No. 08-1438

IN THE

Supreme Court of the United States

HARVEY LEROY SOSSAMON, III,

Petitioner,

v.

TEXAS ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

The Solicitor General rightly acknowledges that the petition in this case presents a question meriting this Court's plenary review. But she is wrong in urging this Court to ignore the court of appeals' constitutional invalidation of RLUIPA's authorization of individual-capacity damages. This Court's longstanding practice is to grant review of decisions holding Acts of Congress unconstitutional, and the Solicitor General offers no sound basis for departing from that tradition here. The petition should be granted in its entirety.

I. The Court Of Appeals' Decision Partially Invalidates An Act Of Congress, And Thus Warrants Full Review.

The Solicitor General makes no effort to explain why review of the court of appeals' Spending Clause holding is not warranted under the Court's – and the Solicitor General's – traditional presumption in favor of review of decisions invalidating Acts of Congress on constitutional grounds. In fact, the arguments made in the Government's brief counsel in favor of, not against, this Court's review of the court of appeals' partial invalidation of RLUIPA's remedial provisions.

1. Although the court of appeals expressed its decision in statutory construction terms, there is no escaping that it refused to give effect to the plain meaning of the statute only because it believed Congress lacked the constitutional power to enact the statute as written.

The Solicitor General agrees with petitioner that RLUIPA, by its terms, "plainly authorizes suits against state officials in their individual capacities." U.S. Br. 11. Indeed, to construe the statute differently would render surplusage the inclusion of government officials in its definition of "government." *See* Pet. Reply 7-8. While public officials are sometimes sued in their official capacities for injunctive or declaratory relief under other statutes (*e.g.*, 42 U.S.C. § 1983), such actions are treated as suits against the governmental entity and are used only as an expedient to end an ongoing violation of federal law in the absence of a cause of action against the government itself. *See*, *e.g.*, *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004); *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). Under RLUIPA, that expedient is unnecessary because all agree that the statute permissibly authorizes suits for injunctive and declaratory relief directly against governmental entities. *See* Pet. App. 14a. Consequently, the *only* purpose for Congress to have authorized suits against public officials in addition to governmental entities is to permit personal capacity suits for damages. *See* Pet. 7-8.

The Solicitor General further agrees that the court of appeals refused to enforce the statute as written solely because of its erroneous interpretation of the Constitution and this Court's decisions. *See* U.S. Br. 12 (explaining that the court of appeals refused to give RLUIPA's text its clear meaning because, in the court's view, "Congress lacks constitutional authority to impose liability on an entity other than the fund recipient for violations of conditions on federal funds") (citing Pet. App. 17a-20a).

Had the Fifth Circuit expressed that conclusion in more direct terms, by acknowledging that RLUIPA authorizes individual capacity suits and holding the statute unconstitutional in that respect, there would be no question that the Spending Clause issue required this Court's review. Indeed, the Solicitor General commonly petitions for certiorari when a court of appeals "partially invalidates an Act of Congress," arguing that the invalidation "alone warrants this Court's review." U.S. Pet. 26, *United States v. Juvenile Male*, No. 09-940; *see also*, *e.g.*, U.S. Pet. 18, *Kempthorne v. Buono*, No. 08-472; U.S. Pet. 18, *Mukasey v. ACLU*, No. 08-565. Moreover, this Court regularly grants such petitions, even when, as here, the Government acknowledges that there is no direct, considered circuit conflict. *See*, *e.g.*, *United States v. Stevens*, 129 S. Ct. 1984 (2009); *Salazar v. Buono*, 129 S. Ct. 1313 (2009); *Gonzalez v. Carhart,* 550 U.S. 124 (2007); *United States v. Morrison*, 529 U.S. 598 (2000); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

While the court of appeals gave effect to its constitutional conclusion through an implausible construction of the unambiguous statutory language, a constitutional decision need not be expressed in terms in order to warrant this Court's review. For example, in *Buono v. Kempthorne,* 502 F.3d 1069 (9th Cir. 2007), the Ninth Circuit refused to give effect to a statute conveying ownership of a parcel of federal land containing a war memorial to a veterans group, on the ground that conveyance required by the statute was inconsistent with a prior injunction. *See id*. at 1081-87. Although the court of appeals had not directly held the statute unconstitutional, the Solicitor General nonetheless petitioned for certiorari

on the ground that the "court of appeals rendered invalid an Act of Congress by affirming the district court's permanent injunction barring the government 'from implementing the provisions of [the Act].'" U.S. Pet. 18, *Kempthorne v. Buono*, No. 08-472. The Government explained that the "invalidation of an Act of Congress is ordinarily a sufficient ground to warrant this Court's review, and the backhanded manner in which the Ninth Circuit invalidated – by refusing to give effect to – the Act in this case calls for no different treatment." *Id.* at 18-19. The Court granted the petition. 129 S.Ct. 1313 (2009).

This case calls for no different treatment. The Fifth Circuit refused to give effect to RLUIPA's express provision of a private right of action against government officials. The backhanded manner in which it expressed its constitutional conclusion – by giving the statute a construction incompatible with its plain text and established meaning in other federal laws – should not derail this Court's review. As with any other decision invalidating a federal statute on constitutional grounds, Congress is powerless to alter the Fifth Circuit's alleged interpretation of RLUIPA because of the constitutional considerations that drove the court of appeals' ruling. If the decision below is wrong, only this Court can correct it.

2. As the Solicitor General explains, the constitutional ruling below *is* wrong, *see* U.S. Br. 11-13, which further warrants this Court's intervention.

It is one thing for the Court to deny review in the face of a uniformly correct consensus among the circuits; it is quite another to permit an erroneous constitutional theory to spread unabated among the

courts of appeals, threatening the enforcement of not only RLUIPA, but other Spending Clause statutes as well. *See* Pet. 19-20. As the petition explained – and the Solicitor General tellingly does not disagree – the holding here directly draws into question the constitutionality of 18 U.S.C. § 666. *See* Pet. Reply 4-5. It could also be used to challenge provisions of the Hatch Act, 5 U.S.C. §§ 1501 *et seq*., which place a variety of limitations on the personal political activities of a "state or local officer or employee" of certain federal funding recipients, *see id.* § 1501(4), 1502, the violation of which can lead to an order by the Merit Systems Protection Board that the employee be terminated from her employment, *id*. § 1505.

II. That Four Circuits Have Now Adopted A Fundamentally Erroneous Construction Of Congress's Spending Clause Authority Is A Compelling Reason To Grant Review, Not To Deny It.

The Solicitor General nonetheless recommends that the Court deny review of the Fifth Circuit's Spending Clause ruling "because there is no division among the courts of appeals on that issue." U.S. Br. 9. "To date," she notes, "four courts of appeals have considered" the question and all four have reached the same erroneous conclusion. *Id*. But the fact that four courts of appeals have invalidated a provision of a federal statute provides even greater reason to grant the petition, not a reason to allow the creeping nullification of a congressional enactment to expand.

The Solicitor General does not contend that all four courts of appeals will actually correct course without this Court's intervention. Instead, she

suggests only that a decision on the Eleventh Amendment question "may influence how courts of appeals determine going forward whether damages are available under RLUIPA against state officials sued in their individual capacities." U.S. Br. 14. Just why that would be, she does not say, and it is far from self-evident. The Eleventh Amendment question turns on whether states are on notice of the damages remedy, whereas the Spending Clause question turns on the scope of Congress's enumerated powers and the Necessary and Proper Clause. *Compare* U.S. Br. 11-13 (discussing Spending Clause question) *with* U.S. Br. 7-19, *Cardinal v. Metrish*, No. 09-109 (discussing Eleventh Amendment issue). Moreover, even if this Court's decision might (for some unknown reason) "influence" courts' analysis of the Spending Clause question, the Solicitor General does not go so far as to argue that it would inspire four courts of appeals to abandon binding circuit precedent.

There is no reason to deny review of a constitutional problem that is only going to get worse. Further percolation will not contribute to this Court's resolution of a straightforward constitutional question, given that the Court already has the benefit of the views of four courts of appeals, the parties in those cases and this, and the solicitors general of Texas and the United States. No one has suggested that delay will produce additional arguments that have not already been identified by these decisions or parties.

The Solicitor General agrees that certiorari is warranted in *Cardinal* to review the closely related question of the states' amenability to suit under the

statute. *See* U.S. Br. 8. The Court should grant the petition in this case as well in order to allow a comprehensive determination of the Act's application to all government defendants. The Solicitor General's contrary recommendation will simply result in piecemeal litigation that ultimately serves no one.

III. The Solicitor General's Suggestion That This Case Is A Poor Vehicle Is Unconvincing.

The only other reason the Solicitor General gives for denying review of the Spending Clause issues is a passing suggestion that petitioner's damages *might* be limited by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(e). *See* U.S. Br. 14. Tellingly, she does not, in fact, dispute petitioner's showing that the PLRA's restriction on damages for "mental or emotional" injuries, 42 U.S.C. § 1997e(e), does not apply to suits alleging a violation of religious freedom. *See* Pet. Reply Br. 10; *see also Cardinal* Reply Br. 6-8. Moreover, the mere possibility that respondents might have an alternative defense that would limit liability is no reason to deny review of the case on the grounds actually decided.

Nor does the Government deny that even if the PLRA applied, petitioner would be entitled to at least nominal damages. *See* U.S. Br. 14. That relief would be far from meaningless. Even nominal damages represent a vindication of a prisoner's claim that his federal rights have been violated and provide guidance to institutions on their obligations under the Act. *Cf. Carey v. Piphus*, 435 U.S. 247, 266 (1978) (noting that the law provides for nominal damages in order to "recognize[] the importance to organized

society that [certain] rights be scrupulously observed").

Furthermore, in this context, nominal damages can play an even more consequential role. Here, because the Eleventh Amendment and Spending Clause prevented any award of even nominal damages, the court held that the State's discontinuation of its cell restriction policy insulated the prison's conduct from all judicial scrutiny. *See* Pet. App. 13a-35a (holding that voluntary cessation rendered claims for injunctive and declaratory judgment moot, that Eleventh Amendment precluded damages award against the State, and that Spending Clause precluded suit against prison officials in their individual capacities). Other courts routinely apply the same rule, dismissing RLUIPA claims without considering their merits after finding that all monetary relief is precluded by the Constitution and that claims for injunctive or declaratory relief were mooted by the prison's cessation of the allegedly unlawful practice, the prisoner's transfer to another facility, or his release from custody. *See, e.g.*, *Nelson v. Miller*, 570 F.3d 868, 883, 885 (7th Cir. 2009); *Rendelman v. Rouse*, 569 F.3d 182, 187 (4th Cir. 2009); *Cardinal v. Metrish*, 564 F.3d 794, 798-801 (6th Cir. 2009), pet. for cert. pending, No. 09-109; *Berryman v. Granholm*, 343 Fed. Appx. 1, 3-4 (6th Cir. 2009); *Harris v. Schriro*, 652 F. Supp. 2d. 1024, 1028-33 (D. Ariz. 2009).

That result demonstrates both the significant practical consequences of the Fifth Circuit's Spending Clause holding and the decision's implausibility as a matter of statutory construction. Under the court of appeals' view, in a great many cases, a statute that

authorizes "appropriate relief," 42 U.S.C. § 2000cc-2, against every conceivable defendant, in fact authorizes *no* relief against *any* defendant, regardless of the injuries suffered. The Fifth Circuit's view of the Constitution has thus resulted in a hobbled and barely recognizable version of the statute Congress enacted. That decision should be reviewed by this Court, and the petition granted in its entirety.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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