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

BRIEF FOR THE PETITIONERS

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
JEFFREY B. WALL
EDWIN S. KNEEDLER
Deputy Solicitors General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
AUSTIN L. RAYNOR
Assistant to the Solicitor General
BENJAMIN H. TORRANCE
SARAH S. NORMAND
ELLEN BLAIN
MARY HAMPTON MASON
REGINALD M. SKINNER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, authorizes suits seeking money damages against individual federal employees.

PARTIES TO THE PROCEEDING

Petitioners were the appellees in the court of appeals. They are First Name Unknown (FNU) Tanzin, Sanya Garcia, John Last Name Unknown (LNU), Francisco Artusa, John C. Harley III, Steven LNU, Michael LNU, and Gregg Grossoehmig, alleged Special Agents of the Federal Bureau of Investigation (FBI); Weysan Dun, alleged Special Agent in Charge, FBI; James C. Langenberg, alleged Assistant Special Agent in Charge, FBI; and five John Does, alleged Special Agents, FBI.

Respondents were the appellants in the court of appeals. They are Muhammad Tanvir, Jameel Algibhah, and Naveed Shinwari.[*]

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[*] As specified above, the pleadings named several defendants as FNU, LNU, or anonymously as John Does. Br. in Opp. App. 1a, 6a-12a. The pleadings list six John Doe Special Agents of the FBI, but John Does 2 and 3 have been determined to be the same person. Pet. App. 64a n.1. Nine other named or unnamed alleged FBI Special Agents, as well as the Attorney General of the United States, the Director of the FBI, the Director of the Terrorist Screening Center, and the Secretary of Homeland Security were defendants in the district court but did not appear in the court of appeals. Awais Sajjad was a plaintiff in the district court but did not appear in the court of appeals. See *id.* at 1a, 62a.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-44a) is reported at 894 F.3d 449. The order of the court of appeals denying rehearing en banc (Pet. App. 45a-61a) is reported at 915 F.3d 898. The opinion and order of the district court (Pet. App. 62a-109a) is reported at 128 F. Supp. 3d 756. Subsequent orders of the district court (Pet. App. 110a-112a, 113a-114a) are unreported.

JURISDICTION

The amended judgment of the court of appeals was entered on June 25, 2018. A petition for rehearing was denied on February 14, 2019 (Pet. App. 45a-61a). On May 8, 2019, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including June 14, 2019. On June 4, 2019, Justice Ginsburg further extended the time to and including July 14,

2019, and the petition was filed on July 12, 2019. The petition for a writ of certiorari was granted on November 22, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. 2000bb-1 provides:

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. 2000bb-2(1) provides:

> As used in this chapter—
>
> (1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity[.]

Other relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

This case involves the nature of the relief authorized under the Religious Freedom Restoration Act of 1993 (RFRA or Act), 42 U.S.C. 2000bb *et seq.*, which provides that a prevailing person may obtain "appropriate relief against a government" when the government has substantially burdened the person's religious exercise without meeting certain statutory requirements. 42 U.S.C. 2000bb-1(c). Respondents here sued various federal employees in their personal capacities for money damages, alleging violations of RFRA. The district court dismissed the claims, ruling that damages awards against individual federal employees were not "appropriate relief" within the terms of the statute. Pet. App. 107a-108a (citation omitted). The court of appeals reversed, concluding that such awards were appropriate. *Id.* at 23a.

1. RFRA was Congress's response to *Employment Division* v. *Smith*, 494 U.S. 872 (1990). In that case, the respondent claimed a religious exemption under the First Amendment from a state criminal law that prevented him from using peyote in a religious ceremony. *Id.* at 874. This Court rejected the claim, holding that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law

of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879 (citation and internal quotation marks omitted). In reaching that conclusion, the Court rejected an earlier line of precedents holding that even nondiscriminatory "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." *Id.* at 883; see, *e.g.*, *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

In Congress's view, however, "the compelling interest test as set forth in [pre-*Smith*] Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. 2000bb(a)(5). Congress thus described RFRA's purposes as twofold: "to restore the compelling interest test" that had been used before *Smith* and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. 2000bb(b)(1) and (2).

RFRA accordingly provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless that burden is "in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1(a) and (b). The Act further provides that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. 2000bb-1(c). "'[G]overnment,'" in turn, is currently defined to "include[] a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States"

or of a specified federal "'covered entity.'" 42 U.S.C. 2000bb-2(1) and (2);[1] see *City of Boerne* v. *Flores*, 521 U.S. 507, 532 (1997) (invalidating Congress's inclusion of States within RFRA's original definition of "government"). RFRA does not expressly define the phrase "appropriate relief."

2. All three respondents immigrated to the United States and are now either U.S. citizens or lawful permanent residents. Pet. App. 3a. Each is Muslim. During the relevant period (approximately 2007-2013, see Br. in Opp. App. 23a, 36a, 37a, 45a, 47a, 55a), petitioners were allegedly agents of the Federal Bureau of Investigation (FBI). Respondents allege that petitioners, in the course of conducting investigations related to national security, asked them various questions about their backgrounds, acquaintances, and activities. *Id.* at 23a-25a, 37a-38a, 42a. They further allege that petitioners asked them to serve as informants for the government in terrorism-related investigations, but that respondents refused, at least in part based on their religious beliefs. Pet. App. 3a. Respondents do not allege that they informed any of the agents that their refusal was based on religious grounds. See *id.* at 58a (Jacobs, J., dissenting from the denial of rehearing en banc). Rather, one respondent allegedly told the agents "that he needed time to consider their request," Br. in Opp. App. 42a-43a, while the others allegedly objected that serving as an informant would be too "dangerous," *id.* at 26a, 53a.

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[1] The term "'covered entity'" means "the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States." 42 U.S.C. 2000bb-2(2).

Respondents assert that petitioners retaliated against them for refusing to serve as informants by improperly placing or retaining them on the No Fly List—a government-maintained list of persons known or suspected of posing a risk of terrorism and therefore barred from boarding commercial aircraft in the United States. Pet. App. 5a-6a. Thus, according to respondents, petitioners substantially burdened their religious exercise by forcing them "into an impermissible choice between, on the one hand, obeying their sincerely held religious beliefs and being subjected to * * * 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." *Id.* at 4a (citation omitted); Br. in Opp. App. 71a. Respondents acknowledge, however, that only relevant agencies, and not individual FBI agents, have the authority to determine the composition of the No Fly List. See Pet. App. 5a; Br. in Opp. App. 9a-10a.

3. Respondents sued, alleging violations of their rights under the First and Fifth Amendments, RFRA, and the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Pet. App. 11a; see *id.* at 12a. Respondents sought injunctive relief against petitioners in their official capacities, as well as damages in their personal capacities.

While the government's motion to dismiss was pending, all three respondents took advantage of the administrative redress procedures available to challenge their

alleged placement on the No Fly List.[2] The Department of Homeland Security subsequently advised respondents that it "knows of no reason [they] should be unable to fly," and that their administrative inquiries were closed. Pet. App. 75a-76a (citation omitted). After confirming that they were able to fly, respondents agreed to dismiss their official-capacity claims for injunctive relief without prejudice. See *id.* at 112a.

With respect to respondents' damages claims against petitioners in their personal capacities, the district court first held that respondents had failed to state a claim for an implied right of action under the First Amendment pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Pet. App. 79a-94a; see *Turkmen* v. *Hasty*, 789 F.3d 218, 236 (2d Cir. 2015), rev'd in part and vacated in part on other grounds *sub nom. Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017). Respondents did not appeal that determination.

Second, the district court dismissed respondents' RFRA claims for damages. Pet. App. 94a-108a. It began by noting that this Court in *Sossamon* v. *Texas*, 563 U.S. 277 (2011), had held that the phrase "appropriate relief" in RFRA's companion statute, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*, does not authorize money damages against a State. Pet. App. 95a-96a. In

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[2] The Department of Homeland Security Traveler Redress Inquiry Program enables travelers to request the correction of erroneous information if they allege, *inter alia*, that they have been unfairly or incorrectly delayed in, or prohibited from, boarding an aircraft as a result of a watch list. See 49 U.S.C. 44903(j)(2), 44909(c)(6), 44926(a); 49 C.F.R. 1560.201-1560.207.

the court's view, *Sossamon* "may counsel caution in concluding that the same term—even one as malleable as 'appropriate relief'—can include damages as applied to one class of defendants but not another." *Id.* at 96a n.19.

The district court further observed that RFRA was designed "to restore the compelling interest test" for free-exercise claims as it had existed before *Smith*, Pet. App. 97a (quoting 42 U.S.C. 2000bb(b)(1)), but "'says very little about remedies'"—making it "'unlikely that Congress intended it to displace the existing remedial system for constitutional violations,'" *id.* at 101a (quoting *Mack* v. *O'Leary*, 80 F.3d 1175, 1181 (7th Cir. 1996), vacated on other grounds and remanded, 522 U.S. 801 (1997)). Prior to *Smith*, the only path for a claimant to obtain damages against a federal official for a free-exercise violation would have been through *Bivens*, and this Court has never recognized a free-exercise *Bivens* claim either before or after *Smith*. *Id.* at 101a-102a. In the court's view, because Congress did not intend to upset this status quo, damages were likewise unavailable under RFRA. *Ibid.*

Finally, the court rejected respondents' reliance on *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), which they invoked for the proposition that courts "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." Pet. App. 104a (quoting *Franklin*, 503 U.S. at 66). The court observed that *Franklin* interpreted the scope of an implied right of action and thus did not govern the question presented here concerning the scope of an express statutory cause of action, which "must be [answered] using the traditional tools of statutory construction." *Id.* at 105a.

4. The court of appeals reversed the dismissal of respondents' personal-capacity claims for damages under RFRA and remanded for consideration of whether petitioners were entitled to qualified immunity. Pet. App. 1a-44a.

The court of appeals first concluded that RFRA permits personal-capacity claims against federal officers, and not just official-capacity claims. Pet. App. 15a-22a. RFRA authorizes an aggrieved person to "obtain appropriate relief against a government," 42 U.S.C. 2000bb-1(c), and defines "'government'" to "include[]" an "official (or other person acting under color of law)," 42 U.S.C. 2000bb-2(1). Substituting the statutory definition for the defined term, the court reasoned that RFRA authorizes a plaintiff to obtain "appropriate relief" against a federal "official." Pet. App. 19a. Accordingly, in the court's view, RFRA's "plain terms[] authorize[] individual capacity suits against federal officers." *Ibid.*

The court of appeals next determined that the phrase "appropriate relief" encompasses money damages in personal-capacity suits against federal officers. Pet. App. 22a-26a. The court observed that Congress enacted RFRA one year after this Court's decision in *Franklin*, and concluded that because RFRA "includes no express indication that it proscribes the recovery of money damages," the "*Franklin* presumption" renders damages an available remedy against individual federal employees. *Id.* at 24a-26a (brackets and internal quotation marks omitted). It rejected the district court's conclusion that the context in which *Franklin* arose (an implied right of action) affected the analysis. *Id.* at 33a.

The court of appeals recognized that the same phrase—"appropriate relief"—in RLUIPA does not authorize damages against a State. Pet. App. 26a-27a; see *Sossamon*, *supra*. And it further acknowledged that other circuits have ruled that RFRA does not permit damages against the federal government. Pet. App. 26a-28a. The court distinguished those rulings on the ground that they involved sovereign immunity, which is not implicated in suits against individual federal officers in their personal capacities. *Ibid.* The court recognized that its holding meant that the same statutory phrase—"'appropriate relief'"—would authorize damages against certain defendants under RFRA and not others. But it concluded that the word "'appropriate'" is flexible and can "take on different meanings in different settings." *Id.* at 31a (citation omitted).

5. Petitioners sought rehearing en banc, which was denied. Pet. App. 45a-46a. Chief Judge Katzmann and Judge Pooler, both members of the panel, concurred in the denial of rehearing en banc. *Id.* at 47a-50a.[3] Judge Jacobs filed an opinion dissenting from the denial of rehearing en banc, which was joined by Judges Cabranes and Sullivan. *Id.* at 51a-58a. Judge Cabranes also filed a dissenting opinion, which was joined by Judges Jacobs and Sullivan. *Id.* at 59a-61a.

a. In their concurring opinion, Chief Judge Katzmann and Judge Pooler reaffirmed their view that the panel decision properly interpreted RFRA to authorize a damages remedy. They rejected the dissents' argument that the panel had improperly implied a new

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[3] The third panel member was Judge Lynch, who as a senior judge could not report his views on the petition for rehearing en banc. See Pet. App. 47a n.1.

Bivens-type cause of action, contending that it had instead interpreted "an *express* private right of action with an *express* provision for 'appropriate relief,'" using traditional tools of interpretation. Pet. App. 47a-48a (quoting 42 U.S.C. 2000bb-1(c)).

b. In his dissent from the denial of rehearing en banc, Judge Jacobs concluded that the panel's reasoning "fails as a matter of law and logic and runs counter to clear Supreme Court guidance." Pet. App. 51a. He began by emphasizing that this Court in *Sossamon* had already interpreted the "identical private right of action" in RLUIPA to foreclose damages actions against a State, and that *Sossamon* relied not only on sovereign-immunity considerations but also "the plain meaning of the text." *Id.* at 52a. In particular, *Sossamon* "explained that the phrase 'appropriate relief' takes its meaning from 'context.'" *Ibid.* (quoting *Sossamon*, 563 U.S. at 286). Here, Judge Jacobs explained, the context is clear: "the full phrase is 'appropriate relief against a government,'" and when the government is a defendant, damages are inappropriate. *Id.* at 53a. At bottom, Judge Jacobs found it implausible, since RFRA and RLUIPA "attack the same wrong, in the same way, in the same words," that the phrase "'appropriate relief against a government'" can mean one thing in RFRA and another in RLUIPA. *Ibid.*

In response to the panel's reasoning, Judge Jacobs explained that the inclusion of "'official[s]'" in the Act's definition of "'government'" "tells us nothing about damages" and simply "facilitate[s] injunctive relief" against particular officials. Pet. App. 53a. Judge Jacobs contrasted the language of RFRA with that of 42 U.S.C. 1983, which permits an "action at law" and thus plainly contemplates damages actions. Pet. App. 53a-54a

(quoting 42 U.S.C. 1983). He further observed that "every other federal statute" respondents identified as authorizing damages actions against federal officers in their personal capacities does so expressly, *id.* at 54a (quoting *id.* at 103a), thus underscoring that "[i]f a statute imposes personal damages liability against individual federal officers, one would expect that to be done explicitly, rather than by indirection, hint, or negative pregnant," *id.* at 55a. The absence of any explicit indication to this effect in RFRA's text or legislative history was unsurprising, given its stated purpose of restoring the pre-*Smith* substantive standard for free-exercise claims, rather than expanding the categories of available relief. *Id.* at 55a-56a.

Finally, Judge Jacobs distinguished *Franklin*, which he explained did not create a presumption of the availability of money damages, but instead recognized a presumption of "appropriate" remedies for private rights of action. Pet. App. 56a. By presuming that damages were available, he continued, the panel had "simply beg[ged] the question" of what "'appropriate'" remedies RFRA allows. *Ibid.* In answering that question, Judge Jacobs would have looked to cases like *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017), which he understood to indicate that damages are not "generally considered appropriate relief against governments and government officials." Pet. App. 56a. Judge Jacobs concluded that by inferring a damages remedy in the absence of clear textual guidance, "[t]he panel has done what the Supreme Court has forbidden: it has created a new *Bivens* cause of action, albeit by another name and by other means." *Id.* at 57a. In so doing, it had disregarded the "'substantial social costs'" that inhere in damages lia-

bility for individual officers of the government, including the threat of "federal policy being made (or frozen) by the prospect of impact litigation." *Id.* at 57a-58a (citation omitted).

c. In his dissent from the denial of rehearing en banc, Judge Cabranes similarly criticized the panel decision as "a transparent attempt to evade, if not defy," this Court's precedents admonishing against the extension of *Bivens*-like remedies. Pet. App. 59a. He argued that cases like *Abbasi* and *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), make clear that "damages remedies against government officials are disfavored and should not be recognized absent explicit congressional authorization," due to the "'substantial costs'" they impose. Pet. App. 60a (quoting *Abbasi*, 137 S. Ct. at 1856). In Judge Cabranes' view, RFRA contains no such explicit authorization. *Ibid.*

SUMMARY OF ARGUMENT

RFRA does not authorize damages awards against federal employees in their personal capacities.

A. RFRA authorizes a prevailing plaintiff to obtain "appropriate relief" in a civil suit against the government for violations thereunder. 42 U.S.C. 2000bb-1(c). As this Court has recognized, "the word 'appropriate' is inherently context dependent." *Sossamon* v. *Texas*, 563 U.S. 277, 286 (2011). Interpreted in light of all relevant context—including the broader statutory language, history, separation-of-powers concerns, and precedent—the phrase "appropriate relief" in RFRA does not encompass a damages remedy against federal employees in their personal capacities, for four reasons.

First, placed within the broader statutory context, relief is "appropriate" only if it runs "against a govern-

ment." 42 U.S.C. 2000bb-1(c). But because federal officers and employees would be *personally* responsible for damages awards against them in their personal capacities, such awards are not "against a government" in any meaningful sense. Properly understood, RFRA permits relief against federal officials only in their official capacities.

Second, "appropriate relief" must be read against the backdrop of the preexisting rule that damages were generally unavailable against individual federal employees. Before RFRA, the only possible avenue for obtaining such relief would have been through an implied cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), but this Court's extant precedents did not recognize such an action under the Free Exercise Clause. Congress enacted RFRA in response to this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990)—which changed the prevailing substantive standard under the Free Exercise Clause—and there is no indication in the statute or its legislative history that Congress's mere reversion to the prior substantive standard was also intended to work an avulsive change in the law of remedies by authorizing a novel damages remedy against federal employees in their personal capacities. Accordingly, the statutory phrase "appropriate relief" should not be read to encompass such a remedy.

Third, this Court should decline to infer from the vague term "appropriate relief" the existence of a personal-capacity damages remedy against federal employees, in the absence of a clear statement of congressional intent to that effect. Congress speaks clearly when authorizing such a remedy, which imposes heavy

burdens on a coequal Branch; Congress, not the Judiciary, is best situated to assess those burdens and determine whether a damages remedy is in the public interest. See, *e.g.*, *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1856-1858, 1860-1861 (2017). The phrase "appropriate relief," however, does not "clearly identify[] money damages." *Sossamon*, 563 U.S. at 286. Rather than adopt a judgment that Congress itself failed to make, this Court should construe "appropriate relief" to exclude personal-capacity damages awards.

Fourth, the phrase "appropriate relief" precludes an award of damages here just as it did in *Sossamon*, *supra*, where this Court construed the identical phrase as it appears in RFRA's sister statute, RLUIPA—which governs state rather than federal entities and officials—to preclude an award of damages against a State. In reaching that conclusion, the Court relied both on traditional tools of statutory interpretation and considerations of sovereign immunity. 563 U.S. at 286-288. The Court should reach the same outcome here, both because the text, and the context that informs its meaning, are the same, and because separation-of-powers concerns apply to imposing a personal damages remedy against federal officers and employees.

B. The reasoning embraced by the court of appeals and respondents does not support a contrary understanding of "appropriate relief." The court of appeals relied heavily on RFRA's definition of the term "'government'" to "include[]" an "official (or other person acting under color of law)." 42 U.S.C. 2000bb-2(1); see Pet. App. 19a. But the definition of "government" does not change the meaning of the phrase "appropriate relief." In any event, RFRA's reference to "official[s]"

simply clarifies that injunctive relief against the government may be entered against individual officials. Injunctive relief against officers in their official capacities, unlike monetary relief against officers in their personal capacities, squares with the overarching statutory requirement that any relief run "against a government." 42 U.S.C. 2000bb-1(c).

The court of appeals also invoked a supposed presumption that money damages are *always* an appropriate form of relief to enforce a cause of action absent a clear indication to the contrary. See Pet. App. 24a-26a. But the case upon which it relied for that proposition, *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), has no application here. *Franklin* addressed an implied cause of action, and the statutory text was thus necessarily silent on the question of remedies. Adverting to a general presumption that damages are available is inappropriate (and unnecessary) where the statute includes an express cause of action and an express remedies provision. Here, the statute permits "appropriate relief against a government," 42 U.S.C. 2000bb-1(c), and that language is susceptible to interpretation using normal tools of statutory construction. Moreover, *Franklin* did not involve personal damages awards against federal employees, which implicate *sui generis* considerations that preclude the use of any generalized presumption in favor of damages. In any event, even if the *Franklin* presumption did apply, it is overcome in RFRA.

ARGUMENT

RFRA DOES NOT AUTHORIZE DAMAGES AWARDS AGAINST FEDERAL OFFICIALS IN THEIR PERSONAL CAPACITIES

RFRA's authorization of "appropriate relief," 42 U.S.C. 2000bb-1(c), does not encompass money damages against federal officers and employees in their personal capacities. Construing RFRA's text in light of all relevant context—including the broader statutory language, history, separation-of-powers concerns, and precedent—demonstrates that damages awards are not "appropriate relief" in this setting. The reasoning advanced by the court of appeals and respondents does not warrant a different conclusion. The statutory definition of "government" clarifies that plaintiffs may obtain relief against the government by enjoining its agents, and this Court's precedent does not require courts to presume the availability of personal damages liability against federal employees.

A. Damages Awards Are Not "Appropriate Relief" In RFRA Suits Against Individual Federal Officials

The traditional tools of textual interpretation show that the phrase "appropriate relief" does not encompass damages awards against federal employees in their personal capacities. 42 U.S.C. 2000bb-1(c). "[T]he word 'appropriate' is inherently context dependent," *Sossamon* v. *Texas*, 563 U.S. 277, 286 (2011), and here the statutory language and history, separation-of-powers principles, and this Court's decision in *Sossamon* all indicate that damages are not appropriate.

1. The broader statutory language makes clear that damages awards against federal officials in their personal capacities are not "appropriate relief"

In determining what constitutes "appropriate relief" under RFRA, this Court should draw guidance from the text of the entire provision, which states that prevailing plaintiffs may obtain "appropriate relief *against a government*." 42 U.S.C. 2000bb-1(c) (emphasis added); see *United States* v. *Morton*, 467 U.S. 822, 828 (1984) (noting that "[w]e do not * * * construe statutory phrases in isolation" and stating that the relevant text "must be read in light of the immediately following phrase"). The most natural interpretation of the whole statutory phrase is that the awarded relief must actually run against the government. Damages awards against individual federal employees in their personal capacities—for which the employees, rather than the federal treasury, are responsible—are not "against a government" in any real sense. See *Kentucky* v. *Graham*, 473 U.S. 159, 166 (1985) ("[A]n award of damages against an official in his personal capacity can be executed only against the official's personal assets.").

Although RFRA defines "'government'" to "include[]" an "official (or other person acting under color of law) of the United States," 42 U.S.C. 2000bb-2(1), damages awards against federal officials in their personal capacities, unlike injunctive relief, do not run "against [the] government" and thus are not "appropriate relief." Indeed, read in the context of the preceding terms in the definition of "'government'"—"branch, department, agency, [and] instrumentality," *ibid.*—"official" is properly understood to refer to an "official" only in his or her *official capacity*. That is plainly true for

all of the governmental entities that precede "official" in the definition.

It is also plainly true when the definition of "government" is applied in RFRA's substantive prohibition, which 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. There, all the listed actors—a "branch, department, agency, instrumentality, and official (or other person acting under color of law)," 42 U.S.C. 2000bb-2(1)—necessarily are named in an official capacity, since purely private conduct would not trigger RFRA's substantive restriction on what "government" may do. It thus should be equally true that when the same definition is applied in RFRA's remedial provision, an "official * * * of the United States" encompasses only an "official" sued in his or her official capacity—the only capacity in which a "branch, department, agency, [or] instrumentality" of the United States can be sued. *Ibid.*

Moreover, as respondents concede, "appropriate relief" does not encompass damages awards against the federal government itself in light of sovereign-immunity considerations. See Pet. App. 96a n.19.[4] Given that officials are covered by RFRA *only* by virtue of being "include[d]" within the term "'government'" pursuant to a definitional provision, see 42 U.S.C. 2000bb-2(1), it

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[4] The courts of appeals that have addressed the issue have unanimously reached the same conclusion. See *Hale* v. *Federal Bureau of Prisons*, 759 Fed. Appx. 741, 744 n.4 (10th Cir.) (per curiam), cert. denied, 140 S. Ct. 196 (2019); *Davila* v. *Gladden*, 777 F.3d 1198, 1210 (11th Cir.), cert. denied, 136 S. Ct. 78 (2015); *Oklevueha Native Am. Church of Haw., Inc.* v. *Holder*, 676 F.3d 829, 840-841 (9th Cir. 2012); *Webman* v. *Federal Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006).

would be particularly jarring to read the phrase "appropriate relief" to authorize broader relief against an official than against the government of which the official is defined to be a part.

2. Congress did not intend to impose personal liability on individual federal officials through a novel damages remedy in RFRA

This straightforward reading of "appropriate relief" is confirmed by RFRA's statutory history and, in particular, the backdrop against which it was enacted and the subject it was intended to address. See *Branch* v. *Smith*, 538 U.S. 254, 271 (2003) (interpreting statute in light of the "circumstances of its enactment"). Prior to the passage of RFRA, this Court's precedents recognized injunctive relief against federal officials in their official capacities, but not damages liability in their personal capacities, as appropriate relief against the government for a violation of the Free Exercise Clause. In enacting RFRA and using the phrase "appropriate relief against a government" in the cause-of-action provision, Congress did not intend to upset that remedial status quo. Instead, it sought merely to abrogate the substantive standard for free-exercise violations adopted in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). In light of this statutory history, the phrase "appropriate relief" is properly read not to authorize damages remedies against federal employees in their personal capacities. Even were the Court to conclude that the phrase was designed simply to reflect the law of remedies as it evolves over time, current precedent confirms that damages remedies against federal employees for free-exercise claims remain inappropriate.

a. At the time RFRA was enacted, an injunction operating against the government was considered the appropriate form of relief against federal officials for free-exercise violations. For instance, in *Davis* v. *Passman*, 442 U.S. 228 (1979), this Court noted its "established practice" of "sustain[ing] the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." *Id.* at 242 (citation omitted). In addition, the APA, as amended in 1976, confirmed a plaintiff's ability to seek equitable relief for constitutional violations. See 5 U.S.C. 702, 704 (1976) (providing for judicial review of agency action and waiving sovereign immunity as to equitable relief).

By contrast, there was no pre-RFRA basis for damages awards against federal employees in their personal capacities for free-exercise violations. Before RFRA's enactment, the only potential basis for obtaining such damages would have been an implied action at law under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, this Court implied a right of action for damages directly under the Constitution for a violation of the Fourth Amendment's prohibition on unreasonable searches and seizures. *Id.* at 389. In the years shortly thereafter, the Court extended *Bivens* to two additional contexts, involving particular applications of the Fifth Amendment's Due Process Clause and the Eighth Amendment. See *Davis*, *supra*; *Carlson* v. *Green*, 446 U.S. 14 (1980).

In the decade that followed, however, this Court became increasingly cautious about implying causes of action and damages remedies against federal employees in their personal capacities in the absence of congres-

sional action. Importantly, that shift took place well before RFRA was enacted in 1993. See, *e.g.*, *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988) ("Our more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts."). Indeed, in the years immediately preceding RFRA's enactment, this Court repeatedly rejected *Bivens* claims in a variety of circumstances. See *Bush* v. *Lucas*, 462 U.S. 367 (1983); *Chappell* v. *Wallace*, 462 U.S. 296 (1983); *United States* v. *Stanley*, 483 U.S. 669 (1987); *Schweiker*, *supra*; see also *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1857 (2017). In *Bush*, for example, the Court declined to recognize an implied damages remedy in a First Amendment suit against a federal officer. 462 U.S. at 390. Thus, at the time Congress enacted RFRA, this Court had never recognized a personal damages remedy against a federal employee for a free-exercise violation, and its cases gave considerable reason to doubt that such a remedy was available.

b. Against this historical backdrop, had Congress intended to expand in a radical way the existing type of "appropriate relief"—especially such relief deemed to be "against a government"—one would expect at least *some* affirmative indication of that intent in the statutory text or legislative history. There is none. Instead, both the statutory text and all available evidence indicate that Congress's goal in enacting RFRA was to modify the substantive standard for free-exercise claims, not the type of appropriate relief. See *Branch*, 538 U.S. at 270 (construing statute in light of problems it was designed to address); John F. Manning, *What Divides Textualists From Purposivists?*, 106 Colum. L. Rev. 70, 84 (2006) ("[T]extualists recognize that the relevant context for a statutory text includes the mischiefs

the authors were addressing."). Congress enacted RFRA in response to this Court's holding in *Smith*, which eliminated the compelling-interest test for free-exercise challenges to neutral laws of general applicability. 494 U.S. at 878. The congressional statement of purpose declares that RFRA was designed to restore the "compelling interest test" and "provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. 2000bb(b). As the Senate Report confirms, "the purpose of this act is only to overturn the Supreme Court's decision in *Smith*." S. Rep. No. 111, 103d Cong., 1st Sess. 12 (1993) (Senate Report); see H.R. Rep. No. 88, 103d Cong., 1st Sess. 15 (1993) (intent was to "'turn the clock back' to the day before *Smith* was decided").

Consistent with Congress's focus on restoring a particular substantive standard, nowhere in RFRA's text or legislative history is there any indication that Congress intended to expand dramatically the range of available remedies by authorizing damages awards against federal employees in their personal capacities. To the contrary, as noted above, the text, properly construed, limits relief to federal officials in their official capacities. And the legislative history similarly suggests that Congress did not expect damages to be available under RFRA. The Congressional Budget Office estimated that RFRA "would result in no significant cost to the federal government," and mentioned the possibility of attorney's fees but not damages. Senate Report 15-16.

In the absence of any evidence that Congress intended to expand the remedies available pre-RFRA, the statute's provision for "appropriate relief against a government" is best read to incorporate the *status quo ante*

that a personal damages award is not an appropriate form of relief in the context of a suit against a federal "official." But at most, in light of this history, the statutory phrase "appropriate relief against a government" should be read as tracking the law concerning such remedies as it develops over time. Cf. *West* v. *Gibson*, 527 U.S. 212, 218 (1999) ("The meaning of the word 'appropriate' permits its scope to expand to include Title VII remedies that were not appropriate before 1991, but in light of legal change are appropriate now."). Here, this Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants," *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001), and has never recognized a *Bivens* claim based on the Free Exercise Clause, see *Reichle* v. *Howards*, 566 U.S. 658, 663 n.4 (2012) ("We have never held that *Bivens* extends to First Amendment claims."); *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009). The Court's stringent test for implying a *Bivens* remedy in new contexts—adopted shortly after *Bivens* was decided and consistently reaffirmed since—makes clear that a damages remedy against federal employees in their personal capacities is not appropriate here. See *Abbasi*, 137 S. Ct. at 1855-1858; *Iqbal*, 556 U.S. at 675; Pet. App. 79a-94a (applying these precedents and rejecting respondents' *Bivens* claims).

Indeed, if a damages remedy were available for RFRA violations, it would create anomalous results given the unavailability of a *Bivens* remedy for free-exercise violations more generally. Plaintiffs could obtain damages when a neutral law of general applicability imposed a substantial burden on their rights, but could *not* obtain damages when facially discriminatory action

by federal officials imposed something less than a substantial burden. Because government action "that single[s] out the religious for disfavored treatment" lies at the core of the First Amendment prohibition, *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2020 (2017), it is unlikely that Congress intended such a discrepancy.

c. The court of appeals did not dispute that this Court had not recognized a *Bivens* free-exercise claim before RFRA's enactment. The court instead pointed to two decisions from its sister circuits. Pet. App. 42a (citing *Caldwell* v. *Miller*, 790 F.2d 589, 607-608 (7th Cir. 1986); *Jihaad* v. *O'Brien*, 645 F.2d 556, 558 n.1 (6th Cir. 1981)). But even if those two decisions had awarded damages under *Bivens* for free-exercise claims, that would hardly be evidence of a consistent practice that Congress might have approved in RFRA, cf. *Milner* v. *Department of the Navy*, 562 U.S. 562, 576 (2011)—especially in the face of this Court's intervening and more restrictive precedent.

In any event, those decisions did *not* award damages under *Bivens* for free-exercise violations. In *Caldwell*, the Seventh Circuit held that the plaintiff had stated a damages claim for the alleged loss of his personal legal and religious books, but that claim was brought under the Fifth Amendment's Due Process Clause, not the Free Exercise Clause. 790 F.2d at 594, 608. And while the plaintiff also asserted an unrelated free-exercise claim, the court of appeals did not analyze the availability of damages for that claim. *Id.* at 595-600. In *Jihaad*, the Sixth Circuit dismissed the plaintiff's free-exercise claim based on qualified immunity. 645 F.2d at 564. It also imported, without analysis, an earlier circuit decision allowing First Amendment free-speech claims to

proceed under *Bivens*. *Id.* at 558 n.1. But the court of appeals in that earlier case did not address the Free Exercise Clause at all, and of course it lacked the benefit of this Court's later decisions explaining the limits of *Bivens*. See *Yiamouyiannis* v. *Chemical Abstracts Serv.*, 521 F.2d 1392, 1393 (6th Cir. 1975) (per curiam), remanded, 578 F.2d 164 (6th Cir. 1978) (per curiam), cert. denied, 439 U.S. 983 (1978). In short, neither *Caldwell* nor *Jihaad* remotely suggests that there was any pre-RFRA basis for awarding damages against federal officials in their personal capacities as an appropriate form of relief for free-exercise violations.

3. Damages awards against federal officials in their personal capacities are not appropriate relief unless Congress clearly indicates that they are

In addition, this Court should not find a damages remedy against federal officials absent a clear indication to that effect in the statute itself. Congress speaks clearly when imposing such a remedy, which implicates sensitive separation-of-powers considerations and can impose heavy burdens on Executive Branch functioning. In the absence of a clear sign of congressional intent, there is no basis to presume that Congress intended to invade the rights of the Executive Branch. And as this Court recognized in *Sossamon*, the word "appropriate" does not "clearly identify[] money damages." 563 U.S. at 286.

a. When Congress determines that a damages remedy against federal officers and employees in their personal capacities is an appropriate form of relief, it says so explicitly. As the district court observed, "*every* other federal statute identified by [respondents] as recognizing a personal capacity damages action against federal officers * * * includes specific reference to the

availability of damages." Pet. App. 103a (emphasis added); see 18 U.S.C. 2520(b)(2) ("appropriate relief includes * * * damages * * * and punitive damages"); 42 U.S.C. 1985(3) ("action for the recovery of damages"); 47 U.S.C. 605(e)(3)(B)(ii) (court "may award damages"); 50 U.S.C. 1810(a) and (b) ("aggrieved person * * * entitled to recover" "actual damages[,] * * * liquidated damages[,] [and] * * * punitive damages"). As the district court further observed, "[respondents] have not pointed to a single statute where 'appropriate relief' was interpreted to include such a remedy without an explicit definition to that effect." Pet. App. 103a; see *id.* at 55a (Jacobs, J., dissenting from the denial of rehearing en banc) ("If a statute imposes personal damages liability against individual federal officers, one would expect that to be done explicitly.").

Congress's reaction when courts have authorized an award of money damages against federal employees in the absence of clear statutory guidance is telling. For example, after this Court held that federal employees could be sued under state tort law for certain actions taken within the scope of their employment, Congress "reacted quickly" to expand federal employees' immunity from such suits. *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 425-426 (1995) (describing Congress's response to *Westfall* v. *Erwin*, 484 U.S. 292 (1988)). In so doing, Congress sought to forestall a "crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce." *Id.* at 426 (quoting Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 2(a)(5), 102 Stat. 4563). Similar concerns are present here: in performing their duties, a

wide range of federal personnel charged with implementing neutral statutes, regulations, or policies of general applicability—including in a wide range of agencies, such as the Bureau of Prisons and the Drug Enforcement Administration—would face personal liability for RFRA violations were respondents to prevail.

Section 1983, although it generally applies to state rather than federal officials, confirms Congress's practice of employing express language to authorize personal damages liability against government personnel. Section 1983 provides that "[e]very person who, under color of [state law]," deprives another of a federal right "shall be liable to the party injured in an action *at law*" as well as a "suit in equity." 42 U.S.C. 1983 (emphasis added). The phrase "at law" makes clear that Congress intended to authorize damages awards against state officials. *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 751 (1999) (Souter, J., concurring in part and dissenting in part) (Section 1983 "provides * * * for actions at law with damages remedies"); see *Curtis* v. *Loether*, 415 U.S. 189, 196 (1974) (damages are "the traditional form of relief offered in the courts of law").

Section 1983 is particularly instructive when set beside RFRA. The court of appeals noted that RFRA applies to an "official (or other person acting under color of law)." 42 U.S.C. 2000bb-2(1). The court thought that language "comparable" to Section 1983, which imposes liability on "'person[s]' who, acting 'under color of [state law],'" violate an individual's federal rights. Pet. App. 21a-22a (citing *Mack* v. *Warden Loretto FCI*, 839 F.3d 286 (3d Cir. 2016)); see *Mack*, 839 F.3d at 302 ("Because RFRA's definition of 'government' tracks the language

of [Section] 1983, it is reasonable to assume that liability can be imposed similarly under both statutes."). The court of appeals thus reasoned that because both Section 1983 and RFRA constrain those who act "under color of" law, they should impose the same remedies on that set of actors. Pet. App. 21a-22a, 32a & n.12.

That simply does not follow. It is Section 1983's reference to an "action at law" that permits damages liability, and of course RFRA has no such language. The phrase "color of [state law]" in Section 1983, like the similar phrase in RFRA, serves a different purpose: it speaks to the *types of actors subject to suit*, not the types of available remedies. Contrary to the panel's reasoning, Congress's omission of the phrase "action at law" (or comparable language) in RFRA confirms that it did not intend the phrase "appropriate relief"—especially as part of the broader phrase "appropriate relief *against a government*"—to encompass a damages remedy against federal employees in their personal capacities. See Pet. App. 53a-54a (Jacobs, J., dissenting from the denial of rehearing en banc) (RFRA's omission of language "akin to [Section] 1983's explicit endorsement of suits for money damages * * * was not a careless oversight"). Section 1983, by contrast, permits an action against "[e]very person" acting under color of law, without RFRA's overarching limitation that any appropriate relief be "against a government." That is yet another indication RFRA was not designed to track the individual-damages model of Section 1983.

b. Requiring that Congress use explicit language to authorize personal damages awards as an appropriate form of relief against federal employees makes good sense. Imposing the threat of damages liability on a

broad range of Executive Branch personnel administering neutral federal laws, regulations, and policies of general applicability would raise sensitive separation-of-powers concerns. Congress is best suited to assess those variables and make a considered judgment as to whether a damages remedy is appropriate. The absence of a clear indication that Congress affirmatively chose in RFRA to impose personal damages liability on individual federal employees means that it does not qualify as "appropriate relief."

i. The costs of a damages remedy against federal employees in their personal capacities—and the concomitant potential for disruption to Executive Branch operations—would be significant. As this Court recognized in *Abbasi*, a damages remedy imposes "burdens on Government employees who are sued personally," preventing them from "devoting the time and effort required for the proper discharge of their duties" and forcing them instead to expend their energies on defending litigation. 137 S. Ct. at 1858, 1860; see *Tenney* v. *Brandhove*, 341 U.S. 367, 377 (1951) (referencing "the cost and inconvenience and distractions of a trial"). Damages remedies against federal employees in their personal capacities also impose "costs and consequences to the Government itself," potentially including costs of "defense and indemnification." *Abbasi*, 137 S. Ct. at 1856, 1858.

More fundamentally, these concerns are especially "pronounced when the judicial inquiry comes in the context of a claim seeking money damages rather than a claim seeking injunctive or other equitable relief," because "[t]he risk of personal damages liability is more likely to cause an official to second-guess difficult but

necessary decisions" in matters committed to the Executive Branch. *Abbasi*, 137 S. Ct. at 1861; see *Barr* v. *Matteo*, 360 U.S. 564, 571 (1959) (plurality) (conferring absolute official immunity in part on the ground that the "threat of" damages suits "might appreciably inhibit the fearless, vigorous, and effective administration of policies of government"). These chilling effects could have systemic implications to the extent they "call into question the formulation and implementation of a general policy," *Abbasi*, 137 S. Ct. at 1860—an outcome that is particularly likely given RFRA's focus on "rule[s] of general applicability," see 42 U.S.C. 2000bb-1(a). And litigation over general policies "would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch." *Abbasi*, 137 S. Ct. at 1861.

This case illustrates the distinct harms that a RFRA damages remedy would impose. "The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task," as "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit * * * protection." *Thomas* v. *Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981); see *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531 (1993). In this case, respondents assert a RFRA violation despite apparently having never informed petitioners that they "believed cooperating with an investigation 'burdened their religious beliefs.'" Pet. App. 58a (Jacobs, J., dissenting from the denial of rehearing en banc). If RFRA were held to permit personal-capacity damages actions, then federal officials whose decisions or conduct allegedly burden the exercise of a person's religious beliefs—including those not "comprehensible to others," *Thomas*, 450 U.S. at 714—would be faced

with the potential for disruptive litigation followed by a possibly devastating damages award. Even well-intentioned federal employees would thus be forced to navigate a minefield of liability that would be difficult to predict or avoid. Cf. *Nieves* v. *Bartlett*, 139 S. Ct. 1715, 1725 (2019) ("Any inartful turn of phrase or perceived slight * * * could land an officer in years of litigation."). And although qualified immunity would mitigate these burdens in some respects, it could not eliminate them. See pp. 32-34, *infra*.

Intrusion on Executive Branch operations would be all the more troublesome when the judicial action, as in this case, concerns the exercise of core Article II authority. See *Abbasi*, 137 S. Ct. at 1861. Respondents' allegations pertain to the No Fly List and purported efforts by FBI agents to obtain assistance in connection with investigations into potential terrorist activity, including by aliens. These issues implicate national security as well as immigration, both inherent executive powers. See *ibid.* (national security); *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) (same); *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (immigration). The costs of chilling official decision-making, or diverting government personnel from their official duties, are "only magnified" in the national-security context. See *Iqbal*, 556 U.S. at 685. The burden of discovery in this context would also be acute. This case well illustrates the problem, as placements on the No Fly List are often based at least in part on classified information. See, *e.g.*, *Kashem* v. *Barr*, 941 F.3d 358, 381-383 (9th Cir. 2019).

ii. Respondents have suggested (Br. in Opp. 12-15) that qualified immunity could mitigate the harm to the Executive Branch that a personal-capacity damages remedy under RFRA would inflict. But the Court has

already rejected that argument in the *Bivens* context, reasoning that "the availability of a damages action * * * for particular *injuries* * * * is a question logically distinct from immunity to such an action on the part of particular *defendants*." *United States* v. *Stanley*, 483 U.S. 669, 684 (1987). So too here, the question of whether to infer a damages remedy against individual federal employees like petitioners in the absence of clear congressional guidance is distinct from whether petitioners would be qualifiedly immune from this suit.

Moreover, there are good reasons for treating the immunity question separately from the remedies question. "The doctrine of qualified immunity is not [a] panacea." *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 351 n.22 (2001). "[E]ven where personal liability does not ultimately materialize, the mere 'specter of liability,'" *ibid.* (citation omitted), might deter employees from carrying out their duties to the fullest extent, see *Barr*, 360 U.S. at 571. And a damages remedy might "inhibit public officials in the discharge of their duties" for the additional reason that "even those officers with airtight qualified immunity defenses are forced to incur 'the expenses of litigation' and to endure the 'diversion of their official energy from pressing public issues,'" *Atwater*, 532 U.S. at 351 n.22 (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982)) (brackets omitted).

To take a concrete example, qualified immunity would not necessarily spare petitioners or other future defendants from the burdens of discovery. See *Iqbal*, 556 U.S. at 685 (noting that discovery "exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government").

Contrary to their current suggestion that qualified immunity could be decided here on the pleadings (Br. in Opp. 13), respondents maintained below that the issue could be resolved only "with the benefit of full factual development" and that "[d]iscovery * * * would be essential." Resp. C.A. Supp. Letter Br. 2, 4 (July 24, 2017). Federal employees themselves might require discovery from the government at the qualified-immunity stage, as information relevant to whether a particular act served a "compelling governmental interest," 42 U.S.C. 2000bb-1(b), might often not be in the possession of individual federal employees in their personal capacities.

A damages remedy would inflict all of these costs even if courts applied qualified immunity with perfect accuracy. But as Judge Jacobs explained below, "qualified immunity is never a foregone conclusion, and many courts * * * have occasionally failed to apply it when appropriate." Pet. App. 58a (Jacobs, J., dissenting from the denial of rehearing en banc); see, *e.g.*, *City of Escondido* v. *Emmons*, 139 S. Ct. 500, 502 (2019) (per curiam) (reversing denial of qualified immunity where "[t]he Ninth Circuit offered no explanation for its decision," and its "unexplained reinstatement of the excessive force claim * * * was erroneous—and quite puzzling"). The significant threat of *erroneous* damages liability amplifies the concerns discussed above.

iii. Congress is the proper Branch to weigh the relevant factors and "consider if 'the public interest would be served'" by imposing a damages remedy on federal employees personally. *Abbasi*, 137 S. Ct. at 1857 (quoting *Schweiker,* 487 U.S. at 427). As part of that weighing, Congress may consider both "whether," and "the

extent to which," personal monetary liability is appropriate. See *id.* at 1856. In short, "'Congress is in a far better position than a court to evaluate the impact of a new species of litigation' against those who act on the public's behalf." *Wilkie* v. *Robbins*, 551 U.S. 537, 562 (2007) (citation omitted); see *Abbasi*, 137 S. Ct. at 1857 ("When an issue involves a host of considerations that must be weighed and appraised, it should be committed to those who write the laws rather than those who interpret them.") (citation and internal quotation marks omitted).

Here, Congress has not clearly subjected individual federal employees to personal damages actions through its use of the phrase "appropriate relief against a government." 42 U.S.C. 2000bb-1(c); see *Sossamon*, 563 U.S. at 286. To the contrary, the far better reading of that language is that it does *not* authorize damages. Accordingly, this Court should refrain from making a judgment that Congress declined to make, and instead hold that damages are not "appropriate relief" in this context.

4. This Court has held that damages are not "appropriate relief" under RFRA's companion statute, RLUIPA

Lastly, the Court should construe the statutory phrase "appropriate relief" to bar damages liability here because it construed the identical phrase in *Sossamon* to preclude an award of damages against a State under RLUIPA. As originally enacted, RFRA applied to both the federal government and state and local governments. See 42 U.S.C. 2000bb-2(1) (Supp. V 1993). In *City of Boerne* v. *Flores*, 521 U.S. 507, 532 (1997), however, this Court invalidated RFRA's state and local applications as exceeding Congress's powers under the

Fourteenth Amendment. Congress responded by enacting RLUIPA in reliance on its powers under the Spending Clause, U.S. Const. Art I, § 8, Cl. 1, Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, and Fourteenth Amendment. RLUIPA enables certain state and local prisoners and individuals regulated by state and local land-use law "to seek religious accommodations pursuant to the same standard as set forth in RFRA." *Holt* v. *Hobbs*, 574 U.S. 352, 358 (2015) (quoting *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006)). Its remedial language is materially identical to RFRA's: a person may "obtain appropriate relief against a government," 42 U.S.C. 2000cc-2(a), and "'government'" includes an "official" and "any other person acting under color of State law," 42 U.S.C. 2000cc-5(4)(A)(ii)-(iii).

Interpreting RLUIPA's identical language in *Sossamon*, this Court held that damages are *not* "appropriate relief" against a State. 563 U.S. at 288. The Court began with "the plain meaning of the text," Pet. App. 52a (Jacobs, J., dissenting from the denial of rehearing en banc), noting that the word "'appropriate'" draws its meaning in significant part from "context." 563 U.S. at 286. The Court observed that "[t]he context here—where the defendant is a sovereign—suggests, if anything, that monetary damages are not suitable or proper." *Ibid.* (internal quotation marks omitted). The Court further explained that "where a statute is susceptible of multiple plausible interpretations, including one preserving immunity, we will not consider a State to have waived its sovereign immunity," and concluded "that the 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 to suits for damages." *Id.* at 287-288.

The same general reasoning applies in this case. As in RLUIPA, the phrase "appropriate relief" in RFRA draws its meaning in large part from context. Here, the relevant context—including the broader statutory language, the pre-RFRA remedial landscape, separation-of-powers concerns, and *Sossamon* itself—indicates that damages awards against individual federal employees in their personal capacities are not "appropriate relief." And although damages actions against individual federal employees would not implicate sovereign immunity, they would implicate analogous separation-of-powers concerns.

At a higher level of generality, "[g]iven that RFRA and RLUIPA attack the same wrong, in the same way, in the same words, it is implausible that 'appropriate relief against a government' means something different in RFRA, and includes money damages." Pet. App. 53a (Jacobs, J., dissenting from the denial of rehearing en banc). That result would be particularly anomalous given the broader legal landscape. Consistent with *Sossamon*, no court of appeals that has analyzed the question has permitted damages awards against individual state officials in suits brought pursuant to RLUIPA.[5]

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[5] The vast majority of decisions addressing individual monetary liability under RLUIPA pertain to the Spending Clause aspect of the statute, and typically rest on the ground that state officials are not direct recipients of federal funds and thus are not personally bound by the conditions RLUIPA places on the acceptance of those funds. See, *e.g.*, *Washington* v. *Gonyea*, 731 F.3d 143, 145 (2d Cir. 2013) (per curiam); *Sharp* v. *Johnson*, 669 F.3d 144, 153-155 (3d Cir.), cert. denied, 567 U.S. 937 (2012); *Rendelman* v. *Rouse*, 569 F.3d 182, 188-189 (4th Cir. 2009); *Sossamon* v. *Lone Star State of*

As a result, under respondents' interpretation, a damages award is not "appropriate relief" against either the federal government, a State, or a state official under RFRA or RLUIPA, but it would be appropriate against individual federal officials in their personal capacities. There is no logic to such a scheme, and no evidence that Congress intended it. See *United States* v. *Bergh*, 352 U.S. 40, 45 (1956) (declining to "attribute such anomalous results to the Congress").

B. The Counterarguments Lack Merit

The court of appeals' reasoning (embraced by respondents) does not warrant a contrary understanding of the phrase "appropriate relief." As noted, RFRA defines the term "'government'" to "include[]" an "official" (along with a "branch, department, agency, [or] instrumentality") of the United States, 42 U.S.C. 2000bb-2(1). But that simply ensures the comprehensive reach of RFRA's substantive prohibition against measures taken under federal authority that substantially burden religion without sufficient justification, 42 U.S.C. 2000bb-1(a) and (b), and clarifies that one way to obtain

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Tex., 560 F.3d 316, 328-329 (5th Cir. 2009), aff'd, 563 U.S. 277 (2011); *Haight* v. *Thompson*, 763 F.3d 554, 567-570 (6th Cir. 2014); *Nelson* v. *Miller*, 570 F.3d 868, 886-889 (7th Cir. 2009); *Wood* v. *Yordy*, 753 F.3d 899, 904 (9th Cir. 2014); *Stewart* v. *Beach*, 701 F.3d 1322, 1333-1335 (10th Cir. 2012); *Smith* v. *Allen*, 502 F.3d 1255, 1271-1275 (11th Cir. 2007), abrogated on other grounds by *Sossamon*, *supra*. With respect to RLUIPA's other applications, at least one court has similarly rejected the availability of damages, on the ground that "appropriate relief" must have a consistent meaning across all its applications. See *Haight*, 763 F.3d at 569. Although certain courts have permitted damages against *municipalities* under RLUIPA, see, *e.g.*, *Centro Familiar Cristiano Buenas Nuevas* v. *City of Yuma*, 651 F.3d 1163, 1168-1169 (9th Cir. 2011), those cases are inapposite here because such relief nevertheless runs "against a government."

"appropriate relief against a government" is by enjoining its agents. It does not authorize damages awards against individual federal officers and employees in their personal capacities, which do not run against the government. Furthermore, the supposed presumption that damages are *always* an appropriate form of relief under a federal cause of action has no application in this context, and in any event is overcome for this particular statute.

1. RFRA's definition of "government" does not render damages awards against individual federal officials in their personal capacities "appropriate relief against a government"

The court of appeals reached its conclusion in large part by substituting RFRA's definition of "'government'"—which "includes" an "official (or other person acting under color of law) of the United States," 42 U.S.C. 2000bb-2(1)—for the defined term itself. Pet. App. 18a-19a. In the court's view, a personal damages award against an individual federal official represents "appropriate relief against" an "official," and then automatically represents "appropriate relief against a government." 42 U.S.C. 2000bb-1(c); Pet. App. 18a-19a. That approach was mistaken. RFRA's definition of "government" does not change the meaning of the phrase "appropriate relief," and for the many reasons discussed above, damages awards against federal employees in their personal capacities do not fall within the meaning of that phrase.

Just as fundamentally, in construing a defined term, a court "cannot forget that [it] ultimately [is] determining the meaning of" that term, and accordingly must take its "ordinary meaning" into account. *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004); accord *Johnson* v.

United States, 559 U.S. 133, 140 (2010) ("We think it clear that in the context of a statutory definition of 'violent felony,' the phrase 'physical force' means violent force.") (emphasis omitted); *United States* v. *Doe*, 960 F.2d 221, 225 (1st Cir. 1992) (Breyer, C.J.) ("[W]e must read the definition in light of the term to be defined."). Here, the defined term is "government," and a personal damages award against an individual federal officer or employee simply does not qualify as relief against the "government" under a plain and commonsense understanding of that term.

There is no need, however, to choose between the statutory definition and the ordinary meaning of relief "against a government." Petitioners' interpretation—that "appropriate relief" encompasses official-capacity injunctive relief, but not an award of personal-capacity money damages, against federal officers—harmonizes the two, and gives meaning to both. Suits for injunctive relief, unlike those for damages, comport with RFRA's requirement that relief be awarded "against a government." Although the government itself might not be a named defendant, such suits are brought against the government *in effect*. See *Lewis* v. *Clarke*, 137 S. Ct. 1285, 1291 (2017). Because "the Government can act only through agents," "'when the agents' actions are restrained, the sovereign itself may, through [the agents], be restrained.'" Pet. App. 76a n.6 (quoting *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949)) (brackets in original). This point is made especially clear by the fact that, "when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation." *Lewis*, 137 S. Ct. at 1292.

In addition, under petitioners' interpretation, the definitional phrase "official (or other person acting under color of law)" confirms that a plaintiff may obtain relief against the government in the form of an injunction against federal personnel as well as private parties acting under color of law. 42 U.S.C. 2000bb-2(1). Injunctive relief against federal officers in their official capacities has traditionally been reconciled with sovereign immunity through the notion that ultra vires conduct by officials is not taken on behalf of the government, see *Larson*, 337 U.S. at 689-691, and Congress's inclusion of the phrase "official (or other person acting under color of law)" simply makes clear that injunctive relief against the government encompasses injunctive relief against all those acting under its authority, even if in an unlawful manner.[6] Reading RFRA's reference to an "official" as limited to suits for injunctive relief against federal officials in their official capacities thus gives meaning both to the statutory definition and the overarching limitation of remedies to "appropriate relief against a government." 42 U.S.C. 2000bb-1(c), 2000bb-2(1).

The terms of the statutory definition itself confirm this interpretation. The word "official" appears as an item in a list, and is preceded by the terms "branch, department, agency, [and] instrumentality." 42 U.S.C.

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[6] The parenthetical phrase "other person acting under color of law" likewise confirms that private actors effectively exercising government authority—for instance, operators of a private prison under contract with the government, see *Richardson* v. *McKnight*, 521 U.S. 399 (1997)—are also subject to RFRA's substantive requirements. See *Brentwood Acad.* v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 & n.2 (2001); *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 928-932 (1982).

2000bb-2(1). Each of those preceding terms necessarily refers to official-capacity actors. An "agency," for example, cannot either act or be sued in anything but an official capacity. The Court should construe the term "official" as similarly limited to official-capacity acts and suits. See *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995) (invoking "the doctrine of *noscitur a sociis*"—that a "word is known by the company it keeps"—"to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress'") (citation omitted). Indeed, no one disputes that the term "government" (including its component "official") is limited to official-capacity acts under RFRA's substantive provision. 42 U.S.C. 2000bb-1(a) and (b) ("Government shall not substantially burden a person's exercise of religion" except in limited circumstances). It would make no sense to apply this prohibition to "official[s]" acting in their purely personal capacities. And there is no basis for adopting one reading of "official" under RFRA's substantive prohibition and another under its remedial provision. See *Clark* v. *Martinez*, 543 U.S. 371, 382 (2005) (rejecting "novel interpretive approach * * * [that] would render every statute a chameleon").[7]

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[7] The inclusion of the phrase "other person acting under color of law" in the list, 42 U.S.C. 2000bb-2(1), does not change the analysis. This language is best read, consistent with the above analysis, to cover private individuals only insofar as they act with a government imprimatur, *i.e.*, in the functional equivalent of an official capacity. See *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) ("[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.") (citation omitted).

Stafford v. *Briggs*, 444 U.S. 527 (1980), adopts a similar analysis. There, the Court construed a venue statute governing "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 or under color of legal authority." *Id.* at 531 (quoting 28 U.S.C. 1391(e) (1970)). Interpreting that language, the Court rejected the plaintiff's argument that the phrase "under color of legal authority" encompasses suits for damages against federal officials in their personal capacities, *id.* at 539, reasoning 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; H.R. Rep. No. 1936, 86th Cong., 2d Sess. 2 (1960); see *Stafford*, 444 U.S. at 542 n.10 ("Here, it is against individuals and not against the Government that a money judgment is sought."). The Court explained that the phrase "under color of legal authority," rather than authorizing damages awards, was intended to allow suits not only against an officer in his official capacity but also suits nominally against an individual officer who was acting within the apparent scope of his authority and not in a private capacity. See, *e.g.*, *id.* at 539. The phrase thus clarifies that the venue provision applies whether the defendant is acting "in an official *or apparently official way*." *Id.* at 536 & n.6 (emphasis added).[8]

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[8] Although Section 1391(e), unlike RFRA, refers to "an officer or employee * * * acting *in his official capacity*," 28 U.S.C. 1391(e) (1970) (emphasis added), that textual distinction makes no difference to the question presented here. Section 1391(e) employs the phrase "official capacity" to specify the capacity in which the officer

2. Franklin *does not require a presumption in favor of personal damages awards against federal officials under RFRA*

In concluding that personal damages awards against individual federal employees qualify as "appropriate relief," the court of appeals also relied heavily on this Court's decision in *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), which it understood to endorse a presumption that money damages are available under all federal causes of action absent a clear indication to the contrary. See Pet. App. 24a-26a. *Franklin* does not support the court of appeals' conclusion, both because it does not apply in this context and because, even if it did, the presumption would be overcome for this particular statute.

a. *Franklin* involved the scope of remedies for the private cause of action that this Court had implied under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979). In the absence of any statutory guidance, the *Franklin* Court held that it would "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." 503 U.S. at 66. Examining Title IX itself and other indicia of congressional intent, the Court found no indication "Congress ha[d] limited the remedies available to a complainant" in such a way as to foreclose damages. *Id.* at 73. The Court therefore held that damages were available in a suit under Title IX. *Id.* at 76.

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acted rather than the capacity in which the officer is sued. See *Stafford*, 444 U.S. at 536. No one disputes that RFRA is similarly limited to an official's official actions, and does not govern off-duty conduct. Moreover, Section 1391(e) lacks the even stronger language—that relief must be "against a government"—included in RFRA.

Franklin is inapposite here for three reasons. First, *Franklin* interpreted an implied cause of action. The Court thus had to fill in the gap left by Congress's silence, and it did so by presuming that all remedies were available. See *Franklin*, 503 U.S. at 69; see also *Sossamon*, 563 U.S. at 288 ("With no statutory text to interpret, the Court 'presume[d] the availability of all appropriate remedies'") (quoting *Franklin*, 503 U.S. at 66) (brackets in original). By further requiring "clear direction" from Congress to overcome that presumption, see *Franklin*, 503 U.S. at 70-71—when Congress had not given any direction on the subject—the Court's methodology effectively foreordained the availability of damages. See *id.* 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.").

Franklin is inapplicable when, as in this case, a statute contains both an express cause of action and an express remedies provision. Indeed, this Court has never applied *Franklin* to recognize the availability of a disputed remedy in the context of an express remedies provision. The question in this case is how best to interpret RFRA's remedial provision, which requires asking whether damages awards against federal employees personally are "appropriate relief against a government," 42 U.S.C. 2000bb-1(c), considered in light of all relevant context. In other words, the Court's task here is to determine what Congress said—not to draw inferences from congressional silence. Section 2000bb-1(c)'s meaning thus should be resolved using the usual tools

of statutory interpretation—not a generalized presumption designed for congressional silence.[9]

Second, because *Franklin* arose under Title IX, it obviously did not address personal damages awards against federal employees. See *Franklin*, 503 U.S. at 63-64 (plaintiff alleged misconduct by public school teachers and administrators). As discussed, damages awards against federal employees implicate separation-of-powers concerns, and thus should not be imposed in the absence of clear direction from Congress, regardless of any judicially created background presumption that might apply in other contexts. See Part A.3, *supra*.

Third, this Court's subsequent decision in *Sossamon* confirms that *Franklin* does not apply here. In *Sossamon*, the Court declined to apply the *Franklin* presumption when interpreting the phrase "appropriate relief against a government" in RLUIPA. 42 U.S.C. 2000cc-2(a); see 563 U.S. at 288. As the Court explained, any presumption under *Franklin* "is irrelevant to construing the scope of an express waiver of sovereign immunity." 563 U.S. at 288, 289 n.6. The Court instead relied on the contrary presumption that damages are not available against a sovereign unless "Congress has given clear direction that it intends to *include*

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[9] There is no indication that Congress's use of "appropriate relief" in RFRA was consciously intended to track the use of that phrase in *Franklin* itself. See, *e.g.*, *Franklin*, 503 U.S. at 69, 74. The phrase "appropriate relief" was first introduced into the draft of RFRA in 1990, two years before this Court decided *Franklin*. See H.R. 5377, 101st Cong., 2d Sess., § 2(c) (1990). Nothing in the legislative history suggests that any Member of Congress subsequently considered *Franklin* to be relevant when deciding what kinds of remedies would be available under RFRA's provision for "appropriate relief against a government."

a damages remedy." *Id.* at 289. Consistent with *Sossamon*, the courts of appeals have uniformly held not only that damages are unavailable against States under RLUIPA, but also that they are unavailable against the federal government under RFRA. See p. 19 n.4, *supra* (collecting cases).

To be sure, RFRA's cause of action applies to the government itself as well as its constituent entities and "official[s]." 42 U.S.C. 2000bb-2(1). But that feature of RFRA's cause of action means that this case cannot be decided simply by pointing to a background presumption that damages are usually available, when damages are in fact *not* available for the primary class of defendants (the "government" and its sovereign entities) identified in the statute. 42 U.S.C. 2000bb-1(c). Rather, the Court should apply the rule applicable to the federal government and its components—that damages are not "appropriate relief"—to cover all of RFRA's applications, including in suits against "official[s]" of the United States, who are also part of the government. "It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern." *Clark*, 543 U.S. at 380. Under the lowest-common denominator approach, the unavailability of damages against the government and its branches, departments, agencies, and instrumentalities dictates the unavailability of damages against *all* defendants under RFRA, even if the considerations of sovereign immunity that apply to the government itself do not apply to its officers and employees. See *Haight* v. *Thompson*, 763 F.3d 554, 569 (6th Cir. 2014) (Sutton, J.) (citing the

"general presumption that language in a statute means the same thing in all settings" in rejecting the argument that RLUIPA permits personal-capacity damages actions under the Commerce Clause but not the Spending Clause).

b. Even if the *Franklin* presumption applied, the presumption is a rebuttable one. See Pet. App. 35a. In *Franklin*, to assess whether Congress gave the requisite "clear direction" to overcome the presumption and foreclose a particular remedy, see 503 U.S. at 70-71, the Court looked to contextual clues like background principles of law and subsequent statutory developments, see *id.* at 71-73. Using those same guideposts here—in addition to the statutory text and context, which were not available to the *Franklin* Court and cut strongly against recognition of a damages remedy—it is clear that Congress did not view personal damages awards against individual federal employees as "appropriate relief" for violations of RFRA.

In particular, *Franklin* held that courts should look to "the state of the law when the Legislature passed" the statute at issue. 503 U.S. at 71. Here, the background rule at the time of RFRA's enactment was that damages were not an appropriate remedy against individual federal officers and employees for free-exercise violations. See Part A.2, *supra*. *Franklin* also looked to subsequent congressional action. In that case, Congress amended Title IX after this Court had already implied a cause of action under it. 503 U.S. at 72. The amendment made available "remedies both at law and in equity" against States "to the same extent as such remedies" would be available against a non-state actor. *Id.* at 72-73 (quoting 42 U.S.C. 2000d-7(a)(2)). The

Court concluded that the amendment effectively ratified a damages remedy under the implied right of action. In this case, by contrast, subsequent events give rise to the opposite conclusion. The Court has further narrowed the scope of the *Bivens* remedy since RFRA's enactment, and Congress has taken no steps to counteract that trend. Moreover, Congress also passed a companion statute, RLUIPA, that uses the identical "appropriate relief" phrase but does not provide a damages remedy against States. *Sossamon*, 563 U.S. at 282.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
JEFFREY B. WALL
EDWIN S. KNEEDLER
Deputy Solicitors General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
AUSTIN L. RAYNOR
Assistant to the Solicitor General
BENJAMIN H. TORRANCE
SARAH S. NORMAND
ELLEN BLAIN
MARY HAMPTON MASON
REGINALD M. SKINNER
Attorneys

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APPENDIX

1. 42 U.S.C. 2000bb provides:

Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

2. 42 U.S.C. 2000bb-1 provides:

Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

3. 42 U.S.C. 2000bb-2 provides:

Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

4. 42 U.S.C. 2000bb-3 provides:

Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

5. 42 U.S.C. 2000bb-4 provides:

Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.