In the
Supreme Court of the United States

CHARLES E. SISNEY, *Petitioner,*
v.
TIM REISCH, ET AL., *Respondents,*
AND
UNITED STATES OF AMERICA, *Intervenor.*

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

PETITION FOR A WRIT OF CERTIORARI

Richard L. Johnson
300 North Dakota Avenue
Suite 406
Sioux Falls, SD 57104
Telephone: (605) 338-2626

Kathryn M. Davis
Counsel of Record
Peter R. Afrasiabi
c/o CHAPMAN UNIVERSITY
SCHOOL OF LAW
APPELLATE LITIGATION CLINIC
One University Drive
Orange, CA 92866
Telephone: (714) 628-2504

Blank Page

QUESTIONS PRESENTED

Section 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1, prohibits state governments from imposing substantial burdens on prisoners' rights of free religious exercise, even if such burdens result from a rule of general applicability. Section 3 of RLUIPA was enacted pursuant to the Spending Clause, U.S. CONST. art. I, § 8, cl. 1, and RLUIPA creates an express private cause of action to "obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2. In imposing that condition, Congress expressly defined the term "government" to include the states, state agencies and instrumentalities and state officials. 42 U.S.C. § 2000cc-5(4)(A)(i),(ii). The Fourth, Fifth, Eighth and Eleventh Circuits have concluded that by accepting federal correctional funds, states consent to federal court jurisdiction for at least some form of relief. The difficult and divisive question is whether RLUIPA's express cause of action for appropriate relief effectuates a waiver of the states' Eleventh Amendment immunity against suits for monetary damages arising under Section 3.

The Civil Rights Remedies Equalization Act (CRREA), 42 U.S.C. § 2000d-7, expressly provides that states shall not be immune under the Eleventh Amendment from suits in federal court for violations of four enumerated antidiscrimination statutes, as well as the "provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a)(1). This Court has observed that CRREA, which expressly provides for

remedies both at law and in equity, 42 U.S.C. § 2000d-7(a)(2), is an unambiguous waiver of the states' Eleventh Amendment immunity.

The questions presented are:

1. Whether RLUIPA's express cause of action coupled with CRREA's explicit waiver language is sufficient to permit monetary awards against states. Put differently, do RLUIPA and CRREA furnish clear notice that states accepting federal funds could be subjected to private damages or, instead, as the Eighth Circuit held, is Congress constitutionally required to expressly and unequivocally impose liability for damages in the text of its Spending Clause legislation?

2. Whether CRREA's unambiguous waiver of Eleventh Amendment immunity extends to government-imposed substantial burdens on religious exercise pursuant to Section 3 of RLUIPA or, instead, as the Eighth Circuit held, is CRREA limited to provisions that expressly and unequivocally reference the term "discrimination" in the statutory text?

3. Whether this Court's requirement that a waiver of federal sovereign immunity expressly and unambiguously extend to include monetary damages applies with equal force to determine whether a state federal funding recipient has knowingly and voluntarily waived its Eleventh Amendment immunity in the face of settled law and clearly expressed conditions?

4. Whether the Eleventh Amendment requires Congress to expressly specify each and every form of discrimination in Spending Clause legislation in order to effectuate a waiver pursuant to CRREA?

LIST OF PARTIES

Petitioner is Charles E. Sisney, an inmate at the South Dakota State Penitentiary.

Respondents, in their individual and official capacities, are Tim Reisch, Secretary of Corrections for South Dakota; Douglas L. Weber, Chief Warden for the Department of Corrections of South Dakota; Dennis Block, Associate Warden for the South Dakota State Penitentiary; Jennifer Wagner a/k/a Jennifer Lane, Cultural Activities Coordinator for the South Dakota State Penitentiary; and, Daryl Slykhuis, Interim Warden for the South Dakota State Penitentiary.

Intervenor is the United States of America.

James Dean Van Wyhe, an appellee in the circuit court proceedings, is not a petitioner here.

TABLE OF CONTENTS

PETITIONER'S APPENDIX

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

STATUTES

CONSTITUTIONAL PROVISIONS

Blank Page

OPINIONS BELOW

The court of appeals' opinion is reported at 581 F.3d 689. Pet. App. 1a. The district court's opinion is reported at 533 F. Supp. 2d 952. Pet. App. 41a.

JURISDICTION

The court of appeals' judgment was entered on September 10, 2009. On December 1, 2009, Justice Samuel A. Alito extended the time to file the petition for writ of certiorari until January 8, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Constitutional Provisions

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

The Spending Clause in Article I of the United States Constitution provides, in part: "The Congress shall have the Power To . . . provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1.

II. Statutory Provisions

Section 3 of the Religious Land Use and Institutionalized Person Act (RLUIPA), 42 U.S.C. § 2000cc-1, titled "Protection of religious exercise of institutionalized persons" provides:

> (a) General rule
>
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> > (1) is in furtherance of a compelling governmental interest; and
> >
> > (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (b) Scope of application
>
> This section applies in any case in which—
>
> > (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance. . . .
>
> * * * * *

Section 4 of RLUIPA, 42 U.S.C. § 2000cc-2, titled "Judicial relief" provides, in part:

> (a) Cause of action
>
> A person may assert a violation of this chapter 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.
>
> * * * * *

Section 8 of RLUIPA, 42 U.S.C. § 2000cc-5, titled "Definitions" provides, in part:

> (4) Government
>
> The term "government"—
>
> (A) means—
>
> (i) a State, county, municipality, or other governmental entity created under the authority of a State;
>
> (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and
>
> (iii) any other person acting under color of State law. . . .
>
> * * * * *

The Civil Rights Remedies Equalization Act (CRREA), 42 U.S.C. § 2000d-7, provides, in part:

> (a) General provision
>
> > (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. §§ 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. §§ 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. §§ 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> > (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.
>
> * * * * *

STATEMENT OF THE CASE

I. Factual Background

Enacted in September 2000 for the express purpose of protecting religious liberty, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc to 2000cc-5, represents "the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens." *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005). By its terms, RLUIPA broadly protects fundamental rights of free religious exercise to the greatest extent the Constitution allows, and categorically prohibits the imposition of government-imposed substantial burdens on religious liberty. 42 U.S.C. § 2000cc-3(g), § 2000cc-1(a)(1)-(2). The only exception to RLUIPA's expansive protective reach is when the government demonstrates that the burden it has imposed furthers a compelling governmental interest, and does so by the least restrictive means. 42 U.S.C. § 2000cc-1(a)(1)-(2).

Section 3 of RLUIPA protects fundamental rights of religious exercise of institutionalized persons: "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, . . . even if the burden results from a rule of general applicability," unless the government proves that the burden furthers a "compelling governmental interest" and does so by the least restrictive means." 42 U.S.C. § 2000cc-1(a)(1)-(2).

By its terms, Section 3 of RLUIPA applies with equal force to prohibit substantially burdensome

discrimination and disparate treatment, as well as government-imposed substantial burdens resulting from rules of general applicability. *Id.* Substantial burdens on the religious exercise of institutionalized persons must therefore withstand the most rigorous of scrutiny, even if they result from facially neutral rules.

As this Court has recognized, Section 3 governs state-run institutions "in which the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise." *Cutter*, 544 U.S. at 720-21; 146 Cong. Rec. S7774, S7775 ("Institutionalized residents' right to practice their faith is at the mercy of those running the institution.") RLUIPA thus "alleviates exceptional government-created burdens on private religious exercise" and protects persons who, "unable freely to attend to their religious needs" are "dependent on the government's permission and accommodation for exercise of their religion." *Cutter*, 544 U.S. at 720-21.

Enacted pursuant to the Spending Clause, U.S. CONST. art. I, § 8, cl. 1, and in response to this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507, 532-36 (1997), Section 3 prohibits the imposition of a substantial burden on religious exercise by the government "in a program or activity that receives Federal assistance." 42 U.S.C. § 2000cc-1(b)(1). RLUIPA provides a broad, express private right of action to enforce its substantive protections, and "to obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a). The term "government" is broadly defined to include:

(i) a State, county, municipality or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under State law.

Id. § 2000cc-5(4)(A).

RLUIPA expressly contemplates that private enforcement actions may be brought in federal court. 42 U.S.C. § 2000cc-2(a) (standing to bring private cause of action governed by article III of the Constitution); *Id.* § 2000cc-2(c) (restricting full faith and credit for adjudication of some claims in non-federal forum).

Since RLUIPA's enactment, institutionalized persons across the country have invoked Section 3 in private enforcement actions, seeking redress for government-imposed burdens on their fundamental rights of free exercise. Several circuit courts of appeals have construed RLUIPA's broadly-crafted, express remedial provision, and the constitutional scope of RLUIPA's substantive protections. Every circuit court to have considered the question has concluded that Section 3 constitutes a valid exercise of Congress' Spending Clause power, and several circuits have determined that, by voluntarily accepting federal correctional funds in light of RLUIPA's clearly expressed conditions, the states have consented to federal jurisdiction for at least some form of relief.

The difficult and divisive question has been whether RLUIPA's express cause of action for

appropriate relief against the states is sufficiently clear to effectuate a knowing waiver of Eleventh Amendment immunity from monetary damages. On this fundamental question of constitutional and federal law, the circuit courts are deeply and profoundly split, on both the answer and doctrinal approach. The Fourth, Fifth, Sixth, Seventh and Eighth Circuits have declined to find consent absent an express textual waiver of immunity that unambiguously extends to monetary damages. The Eleventh Circuit, employing traditional rules of construction derived from this Court's Spending Clause jurisprudence, has not required an explicit reference to money damages, instead finding knowing consent to all appropriate remedies based on the voluntary acceptance of federal funds in the face of RLUIPA's broad provision for private enforcement and settled presumptions of law.

The Eighth Circuit, here, rejected the Eleventh Circuit's approach, concluding that nothing short of an unequivocal expression of elimination of immunity from private damages in the statutory text could effectuate waiver. The court further refused to find waiver under the Civil Rights Remedies Equalization Act (CRREA), 42 U.S.C. § 2000d-7(a), concluding that absent an express textual reference to "discrimination," Section 3 was not a federal statute prohibiting discrimination by recipients of federal funds within the scope of that Act. In so finding, the Eighth Circuit solidified a direct and irreconcilable circuit split, and departed from this Court's jurisprudence in profoundly consequential ways.

Petitioner Charles Sisney (Sisney) is an inmate at the South Dakota State Penitentiary, where he is confined for life and practices the Jewish faith. Sisney brought this action against South Dakota prison officials in their individual and official capacities asserting claims of governmental interference with his rights of free religious exercise under RLUIPA and the Constitution.[1] Pet. App. 43a-46a. Sisney invoked Section 3 of RLUIPA, challenging the prison officials' repeated denials of his requests for religious accommodation on the basis that the unjustified denials substantially burdened his fundamental rights of free religious exercise. Over a period of years, Sisney made several formal requests, which were denied.

Of relevance here, Sisney sought to celebrate the seven-day Jewish festival of Sukkot, in accordance with the dictates of his faith, by taking his meals outdoors in a succah booth. Pet. App. 82a-88a. Sisney did not have a succah booth, and he did not ask the prison to acquire one. Rather, inmates at another South Dakota prison donated a small booth for Sisney and other Jewish inmates to use.[2] Pet. App. 82a.

---

[1] Sisney also claimed retaliation and constitutional violations, which are not at issue here. Pet. App. 38a-39a.

[2] A succah is a three-sided covered booth, in which individuals who practice Judaism eat their meals during Sukkot, a religious festival of thanksgiving commemorating the temporary shelter of the Jews during their wandering in the wilderness. Pet. App. 33a, 82a.

Sisney requested to use the booth during the week of Sukkot in 2003, but his request was denied. Pet. App. 82a-83a.

In 2004, Sisney renewed his request, and again asked to celebrate Sukkot by taking his lunch meals outdoors in the succah for seven days. Pet. App. 83a. The prison refused on grounds of security, and that prison policy prohibits the transfer of property between inmates. Pet. App. 83a-85a. In denying Sisney's request, the associate warden compared the succah to the prison's Native American sweatlodge, which is maintained in the recreation yard and used year-round by hundreds of Native American inmates. According to the warden, the succah posed a security risk, in part, because inmates are shielded from view and, unlike the sweatlodge (a fully-enclosed, permanent structure), the succah is temporary and can be easily destroyed. Pet. App. 84a. In lieu of allowing the succah, the prison granted the Jewish inmates 30 minutes during each day of Sukkot to gather in the Phone Room to recite blessings. Pet. App. 85a.

Sisney also requested to celebrate in the succah during the week of Sukkot in 2005, and again in 2006. Pet. App. 85a. Both requests were denied.

Independently, Sisney sought additional time to gather with other Jewish inmates for group Torah, Kabalistic and Hebrew language studies. Pet. App. 91a-92a. Sisney requested more time for his religious studies because, he asserted, the regularly scheduled twice-weekly services were inadequate because they were dedicated to worship, and left no time for group study of religious texts. Pet. App. 91a. Sisney's

request noted that other religious groups were allowed significantly more time for weekly services, including 6 periods per week for Native Americans, 10 periods per week for Catholics and 8 periods per week for Christians. Pet. App. 91a. When the associate warden denied Sisney's request, he did so by stating: "You have ample time during Shabbat Service to study Torah." Pet. App. 92a.

Finally, Sisney sought to use and possess a tape player so that he could study Hebrew in his cell.[3] Pet. App. 97a-98a. Sisney's request was denied on the basis that no inmates of any faith are permitted to possess tape players in their cells. *Id.*

Sisney engaged the prison grievance process, and informed prison policymakers about the discriminatory and burdensome treatment Sisney believed he received. Pet. App. 50a. Sisney's requests for administrative remedy were denied, and no formal action was taken to ensure his religious rights were not unlawfully restricted. Pet. App. 50a-51a.

In response, Sisney brought this action in the United States District Court for the District of South Dakota challenging the denials as discriminatory and substantially burdensome in violation of RLUIPA, and seeking injunctive and monetary relief. Pet. App. 46a.

II. District Court's Opinion

The prison officials sought summary judgment asserting qualified immunity and Eleventh

---

[3] Sisney advanced other RLUIPA challenges, which are not at issue here. Pet. App. 89a-102a.

Amendment immunity, and challenging the constitutionality of RLUIPA on various grounds. Pet. App. 42a-43a. The United States intervened for the purpose of opposing the constitutional challenge. The district court denied summary judgment, upholding the constitutionality of RLUIPA as a valid exercise of Congress' Spending Clause power, and rejecting the balance of the officials' constitutional claims.[4] Pet. App. 102a-112a. The court granted summary judgment on the individual capacity claims, finding that RLUIPA was enacted pursuant to the Spending Clause; thus, Congress was precluded from subjecting non-recipients of federal funds to private liability. Pet. App. 58a-61a.

On the Eleventh Amendment question, the district court denied summary judgment, concluding that RLUIPA's remedial provision for "appropriate relief" expressly permits recovery of monetary damages and, that by accepting federal correctional funds, South Dakota waived its immunity from suits for monetary damages under CRREA. Pet. App. 57a-58a.

In a comprehensive and detailed opinion, the district court examined this Court's Spending Clause jurisprudence and considered the split in authority between the Fourth and Eleventh Circuits on the question whether the text of RLUIPA's private right of action is sufficiently clear to effectuate a waiver of Eleventh Amendment immunity from suits for damages. The court weighed the Fourth Circuit's approach, and agreed that mere participation in a federal funding program is insufficient to waive

---

[4] The district court upheld RLUIPA against other constitutional challenges not relevant here. Pet. App. 112a.

immunity. Pet. App. 64a-66a. The court concluded that RLUIPA's reference to "appropriate relief" failed to unambiguously require waiver of Eleventh Amendment immunity for monetary damages as a condition of accepting funds. Pet. App. 67a-70a.

Finding the absence of an unequivocal waiver in the text of RLUIPA was not dispositive on the question of immunity, the district court considered whether RLUIPA falls within the scope of CRREA – a statute, which explicitly declares that a State shall not be immune under the Eleventh Amendment from suits for violations of a federal statute prohibiting discrimination by federal funding recipients. In rejecting the Fourth Circuit's strict construction requiring an express textual reference to "discrimination," the district court found RLUIPA was a statute prohibiting discrimination by federal funding recipients under CRREA. Pet. App. 70a-72a.

Recognizing that "[t]he right to exercise one's religion is clearly a fundamental freedom," and observing that Congress found "prison officials were discriminating against prisoners who sought to exercise their religious beliefs," the district court concluded that RLUIPA was enacted, in part, "to prohibit discrimination by prison officials against prisoners who desire to exercise their religious beliefs." Pet. App. 71a. In so finding, the court invoked the Seventh Circuit's observation that: "RLUIPA follows in the footsteps of a long-standing tradition of federal legislation that seeks to eradicate discrimination and is 'designed to guard against unfair bias and infringement of fundamental freedoms.'" Pet. App. 71a (quoting *Charles v. Verhagen*, 348 F.3d 601, 607 (7th Cir. 2003) (quoting *Mayweathers v. Newland*,

314 F.2d 1062, 1066-67 (9th Cir. 2002)). Thus, according to the court, South Dakota waived its immunity from monetary damages under CRREA by accepting federal funds. Pet. App. 72a.

Turning to the scope of the waiver, the district court examined whether RLUIPA authorizes monetary damages. Acknowledging that the Fourth and District of Columbia Circuits have recognized that RLUIPA could be read to extend to damages, the court agreed with the Eleventh Circuit's decision in *Smith v. Allen*, 502 F.3d 1255, 1270 (11th Cir. 2007), that in light of the presumption this Court accords such remedial language, RLUIPA's express right of action "to obtain appropriate relief against a government" is broad enough to encompass the right to recover monetary damages for statutory violations. Pet. App. 72a-73a. In so doing, the court adopted the Eleventh Circuit's reasoning that in using the broad, general language of "appropriate relief" in RLUIPA, Congress was aware of the "presumption in favor of making all appropriate remedies available to the prevailing party," established by this Court in *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 73 (1992), and its progeny. Pet. App. 73a (citing *Smith*, 602 F.3d at 1270-71). Congress could have, but chose not to, limit remedies to injunctive relief. In light of the *Franklin* presumption, and absent an expressed contrary intent, the court concluded that RLUIPA encompasses claims for monetary relief. Pet. App. 73a.

The court further concluded that even if RLUIPA lacked an express, broad remedial provision, this Court's decision in *Barnes v. Gorman*, 536 U.S. 181, 187 (2002), authorizes recovery of compensatory damages. According the district court, RLUIPA was

enacted under Congress' Spending Clause power and, in discussing the permissible scope of remedies for which funding recipients may be held liable in Spending Clause legislation, this Court observed:

> A funding recipient is generally on notice that it is subject to those remedies traditionally available in suits for breach of contract. Thus we have held that under Title IX, which contains no express remedies, a recipient of federal funds is nevertheless subject to suit for compensatory damages and injunction, forms of relief traditionally available in suits for breach of contract.

Pet. App. 73a-74a (quoting *Barnes*, 536 U.S. at 187).

Following *Barnes*, the district court concluded that where Congress did not expressly preclude monetary damages in RLUIPA, South Dakota was on notice that it is subject to that remedy "because an award of compensatory damages is a form of relief traditionally available in suits for breach of contract." Pet. App. 74a.

Turning to the merits of the RLUIPA claims, the court denied summary judgment in relevant part, finding Sisney demonstrated a substantial burden on his free exercise rights regarding the prison officials' denial of his requests to celebrate Sukkot in the succah, engage in group religious text studies, and use a tape player in his cell for Hebrew language studies. Pet. App. 85a-98a. In rejecting the prison officials' proffered justifications, the district court questioned the neutrality of the stated interest and noted evidence

of unequal treatment. Pet. App. 86a-88a (questioning legitimacy of security concerns asserted as grounds for denying succah where Native American sweatlodge posed similar, or greater threat); *id.* 92a-94a (factual issues where non-Jewish religions were provided more worship time than Jewish inmates, and were allocated separate time for group religious text studies).

Regarding the tape player, the court rejected the contention that the facially neutral policy justified the denial because RLUIPA prohibits substantial burdens on religious exercise, even if they result from rules of general applicability. Pet. App. 97a-98a.

III. Eighth Circuit's Opinion

The Eighth Circuit affirmed the district court's conclusion that RLUIPA is a constitutional exercise of Congress' Spending Clause power, but reversed the denial of summary judgment on Eleventh Amendment grounds. Pet. App. 22a-30a. The United States intervened to support RLUIPA's constitutionality.

In finding Section 3 constitutional, the Eighth Circuit determined that a state prison receiving funds under RLUIPA does so on two conditions: (1) that prison officials not impose a substantial burden on an inmate's free exercise unless the burden is justified by a compelling state interest achieved through the least restrictive means, and (2) that the state must submit to judicial proceedings for "appropriate relief" to enforce RLUIPA. Pet. App. 16a. In so concluding, the Eighth Circuit found that RLUIPA unambiguously conditions federal funds on the states' consent to provide heightened religious protection to inmates, and to submit to private enforcement actions. Pet. App. 17a-19a.

Recognizing Congress' interest in protecting inmates' religious exercise and power under the Spending Clause provide greater protection for religious exercise beyond what the Constitution requires, the Eighth Circuit joined the Fourth, Fifth, Sixth, Seventh, Ninth and Eleventh Circuits in upholding the constitutionality of RLUIPA. Pet. App. 22a-23a.

In considering the Eleventh Amendment challenge, the Eighth Circuit expressly acknowledged Congress' power under the Spending Clause to condition federal funds on the states' waiver of sovereign immunity, and again recognized that, in RLUIPA, Congress conditioned the acceptance of funds on the states' consent to "appropriate relief." Pet. App. 23a-25a. In so finding, the court reiterated that RLUIPA expressly creates a private right of action "'for at least some form of relief'" (Pet. App. 25a (quoting *Madison v. Virginia*, 474 F.3d 118, 130 (4th Cir. 2006)), and that the phrase "appropriate relief," is "broad enough to include both injunctive relief and compensatory damages." *Id.*

But while these conditions are sufficiently clear to overcome a Spending Clause challenge, the court required that such language must also "*unambiguously* extend[] to monetary claims" in order to effectuate a waiver of Eleventh Amendment immunity. Pet. App. 25a. In adopting this rule, the Eighth Circuit relied on *Lane v. Pena*, 518 U.S. 187, 192 (1996), a case in which this Court, construing the sufficiency of Congress' abrogation of the federal government's sovereign immunity stated: "To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend

unambiguously to such monetary claims." *Id.* The Eighth Circuit did not purport to consider *Barnes*, or this Court's related Spending Clause jurisprudence.

Instead, the court relied exclusively on *Lane* – a decision, which did not involve Spending Clause power or the states' knowing consent to statutory conditions, and which the Eighth Circuit categorically characterized as "reject[ing] any idea that sovereign immunity could be waived by anything other than the 'unequivocal expression of elimination of sovereign immunity . . . in statutory text.'" Pet. App. 26a-27a (quoting *Lane*, 518 U.S. at 192 (internal citations omitted). Thus, according to the Eighth Circuit, notwithstanding that a state has voluntarily consented to adhere to RLUIPA's heightened substantive requirements and to submit to private enforcement actions for appropriate relief, which could include compensatory damages, (and notwithstanding that such conditions are constitutionally imposed), absent an unequivocal express textual reference to monetary damages, that state's consent extends solely to injunctive relief.

In so finding, the Eighth Circuit acknowledged a direct conflict among the circuit courts of appeals, which has now become deeply entrenched, with the Fifth, Sixth, Seventh and Eighth Circuits following the Fourth Circuit's decision in *Madison v. Virginia*, 474 F.3d at 130, which, like the Eighth Circuit here, imported this Court's rule in *Lane* governing statutory abrogation of the federal government's sovereign immunity to conclude that RLUIPA's "appropriate relief" language "'falls short of the unequivocal textual expression necessary to waive the State immunity from suits for

damages.'" Pet. App. 25a-26a (quoting *Madison*, 474 F.3d at 130 and citing circuit cases).

In further solidifying the circuit split, the Eighth Circuit categorically rejected the Eleventh Circuit's decision in *Smith v. Allen*, 502 F.3d at 1271, which held "that, absent an intent to the contrary, the phrase 'appropriate relief' in RLUIPA encompasses monetary as well as injunctive relief," and its concomitant reliance on this Court's decision in *Franklin*, 503 U.S. 60. Pet. App. 26a. The Eighth Circuit acknowledged *Franklin's* articulation of a presumption in favor of making *all* appropriate remedies available when Congress employs broad remedial language in a Spending Clause statute, but refused to extend that rule to the remedial language in RLUIPA. According to the Eighth Circuit, *Franklin* does not apply because it did not involve the question of state sovereign immunity, and this Court had no occasion to squarely consider whether statutory language at issue was specific enough to effectuate a knowing waiver. Pet. App. 26a-27a.

The Eighth Circuit, again following *Madison*, applied the same rationale to conclude that Section 3 of RLUIPA is not a "Federal statute prohibiting discrimination by recipients of Federal financial assistance" within the meaning of CRREA. Pet. App. 28a. Requiring an express textual reference to the word "discrimination," the court found that Section 3 does not "unambiguously prohibit discrimination – it prohibits substantial burdens on religious exercise, without regard to discriminatory intent." *Id.* The court noted that Section 2 of RLUIPA, in contrast to Section 3, expressly prohibits discrimination and unequal treatment, and that

all the civil rights statutes enumerated in CRREA (Title IX, Title VI, the Age Discrimination Act and the Rehabilitation Act) reference discrimination as well. Again, without considering *Barnes* or the clear notice requirement applicable to Spending Clause legislation, and without construing the substantive text of Section 3 and its strict scrutiny standard, the Eighth Circuit concluded that "[a]bsent an unequivocal textual indication that CRREA applies to Section 3," CRREA does not "effectuate a knowing waiver of sovereign immunity from money damages on those claims." Pet. App. 29a-30a.

On the merits of the RLUIPA claims, the court of appeals affirmed the district court's denial of summary judgment, finding that Sisney established that the denial of his request to use a succah – "'a mandatory part of the Sukkot Festival' and essential to the practice of [Sisney's] Jewish faith" imposed a substantial burden on his religious exercise under RLUIPA. Pet. App. 33a-34a. The court of appeals reversed summary judgment on the two surviving claims for injunctive relief and remanded for judgment in favor of the prison officials. Pet. App. 34a-37a.

REASONS FOR GRANTING THE WRIT

I. THERE IS A DIRECT AND IRRECONCILABLE CONFLICT AMONG THE CIRCUITS ON WHETHER RLUIPA CONSTITUTIONALLY EFFECTUATES A WAIVER OF ELEVENTH AMENDMENT IMMUNITY FROM MONETARY DAMAGES

The Eighth Circuit's sweeping conclusion that Congress cannot constitutionally exercise its Spending Clause power to condition federal funds on consent to suits for monetary damages absent anything other than an unequivocal expression of elimination of immunity from damages solidifies an intractable and irreconcilable conflict among the circuit courts of appeals, which only this Court can resolve. In limiting the scope of RLUIPA's remedial provision, the Eighth Circuit acknowledged the deeply entrenched split among the circuits on this critical question, with the Fourth, Fifth, Sixth and Seventh Circuits holding that RLUIPA does not effectuate a waiver of immunity against suits for monetary damages, and the Eleventh Circuit holding that RLUIPA does effectuate a waiver. *Compare Cardinal v. Metrish*, 564 F.3d 794 (6th Cir. 2009), *Sossamon v. Texas*, 560 F.3d 316 (5th Cir. 2009), and *Madison*, 474 F.3d 118, *with Smith*, 502 F.3d 1255.[5]

---

[5] Petitions for writ of certiorari are pending in two of these cases – *Sossamon v. Texas*, Docket No. 08-1438, and *Cardinal v. Metrish*, Docket No. 09-109. This Court invited briefing from the Solicitor General to express the United States' views in both cases.

In *Madison*, 474 F.3d at 129-32, the Fourth Circuit construed RLUIPA to create an express private right of action to obtain appropriate relief against the government, including states, and determined that because Virginia had clear notice of this condition, "[b]y voluntarily accepting federal correctional funds, it consented to federal jurisdiction for at least some form of relief." *Id.* at 130 (citing *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004) ("[State] was on clear notice that by accepting federal funds for its prisons, [it] waived its immunity from suit under RLUIPA."). According to the Fourth Circuit, however, that RLUIPA unambiguously conditions federal funds on consent to suit in federal court is insufficient to waive full immunity absent an express textual reference to monetary relief.

The Fourth Circuit did not purport to consider this Court's decisional law governing Congress' power to effectuate a waiver a Eleventh Amendment immunity from suit through clearly noticed conditions in Spending Clause legislation, and it failed to expressly consider this Court's decisions in *Franklin* and *Barnes*. Instead, relying exclusively on the rules that apply when Congress waives the federal government's sovereign immunity, the Fourth Circuit required an unequivocal textual waiver that extends unambiguously to monetary claims. *See id.* at 131-32 (citing *Lane*, 518 U.S. at 192 ("To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims."); *United States v. Nordic Village*, 503 U.S. 30, 34 (1992) (refusing to imply waiver of federal immunity from money damages absent an "unequivocal

expression" in text where statute could be read either to include, or preclude damages); *Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006) (finding "appropriate relief" provision of RFRA insufficient to waive federal immunity from damages suits because the "broad term" might include damages, or, plausibly, might not)). The court concluded that because "appropriate relief" is susceptible of more than one interpretation, it failed to constitute an unequivocal textual waiver of immunity extending unambiguously to money damages.[6] *Id.* at 132.

In *Smith*, 502 F.3d at 1269-71, the Eleventh Circuit, noting the division of authority took an entirely different approach and reached the opposite conclusion. Following the rule in *Franklin*, 503 U.S. at 68-69, that absent express congressional intent to the contrary, federal courts should presume the availability of *all* appropriate remedies, the Eleventh Circuit found RLUIPA's "appropriate relief" provision broad enough to encompass monetary damages and effectuate waiver. The question presented in *Franklin* was whether the

---

6 *Madison's* reliance on *Shea v. County of Rockland*, 810 F.2d 27, 29-30 (2d Cir. 1987) for the proposition that "appropriate relief" ordinarily includes injunctive and equitable relief, contravenes the presumptions accorded by *Franklin* and *Barnes*, and it could be misleading. The provision at issue in *Shea* referenced "appropriate relief" exclusively in terms of injunction and reinstatement. In contrast, RLUIPA broadly authorizes, without express or implied limitation, the private right to obtain "appropriate relief" against the states. The only limitations run against the United States, whose remedies are expressly limited to declaratory and injunctive relief. 42 U.S.C. § 2000cc-2(f).

implied right of action under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, supported a claim for monetary damages in light of the longstanding rule that absent clear direction to the contrary by Congress, federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute. In finding a right to damages, this Court noted the traditional rule that "if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief." *Franklin*, 503 U.S. at 69.

Of particular significance in *Franklin* (although not noted in *Smith*), was the fact that Congress enacted CRREA (which expressly waived Eleventh Amendment immunity from suits arising under Title IX) *after* this Court implied a private right of action, but Congress failed to expressly limit the available remedies. Having failed in the face of an implied right of action to abrogate the traditional presumption in favor of any appropriate relief, this Court presumed that Congress enacted CRREA with the traditional presumption in mind.[7] *Franklin*, 503 U.S. at 72-73; *id.* at 78 (Scalia, J., concurring) (stating CRREA was an "implicit acknowledgement that damages are available.").

Following *Franklin*, the Eleventh Circuit thus presumed Congress was aware of the traditional presumption when, in enacting RLUIPA, Congress

---

[7] Notably, while CRREA references "remedies both at law and in equity," it does not unequivocally, or even expressly, reference compensatory damages. 42 U.S.C. § 2000d-7(a)(2).

expressed no intent to limit the remedies for statutory violations and, instead, employed broad language authorizing private enforcement actions with the right to obtain "appropriate relief." *Smith*, 502 F.3d at 1270-71; *id.* at 1276 n.12; *see also Benning*, 391 F.3d at 1305-06 (noting RLUIPA expressly defines "government" to include states and state agencies; thus, "Georgia was on clear notice that by accepting federal funds for its prisons, Georgia waived its immunity from suit under RLUIPA."); *id.* at 1306 (quoting *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1293 (11th Cir. 2003) ("Where Congress has unambiguously conditioned the receipt of federal funds on a waiver of immunity, . . . a state can [not] continue to accept federal funds without knowingly waiving its immunity.")).

In *Sossamon*, 560 F.3d 316, the Fifth Circuit, noting the split in authority, sided with the Fourth Circuit and concluded that "RLUIPA is clear enough to create a right for damages on the cause-of-action analysis, but not clear enough to do so in a manner that abrogates state sovereign immunity from suits for monetary relief." *Id.* at 331. In finding that RLUIPA was unclear regarding the scope of states' liability for violations, the Fifth Circuit adopted the rule in *Madison* that waiver must textually and unambiguously extend to monetary claims. In rejecting the Eleventh Circuit's rule, the Fifth Circuit summarily concluded that the *Franklin* presumption "disappear[s]" in the face of an ambiguous provision involving immunity: "We may not presume the [traditional rule] when we ask whether a state knowingly waived its immunity from damages when damages are not *expressly provided*." *Id.* at 331.

The Fifth Circuit cited no decision from this Court, or any other, limiting the scope and reach of *Franklin*.

In *Cardinal*, 564 F.3d 794, the Sixth Circuit, noting the lack of consensus among the circuit courts, surveyed the holdings of *Madison*, *Smith* and *Sossamon* and ultimately sided with the Fourth Circuit to require an "unequivocal expression" of liability for damages. *Id.* at 799-801. Invoking *Lane* and *Nordic Village*, the Sixth Circuit required an unequivocal expression of waiver against suits for monetary damages. In declining to follow *Franklin*, the Sixth Circuit stated: "The Supreme Court has recognized that *Franklin* is not per se applicable to all claims against a State, but only to claims in which a State has expressly waived its sovereign immunity." *Id.* at 800-01 (citing *Lane*, 518 U.S. at 196-97). But *Lane* created no such rule as against states in the Eleventh Amendment context, and it did not purport to limit *Franklin* in cases where Congress creates an express right of action to enforce a federal statute. *See id.* at 197-98. *Lane* did not involve state defendants, or a challenge to the scope of appropriate remedies. In considering when the *federal* government expressly consents to damages in a federal statute, *Lane* held: "Where a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived." *Id.* at 196-97.

In *Nelson*, 570 F.3d 868, the Seventh Circuit, noting the division of authority, sided with the Fourth and Fifth Circuits. Turning *Franklin* on its head, the Seventh Circuit agreed that by employing the phrase "appropriate relief," Congress necessarily foreclosed any

argument that RLUIPA waives immunity from damages, and that the *Franklin* presumption simply does not apply in the Eleventh Amendment context. The Seventh Circuit summarily concluded: "damages must be 'expressly provided' in the statute in order for a court to find that a state has waived immunity to such suits." *Id.* at 884 (quoting *Sossamon*, 560 F.3d at 331). In importing the express waiver requirement, the Seventh Circuit, like its predecessors, failed to consider *Barnes*, or this Court's Spending Clause jurisprudence.

This Court should not tolerate a split among the circuit courts on such a critical issue as the Eleventh Amendment – particularly, where, as here, the enforcement of a federal civil rights statute involving fundamental rights of religious freedom is at issue.

The Eighth Circuit, here, in adopting *Madison*, rejecting *Smith* and *Franklin*, and importing *Lane* 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 solidifies an entrenched and intractable conflict among the circuit courts of appeals. This split in circuit authority reflects profoundly disparate approaches on the fundamental question of state sovereignty, and the intersection between the Eleventh Amendment and Congress' Spending Clause power. The conflict is irreconcilable, and cannot be resolved without intervention by this Court. Uniformity and clarity on the question of immunity are critical, particularly, given RLUIPA's long history and Congress' repeated attempts to constitutionally effectuate RLUIPA's intended purpose to broadly protect religious liberty.

The Eighth Circuit's categorical rule requiring express waivers for damages substantially limits the scope of RLUIPA's private right of enforcement and potentially implicates all remedial Spending Clause legislation that seeks to condition federal funding on consent to private suits. This Court has not required that Congress expressly reference monetary relief when conditioning federal funds, nor expressed that a textual reference to damages is necessary to secure states' voluntary and knowing consent to suit. This Court has not imported *Lane* to limit Congress' Spending Clause power vis-à-vis the states, or to alter its Eleventh Amendment jurisprudence. Nor has it repudiated *Franklin* when construing the scope of the states' consent to suit in Spending Clause programs. Yet, circuit courts continue to adopt *Madison* and its progeny without independent scrutiny or reservation.

The Eighth Circuit's rule precludes damages for *any* violation of RLUIPA, whether it arises under Section 2 or Section 3, and regardless of whether an intentional discriminatory violation of RLUIPA has been established. If, too, individual capacity suits are indeed foreclosed by the Spending Clause, institutionalized persons subjected to discriminatory deprivations of religious liberty, whose right to practice their faith is at the mercy of the state, have no meaningful recourse against state officials who, undeterred until the eleventh hour, unilaterally render an inmate's action moot.

Five circuits have acknowledged the division in authority on this critical question, and this Court should not tolerate continuing disparity and uncertainty. This petition joins two others pending before the Court, each

seeking resolution on this important federal question. This Court should heal the breach, and clarify whether Congress is constitutionally required to expressly reference damages in effectuating a waiver pursuant to the Spending Clause, so that the lower federal courts and, if necessary, Congress, can respond accordingly.

II. THE EIGHTH CIRCUIT'S DECISION CONTRAVENES *BARNES* AND *FRANKLIN*, AND OTHER DECISIONS OF THIS COURT

In requiring an unequivocal express textual reference to monetary damages, the Eighth Circuit directly contravened *Barnes v. Gorman*, 536 U.S. 181 (2002), and other decisions of this Court. It is true that a state does not automatically waive its immunity merely by accepting federal funds. But it is equally true that a state's acceptance of federal financial assistance in the face of a condition clearly expressed by Congress may give rise to a waiver of Eleventh Amendment immunity, even in the absence of any express statement of waiver by the state or its legislature. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985).

This Court has long recognized Congress' power to impose conditions on states when it legislates pursuant to the Spending Clause and, that unlike legislation enacted under the Fourteenth Amendment, Spending Clause legislation is much in the nature of a contract. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). "The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts"

the contract's terms. *Id.* When Congress imposes a condition it must, of course, do so unambiguously. *Id.*

The question in determining whether Congress has unambiguously conditioned federal funds is whether the statute "furnishes clear notice regarding the liability at issue." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). While states cannot consent to conditions for which they are unaware or unable to ascertain, liability will attach if, the state official engaged in the funding process "would clearly understand" the scope of the state's obligations.[8] *Id.*

Still, this Court has routinely applied a contract-law analogy in defining the scope of conduct for which state funding recipients may be liable for monetary awards, and in finding a damages remedy for private enforcement actions under Spending Clause legislation. *See, e.g.*, *Barnes*, 536 U.S. at 186 ("We have repeatedly characterized [Title VI] and other Spending Clause legislation as 'much in the nature of a *contract*: in return

---

[8] This notice requirement, which applies where states voluntarily participate in federal funding programs, requires Congress to "manifest[] a clear intent to condition participation in the programs funded under the [statute] on a State's consent to waive its constitutional immunity." *Atascadero*, 473 U.S. at 247. This is distinct from the "unequivocal expression" of an "unmistakable congressional purpose" this Court requires when Congress abrogates immunity of non-consenting states under the Fourteenth Amendment, *id.* at 239, 242-47, and from the test this Court applies when states voluntarily through constitutional or statutory provisions waive their immunity by "'the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction,'" *id.* at 239-40 (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)).

for federal funds, the [recipients] agree to comply with federally imposed conditions." (quoting *Pennhurst*, 451 U.S. at 17)). The touchstone is notice: funding recipients must have clear notice that they could be held liable.

In *Barnes*, this Court considered the general rule stated in *Franklin* that "'absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief'" for violation of a federal right, and *Franklin's* finding of a private damages remedy. 536 U.S. at 184 (quoting *Franklin*, 503 U.S. at 70-71). Applying the contract-law analogy to determine the proper scope of that remedy, this Court held that a remedy is appropriate relief under *Franklin*, "only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Id.* at 187 (emphasis in original). The Court stated:

> A funding recipient is generally *on notice that it is subject . . . to those remedies traditionally available in suits for breach of contract.* Thus we have held that under Title IX, which contains no express remedies, a recipient of federal funds is *nevertheless subject to suit for compensatory damages*, and injunction, forms of relief traditionally available in *suits for breach of contract.*

Id. (citations omitted) (emphasis added).

Here, the Eighth Circuit recognized that RLUIPA unambiguously conditions federal funds on the state's consent to provide heightened religious protection to inmates, and to submit to private enforcement actions in federal court, and that the phrase

"appropriate relief," is "broad enough to include both injunctive relief and compensatory damages." Pet. App. 25a. Based on this construction, and under *Barnes*, *Franklin* and *Pennhurst*, a state has adequate notice that it could be liable for damages for, *at least*, an intentional violation of RLUIPA. *See, e.g.*, *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642 (1999) ("*Pennhurst* does not bar a private damages action under Title IX where the funding recipient engages in intentional conduct that violates the clear terms of the statute."). In requiring an express textual reference to monetary damages, the Eighth Circuit contravened this Court's Spending Clause jurisprudence.[9]

III. THE EIGHTH CIRCUIT CONTRAVENES THIS COURT'S DECISIONS GOVERNING FREE EXERCISE AND DISCRIMINATION, AND OTHER CIRCUIT COURT DECISIONS

CRREA provides, in part:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the

---

[9] *Lane*, 518 U.S. 187, does not mandate otherwise. That case involved an express statutory waiver of *federal* sovereign immunity and did not purport to repudiate *Pennhurst, Franklin* or *Atascadero* in the Eleventh Amendment context. *Lane* did not involve a challenge to the scope of a private remedy – rather, this Court refused to find waiver because the respondent (an executive agency) was not a "Federal provider of financial assistance" within the meaning of the Rehabilitation Act. *Id.* at 195.

> Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other *Federal statute prohibiting discrimination by recipients of Federal financial assistance.*

42 U.S.C. § 2000d-7(a)(1) (emphasis added).

Every circuit that has considered the question has held that CRREA "unambiguously conditions a state agency's acceptance of federal funds on its waiver of Eleventh Amendment immunity." *Barbour v. Washington Metro. Area Transit Auth.*, 374 F.3d 1161, 1164 & n.1 (D.C. Cir. 2004). This Court, too, albeit in dictum, has concluded the same. *Lane*, 518 U.S. at 200.

Patterned after longstanding federal anti-discrimination legislation enacted pursuant to the Spending Clause, RLUIPA, by its plain terms, is a "Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a).

In requiring that Section 3 contain an express reference to the term "discrimination" as a condition of finding a clear statement of waiver, the Eighth Circuit contravened this Court's decisions construing the Free Exercise Clause, antidiscrimination law and RLUIPA.

This Court has recognized that Section 3 of RLUIPA prohibits discrimination by prison officials against prisoners on the basis of their religion, and that RLUIPA affords even greater protections to institutionalized persons than what the Constitution requires. *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005) ("RLUIPA is the latest of long-running congressional

efforts to accord religious exercise heightened protection from government-imposed burdens"). RLUIPA protects the religious liberty of those confined to state-run institutions in which, as this Court observed: "the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise." *Id.* at 720-21 (RLUIPA "alleviates exceptional government-created burdens on private religious exercise" and protects persons who, "unable freely to attend to their religious needs" are "dependent on the government's permission and accommodation for exercise of their religion.").

In hearings spanning three years, Congress documented that "frivolous or arbitrary" barriers impeded the religious exercise of institutionalized persons. *See* 146 Cong. Rec. S7774, S7775 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) ("Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways."); *Cutter*, 544 U.S. at 716 & n.5 (reciting instances of nationwide disparate treatment by state prison officials of inmates on the basis of their religion).

Thus, "[t]o secure redress for inmates who encountered undue barriers to their religious observances, Congress carried over from [the Religious Restoration Freedom Act] the 'compelling governmental interest'/'least restrictive means' standard." *Cutter*, 544 U.S. at 716-17. In so doing, Congress through RLUIPA mandated a more searching standard of review for free exercise burdens than the Constitution itself affords. *Cf. Turner v.*

Safley, 482 U.S. 78, 89 (1987) (prison rules of general applicability upheld against free exercise challenge if reasonably related to legitimate penological interest).

Indeed, the entire purpose of RLUIPA was to provide heightened protection against government-imposed burdens on free religious exercise, and to require the government to satisfy strict scrutiny to justify such burdens – *regardless* of whether they result from intentional discrimination or facially neutral rules of general applicability. *See generally Cutter*, 544 U.S. at 714-17 (discussing *Employment Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872, 878-87 (1990), 42 U.S.C. § 2000bb *et seq.*, and *City of Boerne v. Flores*, 521 U.S. 507, 532-36 (1997)); *see also* 42 U.S.C. § 2000bb(a)(2) ("laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."); *id.* § 2000bb(b)(1) (restoring pre-*Smith* compelling interest test and "to guarantee its application in all cases where free exercise of religion is substantially burdened").[10]

By its terms, Section 3 categorically prohibits the imposition of substantial burdens on religious exercise:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of [title 42], *even if the burden results from*

---

10 While no longer applicable against the states, the substantive provisions in 42 U.S.C. § 2000bb-1 mirror those in Section 3 and were incorporated therein. *Cutter*, 544 U.S. at 717.

> *a rule of general applicability*, unless the government demonstrates that imposition of the burden on that person—
>
> > (1) is in furtherance of a compelling governmental interest; and
> >
> > (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a)(1),(2) (emphasis added).

By its terms, Section 3 bans *all* substantial burdens, whether they result from intentional discrimination or general rules of applicability. The only exception to this broad prohibition applies when strict scrutiny is satisfied. That Section 2 expressly references discrimination does not narrow the categorical scope of Section 3. Indeed, it reinforces the plain fact that Section 3 bans all burdens, whether discriminatory in purpose, or in effect.

In recognizing that RLUIPA provides heightened protection, this Court has implicitly acknowledged what the plain text of Section 3 makes clear – namely, that the Free Exercise Clause is a constitutional floor, not a ceiling. *See Cutter*, 544 U.S. at 714. To be sure, the Constitution unequivocally prohibits intentional government-imposed discrimination on the basis of religion or religious exercise. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-34, 542-43, 546 (1993); *Sherbert v. Verner*, 374 U.S. 398, 402-06 (1963); *Cruz v. Beto*, 405 U.S. 319, 322 (1972). And, in requiring all government-imposed

substantial burdens to withstand strict scrutiny, Congress plainly raised the constitutional floor to treat any burden on the fundamental right of free exercise as discrimination. *See, e.g.*, *Church of the Lukumi Babalu*, 508 U.S. at 546; *Smith*, 494 U.S. at 885-86 & n.3.

Circuit courts, too, recognize that RLUIPA provides greater protection than the Constitution requires, and that Section 3 prohibits, *at least*, discrimination. *See Lovelace v. Lee*, 472 F.3d 174, 185-88, 194-95 (4th Cir. 2006); *Warsoldier v. Woodford*, 418 F.3d 989, 994-97 (9th Cir. 2005); *see also Truth v. Kent Sch. Dist.*, 542 F.3d 634, 646 (9th Cir. 2008); *Koger v. Bryan*, 523 F.3d 789, 796 (7th Cir. 2008); *but see Madison*, 474 F.3d at 133 (no CRREA waiver where no express ban on discrimination). Even under *Turner's* deferential standard, neutrality is constitutionally required. *Turner*, 482 U.S. at 90-91; *Mayfield v. Texas Dep't of Crim. Just.*, 529 F.3d 599, 610 (5th Cir. 2008).

The Eighth Circuit's decision further conflicts with the Sixth, Seventh and Ninth Circuits, which, in upholding RLUIPA as a constitutional exercise of Congress' Spending Clause power, expressly characterize RLUIPA as antidiscrimination legislation. The Ninth Circuit held:

> The First Amendment, by prohibiting laws that proscribe the free exercise of religion, demonstrates the great value placed on protecting religious worship from impermissible government intrusion. By ensuring that governments do not act to burden the exercise of religion in institutions, RLUIPA is clearly in line

> with this positive constitutional value. Moreover, *by fostering non-discrimination*, RLUIPA follows a long tradition of federal legislation *designed to guard against unfair bias and infringement on fundamental freedoms.*

Mayweathers v. Newland, 314 F.3d 1062, 1066-67 (9th Cir. 2002) (citing Titles VI, VII, IX) (emphasis added).

Following the Ninth, the Seventh Circuit observed that Titles VI and VII of the Civil Rights Act of 1964 "protect against numerous forms of discrimination," and that Title IX sought to "eliminate gender inequities in education," and ultimately concluded that in RLUIPA, "Congress has an interest in allocating federal funds to institutions that do not engage in discriminatory behavior or in conduct that infringes impermissibly upon individual liberties." *Charles v. Verhagen*, 348 F.3d 601, 607-09 (7th Cir. 2003); *accord Cutter v. Wilkinson*, 423 F.3d 579, 587 (6th Cir. 2005); *Benning*, 391 F.3d at 1306-07.

Finally, this Court has recognized that discrimination manifests in many forms, even if only in effect. *See Ricci v. DeStefano*, __ U.S. __, 129 S. Ct. 2658, 2672-75 (2009); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). This Court has not required Congress to use magic words in analogous antidiscrimination statutes, or to specify every form of discrimination a statute prohibits, before states will be charged with clear notice of potential liability. *See Jackson v. Birmingham Bd. of. Educ.*, 544 U.S. 167, 171-84 (2005); *id.* at 173-75 ("discrimination" covers a wide range of intentional unequal treatment; thus, retaliation is discrimination

because person is "subjected to differential treatment"); *Davis*, 526 U.S. at 635-45, 649-51 (sexual harassment is discrimination under Title IX and satisfies *Pennhurst*).

In so doing, this Court has rejected overly formalistic constructions and has looked instead to the plain meaning of a statute's broad prohibition. *See Gomez-Perez v. Potter*, __ U.S. __, 128 S. Ct. 1931, 1935-39 (2008) (finding broad antidiscrimination ban plainly included retaliation, and relying on *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (finding cause of action for retaliation based on plain meaning of 42 U.S.C. § 1982, despite absence of term "discrimination")).

In requiring an express reference to "discrimination," the Eighth Circuit imposed a higher burden than clear notice requires and created an anomalous and uncertain rule. RLUIPA's broad proscription plainly includes intentional infringement of religious freedom. If the antidiscrimination purpose of RLUIPA is sufficiently clear to support a constitutional exercise of Congress' power, then it should be sufficiently clear to constitute a statute prohibiting discrimination by federal funding recipients. If it is not, then this Court should resolve this important question for Congress, the lower courts and the states to follow.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Dated: January 8, 2010

Respectfully submitted,

Richard L. Johnson
300 North Dakota Avenue
Suite 406
Sioux Falls, SD 57104
Telephone: (605) 338-2626

Kathryn M. Davis
Counsel of Record
Peter R. Afrasiabi
c/o CHAPMAN UNIVERSITY
SCHOOL OF LAW
APPELLATE LITIGATION CLINIC
One University Drive
Orange, CA 92866
Telephone: (714) 628-2504