capacity suits. *See, e.g., Hafer*, 502 U.S. at 25; *Graham*, 473 U.S. at  
8 166. Section 1983 creates a private right of action against “persons” who, acting  
9 “under color of [law],” violate a plaintiff’s constitutional rights—regardless of  
10 whether that person was acting pursuant to an unconstitutional state law,  
11 regulation, or policy. 42 U.S.C. § 1983.

12 We, like several of our sister circuits before us, do not find “this word  
13 choice [] coincidental,” as “Congress intended for courts to borrow concepts from  
14 § 1983 when construing RFRA.” *Mack v. Warden Loretto FCI*, 839 F.3d 286, 302 (3d  
15 Cir. 2016); *see also Listecky v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 738  
16 (7th Cir. 2015); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834-35 (9th  
17 Cir. 1999). As these courts have explained, “[w]hen a legislature borrows an  
18 already judicially interpreted phrase from an old statute to use it in a new

1 statute, it is presumed that the legislature intends to adopt not merely the old  
2 phrase but the judicial construction of that phrase." *Sutton*, 192 F.3d at 834-35  
3 (citation omitted); *Mack*, 839 F.3d at 302 (quoting same); *see also Leonard v. Israel*  
4 *Discovery Bank*, 199 F.3d 99, 104 (2d Cir. 1999) ("[R]epetition of the same language  
5 in a new statute indicates, as a general matter, the intent to incorporate its  
6 judicial interpretations as well.") (citation and ellipses omitted).

7 In light of this presumption, given both RFRA's and Section 1983's  
8 applicability to "person[s]" acting "under color of law," we hold that RFRA, like  
9 Section 1983, authorizes a plaintiff to bring individual capacity claims against  
10 federal officials or other "person[s] acting under color of [federal] law."

11 C. "Appropriate Relief"  
12

13 Having determined that RFRA permits individual capacity suits against  
14 government officers acting under color of law, we now turn to whether  
15 "appropriate relief" in that context includes money damages. In its opinion  
16 below, the district court held that "appropriate relief" did not include money  
17 damages in suits against federal officers in their individual capacities. *Tanvir*, 128  
18 F. Supp.3d at 780-81. We disagree.

19

1 a. Ambiguity and the *Franklin* Presumption

2  
3 Starting with RFRA’s statutory text, as we do in any case of statutory  
4 construction, we note that RFRA does not define the phrase “appropriate relief.”  
5 See *Chai*, 851 F.3d at 217. Unable to draw further insight from a plain reading of  
6 the statute, we turn to the context in which the language is used and the context  
7 of the statute more broadly. See *Robinson*, 519 U.S. at 341.

8 In the context of RFRA’s companion statute, the Religious Land Use and  
9 Institutionalized Persons Act of 2000 (“RLUIPA”), 42 U.S.C. § 2000cc *et seq.*,<sup>8</sup> the  
10 Supreme Court acknowledged that the phrase “‘appropriate relief’ is open-ended  
11 and ambiguous about what types of relief it includes . . . Far from clearly  
12 identifying money damages, the word ‘appropriate’ is inherently context-  
13 dependent.” *Sossamon*, 563 U.S. at 286. Indeed, “[i]n some contexts, ‘appropriate

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<sup>8</sup> The district court opinion aptly notes that RFRA and RLUIPA are companion statutes. See *Tanvir*, 128 F. Supp.3d at 775. After the Supreme Court in *City of Boerne*, 521 U.S. 507, determined that RFRA was unconstitutional as applied to state and local governments because it exceeded Congress’s power under Section 5 of the Fourteenth Amendment, Congress passed RLUIPA pursuant to the Spending Clause and Commerce Clause. See *Tanvir*, 128 F. Supp.3d at 775 n. 18; *Sossamon v. Texas*, 563 U.S. 277, 281 (2011). “RLUIPA borrows important elements from RFRA . . . includ[ing] an express private cause of action that is taken from RFRA.” *Sossamon*, 563 U.S. at 281. As a result, courts commonly apply RFRA case law to issues arising under RLUIPA and vice versa. See *Redd v. Wright*, 597 F.3d 532, 535 n. 2 (2d Cir. 2010).

1 relief’ might include damages.” *Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022,  
2 1026 (D.C. Cir. 2006). But in other contexts, “another plausible reading is that  
3 ‘appropriate relief’ covers equitable relief but not damages.” *Id.* As with the  
4 analogous phrase in RLUIPA, we agree that the phrase “appropriate relief” in  
5 RFRA’s statutory text is ambiguous.

6 Having made that determination, “we resort to canons of statutory  
7 interpretation to help resolve the ambiguity.” *Chai*, 851 F.3d at 217. We turn to  
8 the “the venerable canon of construction that Congress is presumed to legislate  
9 with familiarity of the legal backdrop for its legislation.” *Mobil Cerro Negro, Ltd. v.*  
10 *Bolivarian Republic of Venezuela*, 863 F.3d 96, 115 (2d Cir. 2017); *see also Ryan v.*  
11 *Gonzales*, 568 U.S. 57, 66 (2013) (“We normally assume that, when Congress  
12 enacts statutes, it is aware of relevant judicial precedent.”). We have stated:

13 Of course, Congress may depart from [our traditional legal  
14 concepts] . . . But when a statute does not provide clear direction, it  
15 is more likely that Congress was adopting, rather than departing  
16 from, established assumptions about how our legal . . . system  
17 works. We will not lightly assume a less conventional meaning  
18 absent a clear indication that such a meaning was intended.

19  
20 *Nat. Res. Def. Council, Inc. v. U.S. Food & Drug Admin.*, 760 F.3d 151, 166 (2d Cir.  
21 2014).



1 Congress enacted RFRA in the wake of *Franklin*, 503 U.S. 60, a Supreme  
2 Court decision issued over a year prior to the enactment of the statute. In  
3 *Franklin*, the Supreme Court stated that when faced with “the question of what  
4 remedies are available under a statute that provides a private right of action,” it  
5 “presume[s] the availability of all appropriate remedies unless Congress has expressly  
6 indicated otherwise.” *Id.* at 65-66 (emphasis added); see also *Carey v. Piphus*, 435 U.S.  
7 247, 255 (1978) (upholding damages remedy under 42 U.S.C. § 1983, even though  
8 the enacting Congress did not “address directly the question of damages”). It  
9 based that presumption on a long-standing rule that “has deep roots in our  
10 jurisprudence:” that “[w]here legal rights have been invaded, and a federal  
11 statute provides for a general right to sue for such invasion, federal courts may  
12 use any available remedy to make good the wrong done.” *Franklin*, 503 U.S. at 66  
13 (alterations omitted). Applying this traditional presumption in the context of an  
14 implied right of action to enforce Title IX, the Supreme Court held that a  
15 damages remedy was available. *Id.* at 76.

16 RFRA permits plaintiffs to “obtain appropriate relief against a  
17 government,” 42 U.S.C. § 2000bb-1(c), and includes no “express[] indicat[ion]”  
18 that it proscribes the recovery of money damages, *Franklin*, 503 U.S. at 66.

1 Because Congress enacted RFRA one year after the Supreme Court decided  
2 *Franklin*, and because Congress used the very same “appropriate relief” language  
3 in RFRA that was discussed in *Franklin*, the *Franklin* presumption applies to  
4 RFRA’s explicit private right of action. In light of RFRA’s purpose to provide  
5 broad protections for religious liberty, *Hobby Lobby*, 134 S.Ct. at 2760, and  
6 applying the *Franklin* presumption here, we hold that RFRA authorizes the  
7 recovery of money damages against federal officers sued in their individual  
8 capacities.<sup>9</sup>

9 b. Defendants’ Arguments to the Contrary

10  
11 i. Precedent Does Not Require a Different Outcome

12  
13 Defendants argue that our holding here is inconsistent with several  
14 decisions by the Supreme Court, our Court, and our sister circuits limiting the

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<sup>9</sup> Indeed, the determination that RFRA permits individual capacity suits leads logically to the conclusion that it permits a damages remedy against those individuals. An individual capacity suit that is confined to injunctive relief has limited value; official capacity suits for injunctive relief already supply injunctive relief against the governmental entity as a whole. As a result, plaintiffs will rarely, if ever, prefer to enjoin the conduct of a single officer. In contrast, as noted above, suits seeking compensation from officers in their *official* capacity, being in essence suits against the state or federal government itself, are generally barred by sovereign immunity. Thus, individual capacity suits tend to be associated with damages remedies, and official capacity suits with injunctive relief.

1 recovery of money damages in suits under RFRA and RLUIPA. *See Sossamon*, 563  
2 U.S. 277; *Washington v. Gonyea*, 731 F.3d 143, 145 (2d Cir. 2013); *Webman*, 441 F.3d  
3 at 1026; *Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 840-41  
4 (9th Cir. 2012); *Davila v. Gladden*, 777 F.3d 1198, 1210 (11th Cir. 2015), *cert. denied*  
5 *sub nom. Davila v. Haynes*, 136 S.Ct. 78 (2015). Our holding, however, is not  
6 inconsistent with these decisions, each of which is based upon animating  
7 principles that are inapplicable here.

8         In *Sossamon*, the Supreme Court held that the phrase “appropriate relief”  
9 in RLUIPA does not permit the recovery of money damages against a state or  
10 state officers sued in their official capacities. 563 U.S. at 288. The Supreme Court  
11 based its conclusion on considerations relating to state sovereign immunity.  
12 Namely, when determining whether an act of Congress waives sovereign  
13 immunity, the Court stated that such language “will be strictly construed, in  
14 terms of scope, in favor of the sovereign.” *Id.* at 285. Therefore, in that context,  
15 the Court’s relevant inquiry was the opposite of the one at issue here: “not  
16 whether Congress has given clear direction that it intends to *exclude* a damages  
17 remedy, *see Franklin*, [503 U.S.] at 70-71, but whether Congress ha[d] given clear  
18 direction that it intend[ed] to *include* a damages remedy.” *Sossamon*, 563 U.S. at

1 289 (emphasis in original). Because the phrase “appropriate relief” in that context  
2 did not “unequivocally express[]” Congress’s intent to waive state sovereign  
3 immunity, the Supreme Court held that RLUIPA did not permit a suit for  
4 monetary damages against a state or state officials sued in their official  
5 capacities. *Id.* at 288.

6 Like *Sossamon*, several of our sister circuits have determined that RFRA’s  
7 prescription for “appropriate relief” does not include damages against the  
8 federal government or its officers acting in their official capacities. *See Webman*,  
9 441 F.3d at 1026; *Oklevueha Native Am. Church of Hawaii*, 676 F.3d at 840-41; *Davila*  
10 777 F.3d at 1210. These courts so held because, in the context of suits against the  
11 federal government and its officers in their official capacities, the phrase  
12 “appropriate relief” similarly does not express an unambiguous waiver of the  
13 federal government’s sovereign immunity. *See, e.g., Davila*, 777 F.3d at 1210  
14 (“Congress did not unequivocally waive its sovereign immunity in passing  
15 RFRA. RFRA does not therefore authorize suits for money damages against  
16 officers in their official capacities.”).

17 The animating principles underlying *Sossamon*, *Webman*, *Oklevueha Native*  
18 *Am. Church of Hawaii*, and *Davila*, however, are absent from the instant case. Each

1 of those cases involved a question of whether “appropriate relief” under RFRA  
2 or RLUIPA permitted suits against a sovereign or its officers in their official  
3 capacities. Although the Supreme Court and our sister circuits declined to  
4 construe the phrase “appropriate relief” to amount to an explicit waiver of  
5 sovereign immunity, Plaintiffs’ individual capacity suits against Defendants  
6 present no sovereign immunity concerns here. This is so because Plaintiffs seek  
7 monetary relief from those officers personally, not from the federal or state  
8 government. *See Hafer*, 502 U.S. at 25-28; *Blackburn*, 608 F.2d at 923. As we stated  
9 above, “Congress need not waive sovereign immunity to permit an individual-  
10 capacity suit against a federal official.” *Patel*, 125 F. Supp.3d at 54 (citing *Larson*,  
11 337 U.S. at 686-87).

12 Indeed, as the district court below acknowledged in its discussion of  
13 precedent, “[b]ecause these decisions . . . are grounded in principles of sovereign  
14 immunity, they are of limited assistance in addressing the question of damages  
15 against those who ‘come to court as individuals.’” *Tanvir*, 128 F. Supp.3d at 775  
16 n. 19 (quoting *Hafer*, 502 U.S. at 27). We agree and similarly find those cases  
17 inapplicable here where sovereign immunity concerns are not at play.

1           Furthermore, our holding that RFRA permits the recovery of money  
2 damages against federal officers sued in their individual capacities does not  
3 conflict with our decision in *Washington v. Gonyea*. In *Gonyea*, we held that the  
4 phrase “appropriate relief” in RLUIPA prohibits both the recovery of money  
5 damages from *state* officers sued in their official capacities and in their individual  
6 capacities. *Gonyea*, 731 F.3d at 145. The conclusion that RLUIPA does not permit  
7 the recovery of money damages from state officers sued in their official capacities  
8 follows directly from the Supreme Court’s decision in *Sossamon*. 563 U.S. at 293  
9 (“States, in accepting federal funding, do not consent to waive their sovereign  
10 immunity to private suits for money damages under RLUIPA because no statute  
11 expressly and unequivocally includes such a waiver.”).

12           *Gonyea*’s conclusion that RLUIPA does not permit the recovery of money  
13 damages from state officers sued in their individual capacities follows from  
14 another source: the constitutional basis upon which Congress relied in enacting  
15 RLUIPA. RLUIPA “was enacted pursuant to Congress’ spending power, which  
16 allows the imposition of conditions, such as individual liability, only on those  
17 parties actually receiving state funds.” 731 F.3d at 145 (citation omitted).  
18 “Applying restrictions created pursuant to the Spending Clause to persons or

1 entities other than the recipients of the federal funds at issue would have the  
2 effect of binding non-parties to the terms of the spending contract.” *Patel*, 125 F.  
3 Supp.3d at 52 (internal quotation marks omitted). “Indeed, to decide otherwise  
4 would create liability on the basis of a law never *enacted* by a sovereign with the  
5 power to affect the individual rights at issue—*i.e.*, the state receiving the federal  
6 funds—and this would raise serious questions regarding whether Congress had  
7 exceeded its authority under the Spending Clause.” *Gonyea*, 731 F.3d at 146  
8 (emphasis in original; citations and internal punctuation omitted). As a result, in  
9 *Gonyea*, we held that RLUIPA did not permit a plaintiff to sue state officials in  
10 their individual capacities because the state prison, and not the state prison  
11 officials, was the ‘contracting party,’ which had “agree[d] to be amenable to suit  
12 as a condition to received funds.” *Id.* at 145.

13 RFRA, by contrast, was enacted pursuant to Section 5 of the Fourteenth  
14 Amendment and the Necessary and Proper Clause. *Hankins v. Lyght*, 441 F.3d 96,  
15 105 (2d Cir. 2006). RFRA’s constitutional bases thus “do[] not implicate the same  
16 concerns” as those relevant to RLUIPA and the Spending Clause, which we  
17 addressed in *Gonyea*. *Mack*, 839 F.3d at 303-04; *see also Tanvir*, 128 F. Supp. 3d at  
18 775 n. 19. Because the animating principles underlying our decision in *Gonyea* are

1 absent in the instant case, our holding here—that RFRA permits the recovery of  
2 money damages from federal officials sued in their individual capacities—and  
3 our holding in *Gonyea*—that RLUIPA does not permit the recovery of money  
4 damages from state officials sued in their individual capacities—are entirely  
5 consistent.

6 Defendants complain that our holding in this case makes the phrase  
7 “appropriate relief” in RFRA into a chameleon. See *United States v. Santos*, 553  
8 U.S. 507, 522 (2008) (plurality op.) (stating that the Supreme Court has “forcefully  
9 rejected” the “interpretive contortion” of “giving the same word, in the same  
10 statutory provision, different meanings in different factual contexts”) (emphasis  
11 omitted). But that is incorrect. To the contrary, we are tasked with interpreting  
12 the meaning of RFRA’s phrase “appropriate relief,” an inquiry that is “inherently  
13 context-dependent.” *Sossamon*, 563 U.S. at 286. Indeed, the word ‘appropriate’  
14 does not change its meaning; rather, the question addressed in each of these  
15 various contexts is what sort of relief is ‘appropriate’ in that particular situation.  
16 And, since the relevant animating principles vary appreciably across legal  
17 contexts, the meaning of ‘appropriate’ may well take on different meanings in  
18 different settings.



1           At the time of the district court decision below, neither the Supreme Court  
2 nor any of our sister circuits had squarely addressed whether RFRA provides for  
3 money damages.<sup>10</sup> Since then, however, the Third Circuit has held, as we do  
4 now, that RFRA authorizes individual capacity suits against federal officers for  
5 money damages. *See Mack*, 839 F.3d at 304.

6           In *Mack*, the Third Circuit reached that holding by applying the *Franklin*  
7 presumption—that any “appropriate relief” is available unless Congress  
8 expressly indicates otherwise. *Id.* at 302-03. The court found that its conclusion  
9 was buttressed by the fact that, in enacting RFRA, Congress used the exact  
10 language (“appropriate relief”) discussed by the Supreme Court in *Franklin*. *Id.* at  
11 303. “Congress enacted RFRA one year after *Franklin* was decided and was  
12 therefore well aware that ‘appropriate relief’ means what it says, and that,

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<sup>10</sup> The Seventh Circuit has previously decided that a plaintiff was entitled to sue state prison officials in their individual capacities for damages. *Mack v. O’Leary*, 80 F.3d 1175, 1177 (7th Cir. 1996) (Posner, J.), *vacated on other grounds*, 522 U.S. 801 (1997). Before reaching that conclusion, the court noted that RFRA “says nothing about remedies except that a person whose rights under the Act are violated ‘may assert that violation as a claim or defense in a judicial proceeding and obtain *appropriate* relief against a government.’” *Id.* (emphasis in original) (quoting 42 U.S.C. § 2000bb-1(c)). The court also acknowledged that the defendants in that case did not contest the availability of damages as a remedy under RFRA. *Id.*

1 without expressly stating otherwise, all appropriate relief would be available.”  
2 *Id.* at 303.<sup>11</sup> In light of RFRA’s purpose of providing broad religious liberty  
3 protections, the Third Circuit concluded that it saw “no reason why a suit for  
4 money damages against a government official whose conduct violates RFRA  
5 would be inconsistent with” that purpose. *Id.*<sup>12</sup>

6 We agree with the Third Circuit’s reasoning in *Mack* and adopt it here. In  
7 particular, we reject a strained reading of “appropriate relief” that would be less  
8 generous to plaintiffs under RFRA than under implied rights of action, and thus  
9 would undermine Congress’s intention to “provide broad religious liberty  
10 protections.” *Id.* Further, as one district court has pointed out, “[i]t seems

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<sup>11</sup> Of note, the Third Circuit in *Mack* stated that “[b]ecause Mack brings his RFRA claim against only [two federal officers] in their individual capacities, the federal government’s sovereign immunity to suits for damages is irrelevant here.” *Id.* at 302 n. 92.

<sup>12</sup> The court in *Mack* drew further support from the similarities between RFRA and 42 U.S.C. § 1983, which has long permitted money damages against state officials sued in their individual capacities. *Id.* By comparison, the court distinguished its earlier decision in *Sharp v. Johnson*, 669 F.3d 144, 154-55 (3d Cir. 2012), in which it found that RLUIPA did not provide for money damages against state officials sued in their individual capacities, by pointing out how Congress’s constitutional authorization for RLUIPA (Commerce Clause and Spending Clause) poses concerns not relevant to its analysis of RFRA (§ 5 of Fourteenth Amendment).

1 unlikely that Congress would *restrict the kind of remedies* available to plaintiffs  
2 who challenge free exercise violations in the same statute it passed to *elevate the*  
3 *kind of scrutiny* to which such challenges would be entitled.” *Jama*, 343 F. Supp.2d  
4 at 374-75 (emphasis in original). Given that Congress has not specified that  
5 individual capacity suits for money damages should be barred under RFRA, and  
6 that, unlike in the RLIUPA context, no constitutional conflict prevents their  
7 application, we find that such suits are wholly appropriate under this statutory  
8 scheme.

9 ii. The *Franklin* Presumption Is Not Confined to Statutes with  
10 Implied Rights of Action  
11

12 The district court below found that the *Franklin* presumption did not apply  
13 in the instant case. *Tanvir*, 128 F. Supp.3d at 779. In making that determination,  
14 the district court noted that *Franklin* “required the Supreme Court to interpret the  
15 scope of an *implied* statutory right of action.” *Id.* (emphasis in original). By  
16 comparison, Congress created an express private right of action in RFRA. *See* 42  
17 U.S.C. § 2000bb-1(c). The district court held that “the *Franklin* presumption is  
18 thus inapplicable” to RFRA “and the meaning of ‘appropriate relief’ must be  
19 discerned using the traditional tools of statutory construction.” *Tanvir*, 128 F.

1 Supp.3d at 779. Applying those tools, the district court discerned that Congress  
2 lacked an intent to permit money damages under RFRA through its use of the  
3 phrase “appropriate relief.” *Id.*

4 Although *Franklin* indeed considered the availability of damages under a  
5 statute with an implied private right of action, we are not convinced that the  
6 district court’s distinction is correct. The logical inference, in our view, runs the  
7 other way: one would expect a court to be more cautious about expanding the  
8 scope of remedies available for a private right of action that is *not* explicitly  
9 provided by Congress, than in determining what remedies are available for a  
10 right of action that Congress has expressly created. This is particularly true  
11 where, in creating the right of action, Congress has also explicitly authorized  
12 courts to provide any “appropriate relief,” without limitation. In fact, the Court  
13 in *Franklin* recounted its own case, *Kendall v. United States ex rel. Stokes*, in which  
14 it held that damages were available under a statute with an explicit private right  
15 of action where that statute failed to specify the remedies available. 37 U.S. (12  
16 Pet) 524, 624 (1838) (stating that to find otherwise would present “a monstrous  
17 absurdity in a well organized government, that there should be no remedy,  
18 although a clear and undeniable right should be shown to exist”).

1           As discussed above, the Third Circuit in *Mack* applied the *Franklin*  
2 presumption in determining that RFRA’s express private right of action  
3 permitted the recovery of money damages against individuals sued in their  
4 individual capacities. *Mack*, 839 F.3d at 303-04; *see also Patel*, 125 F. Supp.3d at 53  
5 n. 1 (“[T]he mere mention of remedies [in RFRA] does not rebut the [*Franklin*]  
6 presumption;” rather, the phrase “appropriate relief” “does nothing more than  
7 authorize what courts applying *Franklin* presume, and it falls far short of an  
8 express indication that damages are prohibited.”) (internal punctuation omitted).  
9 Other courts have applied the *Franklin* presumption in the context of statutes  
10 containing express private rights of action. *See, e.g., Reich v. Cambridgeport Air.*  
11 *Sys.*, 26 F.3d 1187, 1191 (1st Cir. 1994) (applying *Franklin* presumption to  
12 conclude that “all appropriate relief” under Section 11 of the Occupational Safety  
13 and Health Act included money damages); *Ditulio v. Boehm*, 662 F.3d 1091, 1098  
14 (9th Cir. 2011) (holding that punitive damages were available under the  
15 Trafficking Victims Protection Act, which permits the recovery of “damages,”  
16 because the court “follow[s] the ‘general rule’ that we should award ‘any  
17 appropriate relief in a cognizable cause of action brought pursuant to a federal  
18 statute’” (quoting *Franklin*, 503 U.S. at 71)).

1           We disagree with the district court’s decision to limit the application of the  
2 *Franklin* presumption in this case. The *Franklin* presumption need not be confined  
3 to only those cases interpreting the remedies available under an implied private  
4 right of action. To the contrary, “[t]he same presumption applies here—more so,  
5 we think, because Congress expressly stated that a claimant may obtain  
6 ‘appropriate relief’ against a government—the exact language used in *Franklin*.”  
7 *Mack*, 839 F.3d at 303. Thus, we reject the district court’s position that the *Franklin*  
8 presumption does not apply in interpreting the meaning of “appropriate relief”  
9 under RFRA.

10                           iii. Legislative History

11           Although we conclude that the *Franklin* presumption extends to express  
12 private rights of action, the presumption can be rebutted. Pursuant to *Franklin*,  
13 “we presume the availability of all appropriate remedies unless Congress has  
14 expressly indicated otherwise,” 503 U.S. at 66, and our analysis of whether  
15 Congress intended to limit the application of this general principle will vary  
16 depending on whether the right of action is implied or explicit.

17           Where a statutory cause of action is implied, it is futile to resort to the  
18 statutory text and legislative history, because Congress usually has not spoken

1 about remedies applicable to a right that the federal courts, rather than Congress,  
2 created. *See id.* at 71 (“[T]he usual recourse to statutory text and legislative  
3 history. . . necessarily will not enlighten our analysis.”). Accordingly, our  
4 analysis of Congress’s intent in such contexts “is *not* basically a matter of  
5 statutory construction,” but rather a matter of “evaluat[ing] the state of the law  
6 when the Legislature passed [the statute].” *Id.* (emphasis in original).

7 On the other hand, where the private right of action is express, the  
8 statutory text and legislative history may enlighten our understanding. The  
9 question thus becomes whether these interpretative sources exhibit a “clear  
10 direction” by Congress that the federal courts lack “the power to award any  
11 appropriate relief in a cognizable cause of action brought pursuant to a  
12 federal statute.” *Id.* at 70-71. We conclude that neither the statutory text nor the  
13 legislative history provides such a clear direction here.

14 As noted above, the district court supported its conclusion in part by  
15 referencing legislative history indicating that RFRA was intended solely to  
16 reverse the Supreme Court’s decision in *Smith*. *See Tanvir*, 128 F. Supp. 3d at 778-  
17 80. For instance, the Senate Committee Report, which discusses the background  
18 and purpose for RFRA, states that “the purpose of this act is only to overturn the

1 Supreme Court’s decision in *Smith*,” S. Rep. No. 103-111, at 12 (1993), and by  
2 doing so restore the compelling interest test to free exercise claims, *id.* at 8. The  
3 House Committee Report similarly focuses on the effect of the *Smith* decision and  
4 the resulting outcome that free exercise claims receive the “the lowest level of  
5 scrutiny employed by the courts.” H.R. Rep. No. 103-88, at 5-6 (1993).

6 The Senate and House Committee Reports, however, are not conclusive as  
7 to the meaning of RFRA’s statutory text. The statutory text of RFRA reflects a  
8 dual purpose: “to restore the compelling interest test” applied by the Supreme  
9 Court in free exercise cases before *Smith*, and “to provide a claim or defense to  
10 persons whose religious exercise is substantially burdened by government.” 42  
11 U.S.C. § 2000bb(b). In accomplishing the latter purpose, Congress also codified a  
12 statutory cause of action to bring claims against officials in their individual  
13 capacities—a type of action never explicitly authorized (or foreclosed) by the  
14 Supreme Court’s free exercise jurisprudence. Congress accordingly went beyond  
15 merely restoring the compelling interest test. It removed ambiguity about who  
16 could be held liable for violations of religious exercise.

17 Indeed, the Supreme Court has noted other ways in which RFRA goes  
18 beyond restoring the Court’s pre-*Smith* jurisprudence. For instance, in *Burwell*,



1 134 S. Ct. 2751, the Court observed that “RFRA’s least restrictive means  
2 requirement was not used in the pre-*Smith* jurisprudence RFRA purported to  
3 codify. On this understanding of our pre-*Smith* cases, RFRA did more than  
4 merely restore the balancing test used in the *Sherbert* line of cases; it provided  
5 even broader protection for religious liberty than was available under those  
6 decisions.” *Id.* at 2761 n. 3 (internal quotation marks and citation omitted).

7         The legislative history further fails to provide an “express[.]” and “clear  
8 direction” that Congress intended to preclude litigants from seeking damages in  
9 these individual capacity suits. *Franklin*, 503 U.S. at 66, 70. To be sure, the House  
10 and Senate Committee Reports each contain similar language stating, “[t]o be  
11 absolutely clear, the bill does not expand, contract or alter the ability of a  
12 claimant to obtain relief in a manner consistent with free exercise jurisprudence,  
13 including Supreme Court jurisprudence, under the compelling governmental  
14 interest test prior to *Smith*.” H.R. Rep. No. 103-88, at 8; *see also* S. Rep. No. 103-  
15 111, at 12 (“To be absolutely clear, the act does not expand, contract or alter the  
16 ability of a claimant to obtain relief in a manner consistent with the Supreme  
17 Court[’]s[.] free exercise jurisprudence under the compelling governmental  
18 interest test prior to *Smith*.”). It does not follow, however, that Congress therefore

1 intended to limit the remedies available for RFRA violations.

2 As an initial matter, the broader legislative history shows that the House  
3 and Senate Committee Reports were not using the term “relief” to refer to  
4 remedies. Rather, the reports were concerned with claimants bringing particular  
5 causes of action. *See generally* Douglas Laycock & Oliver S. Thomas, *Interpreting*  
6 *the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 236-39 (1994). During the  
7 House and Senate hearings, several religious and social organizations raised  
8 concerns that claimants would use RFRA to challenge restrictions on abortion,  
9 tax exemptions, and government funding for religious organizations.<sup>13</sup> These  
10 concerns were sufficiently serious that several key Republican representatives  
11 withdrew their support for the bill and introduced legislation that explicitly  
12 prohibited claimants from using the statute to affect those issues. *Id.*; *see also* H.R.  
13 4040, 102d Cong. § 3(c)(2) (1991).

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<sup>13</sup> *See Religious Freedom Restoration Act of 1991: Hearings on HR. 2797 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 33-35, 40-43 (1992) (statement of Mark E. Chopko, Gen. Counsel, United States Catholic Conference); *id.* at 270-301 (statement of James Bopp, Jr., Gen. Counsel, National Right to Life Committee, Inc.); *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the Sen. Comm. on the Judiciary*, 102d Cong., 99-115 (1992) (statement of Mark E. Chopko, Gen. Counsel, United States Catholic Conference); *id.* at 203-37 (statement of James Bopp, Jr., Gen. Counsel, National Right to Life Committee, Inc.).

1            RFRA’s lead sponsors subsequently agreed to compromise language in the  
2 House and Senate Committee Reports addressing these concerns, and made clear  
3 that the act “does not expand, contract or alter the ability of a claimant to obtain  
4 relief” in accordance with the federal courts’ free exercise jurisprudence. Laycock  
5 & Thomas, *supra*, at 236-39; *see also* S. Rep. No. 103-111, at 12; H.R. Rep, No. 103-  
6 88, at 8. The reports accordingly stated that claims challenging abortion  
7 restrictions should be adjudicated pursuant to the Supreme Court’s decision in  
8 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and  
9 that the bill does “not change the law” determining whether religious  
10 organizations may receive public funding or enjoy tax exemptions. S. Rep. No.  
11 103-111, at 12; HR, Rep. No. 103-88, at 8. Taken in context, it is thus clear that  
12 Congress was not concerned with limiting plaintiffs’ available remedies under  
13 the act—it was concerned with preventing plaintiffs from pursuing certain  
14 causes of action.<sup>14</sup>

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<sup>14</sup> The floor debate likewise confirms that Congress intended to limit the causes of action that could be brought under the statute. Representative Henry Hyde stated that he had offered amendments to RFRA because he was concerned that the legislation would “create an independent statutory basis” for individuals to challenge restrictions on abortion, social service programs operated by religious institutions with public funds, and the tax-exempt status of religious institutions.

1           Moreover, even if the compromise language in the House and Senate  
2 Committee Reports could be read as excluding certain remedies from RFRA’s  
3 scope, it does not clearly indicate that Congress intended to exclude an  
4 individual damages remedy. As previously noted, the Senate Committee Report  
5 states that the act does not “alter the ability of a claimant to obtain relief in a  
6 manner consistent with the Supreme Courts’[] free exercise jurisprudence ...  
7 prior to *Smith*.” S. Rep. No. 103-111, at 12. The Supreme Court, in turn, never  
8 ruled out the possibility of plaintiffs’ bringing individual damages claims for free  
9 exercise violations before *Smith* was decided. To the contrary, in *Bivens v. Six*  
10 *Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the  
11 Supreme Court held that victims of Fourth Amendment violations could pursue  
12 individual damages claims against officials, and it extended this principle in  
13 *Carlson v. Green*, 446 U.S. 14, (1980), to permit individual damages claims for  
14 constitutional violations unless the defendants could show that Congress

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139 Cong. Rec. 103, 9682 (1993). Representative Hyde further stated that his concerns were “resolved either through explicit statutory changes or through committee report language,” which “ma[de] clear” that “such claims are not the appropriate subject of litigation” under RFRA, and that the “bill does not expand, contract, or alter the ability of a claimant to obtain relief” consistent with free exercise jurisprudence prior to *Smith*. *Id.*

1 “provided an alternative remedy which it explicitly declared to be a substitute  
2 for recovery directly under the Constitution,” or there are “special factors  
3 counseling hesitation in the absence of affirmative action by Congress,” *id.* at 18-  
4 19 (emphasis omitted). It was therefore at least possible at the time that Congress  
5 passed RFRA that an individual damages claim would have been available for a  
6 free exercise violation. Given this potential, we cannot say that the Senate  
7 Committee Report expressly intended to exclude such a remedy when it stated  
8 that it did not intend to “expand” or “alter” claimants’ ability to obtain relief. S.  
9 Rep. No. 103-111, at 12.<sup>15</sup>

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<sup>15</sup> To be sure, the Supreme Court has subsequently shown “caution toward extending *Bivens* remedies into any new context,” *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001), and “[s]ince *Carlson* in 1980, the Supreme Court has declined to extend the *Bivens* remedy in any new direction at all,” *Arar v. Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009). This trend, however, was not clearly apparent at the time of RFRA’s passage because the Court had recognized *Bivens* claims in three instances and denied such claims in four. *See id.* at 571-72. Additionally, although the Supreme Court in *Bush v. Lucas*, 462 U.S. 367, 368 (1983), held that federal employees could not bring *Bivens* claims against their superiors, the decision was narrow, and based on federal employees’ existing access to “an elaborate remedial system” that protected their constitutional rights, *id.* at 388. That remedial framework is not applicable here, because the plaintiffs are not federal employees. Moreover, even if the trend away from extending *Bivens* were obvious when RFRA was passed, it still falls short of the Supreme Court’s clearly foreclosing an individual damages remedy for free

1           Furthermore, even if the Senate Committee Report could be read to limit  
2 RFRA's remedies to those explicitly authorized by the Supreme Court prior to  
3 *Smith*, the approach of the House Committee Report is not necessarily so narrow.  
4 Unlike the Senate Committee Report, which authorizes relief "consistent with the  
5 Supreme Courts'[] free exercise jurisprudence," S. Rep. No. 103-111, at 12, the  
6 House Committee Report authorizes relief so long as it is "consistent with free  
7 exercise jurisprudence, including Supreme Court jurisprudence," H.R. Rep. No.  
8 103-88, at 8. The House Committee Report therefore appears to have  
9 contemplated providing a broad array of relief consistent not only with Supreme  
10 Court jurisprudence but that of the lower courts as well. We thus find it highly  
11 relevant that at the time of RFRA's passage, several Courts of Appeals had held  
12 that plaintiffs could pursue individual damages claims for violations of their free  
13 exercise rights. *See Caldwell v. Miller*, 790 F.2d 589, 607-608 (7th Cir. 1986); *Jihad v.*  
14 *O'Brien*, 645 F.2d 556, 558 n. 1 (6th Cir. 1981); *see also Paton v. La Prade*, 524 F.2d  
15 862, 870 (3d Cir. 1975) (holding that *Bivens* claims are broadly available for First  
16 Amendment violations); *Scott v. Rosenberg*, 702 F.2d 1263, 1271 (9th Cir. 1983)

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exercise violations. We therefore conclude that it would not be a basis for finding the *Franklin* presumption inapplicable here.

1 (assuming, without deciding, that the plaintiff could recover damages if his free  
2 exercise rights had been violated).

3 Accordingly, we do not believe that the legislative history evinces a clear  
4 and express indication that Congress intended to exclude individual damages  
5 claims from the scope of RFRA's available relief, and we therefore conclude that  
6 the *Franklin* presumption is applicable.

## 7 **VI. Qualified Immunity**

8  
9 Having held that RFRA authorizes a plaintiff to sue federal officers in their  
10 individual capacities for money damages, we consider whether those officers  
11 should be shielded by qualified immunity.

12 At the panel's request, the parties submitted supplemental briefing  
13 addressing two questions: (1) "whether, assuming *arguendo* that RFRA authorizes  
14 suits against officers in their individual capacities, [Defendants] would be  
15 entitled to qualified immunity," and (2) "whether *Ziglar v. Abbasi*, No. 15-1358,  
16 2017 WL 2621317 (June 19, 2017), applies in any relevant way to this question or  
17 the other questions presented in this appeal." Order, *Tanvir v. Tanzin*, No. 16-  
18 1176 (2d Cir. 2017), Dkt. No. 83; *see also* Post-Argument Ltr. Brs., *Tanvir v. Tanzin*,  
19 No. 16-1176 (2d Cir. 2017), Dkt Nos. 89-90, 93-94.

1           We are sensitive to the notion that qualified immunity should be resolved  
2   “at the earliest possible stage in the litigation.” *Hunter v. Bryant*, 502 U.S. 224, 227  
3   (1991). Indeed, we have, in some circumstances, “permitted the [qualified  
4   immunity] defense to be successfully asserted in a Rule 12(b)(6) motion.”  
5   *McKenna v. Wright*, 386 F.3d 432, 435 (2d Cir. 2004). Nevertheless, as a general  
6   matter, “[i]t is our practice in this Circuit when a district court fails to address the  
7   qualified immunity defense to remand for such a ruling.” *Eng v. Coughlin*, 858  
8   F.2d 889, 895 (2d Cir. 1988) (citing *Francis v. Coughlin*, 849 F.2d 778, 780 (2d Cir.  
9   1988)).

10           Here, the district court decision below did not address whether  
11   Defendants were entitled to qualified immunity. Similarly, until the panel  
12   prompted the parties at oral argument and in its post-argument order, neither  
13   side fully addressed or briefed the issue of qualified immunity on appeal. In the  
14   absence of a more developed record, we decline to address in the first instance  
15   whether the Defendants are entitled to qualified immunity. We remand to the  
16   district court to make such determination in the first instance.

17

18



**CONCLUSION**

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For the foregoing reasons, we reverse the judgment of the district court

and remand for further proceedings.