DOES THE RELIGIOUS FREEDOM RESTORATION ACT AUTHORIZE DAMAGES FOR PERSONAL CAPACITY CLAIMS?

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I. INTRODUCTION

The Religious Freedom Restoration Act ("RFRA")[1] provides that a "person whose religious exercise has been burdened in violation of this section may assert that violation as a claim . . . in a judicial proceeding and obtain appropriate relief against the government."[2] RFRA was meant not only to provide individuals with a means of obtaining relief, but also to signal Congress' intent to broaden the statutory protections encompassing religious liberty.[3] For claimants seeking the "appropriate relief" provided under the Religious Freedom Restoration Act, the statute articulates a balancing test that courts are to apply in deciding whether the government may abridge an individual's religious freedom.[4] Importantly, the statute has defined "government" broadly enough to encompass not only branches and departments of the government, but also government officials or those "acting under the color of law."[5]

Much of the law regarding claims made under the Religious Freedom Restoration Act is settled, particularly that concerning the viability of claims against federal officials in their official capacity.[6] In an official capacity[7] suit—regardless of the named

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[1] Religious Freedom Restoration Act 42 U.S.C. § 2000bb *et seq.* (1993).

[2] 42 U.S.C. § 2000bb-1(c).

[3] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761 n.3 (2014).

[4] "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

[5] "[T]he term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States . . ." 42 U.S.C. § 2000bb-2(1).

[6] *See e.g.* Webman v. Fed. Bureau of Prisons, 441 F.3d 1022 (D.C. Cir. 2006); Oklevueha Native Am. Church of Haw., Inc. v. Holder, 676 F.3d 829 (9th Cir. 2012); Davila v. Gladden, 777 F.3d 1198 (11th Cir. 2015).

defendant—the suit is essentially brought against the United States and subject to sovereign immunity.[8] While sovereign immunity may be waived by a statute's text, the Supreme Court has concluded that "appropriate relief" does not by itself constitute an express waiver of sovereign immunity.[9] Conversely, the remedies generally available for claims against federal officials in their personal capacity are not restricted by sovereign immunity.[10] Yet, this question—whether "appropriate relief" provides for remedies beyond injunctive relief in personal capacity suits—has yet to be addressed by any federal court of appeals.[11] Despite a dearth of pertinent precedent among the higher federal courts, several district courts have affirmatively held that the "appropriate relief" language used in RFRA allows for damages in personal capacity suits.[12] Recently, however, the United States District Court for the Southern District of New York in *Tanvir v. Lynch* held that damages were not an available remedy under RFRA,[13] rejecting other jurisdictions' analysis within this context.[14]

In September 2015, *Tanvir v. Lynch* analyzed whether damages were available in a personal capacity suit under RFRA to lawful Muslim-Americans who were placed on the "No Fly" list in retaliation for declining to serve as FBI "informants within their American Muslim communities and places of worship."[15] Plaintiffs' complaint alleged multiple claims; their RFRA personal capacity claim is the primary focus of this article.[16] Defendants

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[7] *See* Tanvir v. Lynch, 128 F. Supp. 3d 756, 765-67 (S.D.N.Y. 2015) (distinguishing claims against officials in their official capacity to those against officials in their personal capacity).

[8] Jama v. United States INS, 343 F. Supp. 2d 338, 373 n. 24 (D.N.J. 2004).

[9] Sossamon v. Texas, 563 U.S. 277, 288–89 (2011).

[10] Various other federal statutes provide damages remedies in private claims against federal officers in their personal capacity. *See* 18 U.S.C. § 2520(b) (1968); 42 U.S.C. § 1983 (1979); 42 U.S.C. § 1985 (1871); 47 U.S.C. § 605(e)(3) (1934); 50 U.S.C. § 1810 (1978).

[11] "[N]either the Supreme Court nor any of the thirteen court of appeals has held that RFRA provides for money damages." *Tanvir*, 128 F. Supp. 3d at 775.

[12] *See* Patel v. Bureau of Prisons, 125 F. Supp. 3d 44 (D.D.C. 2015); Jama, 343 F. Supp. 2d 338 (D.N.J. 2004); Lepp v. Gonzales, No. C-05-0566, 2005 U.S. Dist. LEXIS 41525 (N.D. Cal. Aug. 2, 2005); Padilla v. Yoo, 633 F. Supp. 2d 1005 (N.D. Cal. 2009), *as amended*, (June 18, 2009), *rev'd on other grounds*, 678 F.3d 748 (9th Cir. 2012).

[13] *Tanvir*, 128 F. Supp. 3d at 781.

[14] *Id.* at 779-80.

[15] *Id.*, at 759-60.

[16] *Id*. at 759.

disputed their amenability to a personal capacity suit under RFRA[17] and maintained that "appropriate relief" does not explicitly provide for money damages.[18] Surprisingly and despite persuasive authority to the contrary, the defense's argument successfully persuaded the court, resulting in the dismissal of plaintiffs' claim.[19]

This article analyzes why the court in *Tanvir v. Lynch* departed from other jurisdictions[20] in holding that that "appropriate relief" does not include money damages.[21] This article begins by offering a brief overview of the birth of RFRA and how other courts over time came to interpret "appropriate relief." Ultimately, however, this article argues that Congress intended personal capacity suits under RFRA to allow for monetary damages and thus that *Tanvir v. Lynch* was incorrectly decided.

II. LEGAL BACKGROUND

A. The Birth of RFRA & "Appropriate Relief"

In 1990, the Supreme Court's watershed *Employment Division v. Smith*[22] decision "virtually eliminated"[23] the balancing test[24] that courts previously employed to adjudicate free exercise claims under RFRA.[25] In response to *Smith*, Congress enacted the Religious Freedom Restoration Act "to [not only] provide a claim[26] . . . to persons whose religious exercise is substantially burdened," but also to reinstate the balancing test that *Smith* had abrogated.[27] Congress, in enacting the RFRA, noted that the "compelling interest test as set forth in prior Federal court rulings

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17 *Id.* at 774 n. 17.

18 *Id.* at 774.

19 *Tanvir*, 128 F. Supp. 3d at 780-81.

20 *Id.* at 780, n. 23.

21 *Id.* at 780.

22 Employment Division v. Smith, 494 U.S. 872 (1990).

23 Religious Freedom Restoration Act, 42 U.S.C. §2000bb(a)(4) (1993).

24 The statute states that the law's purpose is "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . ." 42 U.S.C. § 2000bb(b)(1).

25 42 U.S.C. §2000bb(a)(4) (1993).

26 The full text of this section of the statute states: "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b)(2) (1993). While Section 2 of RFRA also provides a defense as well as a claim, for the purposes of this article, only the availability of a private claim of action is pertinent.

27 *Smith*, 494 U.S. 872, 882–85.

is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[28]

In 1997, the Supreme Court held RFRA unconstitutional as applied to state and local governments because it exceeded Congress' power under the Enforcement Clause of the Fourteenth Amendment.[29] Congress reacted to the *City of Bourne* decision by enacting the Religious Land Use and Institutionalized Persons Act[30] pursuant to its Commerce Clause and Spending Clause authority.[31] Notably, much of the language used in RLUIPA is taken from RFRA, such as the creation of an express cause of action and the availability of "appropriate relief" as a remedy.[32] As a result, courts will often apply case law decided under RLUIPA to issues that arise under RFRA.[33] However, there is an important distinction when applying RLUIPA decisions to RFRA claims that stems from the differing Congressional authority under which they were enacted.[34] Courts are wary of providing damages against federal officials in personal capacity suits under RLUIPA because it could raise questions as to whether Congress exceeded its authority under the Spending Clause.[35] Conversely, the constitutional question facing personal capacity suits under RLUIPA does not apply to RFRA, as Congress may "carve out a religious exemption from otherwise neutral, generally applicable laws based on its power to enact the underlying statute in the first place."[36]

B. Analyzing "Appropriate Relief" Under RFRA

In 2004, the issue of whether money damages could qualify as "appropriate relief" against a federal official in his personal capacity was for the first time substantively addressed by the United States District Court for the District of New Jersey in *Jama v. United States INS*.[37] The *Jama* court began its analysis by

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28 42 U.S.C. § 2000bb(a)(5).

29 City of Boerne v. Flores, 521 U.S. 507 (1997).

30 42 U.S.C. § 2000cc *et seq.* (2000).

31 *Sossamon*, 563 U.S. at 281.

32 *Id.*

33 *Tanvir*, 128 F. Supp. 3d at 775 n. 18 (*citing* Redd v. Wright, 597 F.3d 532 at 535 n. 2).

34 *See generally* Nelson v. Miller, 570 F.3d 868, 889 (7th Cir. 2009).

35 *Id.*

36 *Patel*, 125 F. Supp. 3d at 52 (*quoting* Guam v. Guerrero, 299 F.3d 1210, 1220–21 (9th Cir. 2002)).

37 343 F. Supp. 2d. at 367–76.

addressing whether the RFRA authorized personal capacity suits against federal officials.[38] The court noted that although the statute does not explicitly authorize personal capacity suits,[39] the language of the text plainly indicated Congress' intention to provide for claims against both individuals, such as federal officials, and governmental bodies.[40] Similarly, the statute's applicability to "all [f]ederal law, and the implementation of that law,"[41] was interpreted by the *Jama* court as referencing both legislation and conduct that substantially burdens free exercise.[42] Taken together, the *Jama* court found that the RFRA encompassed claims against the conduct of federal officials, which are the subject of a personal capacity suit.[43]

Next, the court interpreted whether the "appropriate relief" language used in RFRA allowed for monetary damages.[44] Ultimately, the court found RFRA implicitly authorized money damages for several reasons.[45] First, while the statute's language does not explicitly provide a damages remedy, neither does it explicitly exclude it.[46] Second, as RFRA was intended to "re-invigorate the protection of free exercise rights after . . . *Smith*," it was unlikely Congress intended to eliminate a damages remedy[47] while elevating the standard of scrutiny.[48] Third, while no other court had granted damages within this context, courts that had considered the issue implied its availability by basing their denials on unrelated deficiencies in the claims.[49] For these reasons, the *Jama* court granted the claimant a damages remedy in their personal capacity suit under RFRA.[50]

Over the ensuing years, several federal district courts addressing this issue have adopted or arrived at the *Jama* court's

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38 *Id*. at 371–72.

39 *Id*. at 371, n. 20–21.

40 *Id*. at 372.

41 *Id*. (*quoting* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-3(a) (1993).

42 *Jama*, 343 F. Supp. 2d. at 372.

43 *Id*.

44 *Id*. at 373–76.

45 *Id*.

46 *Id*. at 374.

47 "Courts have always recognized § 1983 and Bivens claims for money damages against officials for violation of the Free Exercise Clause." *Jama*, 343 F. Supp. 2d. at 374.

48 *Id*. at 374–75.

49 *Id*. at 375.

50 *Id*. at 376.

interpretation of appropriate relief.[51] In *Patel v. Bureau of Prisons*, for example, the United States District Court for the District of Columbia arrived at the same conclusion as the *Jama* court, but through a different analysis of the statute.[52] In *Patel*, the court found that the "only significant purpose for an individual-capacity claim," as opposed to an official-capacity claim, "would be to seek damages – damages that are unavailable in RFRA actions against the sovereign."[53] The court supported this interpretation of the statute by relying on the 1992 Supreme Court case, *Franklin v. Gwinnett County Public Schools*,[54] which set forth rules to follow in determining "what remedies are available under a statute that provides a private right of action."[55] The *Patel* court, following the rule that courts are to "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise,"[56] found that because the statutes text did not "expressly" prohibit a damages remedy, that such a remedy would be "appropriate" in personal capacity suits under RFRA.[57]

III. ANALYSIS

A. Factual Background

Plaintiffs Muhammad Tanvir, Jameel Albighah, Naveed Shinwari, and Aswais Sajjad brought suit against various governmental officials, alleging, among other things, the unjust burdening of their free exercise of religion.[58] The factual underpinnings that support each plaintiff's claimed violations were similar,[59] as they were all approached by agents of the Federal Bureau of Investigations (FBI) and asked to become informants.[60] Plaintiffs refused, as they believed "serving as informants would contradict their sincerely held religious beliefs."[61] Due to the similar factual characteristics of each plaintiff's claim, the court described Plaintiff Tanvir's situation

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51 *See* cases cited *supra* note 13 and accompanying text.
52 Patel v. Bureau of Prisons, 125 F. Supp. 3d 44, 53 n.1 (D.D.C. 2015).
53 *Id.* at 17–18.
54 503 U.S. 60 (1992).
55 *Patel*, 125 F. Supp. 3d at 53 (quoting *Franklin*, 503 U.S. at 65).
56 *Id.*
57 *Id.*
58 Tanvir v. Lynch, 128 F. Supp. 3d 756, 759 (S.D.N.Y. 2015).
59 *Id.* at 761.
60 *Id.* at 759.
61 *Id.*

with greater detail in lieu of recounting the four situations separately.[62]

Plaintiff Tanvir, at all times relevant to his claim, was a "lawful permanent resident" of the United States, as were his fellow plaintiffs.[63] Notably, while Tanvir was living and working in the United States, the majority of his close family members remained in Pakistan.[64] Following Tanvir's initial refusal to act as an FBI informant, Tanvir was approached on several additional occasions, by both named and unnamed FBI agents, and asked to reconsider his decision.[65] During this time period, at least one of Tanvir's attempts to fly was denied, "leaving him unable to visit loved ones who live abroad."[66] Tanvir believed he was placed on the "No Fly List" in retaliation to his refusals to act as an informant, despite the fact that he "posed no threat to aviation security."[67] In response, plaintiffs brought suit, seeking damages from the named and unnamed FBI agents under RFRA.[68] Plaintiffs argued that the FBI agents should be held personally accountable for their retaliatory actions, which caused each plaintiff significant financial and personal hardship.[69]

B. Discussion

The United States District Court for the Southern District of New York presented many strong arguments in *Tanvir v. Lynch*; yet its conclusion is ultimately flawed due to its misapprehension of Congressional intent in enacting RFRA and improper reliance on RLUIPA case law. Although the *Tanvir* court rebutted a primary premise upon which the court in *Jama v. United States INS* rests,[70] applying the reasoning of *Patel v.*

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62 *Id.* at 761.

63 *Tanvir*, 128 F. Supp. 3d at 761.

64 *Id.*

65 *Id.* at 761-63.

66 *Id.* at 759.

67 *Id.*

68 *Id.*

69 *Tanvir*, 128 F. Supp. 3d at 759.

70 "But [the *Jama*] decision, and subsequent district court opinions adopting its reasoning, rest on a crucial yet flawed premise – that '[c]ourts have always recognized § 1983 and Bivens claims for money damages against officials for violation of the Free Exercise Clause.'" *Id.* at 780 (quoting Jama v. U.S. INS, 343 F. Supp. 2d 338, 374 (D.N.J. 2004).

Bureau of Prisons repairs any alleged deficiency in the court's overall argument.[71]

1. Congressional Intent

The *Tanvir* court began its analysis by addressing whether Congress intended to create a damages remedy in its enactment of RFRA.[72] Rather than interpreting Congress' intent through the statute's text,[73] the court initially looked to the circumstances surrounding the statute's enactment and its legislative history.[74] In analyzing the statute's background, the court acknowledged that the enactment of RFRA had broadened the protections for religious liberty.[75] Nonetheless, it found that the increased protections "did not include expanding the scope of remedies available as compared with those previously available for constitutional violations."[76] In support of its interpretation, the court referred to the statute's legislative history.[77] Specifically, the court selectively quoted the Senate Judiciary Committee's report, which states, in part, "[that] the act does not expand, contract or alter the ability of a claimant to obtain relief."[78] Using this quoted language as a backdrop, the court concluded that "RFRA did not displace the existing remedial scheme," as Congress lacked the intent to create a remedy that had not previously been available.[79]

The *Tanvir* court's interpretation of Congress' intent contains a significant flaw; specifically, the weight it gave to the language from the Senate Judiciary Committee's report. The problem stems from the applicability of the quoted text to the issue at hand because the language is taken from a section labeled "NO RELEVANCE TO THE ISSUE OF ABORTION," which the surrounding text does not explicitly extend beyond the issue of abortion.[80] In contrast, the *Patel* court found Congress' intent could be inferred from the statutory text.[81] The *Patel* court reasoned that Congress'

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71 Patel v. Bureau of Prisons, 125 F. Supp. 3d 44, 53 n.1 (D.D.C. 2015).

72 *Tanvir*, 128 F. Supp. 3d at 777–79.

73 *Id.* at 774–75.

74 *Id.* at 777.

75 *Id.* at 777 n.20.

76 *Id.*

77 *See* S. REP. NO. 103–111 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892.

78 *Tanvir*, 128 F. Supp. 3d at 778 (quoting S. REP. NO. 103-111, at 12, *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1902).

79 *Id.*

80 S. REP. NO. 103-111, at 12–14, *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1901-1903.

81 Patel v. Bureau of Prisons, 125 F. Supp. 3d 44, 49-53 (D.D.C. 2015).

inclusion of language allowing for personal capacity suits would be meaningless absent a damages remedy, as injunctive and declarative relief are the only remedies in official capacity suits due to sovereign immunity.[82] Consequently, the *Patel* court's interpretation of Congress' intent presents a much more persuasive argument than that of the *Tanvir* court.

2. Misapplication of RLUIPA Case Law

Following the discussion of congressional intent, the *Tanvir* court addressed whether *Franklin*'s presumption of "all appropriate remedies" applies to RFRA.[83] The court found the presumption inapplicable, declaring that instead "'appropriate relief must be discerned using the traditional tools of statutory construction."[84] In reaching this conclusion, the court drew support from the Supreme Court case *Sossamon v. Texas*,[85] which similarly addressed whether the presumption of *Franklin* applied to "appropriate relief," but within the context of RLUIPA.[86] The *Tanvir* court, in accordance with *Sossamon*, defined "appropriate relief" as creating "an express private cause of action."[87] The *Franklin* presumption, the court found, could only be triggered by an "implied statutory right of action," which disqualifies RFRA.[88]

While the *Tanvir* court correctly found that RFRA created "an express private cause of action," the court's conclusion that the presumption of "all appropriate remedies" was inapplicable interprets the *Franklin* presumption too narrowly. [89] In contrast,

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82 *Id.* at 53.

83 *Tanvir*, 128 F. Supp. 3d at 779.

84 *Id.*

85 563 U.S. 277 (2011).

86 *Id.* at 287-89.

87 *Tanvir*, 128 F. Supp. 3d at 779 (quoting *Sossamon*, 563 U.S. at 282).

88 *Id.*

89 *See* Patel v. Bureau of Prisons, 125 F. Supp. 3d 44, 53 n.1 (D.D.C. 2015) (discussing the application of the *Franklin* presumption to RFRA). The court stated:

> The *Jama* court also concluded, however, that because RFRA expressly authorizes "appropriate relief against a government," the statute is not "silent" on the issue of remedies and the presumption in *Franklin* is inapplicable. This reading of *Franklin* is too narrow. The presumption in that case obviously does apply where Congress is entirely silent on the issue of remedies. But it is also clear that the mere mention of remedies does not rebut the presumption—instead, the presumption applies unless "Congress has expressly indicated"

the *Patel* court concluded that the presumption applied unless, as the *Franklin* Court stated, "Congress has expressly indicated" that the remedy, such as damages, is unavailable.[90] Unlike the *Patel* court, the reliability of the *Tanvir* court's interpretation is diminished by its reliance on *Sossamon*. The problem with applying *Sossamon* has to do with the different congressional authority supporting RLUIPA and the issue of sovereign immunity.[91] In *Sossamon*, the Court primarily found the *Franklin* presumption irrelevant because "any appropriate relief" is insufficient to constitute an express waiver of sovereign immunity.[92] Moreover, RLUIPA was enacted under the Spending Clause, unlike RFRA, which placed additional restrictions on awarding monetary damages that the *Franklin* presumption does not address.[93] As a result, the *Tanvir* court's reliance on *Sossamon*

> that a remedy is unavailable. RFRA provides only that a plaintiff may obtain "appropriate relief." This language does nothing more than authorize what courts applying *Franklin* presume, and it falls far short of an "express[ ] indicat[ion]" that damages are prohibited.

Id. (citations omitted).

90 *Id.*

91 *See* discussion *supra* Section II.A.

92 *See Sossamon*, 573 U.S. at 288-89 (discussing irrelevance of the *Franklin* presumption to RLUIPA). The Court found:

> The presumption in *Franklin* and *Barnes* is irrelevant to construing the scope of an express waiver of sovereign immunity. The question here is not whether Congress has given clear direction that it intends to *exclude* a damages remedy, but whether Congress has given clear direction that it intends to *include* a damages remedy. The text must "establish unambiguously that the waiver extends to monetary claims." In *Franklin* and *Barnes*, congressional silence had an entirely different implication than it does here. Whatever "appropriate relief" might have meant in those cases does not translate to this context.

Id. (citations omitted).

93 The *Sossamon* Court further discussed the requisite "notice" RLUIPA would be subjected to provide, due to its enactment under the Spending Clause:

> Nor can it be said that this Court's use of the phrase "appropriate relief" in *Franklin* and *Barnes* somehow put the States on notice that the same phrase in RLUIPA subjected them to suits for monetary relief. Those cases did not involve sovereign defendants, so the Court had no occasion to consider sovereign immunity. Liability against nonsovereigns could not

introduced too many inconsistent elements that were inapplicable to an analysis under RFRA. Therefore, the *Patel* court presented a more persuasive argument in favor of applying the *Franklin* presumption.

III. CONCLUSION

The interpretation of RFRA by the *Patel* court, in conjunction with the *Jama* court, presents a much stronger argument in favor of allowing a damages remedy in personal capacity suits than the contrary conclusion arrived at in *Tanvir v. Lynch*. Congress, in enacting RFRA, included language that allows plaintiffs to bring suit against federal officials in their personal capacity. This language would become superfluous should courts refuse to allow a damages remedy, as official capacity suits already provide injunctive and declarative relief. Furthermore, under *Franklin*, courts should presume "any appropriate remedy" unless Congress expressly indicates otherwise. Thus, RFRA should be interpreted as allowing for a damages remedy in personal capacity claims against federal officials.

> put the States on notice that they would be liable in the same manner, absent an unequivocal textual waiver. Moreover, the same phrase in RFRA had been interpreted not to include damages relief against the Federal Government or the States and so could have signaled to the States that damages are *not* "appropriate relief" under RLUIPA.

Id. at 289 n.6.