No. 19-71

IN THE

Supreme Court of the United States

FNU TANZIN, *et al.*,

Petitioners,

v.

MUHAMMAD TANVIR, *et al.*,

Respondents.

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

BRIEF OF STATUTORY INTERPRETATION SCHOLARS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici are law professors who specialize in issues of statutory interpretation. They have written, published, lectured, and taught on the interpretive canons and principles at issue in this case for decades. Amici agree that a textual analysis of the Religious Freedom Restoration Act compels the conclusion that the statute permits suits for money damages brought against government officials in their personal capacities.

A full listing of amici appears in the Appendix.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The question presented in this case is a straightforward issue of statutory interpretation: Does the Religious Freedom Restoration Act ("RFRA") permit plaintiffs to bring individual-capacity suits against government officers for money damages, or are plaintiffs restricted to official-capacity suits against government entities for injunctive relief?

The answer begins—and ends—with the text of the statute. Rather than limiting plaintiffs to injunctive relief, RFRA permits plaintiffs to pursue all "appropriate relief" to remedy violations of their free exercise rights. 42 U.S.C. § 2000bb-1(c). And rather than limiting the universe of potential defendants to government agencies that can only act in official capacities, RFRA

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[1] No party authored this brief in whole or in part, and no one other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Amici obtained written consent to the filing of this brief from the United States pursuant to Rule 37.3(a), and Respondents have filed a blanket letter of consent.

specifically permits suits against government "official[s]" and "other person[s] acting under color of law" who can act in individual capacities. *Id.* § 2000bb-2(1). In the words of Justice Kagan, "we're all textualists now,"[2] and, here, the text of RFRA—which includes language nearly identical to language used in 42 U.S.C. § 1983 to authorize money damages—compels the result reached by the court of appeals below.

The United States' efforts to evade a plain-text answer to a plain-text question are unavailing. The United States cannot swap its own sense of a word's "ordinary meaning" for that term's statutory definition simply because it does not care for the definition that Congress codified. Nor should it be permitted to override the U.S. Code with negative inferences to what Congress did not include in the legislative record. The United States' remaining arguments either misapply or wholly ignore the tools of statutory interpretation that should guide this Court in answering the question before it.

ARGUMENT

I. RFRA'S STATUTORY DEFINITION OF "GOVERNMENT" CONTROLS

When the Court is asked to determine a question of statutory interpretation, its analysis begins "with the language of the statute." *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1976 (2016) (quoting *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)). And when the language of that statute is clear, the

[2] Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YouTube (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg.

Court's inquiry "ends there as well." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999); *see also Rotkiske* v. *Klemm*, 140 S. Ct. 355, 360 (2019) (citing *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992)) ("If the words of a statute are unambiguous, this first step of the interpretive inquiry is our last."). This is especially true in cases like this one when courts are asked to construe statutorily defined terms, as "[i]t is axiomatic that the statutory definition of the term excludes unstated meanings of that term." *Meese* v. *Keene*, 481 U.S. 465, 484-485 (1987).

Here, Section 2000bb-2(1) of RFRA provides an explicit statutory definition for the meaning of the word "government" as it is used in the statute: "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity." The first four terms in that list—"branch," "department," "agency," and "instrumentality"—all plainly contemplate official-capacity suits. Neither party contends otherwise. *See, e.g.*, U.S. Br. 14 ("Properly understood, RFRA permits relief against officials only in their official capacities"); Resp. Br. 21 ("The separate authorization of claims against a government 'agency' and other entities already permits a RFRA plaintiff to obtain all relief from the agency that they could obtain from agency officials in their official capacities[.]").

RFRA's definition for "government," however, does not end after those four terms. Instead, the law expressly "includes … official[s] (or other person[s] acting under color of law) of the United States." 42 U.S.C. § 2000bb-2(1). This language serves a distinct purpose; it performs unique work. By adding that fifth category of actors that can be swept within the ambit of the term "government," RFRA expanded the universe of enti-

ties who can be sued for "appropriate relief" beyond governmental bodies to the individual officials themselves. And because an official-capacity claim against an "official" is just another way of suing the entity the official represents, *see Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985) ("Official-capacity suits … 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'"), this language is best read to contemplate individual-capacity suits against those officers.

Unhappy with Section 2000bb-2(1)'s explicit definition of the term "government," the United States resists a straightforward textual analysis with an appeal to the Court to take what it characterizes as the "'ordinary meaning' [of the word] into account." U.S. Br. 39. The Court should decline to do so.

The United States' request that the Court substitute a term's supposed "ordinary meaning" for the definition that Congress selected is contrary to precedent. In *Meese* v. *Keene*, for example, the Court was asked to determine whether an individual's First Amendment rights were infringed by a requirement to file registration statements before exhibiting films defined as "political propaganda." 481 U.S. at 467-468. The Court noted that while the term "propaganda" in "popular parlance" connoted "slanted, misleading speech that d[id] not merit serious attention," the statutory definition of "propaganda" that Congress had codified included "materials that are completely accurate and merit the … highest respect." *Id.* at 477. Relying on the statutory definition—rather than the ordinary meaning in "popular parlance"—the Court held that "Congress'[s] use of the term 'propaganda' … ha[d] no pejorative connotation." *Id.* at 484. In other words, even though the Court recognized that Congress was using the word "propaganda"

in a statute differently than one might use it in a conversation, it nevertheless applied *Congress's* definition to interpret *Congress's* statute. Similar examples of this Court's deference to Congress's particular word choice abound. *See, e.g.*, *Stenberg* v. *Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, [courts] must follow that definition, even if it varies from that term's ordinary meaning."); *Colautti* v. *Franklin*, 439 U.S. 379, 392 n.10 (1979) (internal quotation marks omitted) ("As a rule, a definition which declares what a term 'means' … excludes any meaning that is not stated."); *cf. Burgess* v. *United States*, 553 U.S. 124, 129-130 (2008) (quoting *Lawson* v. *Suwanee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949)) ("Statutory definitions control the meaning of statutory words … in the usual case.").

The cases the United States cites undermine its position rather than further it. The United States directs the Court to *Johnson* v. *United States*, for example, but there, the Court only considered the "ordinary meaning" of the term "physical force" because that term was not statutorily defined. 559 U.S. 133, 138 (2010) ("Section 924(e)(2)(B)(i) does not define 'physical force,' and we therefore give the phrase its ordinary meaning."). Similarly, in *Leocal* v. *Ashcroft*, the Court interpreted the term "use" which was (1) not statutorily defined and (2) described by the Court as so "elastic" that it required construction "in light of the terms surrounding it." 543 U.S. 1, 9 (2004). And the United States' citation to *United States* v. *Doe* is inapposite. There, in what was effectively a matching exercise rather than an interpretive one, the First Circuit was asked to determine whether the statutory definition of a specific criminal offense met the separate statutory definition of "violent felony." 960 F.2d 221, 223-224 (1st Cir. 1992). This case requires no such comparison, but instead simply asks the Court to

apply a statutory definition written specifically by Congress for a single statutory term. Aside from these cases, the United States points to no support for the novel assertion that the Court should favor the United States' subjective interpretation for what "government" means in "ordinary" use instead of what Congress defined it to mean in the pages of the U.S. Code.

In short, when the United States offers to "harmonize[]" the "statutory definition and the ordinary meaning" of a term Congress has already defined, *see* U.S. Br. 40, it offers a solution to a nonexistent problem. A statutorily defined term need not be "give[n] meaning" by the United States' interpretation, *see id.*, when Congress has already given it all the meaning it requires, *see Rotkiske*, 140 S. Ct. at 360 ("We must presume that Congress 'says in a statute what it means and means in a statute what it says there.'"). A term's statutory definition is not one of many coequal methods to be considered alongside a term's ordinary meaning; it is the primary—and when clear, dispositive—basis for construing the meaning of the statutorily defined term. The United States offers no compelling reason for this Court to conclude otherwise.

II. RFRA'S TEXTUAL PARALLELS TO SECTION 1983 CONFIRM THAT RFRA PERMITS SUITS FOR MONEY DAMAGES

Because a plain-text reading of RFRA establishes Respondents' right to sue for money damages, the Court need go no further. However, the conspicuous similarities between RFRA and 42 U.S.C. § 1983—a statute similarly designed to protect the constitutional rights of plaintiffs and to award them financial compensation for violations of those rights—provide additional support for the conclusion that RFRA also authorizes such damages.

It is a settled rule of statutory interpretation that the same language used across statutes addressing related subject matters should be construed similarly. *See Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2516-2521 (2015); *United States* v. *Freeman*, 44 U.S. 556, 564 (1845). This is known as the *in pari materia* rule, and as this Court has "often observed," it teaches that "when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its … judicial interpretations as well." *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 590 (2010). Indeed, the use of "the same language in two statutes having similar purposes" creates a "presum[ption] that Congress intended that text to have the same meaning in both statutes." *Smith* v. *City of Jackson*, 544 U.S. 228, 233 (2005). That presumption guides the interpretive analysis unless there is a good reason—grounded in context, history, or legislative purpose—to depart from that shared reading. *Cf. United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001).

Here, the text of RFRA mirrors in ways relevant to this case the text of 42 U.S.C. § 1983, a statute that has long been read to permit plaintiffs to bring suits for money damages against government officials in their individual capacities. *See, e.g.*, *Hafer* v. *Melo*, 502 U.S. 21, 25, 31 (1991); *Graham*, 473 U.S. at 166. That Congress chose to draft RFRA in this way is a strong indication that Congress sought to use Section 1983 as an interpretive lodestar for its new statute. Although the United States resists this parallelism, it offers no compelling reason why the presumption that "similar statutes should be interpreted similarly" should be over-

ridden, *see* Eskridge, et al., *Cases and Materials on Legislation and Regulation: Statutes and the Creation of Public Policy* 1166 (6th ed. 2019).

A. Because RFRA's Text Mirrors Section 1983's Text, The Two Statutes Should Be Analyzed Similarly

Invocation of the *in pari materia* rule starts with a straightforward question: How similar is the language Congress chose to use in the two statutes?

Here, the language used in Section 1983 and in RFRA is virtually identical. Section 1983 provides that "[*e*]*very person who, under color of any* [*law*]," violates a plaintiff's rights, "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (emphasis added). The italicized language defines, for purposes of Section 1983, the universe of persons who shall be liable for a violation of the statute's substantive prohibitions. RFRA similarly provides that a plaintiff "whose religious exercise has been burdened in violation of this section" may "obtain appropriate relief against a Government," where the term "Government" includes an "official (*or other person acting under color of law*)." 42 U.S.C. §§ 2000bb-1, 2000bb-2(a) (emphasis added). As in Section 1983, Congress used the italicized language to define in RFRA the universe of persons liable for violations of the statute's substantive prohibition.

RFRA's borrowing of the phrase "under color of law" from Section 1983 is particularly notable. That phrase is a term of art with a specialized and longstanding legal meaning that is largely anchored to how Section 1983 has been interpreted over the past century. *See, e.g.*, *United States* v. *Temple*, 447 F.3d 130, 137-138

(2d Cir. 2006) ("For a definition of the phrase 'under color of law,' we turn to the cases interpreting … 42 U.S.C. § 1983."); *McCormack* v. *City & Cty. of Honolulu*, 762 F. Supp. 2d 1246, 1252 (D. Haw. 2011) ("'Color of law' is a term of art associated with § 1983"); Winter, *The Meaning of "Under Color of" Law*, 91 Mich. L. Rev. 323, 384 (1992) ("[I]n using the 'under color of' law language, [when drafting Section 1983,] Congress adopted a common law term of art with a well-known meaning."). Given there is no statutory definition of "under color of law" in RFRA, it is reasonable to assume that Congress was aware of the import of this particular language, having chosen to enshrine it in dozens of statutes. *See, e.g.*, *Neder* v. *United States*, 527 U.S. 1, 21 (1999) ("[W]here Congress uses terms that have accumulated settled meaning under … the common law, [we] must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of th[o]se terms" (quoting *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 322 (1992)); *Standard Oil Co.* v. *United States*, 221 U.S. 1, 59 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense."). As Justice Frankfurter put it: "If a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings [its] soil with it." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947).

Lower courts agree that RFRA's word choice was not "coincidental," concluding that "Congress intended for courts to borrow concepts from § 1983 when construing RFRA." Pet. App. 22 (quotation marks omitted); *see also Mack* v. *Warden Loretto FCI*, 839 F.3d 286, 302 (3d Cir. 2016) (noting that "RFRA's definition

of 'government' tracks the language of § 1983," and finding that "RFRA, like § 1983, provides for relief from individual government conduct whether or not it is undertaken pursuant to an official rule or policy"). Indeed, several lower courts have stressed that when Congress incorporated Section 1983's "under color of law" language into RFRA, it intended also to incorporate into RFRA the Court's caselaw interpreting that language to authorize individual-capacity suits. *See, e.g.*, *Listecki* v. *Official Comm. of Unsecured Creditors*, 780 F.3d 731, 738 (7th Cir. 2015) (reasoning that because "[t]he phrase 'color of law' in RFRA mirrors that found in 42 U.S.C. § 1983 … Congress intended for RFRA 'color of law' analysis to overlap with Section 1983 analysis"); *Sutton* v. *Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834-835 (9th Cir. 1999) (noting, with respect to RFRA, that the court was "not writing on a clean slate" because "Congress has used the key phrase—'acting under color of law'—before in other statutes, including 42 U.S.C. § 1983."); *see also Patel* v. *Bureau of Prisons*, 125 F. Supp. 3d 44, 51 (D.D.C. 2015) (Moss, J.) (reasoning that incorporation of "under color of law" language from Section 1983 reflects Congressional intent for RFRA to authorize individual-capacity claims against officials); *Brownson* v. *Bogenschultz*, 966 F. Supp. 795, 797 (E.D. Wis. 1997) (reasoning that the "required degree of state action [to state a claim] under RFRA" is the same as under Section 1983 because of similar "color of law" language in both statutes).

This position also finds support in the academic literature, *see, e.g.*, Lunsford Kohen, *Religious Freedom in Private Lawsuits: Untangling When RFRA Applies to Suits Involving Only Private Parties*, 10 Cardozo Pub. L. Pol'y & Ethics J. 43, 67 (2011) (positing that because RFRA employs the same "under color of law"

language as Section 1983, "courts should interpret this language in RFRA as allowing claims against private defendants who would be considered state actors under § 1983"), and from the United States Department of Justice itself, *see, e.g.*, Availability of Money Damages Under the Religious Freedom Restoration Act, 18 U.S. Op. Off. Legal Counsel 180, 182 1994 WL 931952 (1994) (noting the similarities between actions brought under RFRA and actions brought under other "civil rights enforcement" statutes—like Section 1983—that "allow[] recovery of money damages against state officers in their personal capacities").

This textual similarity between the two statutes is more than sufficient to invoke *in pari materia*, which counsels that "when similar statutory provisions are found in comparable statutory schemes, interpreters should presumptively apply them the same way." Eskridge, et al., *Legislation and Regulation*, *supra*, at 1158; *see also Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998) (construing provision in Fair Debt Collections Practices Act in accordance with how courts had interpreted an identical provision in the Truth in Lending Act before the FDCPA was enacted); *cf. Wachovia Bank* v. *Schmidt*, 546 U.S. 303, 316 (2006) ("[S]tatutes addressing the same subject matter generally should be read 'as if they were one law.'"); *Northcross* v. *Board of Educ. of Memphis City Schs.*, 412 U.S. 427, 428 (1973) ("The similarity of language in [two statutes] is, of course, a strong indication that the two statutes should be interpreted *pari passu*.").

In pari materia takes its authority from the fact that "copying a previous statute bespeaks an awareness of the previous statute and its purposes that can legitimately inform the application of the new one." Eskridge, *Interpreting Law: A Primer on How to Read*

Statutes and the Constitution 123 (2016). Congressional polymathy is not required. The canon is based on a "realistic assessment of what the legislature ought to have meant." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012). The canon "rests on two sound principles: (1) that the body of the law should make sense, and (2) that it is the responsibility of the courts, within the permissible meanings of the text, to make it so." *Id.* Put another way, the canon serves the "rule of law values of coherence and predictability," while simultaneously furthering "democratic legitimacy." Eskridge, *Interpreting Law*, *supra*, at 123.

The *in pari materia* rule is most persuasive when an identical provision is found in a statute that is similar in object, purpose, and subject matter to the one being interpreted.[3] *See* Eskridge, *Interpreting Law*, *supra*, at 121. Section 1983 and RFRA are similar in just these ways. Both statutes are federal civil rights provisions intended to ensure heightened protection for constitutionally guaranteed rights. As Justice Stewart explained, "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law." *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972); *see also Albright* v. *Oliver*, 510 U.S. 266, 271

[3] The Court's recent decision in *Mount Lemmon Fire District* v. *Guido*, 139 S. Ct. 22 (2018), is not at odds with this principle. There, the Court rejected the argument that Title VII and the Age Discrimination in Employment Act should be interpreted similarly because they address similar subjects, emphasizing that there are substantial differences in the language that "Congress chose to employ" in the text of those two statutes. *Id.* at 23. Here, by contrast, RFRA and Section 1983 share *both* common language *and* a common object, purpose, and subject matter.

(1994) (quoting *Baker* v. *McCollan*, 443 U.S. 137, 144, n.3 (1979)) ("Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'"). RFRA was likewise intended to protect the people from government action that unnecessarily burdens their constitutional right to practice their religion as they see fit. *See* 42 U.S.C. § 2000bb-1; *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014) (Kennedy, J., concurring) ("The Court and the dissent … agree on the purpose of [RFRA] … to ensure that interests in religious freedom are protected."). Both Section 1983 and RFRA, at bottom, serve these purposes by creating a mechanism for aggrieved parties to vindicate their constitutional rights in federal court.[4]

B. The United States' Efforts To Evade The *In Pari Materia* Rule Are Meritless

Although the United States acknowledges that "Section 1983 is particularly instructive when set beside RFRA," U.S. Br. 28, it resists any efforts to transpose Section 1983's damages remedy to RFRA. Its arguments—semi-textual and semi-atmospheric—fall flat, and offer this Court no compelling reason to derogate the presumption that ordinarily attaches to two

[4] The United States attempts to make an *in pari materia* argument of its own, asserting that, in light of the similarities in text and purpose between RFRA and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), the Court's decision in *Sossamon* v. *Texas*, 563 U.S. 277 (2011), holding that money damages were not available under RLUIPA, should control here. U.S. Br. 35-38. As Respondents rightly point out, however, RLUIPA implicates sovereign immunity concerns—the potential award of money damages against state officials in official-capacity suits—that are not at issue with respect to RFRA, rendering RLUIPA a poor comparator for the provision at issue in this case. Resp. Br. 32-36.

statutes that employ virtually identical language in operative terminology.

1. The United States quibbles with any efforts to draw a parallel between Section 1983 and RFRA by pointing to a textual difference between the two statutes: Because Section 1983 contains language authorizing "an action at law" while RFRA does not, this must be evidence of Congress's intent to exclude suits for money damages—actions at law—from RFRA's ambit. U.S. Br. 28. But when the two statutes are considered in their historical context, this discrepancy becomes little more than a distinction without a difference.

Until 1938, the American legal system forced plaintiffs to pick one of two paths when initiating a lawsuit: For plaintiffs seeking money damages, the proper route was to file an "action at law," while plaintiffs seeking injunctive relief were to bring a "suit in equity." *Cf.* 28 U.S.C. § 384 (1934) ("Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."); Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 919 (1987) ("The ability to fashion specific relief, both to undo past wrongs and to regulate future conduct, also distinguished equity from the law courts, which in most instances awarded only money damages."); 4 Wright & Miller, *Federal Practice and Procedure* § 1042 (4th ed.). That distinction was abolished with the adoption of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 2 ("There is one form of action—the civil action."). Section 1983—which was enacted in 1871, long before the barrier between law and equity was razed—is a relic of its time, authorizing "action[s] at law" *and* "suit[s] in equity" in order to permit plaintiffs to access the full

menu of possible relief. That RFRA—enacted in 1993—does not contain this distinction between law and equity is not in the least notable; Congress understandably chose not to codify a distinction that no longer existed. *See* Fed. R. Civ. P. 2 n.2 ("Reference to actions at law or suits in equity in all statutes should now be treated as referring to the civil action prescribed in these rules.").

The United States offers no reason why this commonsense conclusion is incorrect, and it provides no authority supporting its contention that a statute only authorizes a suit for damages if it also includes the phrase "at law." *See* U.S. Br. 28. Indeed, the two cases it cites for this point—one of them a concurring opinion—stand only for the proposition that the phrase "at law" in Section 1983 is sufficient to demonstrate the availability of a suit for damages in *that* statute. *Id.* But it does not follow from these holdings that the phrase "at law" is necessary to allow a suit for damages, particularly in light of "the prevailing presumption in our federal courts since at least the early 19th century" that "the denial of a remedy [is] the exception rather than the rule." *Franklin* v. *Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 71-72 (1992).

2. Unable to differentiate RFRA from Section 1983 on a meaningful textual basis, the United States asks the Court to put aside the plain language of the two statutes, and instead look to RFRA's legislative history and historical context for clues suggesting that Congress did not intend to authorize suits for money damages. *See, e.g.*, U.S. Br. 20 (encouraging the Court to look to the "backdrop against which [RFRA] was enacted"). The Court should reject the invitation.

The United States' argument is that, pre-RFRA, monetary damages for Free Exercise violations could only be obtained pursuant to *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the availability of which had been tightly circumscribed. U.S. Br. 21-22. If RFRA worked a meaningful change to this regime, the United States continues, "one would expect at least some affirmative indication" of congressional intent to authorize damages in individual-capacity suits. U.S. Br. 22-23. In the United States' view, the *absence* of congressional comment on that change should be viewed as evidence that Congress did *not* intend to work such a change. This formulation is referred to as the "dog that did not bark" canon of statutory interpretation. *See* Eskridge, *Interpreting Law*, *supra*, at 250; *see also* Krishnakumar, *The Sherlock Holmes Canon*, 84 Geo. Wash. L. Rev. 1, 2-3 (2016).

While the "dog that did not bark" canon can be used to persuasive effect in some instances, *see, e.g.*, *Hobby Lobby Stores, Inc.*, 573 U.S. at 754-755 (Ginsburg, J., dissenting), it is also subject to certain practical and logical limitations. For example, from a legislative process standpoint, it is impractical to expect legislators to both anticipate all of the effects of a new law and enter those comments into the legislative record. *See* Krishnakumar, *The Sherlock Holmes Canon*, *supra*, at 21. Moreover, the canon lacks any clear limit or boundaries for defining the degree of change that might warrant affirmative legislative comment—at what point, exactly, should we expect a dog to bark? *Id.* at 28-29. But most problematically, it encourages courts to read the tea leaves of congressional inaction, rather than grapple with the duly enacted text. *Id.* at 37; *see also* Easterbrook, *Text, History, and Structure in*

Statutory Interpretation, 17 Harv. J.L. & Pub. Pol'y 61, 68-69 (1994) ("No matter how well we can know the wishes and desires of legislators, the only way the legislature issues binding commands is to embed them in a law.").

Justice Scalia highlighted precisely this issue on multiple occasions. He noted, for example, that "[t]he only fair inference" that courts should draw "from Congress's silence is that Congress had nothing further to say," and had opted to let its "statutory text do[] all of the talking." *Zuni Pub. Sch. Dist. No. 89* v. *Department of Educ.*, 550 U.S. 81, 121 (2007) (Scalia, J., dissenting). He warned of the "questionable wisdom of assuming that dogs will bark when something important is happening." *Chisom* v. *Roemer*, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting). And he chided his colleagues for invoking the "Canon of Canine Silence" which, in his view, represented a "dangerous" "phenomenon, under which courts may refuse to believe Congress's own words [the text] unless they can see the lips of others moving in unison." *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 73-74 (2004) (Scalia, J., dissenting).

Justice Scalia's core objection to this interpretive canon is that the lack of legislative history (*i.e.*, the dog not barking) ought not to contradict statutory text. *See, e.g.*, *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 453 (1987) (Scalia, J., concurring in judgment) (enacted text always trumps "unenacted legislative intent"). Here, the United States asks the Court to transgress this precise norm of statutory interpretation. As explained, the definition of "government" provided in the statute itself plainly contemplates individual-capacity suits. *See supra* pp. 2-6. Moreover, Congress's decision to include the "under color of law" language bespeaks an in-

tent to read RFRA in *pari materia* with Section 1983. *See supra* pp. 8-13. Because Section 1983 permitted damages against individual capacity officials, it is reasonable to assume that Congress intended the same under RFRA. A lack of legislative history should not frustrate Congress's clear intent expressed through the statutory text it enacted. *See Zuni*, 550 U.S. at 121 (Scalia, J., dissenting).

III. THE UNITED STATES' ADDITIONAL ARGUMENTS MISAPPLY TWO TEXTUAL CANONS OF STATUTORY INTERPRETATION

The United States' primary arguments ask this Court to (1) ignore RFRA's statutory text; and (2) disregard RFRA's similarities to Section 1983. For the reasons outlined above, those efforts fall flat—and its remaining arguments fare no better. As explained below, the United States misapplies one canon of statutory interpretation, and in doing so, runs headlong into another.

A. *Noscitur A Sociis* Does Not Support The United States' Interpretation Of "Official[s]" In 42 U.S.C. § 2000bb-2(1)

The United States invokes the canon of *noscitur a sociis*—the concept that a word is defined by the company it keeps—to argue that "official" really means "'official' only in his or her *official capacity*." *See* U.S. Br. 18. It asserts that because "official (or other person acting under color of law)" "is preceded by the terms 'branch, department, agency, [and] instrumentality,'" each of which "necessarily refers to official-capacity actors," this Court "should construe the term 'official' as similarly limited to official-capacity acts and suits." *Id.* at 41-42.

This argument misapplies the canon. It is, of course, true that branches, departments, agencies, and instrumentalities are offices and thus do not have individual capacities. But just because this is *a* common quality shared by these four items in the list does not mean it is *the* relevant common quality that should characterize every other item in the list.

Noscitur a sociis "means literally 'it is known from its associates,' and means practically that a word may be defined by an accompanying word, and that, ordinarily, the coupling of words denotes an intention that they should be understood in the same general sense." 2A Singer & Singer, *Sutherland on Statutes and Statutory Construction* § 47:16 (7th ed. 2014). Thus, "when two or more words are grouped together, and ordinarily have a similar meaning, but are not equally comprehensive, a general word is limited and qualified by a special word." *Id.*; *see also* Krishnakumar & Nourse, *The Canon Wars*, 97 Tex. L. Rev. 163, 180 n.84 (2018) ("[W]hen a statute contains a list of two or more words, courts are to give each word in the list a meaning that is consistent with the meaning of other words in the list."); Eskridge, et al., *Legislation and Regulation*, *supra*, at 595-596 (describing *noscitur a sociis*). Determining meaning requires choosing a common thread that unites the listed items: "The common quality suggested by a listing should be its most general quality—the least common denominator, so to speak—relevant to the context." Scalia & Garner, *Reading Law*, *supra*, at 196.

Picking that least common denominator can be tricky. Indeed, "it is often possible to characterize the common denominator connecting statutory terms in different and competing ways, so as to support competing *noscitur a sociis* or *ejusdem generis* arguments about

what a term in a list means." Krishnakumar, *Dueling Canons*, 65 Duke L.J. 909, 928 (2016). Here, the United States has chosen to emphasize the fact that branches, departments, agencies, and instrumentalities "cannot either act or be sued in anything but an official capacity." U.S. Br. 42. This is true but immaterial, since—as lower courts have observed—"'officials' are the only persons for whom the distinction between individual-capacity and official-capacity suits has any salience." *Patel*, 125 F. Supp. 3d at 49. For instance, the United States might also choose to observe that branches, departments, agencies, and instrumentalities are all collective entities. But that does not mean that "official (or other person acting under color of law)" only refers to *groups* of officials or persons—it just so happens that "official" and "person" are the only words in the list that, in the singular, refer to non-collective entities.

Properly applied, the *noscitur a sociis* canon supports reading "official" to include an official in his or her personal capacity. Branches, departments, agencies, and instrumentalities—along with officials (or other persons acting under color of law)—all perform tasks that exercise or implement the government's power. This is an alternative common denominator that makes more sense than the United States' in the context of RFRA's substantive provision, that "Government shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). The provision prohibits all entities—encompassing "official[s]" and "other person[s]"—that exercise or implement the government's power from substantially burdening a person's exercise of religion. It makes sense, moreover, for the category of government entities so prohibited to include individual government officials as well as private persons who exercise the government's authority because, in prac-

tice, it is individual government officials who make the fine calls that either burden or grant exemptions for a person's religious exercise. Further, this reading better accounts for the language "or other person acting under color of law." Private persons acting under color of law are not "official-capacity actors," *see* U.S. Br. 41-42, but they still exercise the government's power.

B. The United States' Interpretation Of RFRA Would Violate The Canon Against Surplusage

This Court has often stressed that "statutes should be read to avoid superfluity." *Marx* v. *General Revenue Corp.*, 568 U.S. 371, 392 (2013); *see also TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001))); Eskridge, *Dynamic Statutory Interpretation* app. 3 at 324 (1994) ("Avoid interpreting a provision in a way that would render other provisions of the act superfluous or unnecessary."); Krishnakumar & Nourse, *The Canon Wars*, *supra*, at 187 ("[T]he well-established rule against superfluity dictates that statutes should be construed to avoid redundancy, so that when there are two overlapping terms, each should be construed to have an independent meaning."). This rule is a version of the canon against surplusage. *See Marx*, 568 U.S. at 386 ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

If the phrase "official (or other person acting under color of law)" in RFRA meant only "official in his or her official capacity," the term would add little to the defi-

nition of "government" that is not already covered by the other terms listed—rendering it superfluous. By including "branch, department, agency, [and] instrumentality" in the definition, Congress separately authorized suits against collective government entities—which are necessarily official-capacity suits. According to the United States' reading of RFRA, then, Congress used both "branch, department, agency, [and] instrumentality" *and* "official (or other person acting under color of law)" to permit the exact same injunctive claim against the government. This is true because, as noted above, *see supra* p. 4, this Court has made it crystal-clear that an official-capacity claim against an official is just another way of suing the entity the official represents.

Respondents are thus entirely correct to argue that the United States' proposed reading would render the term "official" in RFRA's statutory definition "impermissible surplusage." Resp. Br. 13. The Second Circuit agreed below. Pet. App. 28. And district courts have properly held the same. *See, e.g.*, *Patel*, 125 F. Supp. 3d at 50 ("Defendants' interpretation would render the entire phrase surplusage: once Congress authorized official-capacity suits against 'officials,' adding another term that allowed only official-capacity suits would have had no effect whatsoever."); *see also, e.g.*, *Jama* v. *USINS*, 343 F. Supp. 2d 338, 374 (D.N.J. 2004) ("The court reads RFRA to allow for individual capacity suits (as opposed to official capacity suits) against individual defendants.").

Moreover, RFRA's definition of "government" lists not just "official" but "official (*or other person acting under color of law*)"—a broad category that extends the universe of entities against whom plaintiffs may seek "appropriate relief" beyond just "official[s]," sug-

gesting that those "other person[s]" can be sued in their individual capacities. 42 U.S.C. § 2000bb-2(1) (emphasis added). The United States, however, spends few words addressing this language, relegating it largely to two brief footnotes. *See* U.S. Br. 41 n.6 ("The parenthetical phrase … likewise confirms that private actors effectively exercising government authority … are also subject to RFRA's substantive requirements); *id.* at 42 n.7 ("This language is best read … to cover private individuals only insofar as they act with a government imprimatur, *i.e.*, in the functional equivalent of an official capacity."). Instead of seriously considering the importance of this language, the United States uses linguistic gymnastics to avoid RFRA's own definition.

RFRA authorizes claims against the broad category of "other person[s] acting under color of law." So, private persons may be sued under RFRA. And private persons—even when acting under color of law—can be sued only in their personal capacities. Persons who are not government officials do not have official capacities. Lower courts have agreed. *See* Pet. App. 27 ("The specific authorization of actions broadly against 'other person[s] acting under color of law,' undercuts the assertion that the term 'official' was intended to limit the scope of available actions."); *Patel*, 125 F. Supp. 3d at 50 ("[RFRA] contemplates that persons 'other' than 'officials' may be sued under RFRA, and persons who are not officials may be sued only in their individual capacities."); *Jama*, 343 F. Supp. 2d at 374 ("The mere fact that § 2000bb–2(1) provides that people who are not government officials ('and other person acting under color of law') are 'government,' and thus proper defendants under RFRA, indicates that individual capacity suits must be permitted because no one

who is not a government official has an 'official capacity' in which to be sued.").

The fact that the statute reads "official (or *other* person …)" (emphasis added) suggests that an "official" is a "person"—and thus can be sued in a personal capacity. Further, it would make little sense if Congress had designed RFRA to permit personal-capacity suits against non-officials acting under color of state law, but not against officials. Because qualified immunity is available, this would mean that government officials could be entirely immune from liability, while private citizens acting under color of state law could be liable. It is highly improbable that this was Congress's intent in a statute that provides for relief against the "government."

The United States asks this Court to replace the language Congress codified with the words the United States wishes Congress had used. It prevails on the Court to ignore the textual parallels between RFRA and Section 1983 that are apparent from the pages of the U.S. Code in favor of the silence of the legislative record. And it encourages this Court to misapply two fundamental canons of statutory interpretation. The court of appeals rejected these requests as inconsistent with law and the longstanding tenets of how we read and interpret statutes. This Court should do the same.

CONCLUSION

The judgment of the Second Circuit should be affirmed.

Respectfully submitted.

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APPENDIX

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