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Office of the Clerk
United States Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, OH 45202

Re: *Randy Haight, et al. v. LaDonna Thompson, et al.* (No. 13-6005)

Dear Clerk of the Court:

During oral argument, the panel requested a letter brief addressing whether damages are available in personal capacity suits under the Religious Freedom Restoration Act ("RFRA"), and whether that sheds light on how to construe the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), at issue here.

RFRA provides that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain *appropriate relief* against a *government*." 42 U.S.C. § 2000bb-1(c) (emphases added). Congress replicated that language in RLUIPA: "A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain *appropriate relief* against a *government*." *Id.* § 2000cc-2(a) (emphases added). RLUIPA's definition of "government" is also materially the same as RFRA's. *See id.* § 2000bb-2(1) ("[T]he term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity."); *id.* § 2000cc-5(4) ("The term 'government' … means (i) a State, county, municipality, or other governmental entity created under the authority of a State; (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and (iii) any other person acting under color of State law."). Indeed, "RLUIPA's remedial provision is virtually identical to RFRA's." *Hankins v. Lyght*, 441 F.3d 96, 111 n.3 (2d Cir. 2006) (Sotomayor, J., dissenting). That is not surprising, because Congress enacted RLUIPA as a limited successor to RFRA after the Supreme Court invalidated the latter as applied to states. *See generally Cutter v. Wilkinson*, 544 U.S. 709, 714-15 (2005) (recounting this history).

Courts have held—both before and after RFRA's partial invalidation— that this "identical language in the federal RFRA entitled a prisoner to sue prison officials in their individual capacities," to recover monetary damages. *Nelson v. Miller*, 570 F.3d 868, 886 (7th Cir. 2009). For example:

- *Mack v. O'Leary*, 80 F.3d 1175, 1177 (7th Cir. 1996) (Posner, J.) (holding that because RLUIPA "defines 'government' to include government employees acting under color of state law," plaintiff was "entitled to sue the prison officials rather than the State of Illinois and does not face the bar of the Eleventh Amendment" in seeking "damages as a remedy for violations of the Act").

- *Daley v. Lappin*, No. 12-3393, 2014 U.S. App. LEXIS 1790, at *15 n.11 (3d Cir. Jan. 29, 2014) ("Defendants do not dispute that damages are available for claims brought against government officials in their individual capacity under both Bivens and RFRA.").

- *Lebron v. Rumsfeld*, 764 F. Supp. 2d 787, 804 (D.S.C. 2011) ("Courts have recognized a right of action under the RFRA against government employees in their individual capacities but have also recognized a qualified immunity defense where the alleged violations of the Act were not a matter of settled law.").

- *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1039 (C.D. Cal. 2009) ("[T]here is no authority to indicate that the language in RFRA … should not be interpreted to establish individual liability for violations.").

- *Jama v. United States INS*, 343 F. Supp. 2d 338, 374 (D.N.J. 2004) ("The court also reads RFRA to allow for individual capacity suits for money damages specifically ….").

- *Jupiter v. Johnson*, No. 3:10-CV-01968, 2011 U.S. Dist. LEXIS 115406, at *6-7 (M.D. Pa. Apr. 26, 2011) ("The cases cited by the defendants do not support their contention that RFRA does not provide for damages against defendants in their individual capacities. The defendants also have not presented any argument or reasoning to

support their contention that RFRA does not provide for damages against them in their individual capacities. As a result, we conclude that the defendants are not entitled to dismissal of the RFRA claims against them in their individual capacities.").

- *Keen v. Noble*, No. 04-5645, 2007 U.S. Dist. LEXIS 69629, at *26-27 (E.D. Cal. Sept. 20, 2007) (dismissing official capacity claims for money damages under RFRA but allowing individual capacity claims for money damages to proceed).

- *Lepp v. Gonzales*, No. C-05-566, 2005 U.S. Dist. LEXIS 41525, at *23 (N.D. Cal. Aug. 2, 2005) (agreeing with other courts "that RFRA 'allows for individual capacity suits for money damages'").

- *Elmaghraby v. Ashcroft*, No. 04-CV-1809, 2005 U.S. Dist. LEXIS 21434, at *96 n.27 (E.D.N.Y. Sept. 27, 2005) ("RFRA accordingly reaches officials acting in their individual capacities.").

Courts thus routinely analyze whether individual capacity defendants in RFRA actions are entitled to qualified immunity from damages claims—a question that would never arise or matter if damages were not available under the statute. *See, e.g.*, *Padilla v. Yoo*, 678 F.3d 748, 762 (9th Cir. 2012); *Lebron v. Rumsfeld*, 670 F.3d 540, 557 (4th Cir. 2012); *May v. Baldwin*, 109 F.3d 557, 561-62 (9th Cir. 1997); *Werner v. McCotter*, 49 F.3d 1476, 1481 (10th Cir. 1995); *see also Rasul v. Myers*, 512 F.3d 644, 676 (D.C. Cir. 2008) (Brown, J., concurring) (disagreeing with majority that plaintiffs were not "persons" under RFRA but concurring on grounds that defendants were protected by qualified immunity).

Notably, courts have recognized personal capacity claims for monetary relief under RFRA even as they held—much as the Supreme Court later did with respect to RLUIPA, *Sossamon v. Texas*, 131 S. Ct. 1651 (2011)—that RFRA did not effectuate a clear waiver of sovereign immunity, and thus that its authorization of "appropriate relief" did not include damages against states, the federal government, or officials in their official capacities. *See Mack*, 80 F.3d at 1177 (finding in RFRA "no indication of congressional intent to abrogate the states' Eleventh Amendment immunity from suit," even while allowing claim for damages against individual officials); *Commack Self-Serv. Kosher Meats v. New York*, 954 F. Supp.

65, 69 (S.D.N.Y. 1997) (holding that RFRA "falls short of manifesting the clear intent necessary to abrogate the Eleventh Amendment" as to claims for damages against sovereign defendants, but noting that it could allow "an action for damages against state officials acting in their individual capacities"); *see also Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006) ("RFRA does not waive the federal government's sovereign immunity for damages."); *id.* at 1028 (Tatel, J., concurring) (noting that RFRA does not make clear that damages are appropriate relief "at least when awarded against the government").

The overwhelming consensus of the federal courts is thus that RFRA's authorization of "appropriate relief" does *not* include damages against sovereign defendants but *does* include damages against officials in their individual capacities, subject to the affirmative defense of qualified immunity. This does not mean that the phrase "appropriate relief" is improperly being given two different meanings—only that what is "appropriate" depends on the facts. Monetary relief may be inappropriate against sovereign defendants but highly appropriate against officials in their individual capacities, just as injunctive or declaratory relief might be appropriate in some contexts but not others. *See Sossamon*, 131 S. Ct. at 1659 (term "appropriate relief" is "open-ended" and "inherently context-dependent," and "[t]he context here—where the defendant is a sovereign—suggests … that monetary damages are not 'suitable' or 'proper'"); *Centro Familiar Cristiano v. City of Yuma*, 651 F.3d 1163, 1168-69 (9th Cir. 2011) (holding money damages available against municipal defendant under RLUIPA). *Cf. Clark v. Martinez*, 543 U.S. 371, 383 (2005) (noting that statutory tolling provision was not "unmistakably clear" and was thus inapplicable to state defendants, but did apply to non-sovereign municipal defendants not protected by any clear-statement rule).

This judicial construction of RFRA further supports the plain-text reading of RLUIPA that Appellants have offered. After all, "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005). Indeed, a number of district courts have applied that canon to hold that RLUIPA authorizes suits for damages against officials in their individual capacities. *See, e.g.*, *Agrawal v. Briley*, No. 02-C-6807, 2006 U.S. Dist. LEXIS 88697, at *33-47 (N.D. Ill. Dec. 6, 2006) (citing and relying on RFRA cases to reach that conclusion); *Bess v. Alameida*, No. Civ-S-03-2498, 2007 U.S. Dist. LEXIS 63871, at *59-60 (E.D. Cal. Aug. 29, 2007) (same).

In sum, it is clear that Congress intended to authorize RLUIPA plaintiffs to recover at least nominal damages (*see* 42 U.S.C. § 2000cc-2(e)) from state officials in their individual capacities, subject to a qualified immunity defense. And for the reasons explained in Appellants' briefs, the Necessary and Proper Clause permits Congress to adopt that appropriate, helpful means of enforcing the constitutional protections of religious liberty permissibly imposed on prisons that receive federal funds. *See Cutter v. Wilkinson*, 423 F.3d 579, 587 (6th Cir. 2005) (upholding RLUIPA's substantive rules under *Dole* and Tenth Amendment); *Sabri v. United States*, 541 U.S. 600 (2004) (Congress may use Necessary and Proper Clause in conjunction with Spending Clause to regulate third parties); *Barbour v. Wash. Metro. Transit Auth.*, 374 F.3d 1161, 1168-69 (D.C. Cir. 2004) (agreeing that "threat of federal damage actions was an effective deterrent" and thus a permissible means of enforcing the Rehabilitation Act's prohibition on disability discrimination by recipients of federal funds).

Sincerely,

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(whom the above-signing attorney certifies was served with this letter on May 14, 2014, via ECF at his email address)