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# Tenth Circuit Allows Government Officials To Assert Qualified Immunity Defense To RFRA Damages Claims

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The U.S. Court of Appeals for the Tenth Circuit recently ruled that the Religious Freedom Restoration Act, 42U.S.C. §2000bb et seq. (RFRA), provides a claim for money damages against government officials acting in their individual capacities and that those officials may raise qualified immunity as a defense. *Ajaj v. Fed. Bureau of Prisons*, — F.4th —, 2022 U.S. App. LEXIS 3584 (10th Cir. Feb. 9, 2022). The circuit court followed the Supreme Court's decision in *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020), which confirmed that damages claims are permissible under RFRA, and expanded on *Tanzin* by allowing individual defendants to raise qualified immunity.

## The Underlying RFRA Claims

Ahmad Ajaj, a practicing Muslim, is currently serving a 114-year sentence for terrorist acts related to the 1993 World Trade Center bombing. *Ajaj*, 2022 U.S. App. LEXIS 3584, at \*1. He sued the Bureau of Prisons (BOP) for injunctive relief and certain BOP officials for money damages on several grounds, including violations of his rights to free exercise of religion under RFRA. *Id.* at \*1-2. Specifically, he alleged the following RFRA violations: (1) failure to accommodate religious fasts during Ramadan; (2) failure to provide a halal diet; (3) failure to provide access to an imam, an Islamic religious leader; and (4) failure to accommodate group prayer five times daily. *Id.* at \*4.

After the district court dismissed his claims, Mr. Ajaj appealed from the court's dismissal of (1) his group-prayer claim as moot, and (2) his individual-capacity claims for money damages under RFRA. *Id.* at \*10. His other claims for injunctive relief were either dismissed following his transfer from a Colorado penitentiary to an Indiana penitentiary, which resulted in

the availability of additional religious accommodations, or resolved at trial. See *id.* at \*2-10.

### **The Tenth Circuit Holds the Group-Prayer Claim Was Not Moot**

As to the district court's dismissal of Mr. Ajaj's group-prayer claim as moot, Mr. Ajaj argued on appeal that the dismissal was based on a misunderstanding of the evidence, which showed he was still being denied the opportunity for group prayer five times per day. *Id.* at \*13-14. The Tenth Circuit agreed, because the record showed that Mr. Ajaj was typically allowed only three to four group-prayer sessions daily. *Id.* at \*16.

The circuit court observed that, “[a]lthough missing one or two daily prayers might be considered a permissible burden on Mr. Ajaj’s religious beliefs, that goes to the merits of his RFRA claim, not its justiciability.” *Id.* at \*16-17. Because Mr. Ajaj’s group-prayer claim was founded on the denial of five daily prayers, and the record showed he was allowed fewer than five group-prayer opportunities per day at the Indiana facility, the district court’s finding that Mr. Ajaj could pray five times daily was clearly erroneous. *Id.* at \*17. The circuit court remanded Mr. Ajaj’s group-prayer claim for further proceedings. *Id.* at \*27.

### **The Circuit Court Confirms Damages Claims Are Permissible Under RFRA**

Mr. Ajaj had sued several BOP officials in their individual capacities for money damages arising from all four of his alleged RFRA violations. *Id.* at \*17-18. The district court dismissed all his RFRA claims, “holding that RFRA did not authorize money damages.” *Id.* at \*18.

But while Mr. Ajaj’s appeal was pending, the Supreme Court issued its decision in *Tanzin*, where it held that money damages are available under RFRA. *Tanzin*, 141 S.Ct. 489. Relying on *Tanzin*, the Tenth Circuit confirmed the availability of money damages, and defendants did not contest this point on appeal. *Ajaj*, 2022 U.S. App. LEXIS 3584, at \*20-21.

### **The Circuit Court Rules Defendants May Raise the Defense of Qualified Immunity**

Instead, the BOP defendants argued that, even though money damages claims are permissible, the Tenth Circuit should nonetheless affirm the district court’s dismissal on the alternative ground of qualified immunity, which the parties briefed below. *Id.* at \*18. Mr. Ajaj replied that qualified immunity does not apply to RFRA claims. *Id.* *Tanzin* did not resolve the issue; however, in the Supreme Court, the parties agreed that there would be a qualified-immunity defense to a RFRA damages claim. See *Tanzin*, 141 S.Ct. at 489 n.\*.

The Tenth Circuit resolved this open issue, holding that “qualified immunity can be invoked by officials sued in their individual capacities for money damages under RFRA.” *Ajaj*, 2022 U.S. App. LEXIS 3584, at \*18. The circuit court explained that “[t]he very analysis that supported [the *Tanzin* court’s] recognition of the damages claim also compels recognition of

qualified immunity.” Id. at \*20.

Of particular importance was the Supreme Court's analysis of the “legal backdrop against which Congress enacted RFRA.” Id. (quoting *Tanzin*, 141 S.Ct. at 490). Specifically, the *Tanzin* court focused on RFRA's phrase “persons acting under color of law[,]” which “draws on” the language of 42 U.S.C. §1983 that has long been interpreted to allow both damages suits against officials in their individual capacities *and* the qualified-immunity defense. Id. at \*20-21 (quoting *Tanzin*, 141 S.Ct. at 490).

The Tenth Circuit further found persuasive *Tanzin's* analysis of the right under RFRA to seek “appropriate relief.” Id. at \*21. The *Tanzin* court explained that “the meaning of this ‘open-ended’ language is ‘inherently context dependent,’” and at the time RFRA was enacted, the Supreme Court had already interpreted “§1983 to permit monetary relief against officials who violated ‘clearly established’ federal law.” Id. (quoting *Tanzin*, 141 S.Ct. at 491). It could thus be inferred that RFRA's damages remedy, i.e., the availability of “appropriate relief,” was meant to mirror the relief afforded under §1983—money damages. Id. at \*22. Likewise, “the same context that supported a RFRA damages remedy also supported the application of qualified-immunity doctrine, which limits individual liability to violations of clearly established law.” Id. at \*21; see also id. at \*22 (noting the “strong implication” that the “venerable and important” qualified immunity component of §1983 was also incorporated).

The circuit court rejected Mr. Ajaj's two counter arguments. Id. at \*23-25. First, the court disagreed with his argument that allowing a qualified immunity defense to RFRA, where it was not expressly provided for by Congress, amounted to “judicial policymaking.” Id. at \*23. It explained that “to recognize qualified immunity in damages cases under RFRA is not to create new policy but to construe statutory language in light of a background presumption that was well-established when RFRA was enacted.” Id. at \*24.

Second, the Tenth Circuit rejected Mr. Ajaj's contention that 42 U.S.C. §2000bb-1, subsection (b), which contains RFRA's exceptions to liability, already encompasses all available defenses, and therefore, the defense of qualified immunity was specifically excluded by Congress. Id. at \*24-25. Subsection (b) provides that the government may burden a person's exercise of religion if: “(1) it is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” The circuit court disagreed. It reasoned that “subsection (b) states the only justification for substantially burdening someone's exercise of religion”; but it does not address “the only ground on which an official can defend against personal liability for such an imposition.” Id. at \*27. The court thus concluded: “We can think of no reason to infer from that provision that Congress was expressing any disapproval of the tradition of granting qualified immunity to public officials.” Id.

Accordingly, the court remanded to the district court to determine in the first instance whether the individual defendants are entitled to qualified

immunity. Id.

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