No. 08-1438

In the Supreme Court of the United States

HARVEY LEROY SOSSAMON, III, PETITIONER

v.

TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation

JAMES C. HO
Solicitor General
Counsel of Record

DANIEL L. GEYSER
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548
James.Ho@oag.state.tx.us
(512) 936-1700

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If the U.S. invitation brief were a petition for a writ of certiorari, it would warrant a clear and obvious denial. The U.S. has recommended that the Court grant review in *Cardinal* v. *Metrish*, 564 F.3d 794 (6th Cir. 2008), petition for cert. pending, No. 09-109 (filed July 22, 2009), and hold *Sossamon* pending *Cardinal*'s disposition, in order to resolve whether RLUIPA authorizes damages suits against the States. As its lead argument on the issue, however, the United States presses a theory based on a *different* statute (42 U.S.C. 2000d-7) that was never raised, much less actually resolved, in either *Cardinal* or *Sossamon* below. There is no circuit split over Section 2000d-7 in this setting, and the U.S. has not suggested otherwise. Indeed, only two circuits have even addressed the issue, and both have explicitly *rejected* the Federal Government's view.

The U.S. is accordingly inviting this Court to be only the third appellate tribunal in the nation to review this question—and the very first to adopt the Federal Government's position. It would be remarkable, to say the least, to grant review on a splitless statutory issue, of limited practical importance, using a vehicle where the issue was not even pressed or passed upon below.

That alone is a sufficient and compelling basis for a denial. But it is only one of several serious problems undercutting these petitions. As for *Sossamon*, the U.S. correctly recognizes that petitioner faces an

insurmountable defect in the PLRA. As for *Cardinal*, one of the three panelists below declared the case so "woefully underdeveloped" that the judge considered it an inappropriate vehicle for resolving the damages question *even at the circuit level*. It follows *a fortiori* that this is a woefully deficient vehicle for deciding the same question, on the same record, on a nationwide basis in this Court.

The U.S. was incorrect to recommend a grant in *Cardinal*, and accordingly it was also incorrect to recommend a hold in *Sossamon*. Both petitions should be denied.

A. Both *Sossamon* And *Cardinal* Are Poor Vehicles

1. As confirmed by the U.S. (Br. 8-9), the Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(e), independently bars any damages otherwise available in *Sossamon*. Even were this Court to grant in *Cardinal* and adopt the Eleventh Circuit's outlier approach, the PLRA would still immediately forbid the very damages that RLUIPA would otherwise allow—as the Eleventh Circuit itself has determined. See *Smith* v. *Allen*, 502 F.3d 1255, 1271 (11th Cir. 2007).

It follows that, although the U.S. was correct to identify a substantial vehicle problem based on this "ancillary and difficult question" (Br. 9), it was incorrect to suggest that *Sossamon* should be held at all. There is no point in remanding for the Fifth Circuit to reconsider the damages question when it is already clear that petitioner's non-physical injuries are categorically ineligible for monetary relief. See, *e.g.*,

Mayfield v. *Tex. Dep't of Criminal Justice*, 529 F.3d 599, 605-606 & n.8 (5th Cir. 2008).

Nor can petitioner avoid this bar by seeking nominal or punitive, rather than compensatory, damages. Even assuming the PLRA allows that kind of relief, his complaint only sought compensatory damages, as both the district court (Pet. App. 37a) and the Fifth Circuit (Pet. App. 5a, 15a n.24) recognized. It is much too late for petitioner to attempt to recast his complaint before this Court. In addition, punitive damages are not only presumptively unavailable against governmental entities, see, *e.g.*, *Barnes* v. *Gorman*, 536 U.S. 181, 190 (2002), but there is no indication that petitioner's claims—which the district court *rejected* on the merits, Br. in Opp. 8—could satisfy the high standard for punitive damages.

2. There are also substantial vehicle problems in *Cardinal*—and those problems are apparent on the face of the Sixth Circuit's decision. The U.S. acknowledges (Br. 6 n.4) that Judge Clay wrote separately because he did not wish to resolve the RLUIPA damages question in that case. *Cardinal*, 564 F.3d at 803-804 (Clay, J., concurring). But the U.S. did not discuss *why* Judge Clay reached that conclusion. His rationale is telling. He directly questioned whether the case served as a "suitable" vehicle for deciding this issue even at the *circuit* level: he cited the "woefully underdeveloped" record, the lack of any meaningful and adequate appellate briefing, the possibility of critical factual disputes, and a serious doubt that "Cardinal has raised a cognizable claim under RLUIPA" in the first place. See *ibid.*

Nor are these concerns merely theoretical. The U.S. contends (Br. 22) that Cardinal alleged a sufficient physical injury to escape the scope of the PLRA. But it is not clear, as a preliminary matter, that weight loss itself (or its attendant effects) is necessarily the kind of physical injury contemplated by the PLRA. See, *e.g.*, *Pearson* v. *Welborn*, 471 F.3d 732, 744 (7th Cir. 2006). And even assuming Cardinal's weight loss constitutes a physical injury, Judge Clay identified a series of factual issues that might prove the weight loss was not directly caused by the prison policy itself. See 564 F.3d at 804.

In addition, in its current posture, Cardinal has not established a clear RLUIPA violation. According to petitioner's own account, the warden undertook a concerted effort to redress his grievance at the earliest practicable moment. See 564 F.3d at 796 & n.1. Cardinal's own misconduct (and the need to place him in temporary segregation) caused his original transfer away from a facility that served kosher meals; once his request at the new facility was elevated to the appropriate decisionmaker—who undoubtedly has many competing responsibilities demanding attention—his request was granted the very next day, and immediate action followed to transfer petitioner to an appropriate facility prepared to accommodate his needs. See *ibid.*

It accordingly is far from obvious that petitioner's rights were violated in the first place. Nowhere does RLUIPA unequivocally declare that States violate the act before having any reasonable opportunity to correct or remove an incidental burden flowing from an

otherwise neutral and valid policy—even in circumstances where some delay is essentially *unavoidable*. On the contrary: 42 U.S.C. 2000cc-3(e) grants governments the right to "avoid the preemptive force of any [RLUIPA] provision * * * by changing the policy or practice" that results in the impermissible substantial burden. See also *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003) ("we read [Section 2000cc-3(e)] to afford a government the discretion to take corrective action to eliminate a nondiscrimination provision violation"). So it is at least questionable whether a burden imposed for only a period of days—initiated as a result of prison security measures—violates RLUIPA and gives rise to damages notwithstanding the swift resolution of the problem once it was disclosed to the appropriate official. Because this predicate issue stands in the way of any damages award—and because the resolution of that question is not independently appropriate for review—the Court should deny *Cardinal* and await a superior vehicle with a clear and proven violation.[1]

1. Nor does the petition arising from *Van Whye* v. *Reisch*, 581 F.3d 639 (8th Cir. 2009), petition for cert. pending, No. 09-821 (filed Jan. 8, 2010), represent an appropriate alternative vehicle for review. That case, like *Sossamon*, arises in an interlocutory posture; has no proven claims (much less any proven damages); and, most importantly, does not involve any proof of physical injury that could conceivably surpass the PLRA's categorical bar. See 581 F.3d at 647, 658.

B. The Federal Government's Lead Argument Under 42 U.S.C. 2000d-7 Is Unworthy Of Review

As its lead argument, the U.S. suggests that the damages question warrants review because the States have waived their sovereign immunity through 42 U.S.C. 2000d-7—rather than directly under RLUIPA itself. This splitless question was not raised or resolved below, and there is no reason to entertain it now.

1. The U.S. cites Section 2000d-7 as an additional reason to grant review, but its argument leads inexorably to the opposite conclusion. According to the U.S. (Br. 13), Section 2000d-7 presents a "sufficient" basis for sustaining petitioners' claims and thus renders consideration of the actual question presented academic. Yet the U.S. concedes (Br. 10-11) that petitioners failed to press this issue below, and acknowledges that neither circuit considered it. Petitioners thus failed to preserve the full range of issues necessary for a complete consideration of the underlying question. If Section 2000d-7 is a relevant, if not essential, component in deciding whether damages are available, these petitions are poor vehicles for adjudicating that claim.

The U.S. nevertheless contends (Br. 9 n.6) that the Court remains "free to consider" the applicability of Section 2000d-7. But the primary concern is not one of power, but *prudence*. The Court does not traditionally consider new arguments attacking an adverse judgment below, see *United States* v. *United Foods, Inc.*, 533 U.S. 405, 416-417 (2001), and these petitions

offer no reason for departing from that sound practice, see *Okla. Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 457 (1995).

In any event, contrary to the Federal Government's submission (at 9 n.6), it is not clear that the argument under Section 2000d-7 is authorized under this Court's "traditional rule." In *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 375, 379 (1995), unlike here, the previously unpressed claim had at least been *addressed* below. In addition, this is not a different argument for the same statute, but the invocation of *different* statutory authority for obtaining the same underlying result. That alone casts doubt on the propriety of granting review. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

2. The Federal Government's lead argument is not the subject of any split. Only *two* appellate courts have even addressed the applicability of Section 2000d-7 in this setting—and both have held, emphatically, that its language is *not* sufficient to waive immunity. *Van Whye*, 581 F.3d at 654-666; *Madison* v. *Virginia*, 474 F.3d 118, 132-133 (4th Cir. 2000). Contrary to the U.S. suggestion, the Court should not grant review to become the third appellate court to consider a theory that has been rejected by both circuits confronting the issue. Further percolation is plainly appropriate.

3. Review is also unwarranted because the U.S. is wrong on the merits. The U.S. contends (Br. 10-13) that RLUIPA is covered by Section 2000d-7's catch-all provision—sweeping in statutes "prohibiting discrimination," 42 U.S.C. 2000d-7(a)(1)—but the U.S. is mistaken.

There is a clear distinction, as a matter of law and logic, between provisions requiring *accommodations* (such as RLUIPA) and those prohibiting *discrimination* (such as in Section 2000d-7). This Court has repeatedly reinforced that distinction in a variety of contexts. See, *e.g.*, *Employment Div.* v. *Smith*, 494 U.S. 872, 878-879, 886 & n.3, 890 (1990); *Washington* v. *Davis*, 426 U.S. 229, 238-242 (1976). And there is no doubt that the pertinent provisions of RLUIPA fall within the category of accommodations.

The statute's text, first and foremost, confirms this conclusion. The RLUIPA provisions at issue target government action that imposes certain "substantial burden[s]" on religious exercise—even when resulting from "a rule of general applicability." 42 U.S.C. 2000cc-1(a). In the land-use section of the act, by contrast, Congress specifically targeted "[d]iscrimination," including regulations "that discriminate[]" against religious organizations. 42 U.S.C. 2000cc(b)(2). Contrary to the Federal Government's contention (Br. 13 n.8), the "close proximity" of these contrasting provisions does not show that "Congress saw the two as of a piece." Congress did not use different language in adjacent sections of the same act because it intended for them to *mean the same thing*. On the contrary, this demonstrates that Congress understood how to invoke concepts of discrimination when it wished to do so. Its decision to speak in terms of accommodation for RLUIPA's prison component, while conspicuously omitting direct language about discrimination, should be presumed deliberate. *Van Whye*, 581 F.3d at 655.

This is also confirmed by RLUIPA's background and purpose. Were this part of RLUIPA an anti-discrimination statute, Congress would not have needed to invoke its Spending Clause authority—as Congress presumably could have simply invoked its powers under Section 5 of the Fourteenth Amendment. There is good reason, however, that the U.S. does not suggest that power was invoked here: the Equal Protection Clause does not prohibit these kinds of neutral policies, see *Smith*, 494 U.S. at 890, and Congress lacks the power to rewrite the Fourteenth Amendment's substantive prohibitions, see *City of Boerne* v. *Flores*, 521 U.S. 507, 519, 535 (1997).

In any event, the U.S. theory fails for another fundamental reason: Section 2000d-7's language, as applied to RLUIPA, is not so unmistakably clear that it compels the conclusion that immunity is waived. So even assuming a catch-all provision could ever "suffice as an 'unequivocal textual waiver,'" the language here surely does not. See *Madison*, 474 F.3d at 132-133.

C. The Damages Question Actually Presented Does Not Warrant Review

Given the lopsided nature of the split, its limited practical significance, and the serious chance that it might resolve itself, there is little reason for the Court to wade into the dispute at this time.

1. The U.S. is incorrect (Br. 21 & n.12) that there is "little reason" to expect the Eleventh Circuit to reconsider its decision. First, the four intervening circuits have not simply "adopt[ed] *Madison*'s reasoning as their own." *Ibid.* These circuits have

done what *Madison* did not do: each explained exactly why *Smith* erred in relying upon *Franklin* and *Barnes* in a context involving sovereign defendants. *E.g.*, Pet. App. 21a-24a. *Madison*, by contrast, invoked the correct line of cases (involving sovereign immunity), but neither mentioned nor discussed *Franklin* or *Barnes*. The Eleventh Circuit has never confronted the core consideration driving the decisions in every other circuit: cases against non-sovereign entities (*Franklin*) do not control in cases against sovereign defendants (*Lane* v. *Pena*, 518 U.S. 187 (1996)).

Second, the U.S. is incorrect, as a logical matter, when suggesting the Eleventh Circuit's position is entrenched because it denied rehearing *in 2008*—before four additional circuits *in 2009* held that *Smith* had erred. There is no indication the Eleventh Circuit will not reconsider its precedent once a proper (and post-hoc) occasion arises.

2. The existing conflict further lacks practical importance. As the U.S. recognized, the average RLUIPA claim does not involve physical injuries. U.S. Br. 22 (citing circumstances of "most cases"). Given that the PLRA forecloses damages—even in the Eleventh Circuit—for the claims most often arising, there is no urgency in resolving this shallow split.

3. As for the merits, few points require response beyond the brief in opposition.

First, the clear-statement rule in the spending context does apply alike to all entities. U.S. Br. 17. But language that clearly implies certain consequences for *non-sovereign* entities will not clearly imply the

same consequences for *sovereign* entities. This is the lesson of *Lane* and *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234 (1985). (*Lane* did not turn on the presence of a *federal* defendant, contra U.S. Br. 18-19, but rather on a *sovereign* defendant. See 518 U.S. at 195-197.) "A general authorization for suit in federal court" may suffice to put private defendants on notice of their obligations, but it "is not the kind of unequivocal statutory language" required in the Eleventh Amendment context. See *Atascadero*, 473 U.S. at 246.

Second, the U.S. errs in drawing a sharp contrast between immunity principles applicable to States and those applicable to the Federal Government. In each context, waivers of immunity must be unequivocally expressed. *E.g.*, *College Sav. Bank* v. *Fla. Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 682 (1999).

Finally, the U.S. has it exactly backwards in suggesting that the identical phrase ("appropriate relief") in RFRA is insufficient to authorize damages against the U.S. while the same language in RLUIPA is sufficient to authorize damages against the States. The standard applicable when the Federal Government regulates its *own* conduct is not less stringent than the standard applicable when the Federal Government purports to regulate State entities. Only the latter threatens the delicate balance of our system of dual sovereignty. It would stand the law on its head to suggest that less is required when an *additional* constitutional dimension is at stake.

D. *Sossamon*'s Second Question Presented Does Not Warrant Review

The U.S. is correct that the individual-liability question does not implicate a circuit conflict and is unworthy of review. Br. 9-10. This Federal recommendation—regarding the interpretation of a federal statute—proves review is unwarranted.

A brief response on the merits:

Contrary to the Federal Government's position, *Sabri* v. *United States*, 541 U.S. 600 (2004), did not hold that Congress has the power to regulate third parties who do not receive federal funds and otherwise act beyond the scope of Congress's regulatory powers. This is why the Court did not address *Pennhurst*, the "contract" analogy in the spending context, or any of the constitutional concerns identified by all four circuits who have confronted the RLUIPA question.

On the contrary, *Sabri* rejected a *facial* challenge on the ground that a strict nexus was not required between the object of a bribe and the federal interest in the funds—a question that does not even ask whether the defendant was a funding recipient or a third party. See 541 U.S. at 604. *Sabri* also involved a defendant whose conduct involved direct attempts to bribe officials in order to obtain *federal* dollars—suggesting that, factually, *Sabri* is close to a situation, for example, in which a person attempts to steal federal funds in route to their end destination. The fact that Congress has the power to prevent the theft of federal dollars does not suggest that Congress has the power to regulate third parties, in their private conduct,

because their activity interferes with a spending *condition*, and not the actual spending (or federal dollars) itself.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation

JAMES C. HO
Solicitor General
Counsel of Record

DANIEL L. GEYSER
Assistant Solicitor General

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