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 UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.*, permits claims seeking money damages against federal government officials, agents, and employees sued in their individual capacities for violations of the law's substantive protections of religious belief.

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STATEMENT

This suit challenges the improper use of the No Fly List (the "List") by the Federal Bureau of Investigation ("FBI") to coerce law-abiding American Muslims into spying on their religious communities. Respondents Muhammad Tanvir, Jameel Algibhah, and Naveed Shinwari are all United States citizens or lawful permanent residents. Each is a practicing Muslim. Each was either placed or kept on the List when he refused to become an informant for the FBI against fellow American Muslims. All were removed from the List after they sued.

Among other claims, Respondents sued under the Religious Freedom Restoration Act ("RFRA") and sought money damages from the FBI agents who attempted to recruit them as informants and placed or retained them on the List.[1] The United States Court of Appeals for the Second Circuit correctly concluded that because RFRA authorizes "appropriate relief" from federal "officials," it permits Respondents to seek money damages from Petitioners in their individual capacities.

A. *Franklin*, *Smith*, and the Religious Freedom Restoration Act

In 1992, this Court's ruling in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), reaf-

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[1] While this action was pending in district court, the government notified Respondents that they were no longer on the List, rendering moot Respondents' official capacity claims for injunctive relief, leaving only a live controversy as to the causes of action for damages against the individual capacity defendants.

firmed "[t]he general rule…that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Id.* at 70–71. Under that "traditional presumption," the Court observed that when a statute provides a right of action, it authorizes "all appropriate remedies," including money damages, "unless Congress has expressly indicated otherwise." *Id.* at 66, 69. The Court noted that "[t]his principle has deep roots in our jurisprudence." *Id.* at 66.

A year after the decision in *Franklin*, Congress passed RFRA, 42 U.S.C. § 2000bb *et seq.*, drawing on its powers under Section 5 of the Fourteenth Amendment (relative to the states) and the Necessary and Proper Clause of Article I (relative to the federal government). Congress stated that its dual purpose in enacting RFRA was "to restore the compelling interest test" that was applicable to suits challenging substantial burdens on free religious exercise prior to this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b).

This Court later observed that Congress passed RFRA "in order to provide very broad protection for religious liberty," *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014), and that RFRA provides "even broader protection…than was available under [pre-*Smith* cases]." *Id.* at 695 n.3; *see also City of Boerne v. Flores*, 521 U.S. 507, 535 (1997). Indeed, Congress "mandated" that RFRA "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted" by law. *Hobby Lob-*

by, 573 U.S. at 696 n.5 (noting that rule of "broad construction" codified in the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-3(g) (2012), applies equally to RFRA pursuant to 42 U.S.C. § 2000bb-2(4)).

With RFRA, Congress created a new, explicit private right of action, permitting any "person whose religious exercise has been burdened in violation of [the statute to] 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). RFRA defined the term "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." *Id.* § 2000bb-2(1). In authorizing "appropriate relief," Congress used language identical to that used by this Court one year earlier in *Franklin* to explain the presumptive availability of money damages absent contrary statutory language. RFRA allows a successful plaintiff to obtain "appropriate relief," without limitation, from the government "agency" or "official (or other person acting under color of law)" who impermissibly burdened the plaintiff's religious exercise. *Id.*

One year after RFRA's passage, the Department of Justice's Office of Legal Counsel issued an opinion evaluating RFRA under the "traditional presumption" set out in *Franklin* and concluded that RFRA likely made money damages available in personal capacity suits. Walter Dellinger, *Availability of Money Damages Under the Religious Freedom Restoration Act*, 18 Op. O.L.C. 180, 182–83 (1994).

A few years later, Congress reaffirmed the availability of money damages under RFRA in a House report regarding a precursor to the Religious Land

Use and Institutionalized Persons Act (passed as a companion to RFRA after this Court's decision in *City of Boerne*), stating that language in the bill providing that a "person may assert a violation of this Act…and obtain appropriate relief against a government" was written to "track RFRA, creating a private cause of action for damages." H.R. Rep. No. 106-219, at 2, 29 (1999).

B. The No Fly List

The No Fly List is a watchlist of people who are prohibited from boarding aircraft for flights that originate from, terminate in, or pass over the United States. The List is created and maintained by the government's Terrorist Screening Center ("TSC"). Pet. App. 5a–6a. The FBI is the principal agency that administers the TSC, which develops and maintains the Terrorist Screening Database ("TSDB"), the government's repository of information about all individuals who are supposedly known to be or reasonably suspected of being involved in "terrorist activity." Pet. App. 5a. The List, a subset of the TSDB, is among the watchlists administered by the TSC. *Id.* The Department of Homeland Security ("DHS") administers the limited redress procedure for individuals who contest their placement on the List. App. Opp'n 10a.

While the TSC maintains and shares the List with other agencies, it does not, on its own, generate the names for placement on the List. Rather, it relies on "nominations" from agencies with investigative functions—primarily, the FBI. *Id.* at 15a. Individual FBI agents, like Petitioners, nominate people

to the List.[2] Pet. App. 6a; *see also Ibrahim v. Dep't of Homeland Sec.*, 62 F. Supp. 3d 909, 916 (N.D. Cal. 2014) (describing process by which FBI special agent made nominations to various federal watchlists). Although the TSC is expected to review each nomination, in practice the TSC almost never rejects the FBI agents' nominations to the List. App. Opp'n 17a.

C. Respondents' Placement and Retention on the No Fly List

Each Respondent's experience with retaliatory placement or retention on the List was similar in one key respect: each was told by one or more of the Petitioners that the only way he could be taken off the List was by becoming a government informant in his religious community. Each Respondent is a practicing Muslim who was born abroad, where at least some of his family remains. *Id.* at 6a–8a, 23a, 37a, 47a. Each immigrated legally to the United States, and each had flown on commercial aircraft many times without incident. *Id.* at 23a, 24a, 37a, 47a–48a. At the time the underlying Complaint was filed, two Respondents were U.S. lawful permanent residents and one was a U.S. citizen. *Id.* at 6a–7a. None poses, has ever posed, or has ever been accused of posing, a threat to aviation security. *See, e.g.*, *id.* at 23a, 34a, 37a, 47a, 55a. Nonetheless, each Respondent found himself on the List.

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[2] Contrary to Petitioners' assertions, Pet'rs' Br. 7, Respondents have not conceded that individual agents play no role in the composition of the List or any other watchlist maintained by the TSC.

Petitioners, who told Respondents that they were FBI special agents, pressured Respondents to collect information about their Muslim communities. *Id.* at 24a, 37a–38a, 48a, 51a–53a. By all appearances, Petitioners sought to force Respondents to serve as informants simply because they were Muslims with access to a religious community under unwarranted suspicion. *See id.* at 24a, 37a–38a, 48a, 51a–53a.[3] Petitioners approached Respondents on multiple occasions, asking them about their acquaintances, families, places of worship, religious practices, and political beliefs—questions Respondents answered truthfully. *Id.* at 32a, 38a, 42a, 48a.[4] Though the agents asked isolated and unsubstantiated questions about training camps, Respondents knew nothing about them. *See id.* at 25a.

Petitioners then pressed Respondents to provide general information about their places of worship, religious communities, and their fellow Muslims more broadly, unrelated to terrorism or any specific investigation. *See id.* at 27a-28a, 38a, 51a. No Respondent wanted to spy on his religious community because doing so would violate his religious beliefs. Pet. App. 3a (opinion of the court of appeals). Rather

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[3] Petitioners' brief repeated an incorrect assertion that Respondents stated that the agents recruited them to serve as informants in "terrorism-related investigations." Pet. 4; Pet'rs' Br. 5. Respondents have made no such allegation and nothing in the record below supports this assertion. Respondents' allegations are taken as true on this appeal from a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[4] Respondents never alleged that Petitioners questioned them as part of investigations "related to national security," as Petitioners assert for the first time in their brief. Pet'rs' Br. 5.

than accepting Respondents' refusals, the FBI agents persisted. In each case, the agents relied upon what they assumed would be the irresistible coercion of the List—threatening to keep Respondents on the List for refusing to accede to the FBI's demands, or offering to remove them from the List in exchange for services as an FBI informant. *See, e.g.*, App. Opp'n at 30a, 39a, 152a.

Petitioners thereby "forced [Respondents] into an impermissible choice between, on the one hand, obeying their sincerely held religious beliefs and being subjected to the punishment of placement or retention on the No Fly List, or, on the other hand, violating their sincerely held religious beliefs in order to avoid being placed on the No Fly List or to secure removal from the No Fly List." Pet. App. 4a (opinion of the court of appeals). Each Respondent alleged that this dilemma placed a substantial burden on his exercise of religion and that the individual Petitioners knew or should have known this.[5] App. Opp'n 28a, 34a, 38a–39a, 55a. Additionally, placement on the List resulted in concrete harms for Respondents, preventing them from visiting family members in the United States and overseas, causing them "to lose money they had paid for plane tickets, and hamper[ing] [Respondents'] ability to travel for work," which also resulted in "emotional distress, reputa-

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[5] Petitioners nonetheless quote Second Circuit Judge Dennis Jacobs's dissent from the denial of rehearing *en banc* to assert that Petitioners were not told about Respondents' religious beliefs (though not that Petitioners were in fact unaware of those beliefs). Pet'rs' Br. 5. The record below suggests otherwise and, at the very least, this is a contested issue of fact that must be resolved by the district court in the first instance.

tional harm, and economic loss." Pet. App. 4a. (opinion of the court of appeals).

D. Procedural History and Respondents' Removal from the No Fly List

Prior to bringing suit, Respondents each pursued and exhausted the limited administrative redress process then available through the DHS Traveler Redress Inquiry Program ("TRIP") for individuals who believed they were on the List. App. Opp'n 31a, 35a, 36a, 40a, 41a, 55a, 56a. Mr. Tanvir filed a TRIP complaint in September 2011 and received a final response in March 2013, nearly two years later, which neither confirmed nor denied his placement on the List. *Id.* at 31a, 36a. Mr. Shinwari similarly waited fifteen months for the same response with respect to his initial TRIP complaint, and ultimately filed a second TRIP before bringing suit. *Id.* at 55a. Mr. Algibhah filed a TRIP complaint in early summer 2010 and was still waiting for a response as of the filing of the Amended Complaint, at which point he had not been able to fly for nearly four years. *Id.* at 40a, 41a. In April 2014, Respondents filed the operative amended complaint against Petitioners in their official capacities, seeking injunctive and declaratory relief, and in their individual capacities, seeking damages on claims including RFRA. Pet. App. 11a (opinion of the court of appeals).

Nearly a year after Respondents filed their Amended Complaint, Petitioners and the official capacity defendants notified the district court of a modified redress procedure available to U.S. citizens and lawful permanent residents on the List, which would provide notice of placement on the List after the fil-

ing of a TRIP complaint. *Id.* at 75a. Respondents pursued the modified redress procedure. *Id.* On June 8, 2015, four days before oral argument on the government's motions to dismiss in the district court and less than a week after Respondents pursued the modified TRIP procedure, DHS informed Respondents that the government "knows of no reason why they would be unable to fly." *Id.* at 12a. Respondents then agreed to stay the official capacity claims, and ultimately to dismiss them after confirming each Respondent was able to board a flight. *Id.*

The district court granted Petitioners' motion to dismiss the remaining claims. The district court did not "address the predicate question of whether 'government' includes federal officials sued in their individual capacity." *Id.* at 108a, n.25. Rather, it held, in pertinent part, that RFRA's provision for "appropriate relief" does not encompass money damages against individual federal officers. *Id.* at 13a.

Respondents appealed, *id.* at 14a, and a unanimous panel of the Second Circuit reversed, holding that RFRA permits actions seeking money damages against federal officials sued in their individual capacities. *Id.* at 32a–33a.

The decision below first considered whether RFRA authorizes individual capacity suits against federal officers, an analysis the district court did not undertake. *Compare* Pet. App. 15a-22a *with id.* at 108a. The court held that "RFRA, *by its plain terms* authorizes individual capacity suits against federal officers." *Id.* at 19a (emphasis added). The court rejected Petitioners' arguments to the contrary, specifically declining to apply Petitioners' proffered "natural reading" of the term "government," because RFRA included an explicit definition of that term,

and noting that "[w]hen a statute includes an explicit definition, we must follow that definition." *Id.* at 19a (quoting *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000)). The court also observed that use of the phrase "other person acting under color of law" "contemplates that persons 'other' than 'officials' may be sued under RFRA, and persons who are not officials may be sued only in their individual capacities." *Id.* at 21a (quoting *Patel v. Bureau of Prisons*, 125 F. Supp. 3d 44, 56 (D.D.C. 2015)). The opinion highlighted RFRA's use of "under color of law" language comparable to that of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (2012), which authorized individual capacity suits, indicating that Congress "intend[ed] to adopt…the judicial construction of that phrase" as well. *Id.* at 22a (internal quotation marks and citations omitted).

The court then addressed whether RFRA's provision for "appropriate relief" included money damages. Citing the "venerable canon of construction that Congress is presumed to legislate with familiarity of the legal backdrop for its legislation," the court recognized that Congress passed RFRA one year after this Court's decision in *Franklin*. *Id.* at 24a–25a. Observing that RFRA used the "very same 'appropriate relief' language in RFRA that was discussed in *Franklin*," the court determined that the longstanding presumption addressed in *Franklin* also applied to RFRA's explicit right of action. *Id.* at 25a. Given the presumption that all "appropriate remedies" are available unless Congress expressly indicates otherwise, the court held that money damages are available under RFRA in individual capacity suits. *Id.* at 25a–26a.

The court rejected Petitioners' arguments to the contrary. *Id.* at 26a–42a. In particular, the court explained why its decision was consistent with decisions interpreting RFRA's sibling statute, RLUIPA, 42 U.S.C. § 2000cc *et seq.*, and this Court's decision in *Sossamon v. Texas*, 563 U.S. 277 (2011), which held that the term "appropriate relief" was not sufficiently specific to abrogate state sovereign immunity and permit money damages against state employees sued in their official capacities. *Id.* at 26a–28a. The court noted that the "animating principles underlying" *Sossamon*—whether the term "appropriate relief" was sufficiently clear to provide an express waiver of state sovereign immunity—were "absent from the instant case." *Id.* at 28a. The court then reviewed RFRA's legislative history and determined that the record lacked "a clear and express indication that Congress intended to exclude individual damages claims from the scope of RFRA's available relief." *Id.* at 42a. Without such an express indication, the court held RFRA's provision for "appropriate relief" was appropriately read to include money damages. *Id.*

Petitioners sought rehearing *en banc*, which was denied. *Id.* at 45a–50a. Chief Judge Katzmann and Judge Pooler issued an opinion concurring in the denial of rehearing *en banc*. Three judges dissented in two separate opinions. *Id.* Chief Judge Katzmann and Judge Pooler wrote a concurrence to specifically dispute the dissents' arguments concerning *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1981), noting that judicially implied causes of action derived from *Bivens* and its progeny are entirely inapposite when considering the interpretation of remedies provided by statute. *Id.* at

47a–50a (describing dissents' *Bivens*-related concerns as a "red herring").

The government petitioned this Court for a writ of certiorari, which this Court granted.

SUMMARY OF ARGUMENT

An individual whose religious exercise has been substantially burdened by a federal official in violation of RFRA may sue that person in their individual capacity for damages. Congress provided that relief, subject to strong statutory defenses and the powerful shield of qualified immunity. Dissatisfied with what Congress enacted, Petitioners urge this Court to devise a novel interpretive doctrine that would immunize federal officials from personal liability under this law. They do so in disregard of statutory text, interpretive canons, settled presumptions, enacted statements of purpose, and the statutory scheme upon which RFRA was modeled, not to mention what legislative history says and does not say.

RFRA's plain text authorizes suits against individual federal officials. It permits plaintiffs to seek "appropriate relief against a government," defined in the statute to include an "official (or other person acting under color of law) of the United States." 42 U.S.C. §§ 2000bb-1(c), 2000bb-2(1). Petitioners ask the Court to disregard that statutory definition in favor of another more conducive to their preferred outcome. The plain meaning of the undefined statutory term "official"—indicating the individual, not the office—fares no better. Petitioners interpret it to be limited to an official capacity. And because, taken contextually, "official (or *other person* acting under color of law)" further suggests personal liability, Pe-

titioners simply look the other way and claim that "official" is subsumed by the meaning of the prior listed terms, notwithstanding that "official" possesses a character all its own, distinct from "a branch, department, agency, [or] instrumentality." 42 U.S.C. § 2000bb-2(1) (emphasis added).

Indeed, the term "official" becomes impermissible surplusage in RFRA if construed to refer only to officials in their official capacities. This Court has long recognized that there is no substantive difference between a suit against an agency for injunctive relief and a suit against an official of that agency seeking the same relief. Congress expressly and separately authorized RFRA claims against federal agencies (and other such entities) in addition to officials. Unless the phrase "official (or other person acting under color of law)" is given independent meaning—signifying the person, not the office—that entire phrase would be redundant.

Congress also provided for "appropriate relief" against RFRA violators. 42 U.S.C. § 2000bb-1(c). It enacted this particular language one year after this Court reaffirmed the longstanding "traditional presumption in favor of all appropriate relief," including both injunctive and monetary relief, "unless Congress has expressly indicated otherwise" or there is a constitutional barrier to liability, such as sovereign immunity. *Franklin*, 503 U.S. at 66, 69; *see also Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 603–04, 614–15, 624 (1838) (noting that damages were among remedies available against a federal official, the Postmaster General, under statute with explicit private right of action that did not specify remedies available to plaintiff). RFRA's text does not limit the "appropriate relief" a plaintiff may obtain

against individual capacity defendants, and Petitioners have failed to identify any actual constitutional constraint on the scope of the phrase.

Instead, Petitioners rely on *Sossamon*, which involved the polar opposite presumption. There, in the context of RFRA's sibling statute, RLUIPA, this Court held that the phrase "appropriate relief" was not a sufficiently clear statement of congressional intent to abrogate states' sovereign immunity from damages suits. 563 U.S. at 285–86, 289–90. Petitioners have no such basis to challenge a RFRA claim seeking damages; they do not enjoy absolute immunity from suit in their personal capacity. Shortly after RFRA's passage, in a formal opinion, the Office of Legal Counsel adopted this very understanding of RFRA as likely permitting personal capacity damages. 18 Op. O.L.C. at 182–83. Though Petitioners would like this Court to import *Sossamon*'s reverse presumption into this context, they offer no convincing argument for why such a novel rule, flipping *Franklin* and its predecessors on their heads, should guide the question before the Court.

Reading RFRA to allow individual capacity damages against federal officials who violate it would be faithful to its enacted statement of purpose. RFRA expressly states that Congress had two separate purposes: to "restore the compelling interest test" *and* "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b). Damages are fully consonant with RFRA's "[s]weeping coverage," *City of Boerne*, 521 U.S. at 532, that "went far beyond what this Court has held is constitutionally required," *Hobby Lobby*, 573 U.S. at 706, and "provided even broader protection for religious liberty than" was

available prior to RFRA's enactment. *Id.* at 695 n.3. Indeed, this Court held that Congress "mandated" that RFRA "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted" by law. *Hobby Lobby*, 573 U.S. at 696 n.5.

Moreover, Congress used the distinctive language, "person acting under color of law," in RFRA, well aware of the very similar language in 42 U.S.C. § 1983, which the Court and Congress have long interpreted to permit damages actions against state officials in their individual capacities. Because Congress (prior to this Court's decision in *City of Boerne*) believed RFRA would regulate both state and federal officials, Section 1983, which allowed both injunctive relief and damages, was the obvious model.[6] RFRA's use of one set of terms to cover all official defendants—state and local as well as federal—bolsters the conclusion that Congress authorized coextensive relief under RFRA, including individual capacity damages actions against federal officials.

Petitioners' arguments, including their reliance on legislative history and freewheeling policy considerations, do not rebut RFRA's text, well-established interpretive canons and presumptions, the enacted statement of purpose, or the parallel that Section 1983 offers. To the extent the legislative history yields any directly relevant statement, it is found in a House report for a precursor to RLUIPA, explain-

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[6] As passed in 1993, the statute continued "…a State, or a subdivision of a State." *Cf.* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106–274, § 7(a)(1), 114 Stat. 803, 806 (2000) (replacing this language with current text "or of a covered entity").

ing that Section 4 of that statute—providing that a "person may assert a violation of this Act…and obtain appropriate relief against a government"—contains language that "track[s] RFRA, creating a private cause of action for damages…." H.R. Rep. No. 106-219, at 2, 29. Beyond that, there is no indication in RFRA's legislative history that Congress intended to limit the remedies available under RFRA to injunctive relief.

This Court should hold that RFRA permits Respondents to state a claim for money damages from Petitioners in their individual capacities, as have both courts of appeals that have addressed the question to date.

ARGUMENT

A. RFRA Authorizes Claims Against Petitioners in Their Individual Capacities

RFRA provides Respondents with a claim against Petitioners in their individual capacities because the statute authorizes suits against a "government," which the statute defines to include 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). Since RFRA already permits claims against the official's "agency" (and other such entities), which this Court has long held as substantively equivalent to official capacity claims, the term "official" must be given its plain and distinct meaning to permit suits against the official as a person. The parenthetical in the phrase "official (or other person acting under color of law)" further

confirms that "official," a term RFRA leaves undefined, must be read to indicate the individual as distinct from the office. The reference to an "other person" in the statutory definition immediately following the word "official" textually signifies that the "official" is also a "person." Like any "other person acting under color of law," the "official" can therefore be sued in a personal capacity. This Court should embrace the statutory text and hold that Petitioners are subject to RFRA claims in their individual capacities.

1. The Statutory Definition of "Government" Along with the Plain Meaning of "Official" and its Context Make Clear that RFRA Provides for Claims Against Federal Officials in Their Individual Capacities

This Court has repeatedly emphasized that, when the plain language of a statute is unambiguous, the "inquiry begins with the statutory text, and ends there as well." *Nat'l Ass'n of Mfg. v. Dep't of Defense*, 138 S. Ct. 617, 631 (2018) (citations omitted); *see also Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("[W]here the statutory language provides a clear answer, [our analysis] ends there…."). RFRA authorizes claims against "a government," expressly defining that term to include "official[s]," in addition to the agencies and departments that comprise the government. 42 U.S.C. § 2000bb-2(1). Because RFRA itself defines the term "government," there can be no ambiguity about its meaning.

The Court should decline Petitioners' bold invitation to ignore this particularized statutory definition of "government" and to adopt instead their exogenous understanding, one limited to agencies and official capacity defendants. *See, e.g.*, Pet'rs' Br. 18. "When a statute includes an explicit definition, [the Court] must follow that definition…." *Stenberg*, 530 U.S. at 942. This rule applies "even if" the use of the term in the statute "varies from [its] ordinary meaning." *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 776 (2018). Congress's inclusive definition of "government" in RFRA therefore trumps Petitioners' narrower alternative.

The term "official," although undefined in RFRA, unambiguously authorizes claims against officials in their personal capacity. "When a term goes undefined in a statute, [the Court] give[s] the term its ordinary meaning." *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 566 (2012) (citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)). In ordinary usage, "official" means "one who holds or is invested with an office," according to Merriam-Webster, *Official*, *Merriam-Webster's Collegiate Dictionary* (10th ed. 1993); or, according to the Oxford English Dictionary, "one who is invested with an office," *Official*, *The Oxford English Dictionary* (2d ed. 1989)—that is to say, the individual, not the office itself.[7]

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[7] These editions of Merriam-Webster's and the Oxford English Dictionary were the most recent at the time RFRA was enacted. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 419–21 (2012) (describing these dictionaries as "the most useful and authoritative for the English language generally and for law" for the time period of 1951–2000).

Seeking to conjure up ambiguity where none exists, Petitioners invoke the doctrine of *noscitur a sociis* to argue that the meaning of the term "official" should be constrained by their selection of some of the other words in the statute's definition of "government." Pet'rs' Br. 42. The Court has recognized that this doctrine is "not an invariable rule" of statutory construction precisely because "the word may have a character of its own not to be submerged by its association." *Graham Cty. Soil & Water Conserv. Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 288 (2010) (internal quotation marks and citation omitted). RFRA's definition of "government" enumerates with particularity who may be sued for substantially burdening a person's right to religious exercise. The actor could be a "branch, department, agency, instrumentality," or an "official," or it could be another "person acting under color of law." *See* 42 U.S.C. § 2000bb-2(1).

Indeed, read fairly in its full context, RFRA's authorization of claims against an "official (or other person acting under color of law)" further confirms that the statute permits individual capacity suits against federal officials like Petitioners. The reference to an "other person" in the statutory definition textually signifies that the "official" mentioned immediately prior in the definition is herself a "person acting under color of law." The parenthetical covers additional or "other"—meaning non-official—persons "acting under color of law," who lack any official capacity in which to be sued and can only be sued in a personal capacity. Like any "other person acting under color of law," an "official" can therefore be sued in a personal capacity.

The correct interpretation of this statutory text is that individuals *as well as* government branches, departments, agencies, and instrumentalities may be held liable.

2. Recognizing that RFRA Permits Claims Against Federal Officials in Their Personal Capacities Avoids Rendering Statutory Text Redundant

There is no indication in RFRA's text that Congress intended to limit the meaning of the word "official" to refer solely to the office, and imposing such a construction would create redundancy. Judicial interpretations of statutory language should not render words in the statute meaningless or redundant. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (describing "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant") (internal quotation marks and citations omitted).

A claim against an official in his or her official capacity is substantively identical to a claim against the official's agency. *See Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985) ("Official-capacity suits…generally represent only another way of pleading an action against an entity of which an officer is an agent…. [A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."). Were this Court to read an implied limitation into the term "official" solely to authorize official capacity claims against government officials under RFRA, it would render the term "offi-

cial" redundant since RFRA also allows suits against the government "agency" (or other enumerated entities) of which the official is a part.

The separate authorization of claims against a government "agency" and other entities already permits a RFRA plaintiff to obtain all relief from the agency that they could obtain from agency officials in their official capacities: injunctive relief would run against the agency. Petitioners' argument that RFRA's inclusion of "official" solely makes injunctive relief available against the government through its officers, Pet'rs' Br. 40, not only avoids the plain meaning of that single statutory term, but it also ignores the thrust of the preceding terms in the statutory definition.[8] Under Petitioners' proposed reading, Congress used two different terms to authorize the same injunctive claim, a construction that renders part of RFRA's language superfluous. The correct interpretation of RFRA must give the word "official" an independent meaning beyond the statute's authorization of claims against government agencies and instrumentalities.

Petitioners' claim that it is not coherent for RFRA to have created individual liability for official actions, Pet'rs' Br. 41–43, ignores this Court's exten-

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[8] Petitioners assert that their interpretation harmonizes and gives meaning to both the statutory definition and ordinary meaning of "government." Pet'rs' Br. 40. As discussed above, *see supra* Part A.1, because RFRA defines "government," the Court should honor that definition without regard to what Petitioners submit is the ordinary meaning of the defined term. *Stenberg*, 530 U.S. at 942. Moreover, it is not unusual for Congress to authorize individual capacity suits against government actors, as it did in 42 U.S.C. § 1983, which was a model for RFRA. *See infra* Part C.

sive precedent recognizing that such statutory schemes are entirely proper. This Court has long affirmed that Congress can create a statutory cause of action—42 U.S.C. § 1983—for individuals to sue public officials in their individual capacities if the officials violated a plaintiff's rights through their official action. *See Monroe v. Pape*, 365 U.S. 167, 172 (1961), *overruled in part on other grounds by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978); *see also Graham*, 473 U.S. at 166; *Monell*, 436 U.S. at 690–91. The qualified immunity defense was created for precisely these circumstances, and the entire jurisprudence of qualified immunity is evidence that individual capacity suits for damages are commonplace for claims that arose as a result of official action. *See, e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 231–32 (2009). In practice, the government acts through individuals, and when those officials take actions that substantially burden a person's free exercise of religion, it is unsurprising that RFRA would hold those officials personally accountable.[9]

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[9] *Stafford v. Briggs*, 444 U.S. 527 (1980), cited by Petitioners, Pet'rs' Br. 43, does not compel a contrary conclusion for three reasons. First, that case involved the interpretation of a statute governing venue for mandamus petitions seeking to compel official action, not the meaning of any substantive cause of action. Second, the statute in *Stafford* related to "civil action[s] in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity," 28 U.S.C. § 1391(e) (2012), an explicit statement that the statute applied to official capacity claims that is not present in RFRA. 444 U.S. at 546. Third, the statute's legislative history, quoted by this Court in *Stafford*, indicated that mandamus actions against "an officer or employee…acting in his official capacity or under color of legal authority" were "in essence against the United States" because they sought to compel nondiscretionary official action. 444 U.S. at 540–42. Not only is

B. RFRA Authorizes Money Damages

RFRA authorized courts to provide "appropriate relief" to successful plaintiffs, 42 U.S.C. § 2000bb-1(c), without setting any limitation on the types of relief a court may provide to remedy burdens on religious exercise. This Court and lower courts have long recognized "the traditional presumption in favor of all appropriate relief," including both injunctive and monetary relief, absent a constitutional or express statutory prohibition. *Franklin*, 503 U.S. at 69; *see id.* (noting "the long line of cases in which the Court has held that if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief").

The Court should reject Petitioners' invitation to upend this long-standing framework with a new rule of statutory construction categorically exempting federal officials' personal liability from the traditional presumption that "appropriate relief" includes money damages unless Congress expressly states otherwise. As the *Franklin* Court recognized, where Congress is silent about remedies, it has been "the prevailing presumption in our federal courts since at least the early 19th century" that money damages are available, even against federal officials. 503 U.S. at 71–72. If money damages are "appropriate relief" when Congress is silent as to remedies, there is no principled reason they should not also be available

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such legislative history missing in RFRA, but it is drastically different than the purpose of RFRA to provide a claim against government officials who substantially burden a person's religious exercise in violation of the statute.

when Congress has provided for "appropriate relief" as a remedy in a statute it "enacted…in order to provide very broad protection for religious liberty." *Hobby Lobby*, 573 U.S. at 693.

Sossamon, upon which Petitioners heavily rely, operates on the polar opposite presumption grounded in a constitutional concern that is absent here: that is, "appropriate relief" is not a sufficiently clear statement to overcome a state's sovereign immunity, which bars suits for damages. 563 U.S. at 285–86. Because there is no constitutional or statutory prohibition on damages against individual capacity defendants like Petitioners, "appropriate relief" authorizes all relief, including money damages.

1. This Court's Longstanding Approach to Remedies Permits a RFRA Plaintiff to Obtain Money Damages from Individual Capacity Defendants

As evidenced by the Court's reliance on a lengthy and unbroken chain of jurisprudence in its opinion in *Franklin*, the availability of damages as a remedy for violations of federal rights—including against federal officials sued in their individual capacities—is fundamental to our legal system. *See* 503 U.S. at 66–67; *Kendall*, 37 U.S. at 575, 603–04, 614–15, 624 (noting that damages were available against a federal official, the Postmaster General, under statute with explicit private right of action that did not specify available remedies); *see also Dooley v. United States*, 182 U.S. 222, 229 (1901) (interpreting Tucker Act to authorize damages "upon the principle that liability created by statute without a remedy may be enforced").

And ever since 1938, when this Court eliminated the distinction between actions at law and in equity, there has been only one pertinent "form of action, the civil action." Fed. R. Civ. P. 2; *id.* Notes of Advisory Committee on Rules—1937. Accordingly, in each particular civil case, "[i]t remains for the [federal] court to decide, in accordance with [legal and equitable] principles, what form of relief [be it legal or equitable] is *appropriate* and just on the particular facts proven." 2 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 1043 (2d ed. 1987) (emphasis added) (edition in effect at the time RFRA was enacted).

Thus, in *Franklin,* when faced with "the question of what remedies are available under a statute that provides a private right of action," the Court concluded that it must "presume the availability of all appropriate remedies"—including damages—"unless Congress has expressly indicated otherwise." 503 U.S. at 65–66. This holding reinforced the longstanding principles 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," *id.* at 66 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)), and that damages are generally available in civil actions, and are thus necessarily "appropriate" relief. *See id.* ("From the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court….").

Congress enacted RFRA one year after the Court's unanimous decision in *Franklin*, and must be presumed to have understood that courts would view a statute that says it provides for "appropriate relief"

to authorize damages absent a limitation in the statute itself or the Constitution. *See McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction…."). It would be absurd for Congress to have used "appropriate relief" in RFRA to sweep more narrowly than the *Franklin* Court implied one year earlier in the absence of any statutory text providing relief.

Petitioners attempt to blunt the powerful force of *Franklin*'s reaffirmation of "the traditional presumption in favor of all appropriate relief," 503 U.S. at 69, by asserting it should be limited to implied causes of action, like Title IX, but not to express causes of action of the kind at issue in RFRA. Pet'rs' Br. 44–45. If anything, the ordinary presumption should carry even more weight where Congress provides for "appropriate relief," given this Court's stated preference for relief expressly conferred by Congress, rather than that implied through judicial rulemaking. *See, e.g.*, *Ziglar v. Abbasi*, 147 S. Ct. 1843, 1857 (2017); Pet. App. 48a (order denying reh'g *en banc*) (Katzmann, C.J., concurring) (observing that, under this Court's jurisprudence, "Congress is typically the best-suited institution to resolve the 'host of considerations that must be weighed and appraised' in deciding whether a remedy for constitutional or statutory rights exists" (quoting *Abbasi*, 147 S. Ct. at 1857)). Justice Scalia echoed this reasoning in his *Franklin* concurrence, stating that the Court "can plausibly assume acquiescence" in the presumption when "the Legislature says nothing about remedy in expressly creating a private right of action," and that the Court can do so "perhaps even when [Congress] says nothing about remedy in creating a private

right of action by clear textual implication." 503 U.S. at 77 (Scalia, J., concurring). With RFRA, Congress not only expressly created a right of action, but it also explicitly provided for a remedy of "appropriate relief" in language echoing *Franklin*, so the presumption that damages are permitted follows with even greater force.

Moreover, the *Franklin* Court drew no distinction between express and implied causes of action in upholding the longstanding presumption in favor of all forms of relief, including money damages, for a violation of a federal right, and its analysis undermines Petitioners' effort to cleave such a distinction. *Franklin* explicitly relied on *Kendall* to support the "traditional presumption" in favor of damages. *Kendall*, in turn, explained that damages would be among the remedies available against the Postmaster General, a cabinet-level federal official at the time, under a statute with an explicit private right of action that was silent as to the particular remedies available. 37 U.S. at 603–04, 614–15, 624 ("As to the numerous cases cited from the English books and from our own reports, in which actions for damages had been brought against public officers of all descriptions, for acts done by them in their official capacities; it was sufficient to say, that the liability of every officer of this government to private action and to public prosecution, in appropriate cases, had been repeatedly conceded.").[10]

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[10] That Congress amended Title IX to provide for remedies after this Court had implied a right of action but prior to the decision in *Franklin* further demonstrates that this Court did not intend to limit its holding to implied rights of action. *See Franklin*, 503 U.S. at 72 (reading subsequent statute as "validation" of right of action previously held to be implied despite

Thus, the *Franklin* Court made clear that it was reaffirming the longstanding principle that Congress should be presumed to mean what it says—a statute providing for appropriate relief without limitation, including against federal officials, should not be judicially limited to mean "all appropriate relief except for money damages." *See Finley v. United States*, 490 U.S. 545, 556 (1989) ("What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts."). Indeed, accepting Petitioners' novel limitation on the "traditional rule" *Franklin* represents, 503 U.S. at 73, would undermine the holdings of lower courts that have applied *Franklin* to express causes of action across a range of substantive areas. *See, e.g.*, *Ditullio v. Boehm*, 662 F.3d 1091, 1098 (9th Cir. 2011) (applying *Franklin* presumption to conclude that punitive damages are available under Trafficking Victims Protection Act)*; Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1190–91 (1st Cir. 1994) (applying *Franklin* presumption to express cause of action in Occupational Safety and Health Act).[11]

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statute's vagueness as to "available remedies"); *id.* at 78 (Scalia, J., concurring) (noting that subsequent statute also "must be read" as "implicit acknowledgement that damages are available").

[11] Petitioners' argument that "[u]nder the lowest common-denominator approach, the unavailability of damages against the government and its branches…dictates the unavailability of damages against all defendants under RFRA," Pet'rs' Br. 47 (citing *Clark v. Martinez*, 543 U.S. 371, 380 (2005)), is inapposite. In *Clark*, this Court applied the rule of lenity to reject a construction of federal immigration law that would have given the same statutory language two different meanings when ap-

Petitioners assert that Congress has a "practice of employing express language to authorize personal damages liability against government personnel." Pet'rs' Br. 28. That practice is by no means inconsistent with the presumption—relied upon in RFRA—that "appropriate relief" includes damages. Congress also knows how to exclude damages with specific language when it so intends. *See* 5 U.S.C. § 702 (1976) (providing that "relief other than money damages" is available under Administrative Procedure Act against federal agencies to remedy "legal wrong"); 12 U.S.C. § 1464(d)(1)(A) (1989) (providing that Comptroller of the Currency "shall be subject to suit (other than suits on claims for money damages)" by savings association or its officers or directors); 33

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plied to two different classes of individuals. But damages are unavailable against the government and its branches not because the text of RFRA is unclear; they are unavailable because of the doctrine of sovereign immunity, which does not bar damages against individual capacity official defendants. Moreover, Congress's use of the term "appropriate" relief suggests that the relief available against different categories of defendants may vary. *See infra* Part B.2.

Even were that not so, Petitioners' proposed extension of *Clark* should be rejected because it would sanction precisely the "havoc" that Justice Thomas warned of in *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 148–49 (2005) (Thomas, J., dissenting) ("As I explained in *Clark*, the lowest common denominator principle requires courts to search out a single hypothetical constitutionally doubtful case to limit a statute's terms in the wholly different case actually before the court, lest the court fail to adopt a reading of the statute that reflects the lowest common denominator."). Petitioners' proposed extension of *Clark* here would upend this Court's jurisprudence regarding the doctrine of constitutional avoidance in the absence of any constitutional question on the facts of this case.

U.S.C. § 2718 (1990) (providing that "nothing in this Act shall be construed to authorize or create a cause of action against a [f]ederal officer or employee in the officer's or employee's personal or individual capacity"). Congress chose not to limit the remedies available under RFRA.

Petitioners' argument that RFRA's scope should be limited by the remedial outcomes that would have been available prior to *Smith*, under this Court's earlier First Amendment cases, Pet'rs' Br. 21, 25–26, is in tension with this Court's understanding that RFRA's scope is in fact broader than what this Court had recognized until that point.[12] *See Hobby Lobby*,

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[12] In any event, at the time RFRA was enacted, this Court had not ruled that damages were unavailable as a remedy against individual federal officers for violations of free religious exercise, and damages were assumed to be available by numerous courts of appeals. *Caldwell v. Miller*, 790 F.2d 589, 607-608 (7th Cir. 1986) (plaintiff "stated a claim for damages arising out of the constitutional violations…alleged, and not merely for injunctive relief"); *Jihaad v. O'Brien*, 645 F.2d 556, 558 n.1 (6th Cir. 1981) (assuming that *Bivens* was available to remedy free exercise violations); *see also Scott v. Rosenberg*, 702 F.2d 1263, 1271 (9th Cir. 1983) (assuming, without deciding, that the plaintiff could recover damages if his free exercise rights had been violated); *Church of Scientology of Cal. v. Foley*, 640 F.2d 1335, 1343 n.57 (D.C. Cir. 1980) ("[T]his court has also held that a cause of action may be implied from the First Amendment.").

RFRA's legislative history indicates that Congress took this into account when enacting RFRA. Unlike the Senate Committee Report for RFRA, which authorizes relief "consistent with the Supreme Court's…free exercise jurisprudence," S. Rep. No. 103-111, at 12 (1993), the House Committee Report authorizes relief so long as it is "consistent with free exercise jurisprudence, *including* Supreme Court jurisprudence," H.R. Rep. No. 103-88, at 8 (1993) (emphasis added). "The House

573 U.S. at 706 (noting that RFRA "went far beyond what this Court has held is constitutionally required"). The passage of RFRA indicated that Congress wanted to create a different result for RFRA plaintiffs than what would have obtained absent Congress's intervention. RFRA says as much in its statement of purpose, which was not solely to "restore the compelling interest test" applied by this Court in free exercise cases before *Smith*, but additionally to "provide a claim or defense to persons whose religious exercise is burdened by government." 42 U.S.C. § 2000bb(b). Petitioners' reading of RFRA, however, effectively eliminates such claims in those instances where "prospective relief accords…no remedy at all." *Franklin*, 503 U.S. at 76. In cases like this one, where only damages can make a plaintiff whole because injunctive relief is unavailing or has been rendered moot, Petitioners' reading would effectively shield violations of RFRA from judicial review, turning RFRA's creation of a "claim" into a hollow proposition. Providing a meaningful damages remedy when federal officials violate an individual's right to free exercise is therefore entirely consistent with RFRA's purpose.

Committee Report therefore appears to have contemplated providing a broad array of relief consistent not only with Supreme Court jurisprudence but that of the lower courts as well." Pet. App. 42a (opinion of the court of appeals).

2. The Presumption in Favor of Damages Is Overcome Only by Constitutional Constraints or Express Statutory Language to the Contrary

Respondents' position aligns with the Court's holding in *Sossamon*, which limited the reach of RFRA's sibling statute, RLUIPA, because of sovereign immunity considerations that do not apply in this context. Petitioners ignore this reality and seek to use *Sossamon* to flip the ordinary presumption in favor of damages, in effect asking the Court to adopt a novel theory of statutory construction that would require Congress to specifically enumerate any damages remedies against federal officials in their individual capacities. But the Court's analysis in *Sossamon* demonstrates that the traditional presumption in favor of damages applies to RFRA, because there is no statutory or constitutional basis here to limit the scope of "appropriate relief" a RFRA plaintiff may obtain.

In *Sossamon*, this Court considered whether RLUIPA's provision for "appropriate relief," 42 U.S.C. § 2000cc-2(a), included money damages against a state. The *Sossamon* Court first explained that the phrase "appropriate relief" was "open-ended" and "inherently context dependent." 563 U.S. at 286. Relying on *West v. Gibson*, 527 U.S. 212 (1999), the *Sossamon* Court concluded that "appropriate relief" did not "unambiguously include damages against a sovereign." *Id.* Because Congress must "unequivocally express[]" its intent to abrogate state sovereign immunity, *Sossamon* held that RLUIPA did not authorize the recovery of money damages

from a state. *Id.* at 293. Were Petitioners correct that Congress's authorization of "appropriate relief" (in RLUIPA and RFRA) could not have included money damages as a textual matter, the *Sossamon* Court would not have needed to discuss sovereign immunity at all to reach its holding.

Instead, the *Sossamon* Court recognized that *Franklin* operated under the opposite presumption—in favor of damages—given the absence of constitutional constraints on abrogating sovereign immunity in that case. *See id.* 288–89. In the context of state sovereign immunity, "the question is not whether Congress has given clear direction that it intends to exclude a damages remedy," but rather whether Congress "has given clear direction that it intends to include a damages remedy." *Id.* at 289 (citing *Franklin*, 503 U.S. at 70–71);[13] *see and compare Sossamon*, 563 U.S. at 283 (recognizing that at issue was the special solicitude afforded to "[d]ual sovereignty [as] a defining feature of our Nation's constitutional blueprint"), *with id.* at 287–90 & 289 n.6 (stating that "[t]he presumption in *Franklin* and *Barnes* is irrelevant to construing the scope of an express

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[13] It is unsurprising that the types of relief that are "appropriate" vary depending on whether the defendant is a sovereign or an individual. The *Sossamon* defendants' sovereign status meant that money damages were not "suitable" or "proper." *See Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 765 (2002) ("[S]tate sovereign immunity serves the important function of shielding state treasuries and thus preserving the States' ability to govern in accordance with the will of their citizens[.]" (internal quotation marks and citations omitted)). Because sovereign immunity concerns are absent here, the traditional approach for determining the availability of remedies applies, not the approach of *Sossamon*.

waiver of sovereign immunity," and that "*Franklin* and *Barnes* did not involve sovereign defendants, so the Court had no occasion to consider sovereign immunity"). In keeping with the traditional approach that all forms of damages are available absent a statutory or constitutional prohibition, the *Sossamon* Court determined that money damages were not available to a RLUIPA plaintiff suing a state government because Congress had not authorized them sufficiently explicitly to constitute a waiver of state sovereign immunity.

The Department of Justice adopted this same view shortly after RFRA was passed. In a formal opinion about RFRA's remedial scope issued in 1994, the Office of Legal Counsel found that RFRA likely authorized money damages against government employees in their individual capacities:

> [S]overeign immunity poses no bar to the recovery of damages against officials sued in their personal capacities or private parties acting under color of law.... When sovereign immunity concerns are removed from the equation…the interpretative presumption is reversed: as against entities unprotected by sovereign immunity, Congress must provide "clear direction to the contrary" if it wishes to make money damages unavailable in a cause of action under a federal statute.

18 Op. O.L.C. at 182–83 (quoting *Franklin*, 503 U.S. at 70–71). The Office of Legal Counsel went on to explain that "such cases would be governed by the

traditional presumption that all customary judicial relief, including damages, is available when Congress provides a statutory right of action," and "[b]ecause RFRA's reference to 'appropriate relief' does not clearly exclude money damages, there is a strong argument that under the *Franklin* standard money damages should be made available to RFRA plaintiffs in suits against non-sovereign entities." *Id.* at 183.

Sossamon also does not limit the scope of "appropriate relief" under RFRA because its holding concerned the extent of Congress's power under the Spending Clause of Article I, which was the basis for enacting RLUIPA but not RFRA. As to federal actors like Petitioners, RFRA was enacted pursuant to the Necessary and Proper Clause of Article I. H.R. Rep. No. 103-88, at 9. Only after this Court held RFRA to be unconstitutional as applied to States and municipalities in *City of Boerne* did Congress pass RLUIPA, using its power under the Spending Clause to avoid the constitutional limitations identified in *City of Boerne*. 146 Cong. Rec. 16698 (2000).

Hence, Congress's reliance on the Spending Clause when enacting RLUIPA implicated additional limitations on the scope of "appropriate relief" that are irrelevant here. *Franklin*, 503 U.S. at 74 ("[R]emedies [are] limited under…Spending Clause statutes…based on the theory that an entity receiving federal funds [may] lack[] notice that it will be liable for damages…." (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28–29 (1981))). Petitioners do not contest Congress's power to authorize money damages against federal officers in their individual capacities pursuant to the Necessary and Proper Clause. As this Court recognized in *Atlantic*

Cleaners & Dryers, Inc. v. United States, 286 U.S. 427, 433 (1932), with respect to identical language in two sections of the same statute, where "the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law…." Accordingly, any Spending Clause-specific limitations on the "appropriate relief" under RLUIPA do not apply to the remedies available under RFRA.[14]

Recognizing the obviously distinguishing features of *Sossamon*, Petitioners request that this Court compare RFRA and RLUIPA at a "high[] level of generality." Pet'rs' Br. 37–38. The Court should not agree to unmoor *Sossamon* from its logical underpinnings: *Sossamon* addressed a different statute (RLUIPA) with a different constitutional basis (the Spending Clause), a different class of defendants (state officials), a different claim for relief (official capacity suits), and a different judicial presumption (state sovereign immunity).

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[14] RLUIPA was also enacted pursuant to the Commerce Clause, *see* 42 U.S.C. § 2000cc(a)(2)(B), and courts—recognizing that the powers of Congress vary depending on the constitutional basis for Congress's action—have left open the question whether RLUIPA claims based on an effect on interstate commerce could be brought for individual capacity damages even after *Sossamon*. *See Washington v. Gonyea*, 731 F.3d 143, 146 (2d Cir. 2013); *Stewart v. Beach*, 701 F.3d 1322, 1334 n.11 (10th Cir. 2012); *see also Rendelman v. Rouse*, 569 F.3d 182, 189 (4th Cir. 2009).

C. Section 1983 Should Inform the Court's Interpretation of RFRA

When Congress drafted RFRA, it intended and expected the statute to apply to both federal and state officials.[15] The natural model for relief against state officials was Section 1983, which created a private right of action against any "person" acting "under color of" state law who violates a plaintiff's federal rights. 42 U.S.C. § 1983. At the time of RFRA's enactment, it was well-established that Section 1983 permitted both injunctive relief against state officials and damages against those officials in their individual capacities, including for violations of free exercise rights. *See, e.g.*, *Murphy v. Mo. Dep't of Corr.*, 814 F.2d 1252, 1259 (8th Cir. 1987) (remanding to enter judgment for plaintiffs on Section 1983 free exercise claim and to determine and order "appropriate relief, which…may, if appropriate, include an award of compensatory and punitive damages"); *Beyah v. Coughlin*, 789 F.2d 986, 988–89 (2d Cir. 1986) (holding that prisoner would be entitled to at least nominal damages for Section 1983 free exercise claim if he proved deprivation of a constitutional right). The original text of RFRA reflects Congress's intent to restore the ability to bring such suits (under an enhanced version of the strict scrutiny standard that existed prior to *Smith*). Congress did so, however, by

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[15] *See supra* note 6 (noting that the definition of government, as originally enacted in 1993, ended with "official (or other person acting under color of law) of the United States, a State, or a subdivision of a State."). This Court's decision in *City of Boerne*, 521 U.S. at 532, subsequently limited the application of RFRA against the states and local governments.

using one definition of "government" to cover *all* defendants—state and local officials as well as federal ones. 42 U.S.C. § 2000bb-2(1) (1994).[16] That choice bolsters the conclusion that RFRA was intended to allow individual capacity damages actions against federal officials as much as it originally was against their state and local counterparts.

RFRA's adoption of the distinctive language of Section 1983 further evinces congressional intent to allow individual capacity damages claims against federal as well as state officials. This follows from the Court's longstanding recognition that Section 1983, providing claims against any "person" acting "under color of any statute" or other law, permits both individual and official capacity suits against government officials and private persons. *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *see also Wyatt v. Cole*, 504 U.S. 158, 161–62 (1992); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150, 163–66 (1970) (paraphrasing "under color of any statute, ordinance, regulation, custom or usage" language in Section 1983 as "under color of law"). The most sensible interpretation for this parallel language is to read RFRA to provide for damages in the same fashion that Section 1983 does, especially where both statutes have the same purpose—establishing claims for violations of individual rights. *See* Scalia & Garner, *supra*, at 323 (noting that "when a statute uses the very same terminology as an earlier statute—especially in the very same field, such as securities law or civil-rights law—it is reasonable to believe that the terminology bears a

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[16] Congress also provided, separately, that RFRA "applies to all Federal and State law, and the implementation of that law." 42 U.S.C. § 2000bb-3(1) (1994).

consistent meaning," and that this holds "even without the benefit of prior judicial interpretation").

Indeed, Congress's repetition of existing statutory language in a subsequent law generally reflects an intent to incorporate how courts have interpreted that language. *See Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."). Because the Court presumes Congress's awareness of settled usages, here, when Congress provided claims against "person[s] acting under color of law" in RFRA, it authorized individual capacity damages claims against all government officials—local, state, or federal—just as it had in Section 1983 against local and state officials. Both courts of appeals to consider this issue agreed. *See* Pet. App. 22a (opinion of the court of appeals) ("We, like several of our sister circuits before us, do not find this word choice coincidental, as Congress intended for courts to borrow concepts from § 1983 when construing RFRA." (internal quotation marks omitted)); *Mack v. Warden Loretto FCI*, 839 F.3d 286, 302 (3d Cir. 2016) ("Because RFRA's definition of 'government' tracks the language of § 1983, it is reasonable to assume that liability can be imposed similarly under both statutes.").

Petitioners' primary counterargument, both here and in the court of appeals, is that the text of Section 1983 specifies that officials shall be "liable…in an action at law" as well as a "suit in equity." Pet'rs' Br. 28. But that particular phrasing is a relic of the historical, long-abandoned distinction between actions

at law and in equity. Section 1983 was passed in 1871, when the distinction between suits in equity and actions at law had practical implications for civil procedure and available remedies. Those distinctions were abolished with the enactment of the Federal Rules of Civil Procedure in 1938. *See* Fed. R. Civ. P. 2 ("There is one form of action—the civil action."); *id.* Notes of Advisory Committee on Rules—1937; *see also* Religious Freedom Restoration Act of 1990, S.3254, 101st Cong. § 2(c) (1990) (first version of RFRA bill, stating that "[a] person aggrieved by a violation of this section may obtain appropriate relief (including relief against a government [defined as in RFRA as enacted]) in a civil action").[17]

Finally, Petitioners stress the fact that Section 1983 allows an action against "[e]very person" acting under color of law, "without RFRA's overarching limitation that any appropriate relief be 'against a government.'" Pet'rs' Br. 29. But RFRA also allows an action against every person acting under color of law—it just does so by expressly including all such persons under its umbrella definition of "government." In sum, here, too, Petitioners overread the word "government" in the phrase "appropriate relief against a government," while ignoring the statute's clear definition of that word in its very next provision, Section 2000bb-2(1).

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[17] Petitioners also assert that the phrase "under color of law" in RFRA identifies only the "*types of actors subject to suit*, not the types of available remedies." Pet'rs' Br. 29. It does, clearly, identify defendants subject to suit; it is also language distinctive enough to suggest strongly that Congress had in mind the overall model of Section 1983.

There is no reason apparent in RFRA itself or its historical models to read the statute as Petitioners urge. Moreover, that reading would be hardly consistent with the "[s]weeping coverage" Congress sought to achieve, *City of Boerne*, 521 U.S. at 532, or with a "broad protection of religious exercise to the maximum extent permitted," *Hobby Lobby*, 573 U.S. at 696 (citing 42 U.S.C. 2000cc-3(g)). *See id.* at 696 n.5 (holding that rule of "broad construction" from RLUIPA, 42 U.S.C. § 2000cc-3(g), applies equally to RFRA).

Ultimately, with a statute conceived to surpass the constitutional baseline and "provide greater protection for religious exercise than is available under the First Amendment," *Holt v. Hobbs*, 574 U.S. 352, 359–60 (2015), Petitioners provide no evidence that, when Congress defined "government" to include federal and state officials, it nonetheless sought to exempt federal officials from the same liability to which it exposed their state and local counterparts by using language directly reminiscent of Section 1983. In this context, that could not have been part of the congressional design. *See generally Butz v. Economou*, 438 U.S. 478, 504 (1978) ("To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head.").

The settled legislative and judicial understandings that Congress imported with language that plainly harks back to Section 1983 should inform the Court's interpretation of RFRA to authorize individual capacity damages claims against Petitioners.

D. Petitioners' Remaining Arguments Lack Merit

1. Legislative History — Petitioners' legislative history and policy arguments lack the force to displace the text of the statute, the governing presumptions at the time it passed, its enacted statement of purpose, and the other considerations outlined above. *See Ratzlaf v. United States,* 510 U.S. 135, 147–48 (1994) ("We do not resort to legislative history to cloud a statutory text that is clear."); *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992) ("[A]ppeals to statutory history are well taken only to resolve statutory ambiguity." (internal quotation marks and citation omitted)). Were such an inquiry necessary, however, RFRA's legislative history in fact comports with Respondents' reading of the statute.

To begin, Petitioners fail to mention that the legislative history of RFRA's companion statute RLUIPA supports the conclusion that RFRA authorizes money damages in individual capacity suits. A House report for a precursor to RLUIPA states that Section 4 of the statute, which provides that a "person may assert a violation of this Act…and obtain appropriate relief against a government"—language that mirrors RFRA—creates a private right of action for damages. H.R. Rep. No. 106-219, at 29. It notes:

> Section[] 4(a)…*track[s] RFRA, creating a private cause of action for damages*…. These claims and defenses lie against a government, but the Act does not abrogate the Eleventh Amendment immuni-

> ty of states. In the case of a violation by a state, the Act must be enforced by suits against state officials and employees.

Id. at 29 (emphasis added). This explanation was repeated, nearly verbatim, in the section-by-section analysis of RLUIPA. 146 Cong. Rec. 19123 (2000).[18] While these are statements from the legislative record for the companion statute, Petitioners have offered no similarly clear, unambiguous evidence from any part of the legislative history demonstrating that Congress intended to *exclude* damages from the ambit of available relief under RFRA.[19] This language makes clear that Congress understood "appropriate relief" to include actions for damages.

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[18] Although such an analysis does not appear in RFRA's legislative history, most of the debate concerning RFRA focused on issues other than the remedies available under the statute. RLUIPA was subject to additional debate on these questions, providing for a fuller congressional record discussing the meaning of RFRA and RLUIPA's remedies provisions. *See generally Religious Liberty: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 91, 145, 160, 166.

[19] It is of little interpretive moment that Congress did not elaborate further in the legislative history on its textual design to provide a damages remedy against federal officials. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark."); *see also Chisom v. Roemer*, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting) (rejecting the "questionable wisdom of assuming that dogs will bark when something important is happening"); Anita S. Krishnakumar, *The Sherlock Holmes Canon*, 84 Geo. Wash. L. Rev. 1, 22–39 (2016).

Legal analysis presented to both the House and Senate committees that ultimately passed RLUIPA also confirms this construction: "[a]ppropriate relief includes declaratory judgments, injunctions, and damages…." *The Religious Liberty Protection Act of 1999: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 111 (1999) (statement of Douglas Laycock, University of Texas Law School); *Religious Liberty: Hearing Before the S. Comm. On the Judiciary*, 106th Cong. 91 (1999) (statement of Douglas Laycock, University of Texas Law School). Having reached these conclusions about the scope of "appropriate relief" when passing RLUIPA, which also revised the text of RFRA, Congress did not amend RFRA's authorization of "appropriate relief." *See* RLUIPA, Pub. L. No. 106-274, 114 Stat. 803, 806 Sec. 7 (2000).[20]

In contrast, there is no indication in the legislative history that Congress intended to limit RFRA plaintiffs to suits seeking injunctive relief against government actors in their official capacities, as Petitioners urge, or to exclude damages claims against individual capacity defendants. As discussed above, *see supra* Part B.2, RFRA's authorization for courts to provide "appropriate relief," without limitation, is consistent with RFRA's dual purposes. *See* 42 U.S.C. § 2000bb(b). Petitioners' argument that "Congress's

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[20] Nor has Congress done so in the more than three years that have passed since the Third Circuit's decision in *Mack* allowed for damages against federal officials in individual capacity suits brought under RFRA. *Contra* Pet'rs' Br. 27–28 (citing instances where Congress revised statutes in response to judicial rulings).

goal in enacting RFRA was to modify the substantive standard for free-exercise claims, not the type of appropriate relief," Pet'rs' Br. 22, ignores the fact that overturning *Smith* was just one of two separate and independent purposes stated by Congress in RFRA's final text. The matter before this Court does not concern the substantive standard of review of government action under RFRA (*i.e.*, Congress's intent to overturn *Smith*), but rather RFRA's distinct purpose to "provide a claim," 42 U.S.C. § 2000bb(b)(2), creating a new statutory cause of action, and the scope of available relief for that claim. In any event, even if Petitioners' hierarchy of congressional purpose held true, "statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998).

Petitioners cherry-pick excerpts of RFRA's legislative history to suggest that Congress did not intend to authorize damages against federal employees in their personal capacities.[21] Pet'rs' Br. 23. However,

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[21] Petitioners' fear about a "crisis" of litigation involving federal employees, *see* Pet'rs' Br. 27–28, is overblown and was dismissed by Congress at the time it enacted RFRA. 139 Cong. Rec. S14461-01 (daily ed. October 27, 1993) (statement of Sen. Lieberman), at *S14462 ("Proponents of this amendment have not proven their claim that RFRA will open the floodgates for prisoner's religion-based claims."); *id.* (statement of Sen. Hatch), at *S14465 (submitting letter signed by several Attorneys General opposing amendment to RFRA which would exempt prisoners from statute). The Senate eventually voted against an amendment to RFRA that would have exempted prisoners from RFRA. *Id.* (statement of Presiding Officer), at

when read in context, statements in the congressional record about the first purpose of RFRA, to reverse *Smith*, are appropriately understood as being about the substantive scope of claims authorized by RFRA (such as claims about abortion, tax exemption, and government funding for religious institutions), not the second purpose of RFRA, to provide a new statutory cause of action, or the meaning of the remedial phrase "appropriate relief." *See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 236–39 (1994).

For example, the Senate report includes such a statement in a section titled "Other Areas of Law are Unaffected," as part of an assessment that RFRA was not meant to substantively change several other areas of law, such as the appropriate relationship between religious organizations and government, or standing. S. Rep. No. 103-111, at 12–13. The House report makes a similar statement in a paragraph discussing the test to be applied in scrutinizing government action in free exercise cases. H.R. Rep. No. 103-88, at 8–9. While the House and Senate Committee reports each provide that RFRA "does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with…free exercise jurisprudence…under the compelling governmental interest test prior to *Smith*," these statements appear in sections discussing claimants' ability to bring actions related to abortions, again referring to the substantive scope of claims, not appropriate remedies. H.R. Rep. No. 103-88, at 8; S.

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*S14468. Despite Petitioners' attempts to rewrite history, the reality is that Congress deemed increased litigation to be a non-issue at the time it passed RFRA.

Rep. No. 103-111, at 12. RFRA's legislative history makes clear that the House and Senate Committee reports did not use the term "relief" to refer to remedies. Rather, the reports concerned particular circumstances under which a plaintiff might bring a RFRA claim. *See generally* Laycock & Thomas, *supra*, at 236–39 (summarizing Congress's evaluation of potential RFRA claims about abortion, tax exemptions for religious institutions, and prisons).

Each of these statements about the jurisprudence prior to *Smith* concerns RFRA's substantive scope, and none evidence any intent by Congress to limit the remedies available for violations of RFRA. Indeed, "the principle that damages are designed to compensate persons for injuries caused by the deprivation of rights hardly could have been foreign to" Congress when it authorized "appropriate relief" for RFRA violations. *Carey v. Piphus*, 435 U.S. 247, 255 (1978) (holding that Section 1983 authorizes damages even though Congress did not "address directly" the question of damages when passing the statute).[22]

2. Separation of Powers — Unsatisfied with the availability of qualified immunity and other defenses, Petitioners also argue that separation-of-powers concerns mandate that Congress expressly state its intention to permit damages against government officials sued in their individual capaci-

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[22] An estimate from the Congressional Budget Office that RFRA "would result in no significant cost to the federal government," S. Rep. No. 103-111, at 15, also does not alter the conclusion that Congress did not intend to preclude money damages against individual capacity defendants. That discussion concerned attorneys' fees, not damages. *Id.* at 15–16.

ties.[23] Pet'rs' Br. 29–35. Such a doctrine would flip the rule of *Franklin* and *Kendall* (and the cases before them) on its head, upsetting wide swaths of settled jurisprudence built on the traditional rule those cases represent. Petitioners offer no reason to believe that applying the reverse of the *Franklin* rule would accurately reflect Congress's intent one year after that unanimous decision. Ultimately, what Petitioners disguise as separation-of-powers concerns are nothing other than an assertion of Executive primacy over the broad protection for religious exercise that Congress intended and the remedies that courts should be empowered to provide where appropriate.

3. *Bivens* — Petitioners' argument analogizing RFRA's authorization of money damages to a *Bivens* action fails to abide by a fundamental "analytical[] distinct[ion]" between "the question of what remedies are available under a statute that provides a private right of action [and] the issue of whether such a right exists in the first place." *Franklin*, 503 U.S. at 65–66 (citing *Davis v. Passman,* 442 U.S. 228, 239 (1979)). A *Bivens* action is a judicially-constructed remedy in which a right of action is *implied* absent any statutory basis for the claim. *Bivens*, 403 U.S. at 389–97. Conversely, as Petitioners themselves acknowledge,

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[23] RFRA's scheme accounts for the "national security" and "immigration" concerns that Petitioners invoke, Pet'rs' Br. 32, and allows Petitioners to raise such considerations to demonstrate that any substantial burden on religious exercise was "in furtherance of a compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Such concerns may well defeat liability in a specific case, but they do not categorically bar damages under the statute in all cases.

RFRA "contains both an express cause of action and an express remedies provision." Pet'rs' Br. 45; *cf. Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71 n.5 (2001) (distinguishing judicially implied private right of action in *Bivens* from the Section 1983 context, akin to RFRA, "where Congress already provides for…liability"). The question presented here is the scope of an *express* right of action and an *express* remedies provision. Once Congress has created an explicit right of action and remedy, "it is too late in the day to address whether a judicially implied exclusion of damages…would be appropriate." *Franklin*, 503 U.S. at 78 (Scalia, J., concurring). Whether *Bivens* remedies should be available in free exercise cases is irrelevant—Congress created a statutory cause of action through RFRA, and Congress's power to create remedies is not cabined by this Court's *Bivens* jurisprudence.[24]

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[24] Nor is it relevant whether or not, by 1993, *Bivens* had been extended to the particular type of claim at issue here. *See Hobby Lobby*, 573 U.S. at 715 ("[T]he results would be absurd if RFRA merely restored this Court's pre-*Smith* decisions in ossified form and did not allow a plaintiff to raise a RFRA claim unless that plaintiff fell within a category of plaintiffs one of whom had brought a free-exercise claim that this Court entertained in the years before *Smith*.").

CONCLUSION

For the reasons set forth above, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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