No. 09-821

In The

Supreme Court of the United States

CHARLES E. SISNEY,

Petitioner,

v.

TIM REISCH, *ET AL.*
AND UNITED STATES OF AMERICA,

Respondents.

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

Brief of Respondents Tim Reisch, et al., in Opposition to Petition for Writ of Certiorari

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QUESTION PRESENTED

The Respondents restate the questions presented as follows:

1. Does the statutory reference to "appropriate relief" in the Religious Land Use and Institutionalized Persons Act of 2000 unambiguously extend to claims for money damages sufficient to waive state sovereign immunity?
2. Is RLUIPA a statute "prohibiting discrimination" as provided in the Civil Rights Remedies Equalization Act of 1986?

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Respondents do not dispute that a split exists in the Circuit Courts on the question whether the "appropriate relief" language in the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §2000cc-1, waives state sovereign immunity against claims for money damages. In holding that it does not, the Eighth Circuit joined the Fourth, Fifth, Sixth and Seventh Circuits. *See Madison v. Virginia*, 474 F.3d 118 (4th Cir. 2006); *Sossamon v. Texas*, 560 F.3d 316 (5th Cir. 2009), *petition for cert. filed*, 77 USLW 3657 (May 22, 2009) (NO. 08-1438); *Cardinal v. Metrish*, 564 F.3d 794 (6th Cir. 2009), *petition for cert. filed*, 78 USLW 3065 (Jul 22, 2009) (NO. 09-109); and *Nelson v. Miller*, 570 F.3d 868 (7th Cir. 2009). One circuit, the Eleventh, has held that "appropriate relief" includes claims for money damages. *See Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2007). While Respondents take no position whether this Court should grant certiorari to resolve the split, they argue: (1) the Eighth Circuit's decision is not contrary to any decision of this Court and was therefore correctly decided; (2) there is no circuit split on the issue whether Congress waived state sovereign immunity for RLUIPA claims through the Civil Rights Remedies Equalization Act ("CRREA"), 42 U.S.C. § 2000d-7; and (3) if the Court concludes that either the RLUIPA or CRREA issues warrant review, certiorari should be granted in this case rather than in *Cardinal* or *Sossamon* because the Eighth Circuit, unlike the Fifth and Sixth Circuits, not only decided both issues, but also decided the prior issue, whether Congress exceeded its spending power in enacting RLUIPA. Respondents have

sought review of that issue through their cross-petition. *See Reisch v. Sisney*, No. 09-953 (filed Feb. 9, 2010).

I. Although A Split Exists In The Circuit Courts, The Eighth Circuit's Decision Is Correct And Consistent With This Court's Decisions.

Petitioner Charles Sisney argues that the Eighth Circuit's decision is wrong because the decision "rejected" *Franklin v. Gwinnett County Pub. Schools*, 503 U.S 60 (1992), ignored *Barnes v. Gorman*, 536 U.S 181 (2002), and improperly imported *Lane v. Pena*, 518 U.S. 187 (1996), "to create a categorical rule that Congress cannot effectuate a waiver of monetary relief in Spending Clause legislation absent an express unequivocal reference to damages." Pet. at 27. Petitioner is mistaken.

First, there is nothing new, as Sisney argues, in "the Eighth Circuit's categorical rule requiring express waivers for damages." *Id.*, at 28. The Eighth Circuit not only cited the uncontroversial statement in *Lane* that a waiver of the federal government's sovereignty "must be unequivocally expressed in statutory text," 518 U.S., at 192, but also noted the difference between congressional abrogation of a state's sovereign immunity through legislation and a state's waiver of immunity through acceptance of federal funds conditioned on accepting liability. Pet. App. 23a. Sisney's suggestion that Congress need not unequivocally define the scope of the remedy to which a state may be subject when it accepts federal funds contradicts clearly-established law that "the mere receipt of federal funds cannot

establish that a State has consented to suit in federal court." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985). The Eighth Circuit unavoidably considered whether in enacting RLUIPA Congress made sufficiently clear that a state accepting federal funds waived its immunity for money damages.

Second, Sisney's reliance on *Franklin*, in which this Court "presume[d] the availability of all appropriate remedies unless Congress has expressly indicated otherwise," 503 U.S., at 66, is misplaced. The Eighth Circuit noted that "*Franklin* did not involve a question of state sovereign immunity." Pet. App. 26a. Because the case did not involve governmental defendants, it cannot be used as authority for an independent waiver of sovereign immunity. "[W]hen it comes to an award of money damages, sovereign immunity places the Federal Government on an entirely different footing than private parties." *Lane*, 518 U.S., at 196. Thus, the Court held in *Lane* that "the Federal Government's sovereign immunity prohibits wholesale application of *Franklin* to actions against the Government to enforce § 504(a)" of the Rehabilitation Act. *Id.* The same is true of actions against a state on matters implicating its sovereignty.

Third, at issue in *Barnes* was whether punitive damages could be awarded in private suits brought under the Americans with Disabilities Act and the Rehabilitation Act. The Court characterized the issue as the scope of "appropriate relief" available under *Franklin's* presumption against local police officials. *Barnes*, 536 U.S., at 185. The Court considered whether punitive damages were

"appropriate relief" under Title VI of the Civil Rights Act of 1964, which itself mentioned no remedies, including even a private right of action. *Id.*, at 187. The case did not involve sovereign immunity, which no doubt explains why *Barnes* was not discussed by the Eighth Circuit in *Van Wyhe*, or by the Fifth or Sixth Circuits in *Sossamon* and *Cardinal*.

II. No Circuit Court Of Appeals Has Held That Congress Waived State Sovereign Immunity For RLUIPA Claims For Money Damages Through CRREA.

Although the Eleventh Circuit in *Smith* concluded that the phrase "appropriate relief" in RLUIPA encompasses monetary relief, thereby creating a circuit split on that issue, no circuit court of appeals has held, as did the district court in this case, that CRREA effects a waiver of state sovereign immunity for money-damage claims brought under RLUIPA. The only two circuits that have expressly considered the question have held that the Eleventh Amendment waiver expressed in CRREA does not extend to claims pleaded under RLUIPA because, contrary to Petitioner's assertion that RLUIPA "[b]y its terms" applies with equal force to discriminatory laws as well as laws of general applicability, Pet. at 5, 33, RLUIPA is not a statute "prohibiting discrimination." Pet. App. 28a-30a (absent an unequivocal textual statement that CRREA applies to Section 3 claims under RLUIPA, CRREA cannot be the basis for a knowing waiver of sovereign immunity); *Madison,* 474 F.3d, at 133 (because it is not clear that RLUIPA is a federal statute "prohibiting discrimination," ambiguity precludes

conclusion that Virginia knowingly consented to actions for damages by accepting federal funds). Sisney does not argue that this issue is, independently, of sufficient importance to warrant review by this Court. To the extent that it warrants review, however, certiorari should be granted in this case, in which the issue was actually decided, rather than in *Cardinal*, in which the issue was not addressed.

III. If Certiorari Is Granted, This Case Presents The Issues, Including The Constitutionality Of RLUIPA Pursuant To Congress's Spending Power, More Clearly Than The Decisions In *Sossamon* And *Cardinal*.

If the Court concludes that certiorari is warranted, this case is a more appropriate vehicle for the Court's consideration than either *Sossamon* or *Cardinal*.

First, Sisney frames three of the four questions that he presents for review as dependent on or relating to CRREA. Pet., at ii-iii. Similarly, the Solicitor General, who has recommended that certiorari be granted in *Cardinal v. Metrish*, No. 09-109, argues first in her invitation brief in that case that the Sixth Circuit did not even need to reach the question whether RLUIPA's authorization of "appropriate relief" is sufficiently clear to constitute a waiver of immunity to damage claims because Congress effected a waiver through CRREA. U.S. Br., *Cardinal*, at 8. As the Solicitor General herself acknowledges, however, the Sixth Circuit did not consider or decide that question. *Id.*, at 9 n.6. To

the extent that certiorari review requires consideration of CRREA as Sisney and the Solicitor General argue, this case alone directly presents the issue for review.

Second, the Solicitor General recommends that certiorari be granted in *Cardinal* and not *Sossamon* in part because the Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(e), can pose an independent bar to recovery of money damages for inmates who do not allege a physical injury. U.S. Brief, *Sossamon*, at 8-9. The district court in this case concluded that Sisney's recovery would be limited to nominal damages under the PLRA for the same reason. *Sisney v. Reisch*, 533 F.Supp.2d 952, 973-74 (D.S.D. 2008). That consideration, however, is wholly secondary to and independent of the waiver issues under RLUIPA. Whether the language of RLUIPA affects a waiver of immunity sufficient to allow a claim for money damages is antecedent to whether the inmate's recovery would be limited by the PLRA, and resolution of the questions presented in this case would not depend on the amount of Sisney's potential recovery.

Finally, as the Eighth Circuit's decision makes clear by having considered the issue first, if RLUIPA is unconstitutional because it exceeded Congress's power under the Spending Clause, then whether RLUIPA authorizes claims for money damages against state officials is a moot question. The pending cross-petition offers the Court the occasion to resolve the issue left open, but noted, in *Cutter v. Wilkinson*, 544 U.S. 709, 727 n.2 (2005) (Thomas, J., concurring) ("RLUIPA . . . may well exceed Congress' authority under either the Spending Clause or the

Commerce Clause"). RLUIPA's constitutionality under the Spending Clause is not only squarely presented by the cross-petition filed in No. 09-953, but the issue should be decided in connection with the immunity issues presented here given that Sisney and the Solicitor General rely heavily on cases based on Congress' power "to impose conditions on states when it legislates pursuant to the Spending Clause." Pet. at 29.

CONCLUSION

The Eighth Circuit correctly concluded that neither the reference to "appropriate relief" in RLUIPA nor the waiver found in CRREA is sufficient to constitute a waiver of immunity here. If the Court concludes, however, that certiorari is appropriate, then the Court should grant certiorari in this case and address as well the scope of Congress' Spending Clause power.

Respectfully submitted,

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