No. 19-71

IN THE

# Supreme Court of the United States

FNU TANZIN, ET AL.,

*Petitioners*,

v.

MUHAMMAD TANVIR, ET AL.,

*Respondents*.

On Writ of Certiorari to the
U.S. Court of Appeals for the Second Circuit

**BRIEF OF *AMICI CURIAE* [#] RELIGIOUS ORGANIZATIONS IN SUPPORT OF RESPONDENTS**

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## INTERESTS OF *AMICI CURIAE*[1]

*Amici* are American religious or religiously-affiliated organizations who represent a wide array of faiths and denominations. *Amici* include congregations and houses of worship, as well as professional, civil liberties, and immigrant rights groups who work with or represent faith communities ("Religious Organizations").

*Amici* are: [INSERT].

## SUMMARY OF ARGUMENT

*Amici*, religious and religiously affiliated organizations of numerous faiths and denominations, have a unique appreciation of the dangers posed to disfavored religious groups by an overbearing executive. This danger has been ever-present throughout American history, even as the identities of the disfavored religious groups have changed over time. RFRA's drafters recognized the vulnerability of religious adherents to government hostility, and enshrined broad protections of religious liberty in the statute. Providing a damages remedy pursuant to

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* represent that they have authored the entirety of this brief, and that no person other than the *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief. [All parties provided consent for *amici curiae* to file this brief.]

RFRA is essential to achieving its explicit textual aims and protecting religious rights in the United States.

Injunctive relief alone is not sufficient. The Government can readily stop its challenged conduct when facing legal challenge and thereby evade judicial scrutiny by mooting the injunctive claim. This concern is not an idle fear, as the fact of this very case suggest. Money damages are necessary to ensure compensation for the deprivation of legally guaranteed rights, deterrence of officials from engaging in unconstitutional behavior, and vindication of rights that have played a central role in the history of the United States. Petitioners' concerns regarding the alleged 'chilling effect' that a damages remedy would have on Executive Branch functions are overblown and fully addressed by the doctrine of qualified immunity.

For the reasons set forth herein and in Respondents' and other *amici's* briefs, *amici* urge the Court to affirm the judgment of the Second Circuit.

## ARGUMENT

### I. MONEY DAMAGES UNDER RFRA ARE VITAL TO PROTECTING DISFAVORED RELIGIOUS GROUPS FROM DISCRIMINATION

#### A. RFRA Codifies This Country's Special Interest in Vindicating the Rights of Religious Minorities

While money damages are essential to preserving individual rights under a number of federal statutes, the need for a damages remedy under RFRA is particularly acute.

"RFRA was designed to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014). The importance of safeguarding religious freedom, driven in part by the danger that an unchecked executive poses to disfavored religious groups, has deep roots in the United States' history. Indeed, that concept is intertwined with the founding of the country. During the early 1620s, King Charles I of England battled with Parliament over its refusal to authorize funds requested by the King, in large part due to Parliament's concerns about the King's respect for the rights of religious minorities. In 1629, King Charles dissolved Parliament so he could obtain the funds without obstruction. In fear of the King's unrestrained threat to religious minorities, thousands of Puritans fled to America in what is today known as the "Great Migration."[2]

The devotion to religious freedom that drove early settlers to America carried into the 18th century. By 1789, twelve of the country's original thirteen states had enacted constitutional provisions

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[2] New England Historical Society, *The Great Migration of Picky Puritans, 1620-40*, *available a*t http://www.newenglandhistoricalsociety.com/the-great-migration-of-picky-puritans-1620-40/.

protecting religious liberty.[3] Throughout the union, "[f]reedom of religion was universally said to be an unalienable right."[4] And in 1791, Congress enshrined the right to free exercise of religion in the First Amendment to the federal Constitution. This provision committed the "government itself to religious tolerance," such that "upon even slight suspicion that proposals for state intervention stem[med] from animosity to religion or distrust of its practices, all officials [would] pause to remember their own high duty to the Constitution and to the rights it secures." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993).

RFRA affirms and expands this distinctly American concern for the free exercise of religion. Congress enacted RFRA in response to—and in order to overturn—the Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), which held that, under the First Amendment, "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997) (citing *Smith*, 494 U.S. at 885). In passing RFRA, the legislature rejected this standard as incompatible with our country's long history of safeguarding religious freedom. Specifically, Congress sought "to

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[3] *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1455 (1990).

[4] *Id.*

restore the compelling interest test" applied by the Court before *Smith* and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b).

As relevant here, the legislature's response to this Court's decision in *Smith* supports two conclusions. First, Congress saw it fit to provide disfavored religious groups with protections even stronger than those first envisioned by the drafters of the First Amendment. As this Court has explained, "Congress enacted RFRA in order to provide *greater protection* for religious exercise than is available under the First Amendment." *Holt v. Hobbs*, 574 U.S. 352, 357 (2015) (emphasis added). Indeed, the Court has recognized that RFRA accomplished more than the mere reversal of *Smith* and "codif[ication] of [the] Court's pre-*Smith* Free Exercise Clause precedents." *Hobby Lobby*, 573 U.S at 706.

Second, by expressly "provid[ing] a claim or defense to persons whose religious exercise is substantially burdened by government," 42 U.S.C. § 2000bb(b), Congress revealed a special interest not only in constraining government policies prospectively, but in vindicating the individual rights of persons whose religious freedom has been violated. As this Court has likewise emphasized, RFRA "contemplates a more focused inquiry and requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to *the person*—the particular claimant whose sincere exercise of religion is being

substantially burdened." *Holt*, 574 U.S. at 363 (emphasis added) (quoting *Hobby Lobby*, 573 U.S. at 726).

The statute therefore pursues two complementary goals—first to provide disfavored religious groups with protections greater even than those afforded under traditional constitutional guarantees, and then to supply a remedy grounded in the specific harm to the person whose religious exercise has been burdened. As discussed below, RFRA cannot accomplish these goals without offering individuals a full panoply of remedies under the statute, including money damages.

### B. Injunctive Relief Alone Is Insufficient to Vindicate the Rights of Religious Minorities under RFRA

Petitioners do not dispute that, in "provid[ing] a claim or defense to persons whose religious exercise is substantially burdened by government," 42 U.S.C. § 2000bb(b), Congress gave individuals a private right of action for violations of their religious freedom. But Petitioners insist that Congress intended to give those persons an incomplete remedy—prospective injunctive relief alone, with no possibility of money damages for harm already caused by government misconduct.

This case is a vivid example of why injunctive relief often fails to achieve the legislature's objectives in passing RFRA. The named plaintiff, Tanvir, is a lawful permanent resident living in Queens, New York and is Muslim. Over more than five years

beginning in 2007, FBI agents repeatedly pressured Tanvir to work as an informant within his American-Muslim community. *See Tanvir v. Tanzin*, 894 F.3d 449, 454–55 (2d Cir. 2018). Although there is no evidence that Tanvir had ties to terrorism or posed a national security risk of any kind, agents threatened him with deportation if he did not cooperate. *Id.* at 455. When he did not accede to the agents' demands, they retaliated by unlawfully placing him on the government's "No Fly List." This placement caused Tanvir to lose his job and made it impossible to visit his family abroad. *See id.* at 456. Agents used these personal and financial losses, and the threat of more in the future, as leverage to exert even greater pressure on Tanvir to inform on Muslims in his community. *See id.* at 454–56. On numerous occasions, agents directly tied Tanvir's inclusion on the No Fly List to his unwillingness to cooperate, and they told him he would not be removed unless he agreed to the agents' demands. *See id.*

Only in March 2013—after Tanvir had retained counsel to respond to the agents' threats and harassment—did Tanvir receive a notice from the Department of Homeland Security ("DHS") that his name had been removed from the list. *Id.* at 456. DHS claimed Tanvir's placement on the list had resulted from a "misidentification against a government record" or "random selection," and it suggested the government had simply "made updates" to its records. *Id.* The letter did not acknowledge Tanvir's years of harassment or the government's express representations, made by multiple agents over a two-and-a-half-year period, that his inclusion on the list was a direct

consequence of his unwillingness to inform on American Muslims in his community.

Under Petitioners' interpretation of RFRA's protections, DHS's decision to remove Tanvir's name from the No Fly List more than five years *after* the agents' harassment began would completely defeat his ability to vindicate the violation of his right to religious freedom under RFRA. The government's late-stage removal of Tanvir's name from the No Fly List would render a claim for injunctive relief moot, and the unavailability of damages would render illusory RFRA's protection from governmental burden on the free exercise of religion, despite the clear injuries Tanvir suffered in the form of five-plus years of deportation threats, financial harm, and routine harassment. To accept this construction, one must conclude that a central lesson of RFRA is this: federal agents may avoid all repercussion for substantially burdening an individual's religious exercise, even for years at a time, so long as they voluntarily cease that conduct before litigation begins.

Petitioners' anemic interpretation of RFRA's protections would defy the intent of Congress, which "enacted RFRA in order to provide very broad protection for religious liberty." *Holt*, 574 U.S. at 363 (emphasis added) (quoting *Hobby Lobby*, 573 U.S. at 693). And it would disregard RFRA's concerted focus on remedying the harm suffered by "*the person*—the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 363 (emphasis added) (quoting *Hobby Lobby*, 573 U.S. at 726). .

## II. PETITIONERS' INTERPRETATION OF RFRA THREATENS *AMICI*'S RELIGIOUS LIBERTY

If, as Petitioners propose, RFRA offered only an incomplete remedy to victims of religious persecution, then *Amici* have a rational fear that agents of the executive branch will exploit this weakness in RFRA's protections to impinge on the liberty of minority religious groups. This danger concerns not only members of groups that are disfavored today, but also members of any religious faith that may be disfavored in the future.

Despite the ethic of religious freedom rooted in the country's founding, many faiths have been the target of hatred and mistrust over the course of U.S. history. Rhode Island was founded by a Protestant dissenter, Roger Williams, who had been banished from the Massachusetts Bay Colony for his religious views.[5] Pennsylvania and Delaware were founded by William Penn as a sanctuary for Quakers from religious discrimination.[6] And the Mormons settled in Utah only after being driven out of Missouri and Illinois.[7]

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[5] McConnell, *supra* note [X].

[6] *Id.*

[7] Paul Wake, *Fundamental Principles, Individual Rights, and Free Government: Do Utahns Remember How to Be Free?*, 1996 Utah L. Rev. 661, 672 (1996).

Some religious groups have suffered especially pernicious and lasting discrimination. In the early American colonies, for example, "with few exceptions, Roman Catholics did not enjoy the guarantees of religious liberty that were gradually extended to other sects."[8] In 1741, a man in New York was convicted and hanged "on the suspicion that he was a Roman Catholic priest."[9] The so-called "Blaine Amendments" of the nineteenth century, which aimed to deprive Roman Catholic schools of government funding, "were added to about three-quarters of [] state constitutions."[10] As recently as 1925, a Texas state court had to make clear that the Equal Protection Clause prohibited the "systematic exclusion of Catholics from grand jury service." *See Casarez v. State*, 857 S.W.2d 779, 784 n.4 (Ct. App. Tx. 1993) (describing *Juarez v. State*, 102 Tex. Crim. 297, Crim. App. 1925).

Members of the Jewish faith have also been frequent targets of harassment and persecution. A Rhode Island statute that "barred Jews from citizenship . . . was not abandoned until 1842."[11] The national origins quota system, which played a major role in the United States turning away Jewish

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[8] Walter J. Walsh, *The First Free Exercise Case*, 73 Geo. Wash. L. Rev. 1, 4 (2004).

[9] *Id.* at 5.

[10] Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 187–89 (2004)

[11] McConnell, *supra* note X, at 1425.

refugees fleeing the Holocaust, was conceived in part to limit Jewish immigration.[12] And just in 2017, after neo-Nazi groups held a rally in Charlottesville, VA during which one of their members murdered a protester, the President told reporters that there "were very fine people on both sides."[13]

While many faiths have been singled out at different stages of U.S. history, today the American-Muslim community is at particular risk. Shortly after the September 11, 2001 terrorist attacks, a poll "found that about one-third of Americans thought it was acceptable to detain Arab Americans in camps reminiscent of the internment of Japanese Americans during World War II."[14] Since that time, each successive administration has targeted members of the American-Muslim community for unwarranted surveillance and discrimination. To name a few examples:

- Under the Bush administration, the Patriot Act enabled DHS to monitor the private

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[12] Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A 'Magic Mirror' into the Heart of Darkness*, 73 Ind. L.J. 1111, 1129 (1998).

[13] Politico, Trump's Comments on White Supremacists, 'Alt-Left' in Charlottesville, https://www.politico.com/story/2017/08/15/full-text-trumpcomments-white-supremacists-alt-left-transcript-241662, accessed Apr. 25, 2019

[14] Considine, Craig. *The Racialization of Islam in the United States: Islamophobia, Hate Crimes, and 'Flying while Brown.'* Religions 8 (9): 165 (Aug. 26, 2017).

communications of American Muslims without a court order.[15] Federal agents insisted that even "benign private communication with actors in Muslim-majority countries," such as "sending remittances back to family or friends" or "completing the religious pilgrimage to Saudi Arabia," could create a "suspicion of terror activity" that justified the warrantless surveillance of American Muslims.[16]

- President Obama's administration initiated the "Countering Violent Extremism" (CVE) program in 2011. Although "couched in neutral terms," this program "in practice [] focused almost exclusively on American-Muslim communities."[17] CVE empowered DHS to "strategically map[] and then tap[] informants within mosques, student organizations . . . and other places for religious and political discussion and gathering."[18] DHS maintained this focus notwithstanding the fact that, since the 9/11 attacks, "nearly twice as many people have been killed by white supremacists, antigovernment fanatics and other non-Muslim extremists than by

[15] Khaled A. Beydoun, *Acting Muslim*, 53 Harv. C.R.-C.L. L. Rev. 1, 29 (2018).

[16] *Id.* at 30.

[17]https://www.brennancenter.org/our-work/research-reports/countering-violent-extremism

[18] Beydoun, *supra* note, at 35 (citation and internal quotation marks omitted).

radical Muslims," as reported in the New York Times.[19]

- In December 2015, then-candidate Donald Trump called for a ban on all Muslims entering the United States, declaring it "obvious to anybody" that "the hatred [of Muslims toward Americans] is beyond comprehension."[20] Within days of his inauguration, President Trump issued Executive Order 13769, blocking entry into the United States of individuals from seven Muslim-majority countries. After multiple courts held that Executive Order 13769 was illegal, President Trump eventually issued Executive Order 13780. Data shows that this most recent ban, which includes two non-Muslim majority countries, has been implemented to disproportionately limit entry of individuals from the Muslim-majority countries impacted.[21]

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[19] Scott Shane, "Homegrown Extremists Tied to Deadlier Toll Than Jihadists in the U.S. Since 9/11," The New York Times (June 24, 2015), https://www.nytimes.com/2015/06/25/us/tally-of-attacks-in-us-challengesperceptions-of-top-terror-threat.html, accessed Apr. 24, 2019.

[20] Jeremy Diamond, CNN, "Donald Trump: Ban all Muslim travel to U.S.," https://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/index.html, accessed January 21, 2020.

[21] Vahid Niayesh, Washington Post, *Trump's Travel Ban Really Was a Muslim Ban, Data Suggests* (Sept. 26, 2019), https://www.washingtonpost.com/politics/2019/09/26/trumps-

(*footnote continued …*)

- Under the Trump administration, CVE—which the President said he intended to rename the "Countering Islamic Extremism" program[22]—has focused at least 85% of its grants on targeting minority groups, particularly Muslims.[23] The Trump administration recently proposed cutting funding to CVE, but not because it unlawfully targeted American Muslims; rather, the administration believed CVE did not target Muslims aggressively enough. The President reportedly objected to the program's interest in community engagement, as opposed to "empower[ing] the police to arrest suspected terrorists," and its even minimal focus on white supremacist groups, as opposed to American Muslims exclusively.[24]

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muslim-ban-really-was-muslim-ban-thats-what-data-suggest/, accessed Jan. 23, 2020.

[22] Dustin Volz, Reuters, *U.S. Senators Denounce Trump Plan to Focus Counter-Extremism Program on Islam* (Feb. 9, 2017), https://www.reuters.com/article/us-usa-trump-extremists-program-idUSKBN15O2QT, accessed Apr. 24, 2019.

[23] Faiza Patel, Andrew Lindsay, and Sophia DenUyl, Brennan Center for Justice, *Countering Violent Extremism in the Trump Era* (June 15, 2018), https://www.brennancenter.org/analysis/countering-violent-extremism-trump-era, accessed Apr. 24, 2019.

[24] Peter Beinart, The Atlantic (Oct. 29, 2018), "Trump Shut Programs to Counter Violent Extremism," https://www.theatlantic.com/ideas/archive/2018/10/trump-shut-countering-violent-extremism-program/574237/, accessed Jan. 20, 2020.

Just as other faith traditions have been special targets of discrimination in decades past, each new era brings with it the risk that some other religious group will be singled out for derision and disfavor. *Amici* of all faiths thus understand that if federal agents can substantially burden the religious exercise of American Muslims without fear of personal liability, then little stands in the way of agents using that same authority to surveil, harass, and sanction other religious groups in the future. A damages remedy under RFRA therefore bolsters the protections the statute provides to all religious groups now and in the future.

## III. MONEY DAMAGES IMPLEMENT RFRA'S EXPLICIT TEXTUAL PURPOSES

### A. Damages Are an Essential Mechanism of Vindicating Critical Rights

In our system of law, damages serve three central purposes. First, "damages is an instrument of corrective justice, an effort to put plaintiff in his or her rightful position." Dan B. Dobbs & Caprice L. Roberts, Law of Remedies: Damages—Equity—Restitution § 3.1 at 215 (3d. ed. 2017) (hereinafter, "Law of Remedies"). Where a person violates the legal rights of another and causes injury, a factfinder awards damages in order to right the wrong done to the plaintiff by the defendant. *See* Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, The Law of Torts § 11 (2d ed.); *see also* Fowler Harper & Fleming James, Jr., The Law of Torts § 25.1 at 1299 (1956) (hereinafter, "Harper & James") ("The cardinal principle of damages in Anglo-American law is that

of *compensation* for the injury caused to plaintiff by defendant's breach of duty." (emphasis in original)).

Second, damages awarded for a past breach of a duty or legal right serve to deter future violations. *See* Law of Remedies § 3.1 at 216 (a "damages judgment can provide an appropriate incentive to meet the appropriate standard of behavior"). Damages, a cost to the liable defendant, raise the price of illegal conduct and make it less attractive to potential wrongdoers. *See Owen v. City of Indep., Mo.*, 445 U.S. 622, 651–52, 100 S. Ct. 1398, 1416, 63 L. Ed. 2d 673 (1980) ("The knowledge that a municipality will be liable for all of its injurious conduct [in a Section 1983 suit], whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights."); *see also* Guido Calabresi, The Costs of Accidents: A Legal and Economic Analysis at 26 (1970).

Third, damages vindicate the legal rights of the plaintiff. "By holding the defendant liable for the tangible consequences of his wrongdoing, the law makes clear that these consequences should not have happened[;] . . . the law holds the wrongdoer responsible for his wrongdoing as wrongdoing." Stephen A. Smith, Duties, Liabilities, and Damages, 125 Harv. L. Rev. 1727, 1756 (2014). This rationale also has a deep historical basis, judged, along with deterrence, as equally important as compensation as a rationale for damages in tort actions such as defamation, false imprisonment, and invasion of privacy. Harper & James § 5.30 at 468-70; *see also*

*Owen*, 445 U.S. at 651, 100 S. Ct. at 1415 ("A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees . . . .").

### B. A Damages Remedy Serves RFRA's Ends

"Congress enacted . . . [RFRA] 'in order to provide very broad protection for religious liberty.'" *Holt*, 135 S. Ct. at 859 (quoting *Hobby Lobby*, 573 U.S. at 693, 134 S. Ct. at 2760). Moreover, RFRA requires a focused, individualized inquiry to determine whether a Government practice substantially burdens the plaintiff's religious exercise. *See Hobby Lobby*, 573 U.S. at 726, 134 S. Ct. at 2779. In other words, RFRA pays particular attention to the rights of individuals, and provides a remedy to alleviate burdens on those rights. A damages remedy implements this goal of individualized protection for religious exercise.

In order to protect religious liberty, RFRA must deter would-be wrongdoers; without deterrence, government officials could routinely violate RFRA, and, as here, cease any wrongdoing under threat of suit, only to resume the wrongful conduct at a later date. RFRA's concrete focus on individual harms also supports a damages remedy: when "[t]he government has achieved a wrongful gain (some more effective or less costly implementation of government policy" by inflicting a wrongful loss" a damages award "retraces the moral relationship between them." John C. Jeffries, Jr., Compensation for Constitutional Torts: Reflections on the Significance of Fault, 88 Mich. L. Rev. 82, 94 (1989).

Put more simply, the damages award, "[t]o the extent possible, . . . undoes the wrong." *Id.* Moreover, damages vindicate this essential right that Congress sought to broadly protect.

A comparison to 42 U.S.C. § 1983 is instructive.[25] Like RFRA, Section 1983 "provides relief for invasions of rights protected under federal law." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709, 119 S. Ct. 1624, 1638, 143 L. Ed. 2d 882 (1999). Like RFRA, Section 1983 "provide[s] protection to those persons wronged by the misuse of power, possessed by virtue of . . . law and made possible only because the wrongdoer is clothed with the authority of state law." *Owen*, 445 U.S. at 650, 100 S. Ct. at 1415. A damages remedy against liable parties achieves this goal by providing compensation to the plaintiff wrongfully injured, deterring future unlawful conduct, and vindicating valued rights. *Id.*, 445 U.S. at 650, 100 S. Ct. at 1415-16. In cases such as these, the statute cannot achieve its explicitly stated aims without a damages remedy.

### C. A Damages Remedy Will Not Hamper Government Decisionmaking

Judge Jacobs, in his dissent from the denial of rehearing en banc, suggested that allowing a

[25] While Section 1983 provides a remedy for violations of the Constitution, and RFRA provides *broader* protection than the First Amendment, nonetheless RFRA "is a statute designed to perform a constitutional function," Douglas Laycock & Oliver S. Thomas, Interpreting the Religious Freedom Restoration Act, 73 Tex. L. Rev. 209, 219 (1994), making them analogous laws.

damages remedy would lead to "federal policy being made (or frozen) by the prospect of impact litigation" and discourage government employees from fulfilling their obligations. But a doctrine already protects government officials from liability for the good-faith performance of their roles: qualified immunity. The Court has developed a substantial body of law in the Section 1983 context that ensures that government officials are shielded from overwhelming financial liability, *Pierson v. Ray*, 386 U.S. 547, 555 (1967), properly focused on their duties without fear of liability for the good-faith performance of their duties, *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), and protected from entanglement in time-consuming but frivolous litigation,[26] *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Petitioners argue that, even with a qualified immunity defense, government officials may still have to engage in the time-consuming process of complying with discovery requests, diverting them from their duties. Br, at 33-34. But that is not a reason to hold that RFRA does not provide a damages remedy; after all, RFRA concededly permits a wronged individual to seek an injunction, to which

[26] In fact, qualified immunity places such a formidable barrier between a plaintiff and vindication of his or her rights, that it imposes significant costs on society, including "disrespect for authority, disrespect for the Constitution and laws generally, the erosion of Fourteenth Amendment values, and the prospect that some executives might be undeterred in connection with Fourteenth Amendment compliance." 2 Sheldon H. Nahmod, Civil Rights & Civil Liberties Litigation: The Law of Section 1983 § 8:5.

qualified immunity does not apply. *Pearson v. Callahan*, 555 U.S. 223, 242, 129 S. Ct. 808, 822, 172 L.Ed.2d 565 (2009). Therefore, Government officials will play an active role in defending themselves against RFRA suits regardless of the outcome today; for the remainder of the traditional concerns of qualified immunity—ruinous liability, overdeterrence, and *frivolous* litigation—that doctrine will address Petitioners' concerns.

## CONCLUSION

For the reasons set forth above and in Respondents' and other *amici's* briefs, the Court should affirm the judgment of the Second Circuit.

February X, 2020

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## CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Rule 33.1(g), that the attached brief is proportionally spaced; uses a typeface (Century Schoolbook) of 12 points; and contains [X] words, as counted by Microsoft Office Word 2010, which was used to produce this brief.

Dated: New York, New York
February X, 2020

/s/ Adeel A. Mangi

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