No. 19-71

In the Supreme Court of the United States

FNU TANZIN, ET AL., PETITIONERS

v.

MUHAMMAD TANVIR, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondents' brief is most notable for what it does *not* say. Respondents do not seriously contest that text, history, separation-of-powers considerations, and precedent all support reading the phrase "appropriate relief against a government," 42 U.S.C. 2000bb-1(c), to exclude damages awards against federal employees in their personal capacities under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* As to text, respondents do not dispute that such awards are not "against a government" in any meaningful sense. As to history, they do not identify a single court of appeals that had awarded damages against a federal official for a free-exercise violation prior to RFRA's enactment. As to separation of powers, they do not identify a single statute that has been interpreted to authorize damages against individual federal employees without a clear textual indication to that effect, and they fail to refute petitioners' showing that

awarding damages in this context would significantly impair Executive Branch functioning. And as to precedent, they of course must acknowledge that this Court has previously interpreted materially identical statutory language to exclude a damages remedy. See *Sossamon* v. *Texas*, 563 U.S. 277 (2011).

Respondents' affirmative textual and contextual arguments fare no better. They focus on the term "official" in isolation, ignoring that it appears in RFRA only as part of the definition of "government" and that an "official" can violate RFRA's substantive prohibition only in an official capacity. They contend that limiting the term "official" to officials acting in their official capacities would render that term surplusage, but ignore the independent functions "official" serves. They also analogize to 42 U.S.C. 1983, but that statute unambiguously authorizes damages using language—"action at law"—that RFRA conspicuously omits.

Ultimately, respondents stake their claim primarily on the idea that this Court should *presume* the availability of damages against federal employees. That is a radical proposition. To the extent a presumption is appropriate here, the Court should apply the opposite one. And in any event, the decision upon which respondents rely, *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), has no application in this case even on its own terms. It addressed an implied cause of action and has *never* been applied by this Court to an express remedies provision. When, as here, a statute includes an express cause of action and an express remedies provision, the proper approach is to begin with the statute's text and structure, rather than a blanket pre-

sumption designed for an altogether different circumstance. Regardless, even if the presumption did apply, it would be rebutted in this case.

A. Personal-Capacity Damages Awards Are Not "Appropriate Relief Against A Government" Under RFRA

The statutory phrase "appropriate relief against a government" does not encompass damages awards against federal officers and employees in their personal capacities. 42 U.S.C. 2000bb-1(c). As petitioners explain in their opening brief (at 17-38), each of the traditional tools of statutory interpretation confirms this result.

1. The statutory text precludes damages actions against federal employees in their personal capacities

a. RFRA authorizes suits to obtain "appropriate relief *against a government*." 42 U.S.C. 2000bb-1(c) (emphasis added). Damages awards against federal employees in their personal capacities, however, are not "against a government" in any formal or functional sense. Respondents do not even attempt to explain how personal-capacity damages run "against a government."

Instead, they read that phrase out of the statute altogether, contending (Resp. Br. 17-18) that the definition of the term "government" permits plaintiffs to obtain relief that is not against the government at all. Respondents argue that "[w]hen a statute includes an explicit definition, [the Court] must follow that definition." *Id.* at 18 (quoting *Stenberg* v. *Carhart*, 530 U.S. 914, 942 (2000)) (second set of brackets in original). But petitioners are not advocating that the Court ignore the

statutory definition. As explained below, the definitional term "official" is best read to encompass official-capacity conduct and suits only. But to the extent the Court concludes that the term is ambiguous on this point, it "is not unusual [to use] the ordinary meaning of the term being defined for the purpose of resolving an ambiguity in the definition." *Bond* v. *United States*, 572 U.S. 844, 870 (2014) (Scalia, J., concurring in the judgment) (emphasis and internal quotation marks omitted); see *United States* v. *Stevens*, 559 U.S. 460, 474 (2010) ("[A]n unclear definitional phrase may take meaning from the term to be defined."); Pet. Br. 39-40. Respondents ignore this well-established interpretive principle.

b. As noted, the statutory definition itself indicates that an employee may be held liable only in an official capacity. The term "official" is an item in a list, and each of the preceding items—"branch, department, agency, [and] instrumentality," 42 U.S.C. 2000bb-2(1)—refers to official-capacity actors. The term "official" should be construed consistently with these preceding terms. See *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995). Moreover, RFRA's substantive prohibition—which relies on the same definition of "government" and provides that "[g]overnment shall not substantially burden a person's exercise of religion * * * , except as provided in subsection (b)," 42 U.S.C. 2000bb-1(a)—necessarily applies only to action taken by an "official" in an official capacity, on behalf of, *inter alia*, the "department" or "agency" in which he or she serves. 42 U.S.C. 2000bb-2(1).[1]

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[1] One set of respondents' amici, citing Section 1983, argues that employees who take action in an official capacity may be sued in an individual capacity. Fourteen Religious-Liberty Scholars Amici Br.

Again, respondents largely decline to engage with these basic arguments, instead advancing several separate contentions, each of which lacks merit. First, they cite dictionary definitions of "official" to mean "one who holds or is invested with an office," Resp. Br. 18 (quoting *Merriam-Webster's Collegiate Dictionary* 805 (10th ed. 1993)), arguing that the term thus refers to the "individual, not the office itself," *ibid.* But everyone agrees that the reference to "official" in RFRA's definition can refer to a named person. *Ibid.* The only question is in what capacity such a person may be sued. Although respondents' dictionary definitions do not directly answer that question, they strongly support petitioners' position that a suit under RFRA is against an official *as* "one who holds or is invested with an office"—*i.e.*, in an official capacity. And that is true whether that official is identified in the suit by name or title. Moreover, in contrast to federal *officers*, many federal *employees* cannot be characterized as "hold[ing]" or "invested with" "an office." *Ibid.*; cf. *Lucia* v. *SEC*, 138 S. Ct. 2044, 2049 (2018) (distinguishing "'Officers'" from "mere employees" for constitutional purposes) (citation omitted).

Respondents further contend (Br. 19) that the parenthetical following the term "official"—"(or other person acting under color of law)," 42 U.S.C. 2000bb-2(1)—

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19. But RFRA's definition of "government"—including its reference to "under color of law," 42 U.S.C. 2000bb-2(1)—applies equally to *both* its substantive and remedial provisions. Section 1983, in contrast, states that "[e]very person who, under color of [state law], subjects" another to "the deprivation of any rights," "shall be liable to the party injured." 42 U.S.C. 1983. This phrasing makes clear that the "under color" modifier applies only to the person's capacity in committing the violation, not the capacity in which the person may be sued.

refers to persons "who lack any official capacity in which to be sued and can only be sued in a personal capacity." In their view, this means that "official" similarly encompasses personal-capacity actions. But courts construe catchall phrases in light of the preceding listed terms—not the other way around. See *Sossamon*, 563 U.S. at 292. Taking respondents' converse approach would give the judicial relief provision "unintended breadth." *Ibid.* (citation omitted). Rather than expanding the scope of the prior listed terms, RFRA's catchall phrase covers private persons performing governmental functions, even if not technically in an official governmental capacity. Pet. Br. 42 n.7.[2]

Respondents argue (Br. 20-22) that limiting "official" to official-capacity suits would render the term redundant, because such a suit is functionally against the "agency" of which the official is a part, and "agency" is already listed in the statutory definition. See 42 U.S.C. 2000bb-2(1). But it is commonplace in suits against the government challenging agency action to name the agency, the responsible agency official, or both as the defendant. See, *e.g.*, *Department of Commerce* v. *New York*, 139 S. Ct. 2551 (2019); cf. 5 U.S.C. 702.

In any event, there is no surplusage because, as petitioners have explained (Br. 41), Congress's inclusion

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[2] This Court held in *Stafford* v. *Briggs*, 444 U.S. 527 (1980), that the phrase "under color of legal authority" did not encompass an action for damages against federal officials in their personal capacities. *Id.* at 539 (citation omitted). It further held that "[a] suit for money damages which must be paid out of the pocket of the private individual who happens to be—or formerly was—employed by the Federal Government plainly is not one essentially against the United States." *Id.* at 542 (internal quotation marks omitted). Although respondents quibble with *Stafford*'s relevance in several respects (Br. 22 n.9), they do not contest either of those basic holdings.

of the term "official" ensures that agencies cannot disclaim responsibility for, or escape suit by disavowing, the acts of a rogue official. Otherwise, an agency might have argued that it had not burdened religion under RFRA's substantive prohibition when the relevant action was taken by an official acting contrary to agency policy. And an agency might have contended that RFRA's remedial provision did not reach suits against an agency official for unauthorized conduct, given that this Court's sovereign-immunity doctrine has long held that "official-capacity actions for prospective relief are *not* treated as actions against the [government]." *Kentucky* v. *Graham*, 473 U.S. 159, 167 n.14 (1985) (emphasis added). Moreover, naming the official as a party places that official on notice of the proceeding, thereby potentially facilitating enforcement of any injunctive relief ultimately issued by the court. See, *e.g.*, *In re Baum*, 606 F.2d 592, 593 (5th Cir. 1979) (reversing finding of contempt because, *inter alia*, order in question "was not addressed specifically" to the putative contemnor); see also 5 U.S.C. 702 (in suit under Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, injunctive order "shall specify the Federal officer or officers (by name or by title) * * * personally responsible for compliance").

Even if the listed terms in 42 U.S.C. 2000bb-2(1) are overlapping in some respect, that is not a reason to reject petitioners' interpretation. The canon against superfluity applies "only if verbosity and prolixity can be eliminated by giving the offending passage, or the remainder of the text, a competing interpretation." *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 236 (2011). According to respondents (Br. 21), "us[ing] two different terms" to permit official-capacity suits against different components of the same entity is redundant because all

official-capacity suits ultimately run against that entity itself. That view renders several other listed items in the statutory definition redundant both with each other and with the defined term "government." 42 U.S.C. 2000bb-2(1). For example, if respondents are correct, there is no need to sue an "agency" when one can sue a "branch." *Ibid.*

2. Congress did not intend to dramatically expand existing remedial options

Prior to the passage of RFRA, courts recognized injunctions against federal officials in their official capacities, but not damages awards in their personal capacities, as appropriate relief for a violation of the Free Exercise Clause. Pet. Br. 21-22, 25-26. In enacting RFRA and using the phrase "appropriate relief against a government," Congress did not expand preexisting remedies. Instead, RFRA's purpose was merely to abrogate the substantive standard for free-exercise violations adopted in *Employment Division* v. *Smith*, 494 U.S. 872 (1990); see Pet. Br. 22-25.

a. Respondents do not meaningfully dispute that damages were unavailable against federal employees in their personal capacities for free-exercise violations prior to RFRA. They observe (Br. 30 n.12) that this Court had not *expressly* "ruled that damages were unavailable as a remedy" in this context under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), but they do not contest either that the Court had never recognized a *Bivens* claim for a violation of the Free Exercise Clause, or that its precedents suggested no such relief was available. See Pet. Br. 22. Respondents also assert (Br. 30 n.12) that "damages were assumed to be available by numerous courts of appeals" at the time, but do not cite a *single* decision

that actually awarded damages against a federal employee for a free-exercise violation. See Pet. Br. 25-26.

b. Respondents also fail to identify any clear indication that Congress intended to depart from this settled remedial backdrop. They primarily rely on RFRA's statement of purpose, which declares that Congress intended not only to restore the pre-*Smith* substantive standard, but also to "provide a claim or defense to persons" to enforce that restored substantive standard. Resp. Br. 31 (quoting 42 U.S.C. 2000bb(b)(2)); see also *id.* at 45. But according to respondents themselves, there is 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.'" *Id.* at 48 (quoting *Franklin*, 503 U.S. at 65-66) (brackets in original). Congress's inclusion of an express cause-of-action provision merely ensured that RFRA's substantive provision was subject to affirmative judicial enforcement.[3]

As to RFRA's legislative history, respondents' arguments are largely self-defeating. The Congressional Budget Office estimated that RFRA "would result in no significant cost to the federal government." S. Rep. No. 111, 103d Cong., 1st Sess. 15 (1993) (Senate Report); see Pet. Br. 23. Respondents retort (Br. 47 n.22) that this

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[3] Respondents quote *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), for the proposition that RFRA "provided even broader protection for religious liberty than was available" under pre-*Smith* precedents. Resp. Br. 14-15 (quoting *Hobby Lobby*, 573 U.S. at 695 n.3) (internal quotation marks omitted). But the Court made that observation in relation to RFRA's substantive standard, not the remedies it authorizes. *Hobby Lobby*, 573 U.S. at 695 n.3. (discussing "least restrictive means requirement") (citation omitted).

"discussion concerned attorneys' fees, not damages," but that is precisely the point—no one contemplated that damages would be available.

RFRA's legislative history also contains a host of statements that the bill was intended "only to overturn the Supreme Court's decision in *Smith*." Senate Report 12. Respondents maintain (Br. 46) that these statements "are appropriately understood as being about the substantive scope of claims authorized by RFRA," but that argument again supports petitioners. The legislative history's focus on the applicable substantive standard reflects the simple fact that RFRA was designed to restore the pre-*Smith* substantive standard (and provide a cause of action to give effect to that restored standard), and nothing more.[4]

Respondents also invoke (Br. 42) the legislative history of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.* They point to "[a] House report for a precursor to RLUIPA," which states that RLUIPA's remedial provision "'track[s] RFRA, creating a private cause of action for damages.'" Resp. Br. 42 (quoting H.R. Rep. No.

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[4] Respondents' amici also point to a discussion in RFRA's legislative history in which a district court's rejection of a free-exercise claim in a damages action was invoked as an example of *Smith*'s baleful influence. See, *e.g.*, Sikh Coal. Amicus Br. 5-7. That case involved a damages claim against a *state* official, not a federal one. See *You Vang Yang* v. *Sturner*, 728 F. Supp. 845, 846 (D.R.I.), withdrawn, 750 F. Supp. 558 (D.R.I. 1990). In any event, the most relevant discussions of the case occurred in committee testimony, and as this Court has recognized, "excerpts from committee hearings" rank "'among the least illuminating forms of legislative history.'" *Advocate Health Care Network* v. *Stapleton*, 137 S. Ct. 1652, 1661 (2017) (citation omitted).

219, 106th Cong., 1st Sess. 29 (1999)) (brackets in original; emphasis omitted); see also *id.* at 44 (committee testimony to the same effect). But such stray statements by some Members of Congress and witnesses about their subjective view of the meaning of previously enacted legislation shed little if any light on the proper interpretation of that legislation. *Bruesewitz*, 562 U.S. at 242.

3. RFRA lacks the requisite clear indication that damages are available against federal officials

Congress speaks clearly when authorizing damages actions against federal employees, and for good reason: such suits represent a serious intrusion on executive prerogative and should be imposed only after careful legislative deliberation. RFRA's provision for "appropriate relief" does not expressly authorize personal damages actions against federal employees, and this Court should decline to find that it does so implicitly.

a. Respondents do not contest that Congress's typical (if not exclusive) practice is to use express language when authorizing personal damages actions against federal officers and employees, nor do they identify a single provision in the entire federal code that has been interpreted to authorize such a remedy in the absence of a clear indication to that effect. Instead, respondents observe (Br. 29) that "Congress also knows how to exclude damages with specific language when it so intends." See Resp. Br. 29-30 (citing examples). None of respondents' examples moves the ball. They either reflect carve-outs from otherwise generally applicable waivers of sovereign immunity (a situation not presented here) or, at most, a belt-and-suspenders approach to preventing damages actions against federal officials.

Apart from statutes that exclude damages, respondents also point to a statute that *includes* damages—42 U.S.C. 1983—and claim that it "should inform the Court's interpretation of RFRA." Resp. Br. 37 (capitalization altered; emphasis omitted). They repeat the court of appeals' view that because the phrase "under color of law" in RFRA is similar to the phrase "under color of any statute, ordinance, regulation, custom, or usage" in Section 1983, RFRA should be read to authorize personal-capacity money damages just as Section 1983 does. *Id.* at 38 (citation omitted). But it is Section 1983's reference to an "action at law"—not the "color of" law language—that authorizes damages. Pet. Br. 29.

Respondents contend that the phrase "'action at law'" is "a relic of the historical, long-abandoned distinction between actions at law and in equity." Resp. Br. 39-40 (citation omitted). But of course Section 1983 was enacted long before the merger of law and equity in the federal courts. See Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13. And respondents' argument overlooks the fact that because different forms of action were historically associated with different remedies, see *Curtis* v. *Loether*, 415 U.S. 189, 196 (1974) (noting that damages are "the traditional form of relief offered in the courts of law"), the phrase continues to serve the important function of specifying the remedies available in a suit under Section 1983. Tellingly, Congress has continued to use the phrase "action at law" even after the merger of law and equity, when its only possible purpose in doing so is to specify the availability of damages relief. See, *e.g.*, 42 U.S.C. 5207(a) and (c)(1) (permitting an "action at law" against a federal officer or employee to recover for impermissible firearm confiscation). Con-

gress's omission of such language in RFRA thus confirms its deliberate decision not to adopt the model of damages liability reflected in Section 1983.

Moreover, the single textual similarity on which respondents rely cannot overcome the multiple material differences between the two statutes. Unlike in Section 1983, the phrase "other person acting under color of law" appears in RFRA as a residual parenthetical following "official," which itself appears in a list following a string of governmental entities that can only act and be sued in their official capacities. 42 U.S.C. 2000bb-2(1). Those preceding terms militate strongly in favor of reading "other person acting under color of law" as comparably limited. Also in stark contrast to Section 1983, the parenthetical functions to define the broad scope of RFRA's substantive limitations on what "government" may do, and its corresponding provision for relief "against a government," 42 U.S.C. 2000bb-1(c). Individual-capacity damages actions do not accord with the plain meaning of the latter phrase. See p. 3, *supra*. Those contextual differences preclude importing wholesale the judicial interpretations of Section 1983 into RFRA. See *Johnson* v. *United States*, 559 U.S. 133, 144-145 (2010) (declining to import the common-law meaning of "force" into the Armed Career Criminal Act of 1984's, 18 U.S.C. 924(e), definition of a "violent felony" because it was a "comical misfit with the defined term").

Respondents further observe (Br. 37-38) that RFRA as originally enacted applied to state as well as federal officials, implying that it would have been anomalous for RFRA to provide for damages against the former but not the latter. That argument rests on a false premise: RFRA as originally enacted did *not* itself provide for

damages against state officials in their personal capacities. To the extent Congress thought such a remedy would be available, it would only have been by channeling RFRA claims through Section 1983's cause of action against state officials for violation of the federal "Constitution *and laws*," 42 U.S.C. 1983 (emphasis added); see *Availability of Money Damages Under the Religious Freedom Restoration Act*, 18 Op. O.L.C. 180, 182 (1994) (*Availability of Money Damages*) (suggesting that Section 1983 was available), although this Court has subsequently imposed additional restrictions on invoking Section 1983 to enforce federal statutory provisions, see *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 127 (2005); *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 276 (2002). And contrary to respondents' contention (Br. 41), there is nothing unusual about making damages available against state but not federal employees for free-exercise violations. That was the background rule when RFRA was enacted. See Pet. Br. 21-22, 25-26.

b. Presuming that Congress will use explicit language if it seeks to subject federal employees to personal damages actions serves to protect the Executive Branch from a potentially onerous burden in the absence of congressional weighing of the relevant costs and benefits. Although respondents quibble (Br. 48-49) with certain *Bivens* precedents cited by petitioners—arguing that those precedents are irrelevant because they address the availability of an implied cause of action—respondents do not contest that the separation-of-powers *principles* underlying those precedents are applicable here. In particular, they do not dispute that the availability of damages actions against federal personnel generally hampers executive functioning and

would be likely to impose an especially heavy burden in the free-exercise context. Nor do they dispute that qualified immunity would fail to adequately mitigate this burden, or that Congress—rather than the courts—is best situated to weigh the tradeoffs in determining whether personal damages actions are appropriate. See Pet. Br. 29-35.

Instead, citing a debate from the legislative history over whether RFRA should be amended to exempt prisoners from its scope, respondents contend (Br. 46 n.21) that "Congress deemed increased litigation to be a non-issue at the time it passed RFRA." But the Senators who opposed that amendment did so on the ground that prisoner suits had not presented major problems pre-*Smith*, and RFRA would simply restore that status quo. See, *e.g.*, 139 Cong. Rec. 26407 (1993) (Sen. Lieberman) (stating that because "RFRA does not create a new legal standard," "we have a track record as to how it will affect the conduct in the prisons"). As discussed, the status quo did *not* include damages against federal employees. See pp. 8-9, *supra*. It is highly unlikely that Congress—without assessing (or even remarking on) the practical difficulties such a remedy would generate—intended to create a novel personal damages action available to every federal prisoner in the country for burdens allegedly imposed by generally applicable prison rules on his or her religious beliefs, which might often be unfamiliar or uncertain to a prison employee.

c. Respondents also argue (Br. 48) that requiring a clear indication of congressional intent before subjecting federal employees to personal damages actions "would flip the rule of *Franklin* * * * on its head." *Franklin* is inapposite for a variety of reasons, see pp.

17-20, *infra*, including that it did not involve federal employees. The unique considerations associated with monetary liability against federal employees indicate that a different rule is appropriate in this context, and this Court has not hesitated to reject *Franklin* when circumstances so dictate. See *Sossamon*, 563 U.S. at 289 (noting that "[i]n *Franklin*," "congressional silence had an entirely different implication than it does here"). Respondents further claim (Br. 48) that applying a presumption against damages actions against federal employees would "upset[] wide swaths of settled jurisprudence built on" *Franklin*, but they fail to identify any decisions that have invoked *Franklin* to subject federal employees to damages actions. See Resp. Br. 28 (listing two court of appeals decisions relying on *Franklin* to impose liability on private parties).

4. This Court has rejected the availability of damages under identical statutory language

Lastly, this Court should construe RFRA's provision for "appropriate relief" to bar damages liability because it construed materially identical language in *Sossamon* to preclude an award of damages against a State under RLUIPA. 563 U.S. at 288. Respondents contend (Br. 32-36) that *Sossamon* rested exclusively on sovereign-immunity concerns, which are not present here. But this case involves analogous separation-of-powers concerns, which dictate a similar interpretive approach. See Pet. Br. 26-35. In the same vein, respondents contend (Br. 33) that if the phrase "appropriate relief" did not encompass "money damages as a textual matter, the *Sossamon* Court would not have needed to discuss sovereign immunity at all to reach its holding." That argument misapprehends the opinion's reasoning: the *Sossamon* Court declined to construe the text definitively

because doing so was unnecessary in light of sovereign-immunity considerations. See 563 U.S. at 288 ("[T]he phrase 'appropriate relief' in RLUIPA is not so free from ambiguity that we may conclude that the States, by receiving federal funds, have unequivocally expressed intent to waive their sovereign immunity."); see also *id.* at 287-288.

B. Respondents' Atextual Counterarguments Lack Merit

Unable to identify any persuasive textual or contextual basis for their interpretation of "appropriate relief against a government," respondents largely stake their claim on this Court's decision in *Franklin*, *supra*, as well as on atextual policy arguments. Neither is persuasive.

1. Franklin *does not require the Court to presume the availability of damages in this case*

Respondents lean heavily (Br. 23-36) on *Franklin*, *supra*. But *Franklin* does not apply here, and even if it did, the presumption would be overcome in this context.

a. *Franklin* interpreted an implied cause of action and has no application in this case, where the statute includes both an express cause of action and an express remedies provision. Pet. Br. 45-46. Respondents contend (Br. 27) that *Franklin* "drew no distinction between express and implied causes of action," but that contention ignores *Franklin*'s context and reasoning. *Franklin* held that damages are presumptively available when "Congress is *silent* on the question of remedies," 503 U.S. at 69 (emphasis added), and the Court predominantly invoked cases construing implied rights, see *id.* at 67-68 (citing, *e.g.*, *Texas & Pac. Ry. Co.* v. *Rigsby*, 241 U.S. 33 (1916) (implied cause of action under Safety Appliance Act (Act of Mar. 2, 1893, ch. 196,

27 Stat. 531, as amended)); *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964) (implied cause of action under Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*)).

Indeed, the *sole* case cited in *Franklin* that respondents identify (Br. 27) as interpreting an express right of action is *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838). See *Franklin*, 503 U.S. at 67. Contrary to respondents' contention, however, the private bill at issue there did *not* provide an express right of action for suit in court; it provided for adjustment of the claims by the Solicitor of the Treasury. See Act of July 2, 1836, ch. 284, 6 Stat. 665; see also *Franklin*, 503 U.S. at 67 (noting that the bill "accorded a right of action in mail carriers to sue," without characterizing that right as express or implied). And the relief awarded was mandamus requiring the Postmaster General to take an official act. See *Kendall*, 37 U.S. (12 Pet.) at 618.

Subsequent precedents are consistent with this understanding of *Franklin*. The Court has never applied *Franklin* to recognize the availability of a disputed remedy in the context of an express remedies provision. And it has reaffirmed that *Franklin* applies only when the statute is silent as to available remedies. See *Lane* v. *Pena*, 518 U.S. 187, 197 (1996) ("The existence of the § 505(a)(2) remedies provision brings this case outside the 'general rule' we discussed in *Franklin*: This is not a case in which 'a right of action exists to enforce a federal right and Congress is silent on the question of remedies.'") (quoting *Franklin*, 503 U.S. at 69); see also *Sossamon*, 563 U.S. at 288 (noting that the *Franklin* Court had "no statutory text to interpret").

Respondents argue (Br. 26) that "[i]f 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." That argument lacks merit. *Franklin*'s methodology prescribes not only a presumption, but also a particular order of operations: a court must *first* presume that damages are available, and *then* inquire whether the statute provides a clear indication to the contrary. *Franklin*, 503 U.S. at 70-71. But when a statute includes an express remedies provision, it is far more consistent with this Court's general approach to "begin[] with the text." *Ross* v. *Blake*, 136 S. Ct. 1850, 1856 (2016). Here, the text is best read to foreclose personal damages actions, so there is no need to turn to any ambiguity-resolving presumption. And even if resort to a presumption were necessary, the Court should apply a presumption *against* awarding damages, given the special considerations associated with subjecting federal employees to personal damages actions. See pp. 11-16, *supra*.[5]

Regardless of whether *Franklin* extends beyond the realm of implied rights, *Sossamon*'s holding that the phrase "appropriate relief" does not authorize damages against the government militates strongly against reading that very same phrase to authorize damages against federal employees in their personal capacities. See Pet. Br. 46-48; *Clark* v. *Martinez*, 543 U.S. 371, 380 (2005)

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[5] In any event, the possibility that broader remedies will be available for implied rights of action than for express rights of action is a consequence of *Franklin*'s logic. See *Franklin*, 503 U.S. at 78 (Scalia, J., concurring in the judgment) ("To require, with respect to a right that is not consciously and intentionally created, that any limitation of remedies must be express, is to provide, in effect, that the most questionable of private rights will also be the most expansively remediable.").

("The lowest common denominator, as it were, must govern."). Respondents argue (Br. 29 n.11) that "Congress's use of the term 'appropriate' relief suggests that the relief available against different categories of defendants may vary." To be sure, a court determining what relief is "appropriate" must take into account the facts and circumstances of the particular case before it, such as the operation and scope of any rule of general applicability that would otherwise govern, the nature and extent of the burden on free exercise, and possible alternative ways in which the burden might be alleviated or less restrictive means adopted. But that commonsense interpretation, calling for a case-specific tailoring of injunctive or other equitable relief, lends no support to respondents' categorical rule under which certain *classes* of defendants (like federal employees) would be subject to damages awards, and other *classes* of defendants (like sovereigns) would not. The Court should give "appropriate relief" a consistent meaning across all defendants subject to RFRA. See *Haight* v. *Thompson*, 763 F.3d 554, 569 (6th Cir. 2014) (Sutton, J.).[6]

b. Even if the *Franklin* presumption did apply in this case, it would be overcome. In determining

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[6] Respondents point (Br. 34-35) to an Office of Legal Counsel opinion noting that "[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." *Availability of Money Damages*, 18 Op. O.L.C. at 183. But the purpose of that opinion was to assess whether RFRA waived sovereign immunity, *id.* at 181, and it remarked on officials' liability tentatively and in passing. Moreover, the opinion predates important developments in the law, including this Court's decision in *Sossamon*.

whether the presumption was rebutted, *Franklin* itself looked to background principles and subsequent developments in the law. 503 U.S. at 71-73; see Pet. Br. 48. Here, both of those cues indicate damages are unavailable: damages were unavailable against federal officials prior to RFRA, and this Court's *Bivens* jurisprudence has only become more stringent since RFRA's passage. Pet. Br. 48-49. Respondents make no serious effort to contest either of those points. Moreover, the statutory text independently provides a sufficiently clear indication to overcome the presumption.

2. Respondents' policy arguments do not overcome RFRA's text and context

Respondents and their amici argue that petitioners' interpretation would hamper RFRA's remedial purposes by resulting in denial of relief in a significant number of cases. See, *e.g.*, Resp. Br. 31; 67 Religious Orgs. Amicus Br. 7. But "[p]olicy considerations cannot override" RFRA's "text and structure." *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U.S. 164, 188 (1994).[7]

In any event, respondents' policy arguments are unpersuasive on their own terms. Respondents misunderstand RFRA's central purpose, which is to prohibit burdens on religion that "result[] from a rule of general applicability." 42 U.S.C. 2000bb-1(a). Equitable relief

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[7] Respondents cite (Br. 41) a provision from RLUIPA stating that "[t]his chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. 2000cc-3(g). But that rule does not apply to RFRA's provision for "appropriate relief." See *Hobby Lobby*, 573 U.S. at 696 & n.5 (holding that the rule applies to RFRA's definition of "exercise of religion," and only because RFRA incorporates RLUIPA's definition of that term).

fulfills that purpose. Rules of general applicability—because they persist over time and affect entire classes of individuals—are nearly always subject to tailoring by equitable relief, even if isolated instances of discrimination may be marginally more difficult to redress in certain cases. But such isolated instances of discrimination remain within the ambit of the Free Exercise Clause post-*Smith*, see *Smith*, 494 U.S. at 881, and respondents' claim that damages are necessary for such violations should be no more persuasive here than it is in the *Bivens* context.

As a general matter, respondents also dramatically understate the efficacy of equitable relief, which may be applied "in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action." *Freeman* v. *Pitts*, 503 U.S. 467, 487 (1992). Congress has historically viewed equitable relief as sufficient to remedy free-exercise violations by federal officials, see pp. 8-9, *supra*, and there is no indication that it abandoned this view in adopting RFRA. Although respondents and their amici suggest, see, *e.g.*, Becket Fund for Religious Liberty Amicus Br. 12-13, that equitable claims may be particularly susceptible to mootness—including as a result of strategic action by the government—this Court already has well-developed doctrines for addressing precisely that concern. See, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174, 189 (2000) (addressing voluntary cessation doctrine). Moreover, when defendants permanently modify their conduct to comply with RFRA, the statute has achieved its fundamental goal of protecting religious exercise.

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For the foregoing reasons and those stated in petitioners' opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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