No. 09-821

In The Supreme Court of the United States

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

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

REPLY BRIEF FOR THE PETITIONER TO THE BRIEF OF RESPONDENTS TIM REISCH ET AL.

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

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

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

STATUTES

REPLY BRIEF FOR THE PETITIONER

I. The Eighth Circuit's Construction Of The Scope Of Eleventh Amendment Waivers In Spending Clause Legislation Is Fundamentally Wrong.

Respondents contend that there is nothing controversial about the Eighth Circuit's holding that Congress must unequivocally and expressly reference damages in statutory text before a state which voluntarily accepts federal funds and consents to suit for violations of Spending Clause legislation will be found to have consented to a waiver of its Eleventh Amendment immunity from monetary relief. They argue that the importation of the standards governing the Federal Government's sovereign immunity and consent to suit into the Eleventh Amendment and Spending Clause contexts is wholly unobjectionable.

But the question whether Congress has expressly and unequivocally consented to waive the Federal Government's sovereign immunity from suit is entirely distinct from the question whether a state has knowingly and voluntarily consented to a spending condition on the receipt of federal funds. And the question whether a state has knowingly and voluntarily consented to private suits in federal court is entirely distinct from the question of the scope of remedies available for a breach of Spending Clause conditions.

The United States as a sovereign is categorically immune from suit. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). The only exception to the Federal Government's immunity is consent, the express terms of which are necessary to waive immunity and define

the scope of jurisdiction over the United States. *See id.* (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). When Congress waives the sovereign immunity of the United States, it must do so expressly and unequivocally in the statutory text. *Id.* ("A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'") (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). Thus, "[w]aivers of immunity must be 'construed strictly in favor of the sovereign,' and not 'enlarge[d] . . . beyond what the language requires.'" *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983) (citations omitted).

Even when Congress waives the United States' sovereign immunity from suit, the terms of plaintiff's substantive rights and the scope of judicial remedies require the Federal Government's consent: "Like a waiver of immunity itself, which must be 'unequivocally expressed' . . . 'this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.'" *Lehman v. Nakshian*, 453 U.S. 156, 160-61 (1981) (citations omitted) (considering whether express waiver of sovereign immunity in ADEA also included express waiver of immunity from right to jury trial); *United States v. Williams*, 514 U.S. 527, 531 (1995) (construing scope of express waiver of Federal Government's sovereign immunity to determine whether statute authorized tax refund suit); *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986) (considering whether express waiver of immunity from suit in the Court of Claims Act included express consent by

Congress to waive traditional immunity from interest); *see also United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 659 (1947).

In *Lane v. Pena*, 518 U.S. 187 (1996), this Court applied settled doctrine governing the express consent requirement and considered whether Congress unequivocally waived the Federal Government's sovereign immunity from monetary damages. At issue in *Lane* was the scope of the waiver: "[A] waiver of the [Federal] Government's sovereign immunity will be strictly construed, *in terms of its scope*, in favor of the sovereign." *Id.* at 192 (emphasis added). This Court 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.*; *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (applying traditional rule that Federal Government's consent to suit must be construed strictly and in favor of the sovereign).

Finding that the statutory text did not unambiguously extend to monetary damages from federal defendants, this Court refused to expand the scope of the express waiver. *Lane*, 518 U.S. at 196-97. This Court expressly recognized the unique status the United States enjoys with respect to immunity from suit and, in rejecting the wholesale application of *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), expressly noted that while nonfederal defendants may be subject to all appropriate remedies (including monetary damages) arising from a cognizable cause of action, the Federal Government stands on entirely different footing. Thus, in keeping

with the rule that not only the waiver of sovereign immunity itself but also the terms and scope of the Federal Government's consent to suit must be unequivocally expressed, this Court held that "'[w]here 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 197.

By its terms, *Lane* involves only the Federal Government's sovereign immunity. Nothing in *Lane* or any other decision of this Court purports to extend the strict requirement that consent to be sued must extend expressly and unambiguously not only to the waiver of immunity but also to the scope of available remedies beyond the context of the United States' sovereign immunity. Nothing in *Lane* or any other decision of this Court purports to import this strict standard into the Eleventh Amendment or Spending Clause contexts. That is because federal sovereign immunity and the Eleventh Amendment are distinct constructs.

Indeed, just as *Franklin* had no application in the sovereign immunity context, this Court has expressly rejected the contention that cases governing waiver of the United States' sovereign immunity apply with equal force to the Eleventh Amendment or govern a state's voluntary consent to federal court jurisdiction. *See Lapides v. Bd. of Regents of the Univ. Sys. Of Ga.*, 535 U.S. 613, 623 (2002) (rejecting reliance on cases involving the United States' waiver of immunity where cases did "not involve the Eleventh Amendment -- a specific text with a history that focuses on the State's sovereignty vis-à-vis the Federal Government.");

compare Nordic Village, 503 U.S. at 33 (noting that finding of Eleventh Amendment immunity does not necessarily confer immunity on United States).

This Court applies a different set of rules to determine whether the Eleventh Amendment applies and whether immunity has been constitutionally abrogated or a state has expressly consented to suit; and a different set of rules still to determine whether a state has knowingly and voluntarily waived its Eleventh Amendment immunity by accepting federal funds pursuant to valid Spending Clause legislation. Even if the States' consent to suit or Congressional abrogation of non-consenting States' immunity requires an unequivocal express reference to monetary damages, the test for whether a state, through its affirmative conduct, knowingly and voluntarily accepts the conditions of Spending Clause legislation requires no express statutory reference to monetary relief.

"We have repeatedly characterized . . . Spending Clause legislation as 'much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions.'" *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). In considering whether funding recipients have consented to suit, the touchstone is not unequivocal expression in statutory text; it is notice. "Just as a valid contract requires offer and acceptance of its terms, '[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the "contract." . . . Accordingly, if

Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.'" *Id.* (quoting *Pennhurst*, 451 U.S. at 17).

The contract analogy applies with equal force to the scope of remedies available for breach of substantive Spending Clause conditions. *Id.* at 187 ("The same analogy applies, we think, in determining the *scope* of damages remedies.") (emphasis in original). Thus, in construing the scope of damages (and therefore, necessarily, waiver of immunity) available under Title IX, this Court, in *Barnes*, relied on *Franklin*, and not on *Lane*, to find that, given the contractual nature of the statute, "appropriate relief" including compensatory damages is available "if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Id.* This Court expressly rejected a rule, like the one in *Lane*, that would require an express reference to monetary damages in Spending Clause legislation: "A funding recipient is generally on notice that it is subject *not only to those remedies explicitly provided* in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract." *Id.* (emphasis added). Thus, even in Spending Clause legislation that contains no express reference to remedies whatsoever, this Court has recognized a right to compensatory damages. *See id.*

Barnes is not the only case in which this Court has recognized the distinct nature of voluntary Eleventh Amendment waivers in the Spending Clause context. *See, e.g., Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 678 n.2 (1999)

("[C]onditions attached to a State's receipt of federal funds are simply not analogous to *Parden*-style conditions attached to a State's decision to engage in otherwise lawful . . . activity."); *id.* at 686 (distinguishing waivers of immunity in Spending Clause legislation as "fundamentally different" in that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions."); *compare Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985) (mere participation in federal program is insufficient to effect waiver absent Congress' manifestation of "clear intent to condition participation . . . on the State's consent to waive its constitutional immunity."); *Lapides*, 535 U.S. at 619-23 (distinguishing voluntary conduct from intent and finding state waived immunity by voluntarily invoking federal court jurisdiction).

Here, that Congress unambiguously conditioned the voluntary acceptance of federal funds on the States' compliance with RLUIPA's substantive provisions and their consent to be sued by private parties in federal court is not seriously in dispute. The question here is whether Congress was also required to unequivocally and expressly reference monetary damages or whether, once a waiver of immunity has been secured, the *scope of available remedies*, including monetary relief, is governed by *Franklin* and *Barnes*.[1]

---

[1] Respondents contend that *Lane's* rejection of *Franklin* applies equally to matters implicating state sovereignty, and that *Barnes*

The Eighth Circuit and the other courts of appeals it followed have profoundly erred in conflating this Court's treatment of sovereign and Eleventh Amendment immunity, and in replacing the clear notice requirement applicable to Spending Clause conditions with the most stringent test this Court applies to ascertain the United States' express consent to be sued. In so doing, the Eighth Circuit has disregarded the unique nature of Spending Clause legislation and the *voluntary* relationship it creates between the States and the Federal Government, and has created two disparate standards for federal funding conditions—one for substantive conditions and another, heightened one for waivers of immunity.

This analytic error, which has now become entrenched among the courts of appeals, cannot stand. The courts of appeals have compounded the error by fundamentally misconstruing and applying this Court's decision in *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506-07 (1998). *See e.g.*, *Holley v. California Dep't of Corr.*, 599 F.3d 1108, 1111-12 & n.3 (9th Cir. 2010); *Nelson v. Miller*, 570 F.3d 868, 883-85 (7th Cir. 2009); *Madison v. Virginia*, 474 F.3d 118, 131 (4th Cir. 2006). *Deep Sea* did not remotely purport to conflate

---

is inapposite because it did not involve immunity. BIO 3-4. Respondents' criticism begs the question whether *Lane's* "unequivocal expression" requirement applies in the Eleventh Amendment and Spending Clause contexts. *Barnes* governs the scope of remedies, including damages, available against federal funding recipients for violations of Spending Clause legislation, and makes no exception for States.

the standards governing Federal sovereign and Eleventh Amendment immunity. That case involved the narrow question whether the Eleventh Amendment applies to bar federal jurisdiction over *in rem* admiralty actions where the State is not in possession of the property. *Deep Sea*, 523 U.S. at 507.

This Court stated that, for *purposes of determining whether immunity turns on possession of the property*, "this Court's decisions in cases involving the sovereign immunity of the Federal Government in *in rem* admiralty actions provide guidance, for this Court has recognized a correlation between sovereign immunity principles applicable to the States and the Federal Government." *Id.* at 506-07 (discussing analogous *in rem* cases where state, federal or foreign governments assert ownership and immunity turns on possession). *Deep Sea* involved the threshold question of whether the Eleventh Amendment even applies where a State is not in possession; it did not involve voluntary waiver, express consent or abrogation of the States' immunity.

Even so, correlation is not equivalence, and this fundamental error, which implicates all Spending Clause legislation, should not be allowed to persist.[2]

---

[2] *Hoffman v. Conn. Dep't of Income Maintenance*, 492 U.S. 96, 104 (1989), is not to the contrary, as it involved express abrogation.

II. The Eighth Circuit's Refusal To Recognize RLUIPA As A Statute Prohibiting Discrimination Is Fundamentally Wrong.

Respondents contend that RLUIPA is not a statute prohibiting discrimination under CRREA because it does not contain an unequivocal textual reference to discrimination. BIO 4-5. But the Eighth Circuit's error was precisely in its demand that RLUIPA expressly employ the term "discrimination." Again, in importing the kind of stringent textual requirements that typically apply to consent and abrogation and to express waivers of the Federal Government's sovereign immunity, the Eighth Circuit raised the bar on Congress' ability to condition federal funds in Spending Clause legislation without justification.

RLUIPA unambiguously prohibits at least intentional discrimination and much more—including facially neutral but substantially burdensome rules of general applicability. To suggest that RLUIPA applies to nondiscriminatory substantial burdens but offers no remedy for intentionally discriminatory burdens on religious exercise is to ignore the stated purpose of RLUIPA and to defy common sense. Modeled on analogous Spending Clause legislation aimed at eradicating discrimination in federal funding programs, RLUIPA is expressly designed to confer heightened standards for religious free exercise more rigorous than what the Constitution requires. To the extent the First Amendment prohibits intentional discrimination, and RLUIPA protects against even more, Section 3 necessarily prohibits discrimination. *See Employment Div. v. Smith*, 494 U.S. 872, 885-86, 886 n.3 (1990).

Given the strict scrutiny RLUIPA demands in order to justify substantially burdensome prison regulations, it is not reasonable to conclude that States that accept federal funds are unaware that they must refrain from discrimination, intentional or otherwise.

Section 3 of RLUIPA need not include the term "discrimination" in order to unambiguously prohibit discrimination, and to put the States on notice that by accepting federal funds they agree to refrain from discrimination against religious exercise. CRREA by its terms applies to *any statute prohibiting discrimination*, and does not require an express textual reference to that term. 42 U.S.C. § 2000d-7(a). This Court has expressly recognized that "'[d]iscrimination' is a term that covers a wide range of intentional unequal treatment," and that by using that broad term, Congress gives a statute a "broad reach." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005).

Discrimination manifests in many forms and Congress is not required to use magic words, so long as its intent is plain. *See id.* at 172-74 (retaliation is form of discrimination); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 649-51 (1999) (deliberate indifference is form of discrimination); *see also Gomez-Perez v. Potter*, 128 S.Ct. 1931, 1936-37 (2008) (broad antidiscrimination statute plainly prohibited retaliation); *CBOCS W., Inc. v. Humphries*, 128 S.Ct. 1951, 1960-62 (2008) (failure to explicitly reference retaliation does not reflect intent to exclude it).

Under Title VII, discrimination includes both disparate treatment and disparate impact *without*

regard to discriminatory intent. The question is not whether the conduct was intentionally discriminatory but whether the government had a lawful justification. *Ricci v. DeStefano*, 129 S.Ct. 2658, 2672-77 (2009). Further, unjustified refusals to reasonably accommodate constitute discrimination. 42 U.S.C. §§ 2000e-2(a), 2000e(j). Here, too, substantial burdens imposed on the basis of religion without a legitimate, *neutral* justification plainly constitute discrimination, even if unintentional.

Under the Rehabilitation Act, discrimination is expressly defined to include "exclusion from participation in," or "deni[al] [of] the benefits of" federally funded programs, *without regard to unequal treatment or discriminatory intent.* 28 C.F.R. §§ 41.51(a), (b)(1)(i), (vi), (vii), (b)(3)(ii), (b)(4)(i)-(ii). The unjustified failure to reasonably accommodate is a prohibited discriminatory practice. 28 C.F.R. § 41.53.

Finally, CRREA was enacted in response to this Court's holding that Congress failed to unmistakably express its intent to abrogate Eleventh Amendment immunity. *Lane*, 518 U.S. at 198. CRREA thus abrogates immunity for the enumerated statutes. That CRREA is sufficiently unequivocal to abrogate immunity for the enumerated statutes says nothing about whether it manifests sufficiently clear intent to condition federal funds on States' voluntary waiver of immunity for un-enumerated laws, like RLUIPA.[3]

---

[3] Respondents suggest CRREA alone does not warrant review. BIO 5. However, CRREA was raised as a separate question

The absence of a textual reference to "discrimination" does not render CRREA ambiguous. States have notice sufficient for them to knowingly and voluntarily accept federal funds fully cognizant of the consequences of their participation—namely, that they will be subject to RLUIPA's heightened protections and subject to suit in federal court for breach.[4]

CONCLUSION

For these reasons, the petition should be granted.

Dated: May 3, 2010

Respectfully submitted,

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

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

---

presented, Pet. at ii, 32-39, and the courts below considered CRREA independently, Pet. App. 27a-30a, 70a-72a.

[4] That Section 2 expressly references discrimination does not render Section 3 ambiguous. Section 3's broad prohibition against all substantially burdensome prison regulations necessarily includes intentionally discriminatory and facially neutral laws. Section 2 provides additional protection against discriminatory land use laws, *even if they do not impose a substantial burden.*

Blank Page