*Religious Freedom Restoration Act of 1993 — Textualism — Bivens Actions* — Tanzin v. Tanvir

When a federal officer violates somebody's constitutional rights, what remedies are appropriate for a court to grant? In the landmark case *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[1] the Supreme Court allowed a man whose Fourth Amendment rights had been violated to sue certain federal officers for monetary damages because "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."[2] Although the Court in the decade following *Bivens* allowed damages causes of action to proceed in two other cases — a Fifth Amendment Due Process Clause case[3] and an Eighth Amendment Cruel and Unusual Punishment Clause case[4] — the Court has since effectively closed the door on most new *Bivens* actions.[5] However, the Supreme Court does not seem to apply this presumption against damages in constitutional tort cases to its statutory interpretation cases. Last Term, in *Tanzin v. Tanvir*,[6] the Supreme Court held that, under the Religious Freedom Restoration Act of 1993[7] (RFRA), litigants may sue federal officials in their individual capacities for money damages because damages are "appropriate relief" under the statute.[8] The Court's understanding of damages as an "appropriate" remedy for RFRA violations in *Tanzin* is supported by a robust history of legal practice dating back to the early Republic. The historical roots of damages remedies suggest that the Court ought to revisit its recent blocking of damages actions against individual federal officers who violate constitutional rights.

In the years following 9/11, the U.S. government developed an expansive surveillance network to monitor American Muslims.[9] One tactic employed by the Federal Bureau of Investigation (FBI) and Department of Homeland Security (DHS) was to recruit individuals to

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[1] 403 U.S. 388 (1971).

[2] *Id.* at 395 (citing cases, books, and articles); *see id.* at 397.

[3] Davis v. Passman, 442 U.S. 228, 230 (1979).

[4] Carlson v. Green, 446 U.S. 14, 17–18 (1980).

[5] *See* Hernández v. Mesa, 140 S. Ct. 735, 752 (2020) (Thomas, J., concurring) ("[I]t appears that we have already repudiated the foundation of the *Bivens* doctrine; nothing is left to do but overrule it."); *see also* Byrd v. Lamb, 990 F.3d 879, 884 (5th Cir. 2021) (Willett, J., specially concurring) ("[R]edress for a federal officer's unconstitutional acts is either extremely limited or wholly nonexistent, allowing federal officials to operate in something resembling a Constitution-free zone. *Bivens* today is essentially a relic, technically on the books but practically a dead letter, meaning this: If you wear a federal badge, you can inflict excessive force on someone with little fear of liability.").

[6] 141 S. Ct. 486 (2020).

[7] 42 U.S.C. §§ 2000bb to 2000bb-4, *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[8] *Tanzin*, 141 S. Ct. at 489.

[9] *See* Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429, 433 (2011–2012).

serve as "informants within their American Muslim communities and places of worship."[10] In February 2007, two FBI special agents approached Muhammad Tanvir — a lawful permanent resident living in Queens, New York, who immigrated from Pakistan to support his family — and pressured him to serve as such an informant in violation of the tenets of his Muslim faith.[11] When Tanvir refused, he was allegedly threatened with deportation and arrest[12] then placed on the No Fly List,[13] which prevented him from obtaining work opportunities and seeing his family in Pakistan.[14]

Tanvir and three other similarly situated plaintiffs[15] filed a lawsuit in the United States District Court for the Southern District of New York in October 2013 against the U.S. Attorney General, the heads of the FBI and DHS, and twenty-five FBI and DHS agents.[16] Plaintiffs sought monetary damages (for airline tickets the plaintiffs had been barred from using and lost income from missed job opportunities) from the FBI and DHS agents in their personal capacities for alleged violations of the plaintiffs' rights under the First Amendment and RFRA.[17] They also sought injunctive and declaratory relief against the defendants in their official capacities, seeking to end the government's alleged coercive investigatory tactics.[18]

The district court stayed the official capacity claims in June 2015 after DHS notified the plaintiffs that they were not on the No Fly List at the time.[19] The court then dismissed the individual capacity claims on the grounds that (a) there was no *Bivens* cause of action for the alleged First Amendment violation and (b) RFRA did not permit claims for money damages.[20] Plaintiffs appealed only the RFRA decision.[21]

A Second Circuit panel reversed, holding that RFRA does permit money damages claims and remanding for further proceedings as to

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10 First Amended Complaint ¶ 8, Tanvir v. Lynch, 128 F. Supp. 3d 756 (S.D.N.Y. 2015) (No. 13-cv-06951).

11 *See id.* ¶¶ 68–84.

12 *Tanvir*, 128 F. Supp. 3d at 762.

13 *See id.* at 762–63. "The No Fly List is a database compiled and maintained by the Terrorist Screening Center (TSC), an agency within the FBI. . . . Anyone whose name is on the list is barred from boarding a flight that starts or ends in the United States, or flies over any part of the country." *Id.* at 760.

14 *See id.* at 762–63. Tanvir worked for a time as a long-haul trucker, which required him to drive across the country and then take a return flight back. *Id.*

15 The three others were Jameel Algibhah, Naveed Shinwari, and Awais Sajjad, who all share similar stories as Tanvir. *Id.* at 759.

16 *See* First Amended Complaint, *supra* note 10, ¶¶ 18–35. The head of the TSC was also included as a defendant. *See id.* ¶ 20.

17 *Tanvir*, 128 F. Supp. 3d at 759, 764.

18 *Id.* at 759.

19 *Id.* at 765.

20 *Id.* at 774, 781.

21 Tanvir v. Tanzin, 894 F.3d 449, 453 (2d Cir. 2018).

whether the defendants should be shielded by qualified immunity.[22] RFRA provides that any "person whose religious exercise has been burdened in violation of [the statute]" can "assert that violation as a claim or defense in a judicial proceeding and obtain *appropriate relief against a government*."[23] Writing for the unanimous panel, Judge Pooler[24] determined that agents may be sued in their individual capacities because RFRA includes "official[s]" within its definition of "government."[25]

The panel next determined that damages are included by the phrase "appropriate relief." RFRA was passed after the Supreme Court's decision in *Franklin v. Gwinnett County Public Schools*,[26] which held that when courts consider what remedies are available under a statute that provides a private right of action, they must "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise."[27] The *Franklin* Court "based that presumption on a long-standing rule that 'has deep roots in our jurisprudence:' that '[w]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.'"[28] The panel determined that because Congress enacted RFRA after the Supreme Court decided *Franklin*, and because RFRA's purpose is "to provide broad protections for religious liberty," the statute allows litigants to sue individual officers for damages.[29] The panel therefore reversed the district court's dismissal of the case and remanded to consider the issue of qualified immunity, which the district court had not yet addressed.[30]

The Second Circuit declined to rehear the case en banc.[31] Judge Jacobs dissented,[32] arguing that, among other things, "[t]he panel ha[d] done what the Supreme Court has forbidden: it . . . created a new *Bivens* cause of action, albeit by another name and by other means."[33] Judge

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[22] *Id.* at 472.

[23] *Id.* at 460 (alteration in original) (quoting 42 U.S.C. § 2000bb-1(c)).

[24] Judge Pooler was joined by Chief Judge Katzmann and Judge Lynch.

[25] *Tanzin*, 894 F.3d at 460 (quoting 42 U.S.C. § 2000bb-2(1)).

[26] 503 U.S. 60 (1992).

[27] *Tanzin*, 894 F.3d at 463 (alteration and emphasis omitted) (quoting *Franklin*, 503 U.S. at 65–66).

[28] *Id.* (alteration in original) (quoting *Franklin*, 503 U.S. at 66).

[29] *Id.* (citing Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 693 (2014)); *see id.* at 463–64. The panel opinion also specifically addressed counterarguments raised based on how other cases have interpreted the phrase "appropriate relief," *see id.* at 464–67, on whether the *Franklin* presumption applies only to implied rights of action, *see id.* at 467–68, and on whether inspecting RFRA's legislative history would lead to a different outcome, *see id.* at 468–72. The panel found each concern unconvincing. *Id.* at 467, 468, 472.

[30] *Id.* at 472.

[31] Tanvir v. Tanzin, 915 F.3d 898, 899 (2d Cir. 2019).

[32] Judge Jacobs was joined by Judges Cabranes and Sullivan.

[33] *Tanzin*, 915 F.3d at 903 (Jacobs, J., dissenting from denial of rehearing en banc). Judge Jacobs also quipped sharply that "the panel's expansive conclusion could be viewed without alarm only by people (judges and law clerks) who enjoy absolute immunity from such suits." *Id.* at 901.

Cabranes also dissented,[34] reiterating that "the panel decision represents a transparent attempt to evade, if not defy, the precedents of the Supreme Court" with respect to *Bivens* and damages remedies for free exercise claims.[35] Chief Judge Katzmann and Judge Pooler concurred in the denial of rehearing, arguing that both dissentals improperly conflated statutory interpretation with the creation of a new *Bivens* action.[36] Tanzin and the other defendants petitioned for certiorari.[37]

The Supreme Court affirmed.[38] In a unanimous opinion by Justice Thomas,[39] the Court held that RFRA allows for damages suits against government officials in their individual capacities.[40] Justice Thomas's analysis began with the text of the Act, which allows aggrieved individuals to "obtain appropriate relief against a government."[41] The government argued that the phrase "against a government" should be read to encompass only suits that name government officials in their official capacities because that fits more naturally with the ordinary meaning of the phrase "against a government."[42] The Supreme Court rejected this argument because of the general rule of statutory interpretation that "'[w]hen a statute includes an explicit definition, we must follow that definition,' even if it varies from a term's ordinary meaning."[43] Thus, the statutory definition of the word "government," which includes any "official (or other person acting under color of law) of the United States," controls.[44] Since an "official" is a person "who is invested with an office," rather than the office itself, the statutory definition of "official" encompasses suits against officers in their individual capacities.[45] Additionally, the reference to "persons acting under color of law" derives from 42 U.S.C. § 1983, which the Supreme Court has "long interpreted . . . to permit suits against officials in their individual capacities."[46]

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[34] Judge Cabranes was likewise joined by Judges Jacobs and Sullivan.

[35] *Tanzin*, 915 F.3d at 904 (Cabranes, J., dissenting from denial of rehearing en banc).

[36] *See id.* at 899 (Katzmann, C.J. & Pooler, J., concurring in denial of rehearing en banc).

[37] *Tanzin*, 141 S. Ct. at 489.

[38] *Id.* at 493.

[39] Justice Thomas was joined by all the other Justices except for Justice Barrett, who did not participate in the consideration or decision of the case.

[40] *Tanzin*, 141 S. Ct. at 493.

[41] *Id.* at 490 (quoting 42 U.S.C. § 2000bb-1(c)).

[42] *Id.* The government's rationale was that recovery against an official's personal assets cannot reasonably be considered to be recovery "against a government." *Id.*

[43] *Id.* (quoting Digit. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 776 (2018)).

[44] *Id.* (emphasis omitted) (quoting 42 U.S.C. § 2000bb-2(1)).

[45] *Id.* (quoting 10 OXFORD ENGLISH DICTIONARY 733 (2d ed. 1989)).

[46] *Id.* (citing, for example, Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 305–06, 305 n.8 (1986)).

Next, the Supreme Court held that "appropriate relief" against those government officials includes money damages.[47] Because the Act did not define "appropriate relief" like it did "a government," Justice Thomas's opinion for the Court first turned to the dictionary definition of "appropriate" as "[s]pecially fitted or suitable, proper."[48] Finding this definition too "open-ended" to answer the question,[49] the Court examined history, noting that "damages have long been awarded as appropriate relief," and that "[i]n the early Republic, 'an array of writs . . . allowed individuals to test the legality of government conduct by filing suit against government officials' for money damages 'payable by the officer.'"[50] The Court traced this history to the present, noting that, prior to RFRA, damages were already available against state officials in their individual capacities under § 1983 when those officials violated "clearly established" federal law.[51] RFRA created a statutory religious free exercise right that effectively overturned the Free Exercise Clause case *Employment Division v. Smith*,[52] so the Court determined that "parties suing under RFRA must have at least the same avenues for relief against officials that they would have had before *Smith*."[53] The Court held that these avenues include "a right to seek damages against Government employees."[54]

The Court then rejected the government's counterarguments.[55] First, it noted that damages are "the *only* form of relief that can remedy some RFRA violations."[56] For those who are not likely to suffer the same harm by federal officials in the future, an injunction provides no relief at all.[57] Second, the Court distinguished *Tanzin v. Tanvir* from *Sossamon v. Texas*,[58] in which the Court had interpreted the same language of "appropriate relief against a government" as it appears in the Religious Land Use and Institutionalized Persons Act of 2000[59] (RLUIPA) to bar monetary damages against the states.[60] Justice

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[47] *Id.* at 492.

[48] *Id.* at 491 (alteration in original) (quoting 1 OXFORD ENGLISH DICTIONARY, *supra* note 45, at 586).

[49] *Id.* (quoting Sossamon v. Texas, 563 U.S. 277, 286 (2011)).

[50] *Id.* (omission in original) (quoting James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1871–75 (2010)).

[51] *Id.* (citing, for example, Procunier v. Navarette, 434 U.S. 555, 561–62 (1978)).

[52] 494 U.S. 872 (1990).

[53] *Tanzin*, 141 S. Ct. at 492.

[54] *Id.*

[55] *See id.* at 492–93.

[56] *Id.* at 492.

[57] *See id.*

[58] 563 U.S. 277 (2011).

[59] 42 U.S.C. §§ 2000cc to 2000cc-5.

[60] *Tanzin*, 141 S. Ct. at 492–93 (citing *Sossamon*, 563 U.S. at 280, 282). Judge Jacobs, in his dissental, had argued that "[g]iven that RFRA and RLUIPA attack the same wrong, in the same way, in the same

Thomas simply noted that the "obvious difference" was that *Tanzin* did not involve sovereign immunity.[61] Third, the Court rejected the government's argument that personal monetary damages would cause separation of powers concerns, as "this exact remedy has coexisted with our constitutional system since the dawn of the Republic."[62] Finally, the Court noted that limiting the availability of damages is Congress's role, and that the Court is not at liberty "to create a new policy-based presumption against damages against individual officials."[63]

The presumption in favor of damages applied by the Court in *Tanzin v. Tanvir* is striking when considered alongside the Court's recent *Bivens* jurisprudence. In the *Bivens* context — where the Court must determine the appropriate remedy for a violation of a constitutional right in the absence of a statute — the Court has recently created a strong presumption against damages. For example, earlier in the same year that *Tanzin* was decided, the Supreme Court held in *Hernández v. Mesa*[64] that it would not allow parents of a fifteen-year-old Mexican child who was shot and killed by a U.S. Border Patrol agent to sue for damages under the Fourth and Fifth Amendments out of concern for the separation of powers, writing that "Congress *might doubt* the efficacy or necessity of a damages remedy" in that instance.[65] The Supreme Court's reading of damages as "appropriate" for RFRA violations cannot be squared with the reasoning offered by the Court for cabining *Bivens*-style actions. However, the *Tanzin* approach to damages marks a welcome return to a historical approach, which in turn should cause the Court to reconsider its recent hostility to constitutional damages actions against federal officials.

The Court's opinion in *Tanzin* correctly applies the long-standing historical practice of damages suits against federal officers who violate individuals' rights. As Justice Thomas explained, "[i]n the context of suits against Government officials, damages have long been awarded as appropriate relief."[66] This judicial practice stretches back to the early Republic.[67] In the Founding era, "citizens harmed by federal officers who acted outside the constitutional or statutory limits on their authority recovered damages from a wide range of federal officer defendants," regardless of whether there was an express statutory cause of action for

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words, it is implausible that 'appropriate relief against a government' means something different in RFRA, and includes money damages." Tanvir v. Tanzin, 915 F.3d 898, 901 (2d Cir. 2019) (Jacobs, J., dissenting from denial of rehearing en banc).

[61] *Tanzin*, 141 S. Ct. at 493.

[62] *Id.*

[63] *Id.*

[64] 140 S. Ct. 735 (2020).

[65] *Id.* at 743 (emphasis added) (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1858 (2017)); *see id.* at 739–40.

[66] *Tanzin*, 141 S. Ct. at 491.

[67] *Id.*

damages.[68] Congress in the early nineteenth century seemed to endorse the practice by passing private bills that indemnified officers on the receiving end of such suits when those officers acted in good faith and petitioned Congress for such relief.[69] Regardless of Congress's choice to indemnify an officer or not, "the courts' role in determining the legality of officer conduct, and awarding relief, went unquestioned."[70]

*Bivens* was an extension of the long-standing, historical practice of remedying the wrongs of federal officers with monetary damages. In *Bivens*, the Court recognized that a man whose Fourth Amendment rights had been violated by federal law enforcement officers after an unlawful search could sue those officers in their individual capacities for damages.[71] Although the Court in *Bivens* was not faced with a statutory interpretation question about the meaning of "appropriate relief," it was still determining what relief would be appropriate to grant, given that the source of the federal right — the Fourth Amendment — "does not in so many words provide for its enforcement by an award of money damages."[72] Justice Harlan, in his concurrence, even specifically identified the question presented as "whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted,"[73] and he wrote that "a traditional judicial remedy such as damages is appropriate to the vindication of the personal interests protected by the Fourth Amendment."[74] In the decade after *Bivens*, the Court allowed damages claims for other constitutional violations in only two more cases: *Davis v. Passman*[75] and *Carlson v. Green*.[76]

And yet, times have changed. The Court now calls the era in which *Bivens* was decided an "*ancien regime*."[77] Although there is still, on paper, a doctrinal path for the recognition of new implied damages actions in the constitutional context, "[t]he Supreme Court has not recognized a new *Bivens* action in the 40 years since *Carlson*."[78] This has not

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[68] Brief of Federal Courts Scholars as Amici Curiae in Opposition to Defendant Barr's Motion to Dismiss at 9, Black Lives Matter D.C. v. Trump, No. 20-cv-01469 (D.D.C. Dec. 1, 2020) [hereinafter Brief of Federal Courts Scholars] (citing, for example, Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246 (1818)); *see id.* at 8.

[69] *See* Pfander & Hunt, *supra* note 50, at 1866–68.

[70] Brief of Federal Courts Scholars, *supra* note 68, at 11.

[71] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389–90 (1971).

[72] *Id.* at 396.

[73] *Id.* at 407 (Harlan, J., concurring in the judgment) (citing J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964), *abrogation recognized by* Ziglar v. Abbasi, 137 S. Ct. 1843, 1855 (2017)).

[74] *Id.* at 399.

[75] 442 U.S. 228 (1979) (discrimination on the basis of sex in violation of the Fifth Amendment).

[76] 446 U.S. 14 (1980) (failure to medically aid prisoner in violation of the Eighth Amendment).

[77] *Abbasi*, 137 S. Ct. at 1855 (quoting Alexander v. Sandoval, 532 U.S. 275, 287 (2001)).

[78] Callahan v. Fed. Bureau of Prisons, 965 F.3d 520, 523 (6th Cir. 2020). The formal, doctrinal maneuver for recognizing new *Bivens* actions is a two-step analysis, wherein the Court first asks whether the case at bar "arises in a 'new context' or involves a 'new category of defendants,'" Hernández v. Mesa, 140 S. Ct. 735, 743 (2020) (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61,

been for lack of opportunity — the Court "has repeatedly declined invitations . . . to create such actions."[79] Justice Thomas has described the Court as having "cabined the *Bivens* doctrine to the facts of *Bivens*, *Davis*, and *Carlson*."[80] And the Court has suggested that those three cases "might have been different if they were decided today,"[81] with Justice Thomas concurring in every new *Bivens*-action case to remind the Court that he believes his colleagues "have already repudiated the foundation of the *Bivens* doctrine; nothing is left to do but overrule it."[82]

In the context of *Bivens* actions, the Court now applies a presumption that damages are not appropriate unless explicitly authorized by Congress. The Court has said "it is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials."[83] For this reason, the Court has recently stressed that *Bivens* should not be extended to a new context in the absence of an affirmative congressional act.[84] The Court has also emphasized that in the constitutional tort context, there must be no ambiguity about Congress's intent to create a damages action.[85]

In *Tanzin*, by contrast, Justice Thomas applied a presumption in favor of damages when RFRA's text was ambiguous as to what remedies were available. Rather than applying the new *Bivens*-context standard that there must be no ambiguity about Congress's intention to create a damages action for a court to recognize one, the Court read RFRA to allow such suits despite being textually ambiguous. The Court openly recognized that the phrase "appropriate relief" is "inherently context dependent."[86] And in *Sossamon v. Texas*, in which the Court previously interpreted the phrase "appropriate relief" as it appears in RLUIPA, the Court understood "appropriate relief" to be "open-ended and ambiguous about what types of relief it includes."[87] In the face of such ambiguity,

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68 (2001)); and, if so, then asks whether the case presents "any 'special factors that counsel hesitation' about granting the extension," *id.* (alterations omitted) (quoting *Abbasi*, 137 S. Ct. at 1880). If the answer to both questions is "yes," then the Court does not allow for a *Bivens* action to proceed. *See id.*

79 *Callahan*, 965 F.3d at 523 (citing *Abbasi*, 137 S. Ct. at 1857).

80 *Hernández*, 140 S. Ct. at 751–52 (Thomas, J., concurring).

81 *Abbasi*, 137 S. Ct. at 1856.

82 *Hernández*, 140 S. Ct. at 752 (Thomas, J., concurring); *see also, e.g.*, *Abbasi*, 137 S. Ct. at 1869 (Thomas, J., concurring in part and concurring in the judgment) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action." (quoting Wilkie v. Robbins, 551 U.S. 537, 568 (2007) (Thomas, J., concurring) (quoting *Malesko*, 534 U.S. at 75 (Scalia, J., concurring, joined by Thomas, J.)))).

83 *Abbasi*, 137 S. Ct. at 1856.

84 *See id.* at 1857.

85 *See id.* at 1858 (refusing to remedy a constitutional violation with damages because Congress "*might doubt* the efficacy or necessity of a damages remedy" (emphasis added)).

86 *Tanzin*, 141 S. Ct. at 491 (quoting Sossamon v. Texas, 563 U.S. 277, 286 (2011)).

87 *Sossamon*, 563 U.S. at 286.

the Court in *Tanzin* applied a presumption in favor of damages rather than its *Bivens*-context presumption against damages, writing that "there may be policy reasons why Congress may wish to shield Government employees from personal liability, and Congress is free to do so. But there are no constitutional reasons why we must do so in its stead."[88]

The Supreme Court should apply the *Tanzin* presumption in favor of damages when considering new *Bivens* actions. As the Court's historical analysis in *Tanzin* reveals, what the current Court derides as an "*ancien regime*" of allowing monetary damages for constitutional rights violations is better characterized by a different phrase: "original understanding."[89] Given the long-standing history of damages suits remedying the constitutional and statutory transgressions of federal officers,[90] the Court should apply the same *Tanzin* presumption in favor of damages when considering damages actions brought to remedy constitutional violations.

To make the point clearer, consider how *Tanzin* would have come out had Tanvir brought his claim under the First Amendment directly. Even if the federal agents' RFRA-violating actions also violated the First Amendment's Free Exercise Clause, the Supreme Court would almost certainly not have permitted a damages action given that it has consistently rejected *Bivens* claims under the First Amendment.[91] However, the Court would have likely allowed for equitable relief (assuming Tanvir had standing) by enjoining the federal officers from violating Tanvir and his co-plaintiffs' First Amendment rights in the future.[92] Many of the same members of the Court who have sought to constrain or overturn *Bivens* as a "congressionally uninvited intrusion"[93] have recognized that injunctive relief — which the Court has stated (without dissent on this point) is available "with respect to violations of federal law by federal officials"[94] — is itself "a judge-made remedy" resting on a court's inherent equitable powers.[95] This recognition in turn "reflects a long history of judicial review of illegal executive action, tracing back to England."[96] Indeed, for the conservative Justice Harlan in *Bivens* itself, "the presumed availability of federal equitable relief

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88 *Tanzin*, 141 S. Ct. at 493.

89 *See id.* ("[T]his exact remedy has coexisted with our constitutional system since the dawn of the Republic.").

90 *See id.* at 491; Brief of Federal Courts Scholars, *supra* note 68, at 3–4.

91 *See* Watkins v. Three Admin. Remedy Coordinators of the Bureau of Prisons, 998 F. 3d 682, 685–86 (5th Cir. 2021) (first citing Reichle v. Howards, 566 U.S. 658, 663 n.4 (2012); and then citing Bush v. Lucas, 462 U.S. 367, 368 (1983)).

92 *See* Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327 (2015).

93 Ziglar v. Abbasi, 137 S. Ct. 1843, 1862 (2017) (quoting United States v. Stanley, 483 U.S. 669, 683 (1987)).

94 *Armstrong*, 575 U.S. at 327; *accord id.* at 337 (Sotomayor, J., dissenting) ("That . . . federal courts [may] enjoin unconstitutional government action is not subject to serious dispute.").

95 *Id.* at 327 (majority opinion).

96 *Id.*

against threatened invasions of constitutional interests appear[ed] entirely to negate the contention that the status of an interest as constitutionally protected divests federal courts of the power to grant damages absent express congressional authorization."[97]

That *Tanzin* involves an "express" remedies provision, rather than an implicit one, is a distinction without a difference because RFRA's text is ambiguous, not explicit. RFRA's textual foundation for interpreting what relief is "appropriate" puts the Court in functionally the same position it faces in *Bivens* cases: determining what remedies are appropriate to provide where Congress has not made its wishes clear.[98] And if Congress's express grant of authorization to the Court to consider what relief is "appropriate" under RFRA distinguishes *Tanzin* from *Bivens* cases, it does so in a way that cuts against the Court's recent reasoning in *Bivens* actions: the Court's separation of powers concerns and its expectation of explicit authorization for damages actions are more compelling in the statutory context than in constitutional cases. In *Ziglar v. Abbasi*,[99] the Court compared statutory to constitutional causes of action and determined that because Congress has "specific procedures and times for considering [a statute's] terms and . . . its enforcement," it "is logical, then, to assume that Congress will be *explicit* if it intends to create a private cause of action" for damages.[100] In the constitutional context, by contrast, "there is no single, specific congressional action to consider and interpret."[101] Under the Court's own reasoning, then, the Court should expect the clearest indication of congressional intent when interpreting statutes. And yet, ambiguity in *Tanzin* was met with a presumption in favor of damages because historical analysis demanded so. By this logic, the Court should apply *Tanzin*'s presumption in favor of damages to the constitutional context in *Bivens* cases.

The Court's recent retrenchment of *Bivens* is out of place within the long-standing legal practice, as revealed by the Court's historical analysis in *Tanzin*. Because *Tanzin* is more in line with the original understanding of the federal courts' power to issue damages remedies for the violation of federal rights, the Court should apply the *Tanzin* presumption to its *Bivens* jurisprudence. Otherwise, for too many people, the original understanding of the judicial power to secure the rights of all Americans will fade, and the rights secured on paper by our Constitution will be rendered merely "a form of words."[102]

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97 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 404 (1971) (Harlan, J., concurring in the judgment).

98 *Cf., e.g.*, *Abbasi*, 137 S. Ct. at 1862 (describing the recognition of a *Bivens* claim as an "'inappropriate' action for the Judiciary to take" (quoting *Stanley*, 483 U.S. at 683)).

99 137 S. Ct. 1843.

100 *Id.* at 1856.

101 *Id.*

102 Mapp v. Ohio, 367 U.S. 643, 648 (1961) (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).