No. 08-___

IN THE

Supreme Court of the United States

HARVEY LEROY SOSSAMON, III,

Petitioner,

v.

TEXAS ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Patricia A. Millett
Thomas C. Goldstein
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Kevin K. Russell
Counsel of Record
Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814
(301) 941-1913

QUESTION PRESENTED

The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5, provides an express private right of action to "obtain appropriate relief against a government," *id.* § 2000cc-2. The statute defines "government" to include state and local governmental entities and any "official of [such] an entity." *Id*. § 2000cc-5(4) (A). The Fifth Circuit held, in conflict with the decisions of other courts, that the Constitution prohibits Congress from authorizing damages claims against states, or against state officials in their individual or personal capacities, for violations of the statute. The question presented is:

Whether states and state officials may be subject to suit for damages for violations of the Religious Land Use and Institutionalized Persons Act?

PARTIES TO THE PROCEEDINGS

Petitioner is Harvey Leroy Sossamon, III, an inmate in the Robertson Unit of the Texas Department of Criminal Justice.

Respondents are the State of Texas; Christina Melton Crain, Chair, Texas Criminal Justice Board; Cathy Clement, Assistant Director, Texas Department of Criminal Justice, Correctional Institution Division Region VI; Brad Livingston, Executive Director, Texas Department of Criminal Justice; Doug Dretke, Executive Director, Correctional Institutional Division; Reverend R.G. Murphy, Texas Department of Criminal Justice, Correctional Institutional Division Region VI Chaplaincy Regional Program Admin.; Senior Warden Robert Eason, French M. Robertson Unit, Texas Department of Criminal Justice, Correctional Institutional Division; Assistant Warden Stacy L. Jackson, French M. Robertson Unit, Texas Department of Criminal Justice, Correctional Institutional Division; Chaplain Paul J. Klien, French M. Robertson Unit, Texas Department of Criminal Justice, Correctional Institutional Division.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Harvey Leroy Sossamon, III respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 560 F.3d 316 (5th Cir. 2009). The district court's opinion (Pet. App. 36a-57a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2009. Pet. App. 35a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

I. Constitutional Provisions

The Eleventh Amendment to the United States Constitution, U.S. CONST. amend. XI, 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.

The Spending Clause of the United States Constitution, U.S. CONST. art. I, § 8, cl. 1, provides, in relevant part:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States . . . .

II. Statutory Provisions

The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5 (2000), provides, in relevant part:

> **Section 2000cc-1. Protection of religious exercise of institutionalized persons**
>
> (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 government interest; and
>
> (2) is the least restrictive means of furthering that compelling 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; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

Section 2000cc-2. Judicial relief

(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.

* * * * *

Section 2000cc-5. Definitions

In this chapter:

* * * * *

(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 . . . .

STATEMENT OF THE CASE

Petitioner, a prison inmate, brought this suit against the State of Texas and state prison officials in their individual and official capacities, seeking monetary damages for violations of his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc to 2000cc-5 (2000). In acknowledged conflict with the decisions of other federal courts, the Fifth Circuit held that although RLUIPA's statutory text supported damages claims against states and state officials, the Eleventh Amendment and Spending Clause foreclosed such relief.

1. RLUIPA is a civil rights law designed to protect against religious discrimination, unequal religious accommodations, and unjustified infringement of the free exercise of religion. Section 3 of the Act applies to any state prison that "receives federal financial assistance." *id.* § 2000cc-1(b), and directs that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," *id.* § 2000cc-1(a), unless the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means" of furthering that interest, *id.* §§ 2000cc-1(a)(1) and (2). "[R]eligious exercise" is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A).

Congress enacted RLUIPA's institutionalized persons provision in response to substantial evidence collected during three years of hearings that persons institutionalized in state facilities face "'frivolous or

arbitrary' barriers" to their religious exercise. *Cutter v. Wilkinson*, 544 U.S. 709, 716 (2005) (citation omitted); *see also* H.R. Rep. No. 106-219, at 9-10 (1999) (describing prison's taping of confession between priest and penitent); *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) (*Joint Stmn.*) (summarizing findings); *Protecting Religious Liberty After Boerne v. Flores*: *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 1st Sess., Pt. 3, at 41 (1998) (discussing discriminatory accommodations).

Based on its investigation, Congress found that, "[w]hether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." *Joint Stmn.*, 146 Cong. Rec. at S7775. Concerned that federal funding not contribute to such frivolous, unreasoned, or discriminatory impositions on religious exercise, Congress invoked its Spending Clause authority, U.S. CONST., art. I, § 8, cl. 1, to require the application of RLUIPA's heightened statutory protection for religious exercise whenever a substantial burden on religious exercise "is imposed in a program or activity that receives Federal financial assistance." 42 U.S.C. § 2000cc-1(b)(1).

To ensure effective enforcement of the Act, Congress created an express private right of action, providing that 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."

42 U.S.C. § 2000cc-2(a). The term "government," in turn, 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 color of State law.

Id. § 2000cc-5.

2. Petitioner is an inmate at the Robertson Unit of the Texas Department of Criminal Justice Correction Institutions Division. In 2006, he filed suit in the U.S. District Court for the Western District of Texas against the State of Texas and various prison officials in their individual and official capacities alleging, among other things, violations of RLUIPA. Pet. App. 4a-5a.[1] More specifically, petitioner challenged respondents' policy forbidding prisoners who were in confinement for disciplinary infractions from leaving their cells to attend religious services, even though such inmates were allowed to leave their cells "to attend work, to eat, to shower, to have medical lay-ins, to attend educational classes, to

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[1] Petitioner also brought claims for violations of the Texas Religious Freedom Restoration Act and under 42 U.S.C. § 1983 for violations of his First, Eighth, and Fourteenth Amendment rights. Pet. App. 4a-5a. The district court dismissed those claims, Pet. App. 56a-57a, and they are not at issue here.

use the law library, and to participate in other secular activities." Pet. App. 3a.

In addition, even when not on cell restriction, petitioner and other inmates were prohibited from using the prison chapel for religious services under any circumstances. Pet. App. 5a-6a. Instead, petitioner and other inmates were relegated to attending worship services in a "multi-purpose room," Pet. App. 39a, that lacked "Christian symbols or furnishings, such as an altar and cross, which have special significance and meaning to Christians." Pet. App. 2a-3a (internal quotation marks omitted). Petitioner was thus prevented from engaging in basic aspects of Christian worship, such as kneeling at an altar or receiving Holy Communion in view of a cross. Pet. App. 3a. Moreover, during Sunday assembly and Bible study, loud noise from the nearby prison yard disrupted services in the multi-purpose room. Pet. App. 3a.

While respondents alleged that the prohibition was for security reasons, the prison nonetheless allowed inmates to use the chapel for non-religious purposes, including "weekend-long marriage training sessions (with outside visitors), sex education, and parties for GED graduates." Pet. App. 30a. Prisoners were also allowed to use the chaplain's office at night to make phone calls, but nonetheless could not enter the area to pray or worship. Pet. App. 8a.

Petitioner's complaint sought declaratory and injunctive relief, as well as compensatory and punitive damages. Pet. App. 5a.

The District Court granted respondents' motion for summary judgment, holding that Texas's sovereign immunity barred damages claims against the state or its officers in their official capacities, and that, in any event, petitioner's RLUIPA claims failed on the merits. Pet. App. 57a.

4. The Fifth Circuit affirmed in part and reversed in part. Pet. App. 35a.

a. As an initial matter, the court dismissed as moot petitioner's claims for injunctive relief relating to the cell-restriction policy based on the State's representation that it had abandoned the policy statewide while the appeal was pending. Pet. App. 12a.

With respect to petitioner's chapel-access claims, the Fifth Circuit reversed the grant of summary judgment. The court held that "RLUIPA unambiguously creates a private right of action for injunctive and declaratory relief." Pet. App. 14a. The court next determined that there were genuine issues of material fact concerning whether petitioner's rights under RLUIPA had been violated. Pet. App. 32a. The court held that "there can be no serious dispute" that petitioner's desire for access to the chapel was motivated by genuine religious belief, Pet. App. 26a, and that a jury could reasonably find that barring petitioner from the chapel imposed a "substantial burden" on his religious exercise. Pet. App. 30a. The court further ruled that the prison's willingness to let the chapel be used for a variety of secular activities called into serious question whether the chapel-prohibition advanced a genuinely compelling governmental interest by the least restrictive means. Pet. App. 32a.

Accordingly, the court remanded for further proceedings on petitioner's claims for injunctive relief on the chapel-access claim. Pet. App. 35a.

b. With respect to petitioner's request for damages on his cell-restriction and chapel-access claims, the Fifth Circuit affirmed, reasoning that RLUIPA provides no cause of action for damages against any of the defendants. Pet. App. 24a.

The court accepted that RLUIPA provides an express cause of action for "appropriate relief" against states and state officials in their official and personal capacities, Pet. App. 16a-17a, and noted that "appropriate relief" ordinarily includes damages. Pet. App. 16a n.26. Referring to this Court's decision in *Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60 (1992), the Fifth Circuit explained that "the Supreme Court has instructed us to 'presume the availability of all appropriate remedies unless Congress has clearly indicated otherwise' or given guidance by a 'clear indication of its purpose with respect to remedies.'" Pet. App. 16a n.26 (quoting *Smith v. Allen*, 502 F.3d 1255, 1270 (11th Cir. 2007) (citing *Franklin*, 503 US. 68-69)).[2] And, the court of

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[2] In *Franklin*, this Court held that the implied private right of action under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 to 1688 – a federal Spending Clause statute that prohibits sex discrimination in federally funded education programs – affords injured plaintiffs all "appropriate relief," including damages. 503 U.S. at 76. In *Barnes v. Gorman*, 536 U.S. 181 (2002), the Court elaborated that "appropriate relief" under Spending Clause legislation extends to "not only those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in

appeals noted, "[t]here is no clear or express indication in RLUIPA that damages are unrecoverable." Pet. App. 16a n.26.

Despite RLUIPA's "plain language," Pet. App. 16a, and this Court's precedents, Pet. App. 17a & n.30, 20a, the court of appeals held that damages were constitutionally unavailable. The court first held that Congress lacked the constitutional power to authorize RLUIPA damages claims against state officials in their individual capacities because the officials did not personally accept federal funding and thus, in the court of appeals' view, they did not fall within Congress's legislative jurisdiction under the Spending Clause. Pet. App. 20a. RLUIPA, the court reasoned, was enacted pursuant to Congress's Spending Clause power and, as a result, "only the grant recipient – the state – may be liable for its violation." Pet. App. 17a. Although Congress may attach funding conditions that require recipient governments to regulate third parties, the court of appeals held, Congress has no constitutional authority under the Spending Clause to regulate directly the conduct of non-recipients. Pet. App. 18a-20a.

The court acknowledged that its holding conflicted with the decisions of other courts, noting that there is a "split in the district courts," Pet. App. 16a, on the question and that "[a] number of circuits

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suits for breach of contract," including "compensatory damages and injunction." *Id*. at 187.

appear to have assumed that an individual-capacity cause of action for damages exists." Pet. App. 15a.

With respect to the State and state officials in their official capacities, the court of appeals held that compensatory relief was "barred by Texas's sovereign immunity." Pet. App. 20a. The Court recognized that Congress may require a state to waive its sovereign immunity as a condition of receiving federal funds, but explained that whether RLUIPA provides states sufficiently clear notice of their liability for damages is the subject of "a circuit split." Pet. App. 21a (citing *Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004), and *Madison v. Virginia*, 474 F.3d 118 (4th Cir. 2006)). Siding with the Fourth Circuit, and rejecting the view of the Eleventh, the court 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." Pet. App. 23a.

REASONS FOR GRANTING THE WRIT

This Court's review of the court of appeals' decision holding that RLUIPA does not authorize an award of compensatory damages against state defendants is warranted. The Fifth Circuit held, in acknowledged conflict with the rulings of other courts, that the Constitution compels judicial disregard of RLUIPA's textual authorization of compensatory damages. The constitutional implications of that ruling, which effectively declares unconstitutional a key enforcement provision of a federal civil rights law, merit this Court's review in their own right. The necessity of such review is

compounded by the divergent rulings of lower courts, which leave both states and individuals facing uncertainty and disparity in the enforcement of a single national law based on nothing more than accidents of geography.[3]

I. Courts Are Divided Over The Availability Of Compensatory Damages Against State Defendants Under RLUIPA.

There is no dispute that RLUIPA authorizes suits against state governments, state officials, and individuals acting under color of state law. 42 U.S.C. §§ 2000cc-2(a), 2000cc-5(4) . And RLUIPA expressly authorizes courts to award "appropriate relief" against such defendants. *Id*. § 2000cc-2. Congress, moreover, enacted RLUIPA's "appropriate relief" provision against the backdrop of this Court's specific holding in *Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60 (1992), that "appropriate relief" includes compensatory damages, *id*. at 66-68. For that reason, courts broadly agree that, as a textual matter, RLUIPA authorizes suits for monetary damages against states and state officials in their official and individual capacities. Nonetheless, the federal courts are divided in multiple respects over whether Congress constitutionally authorized such relief in

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[3] Because the decision below draws into question the constitutionality of an Act of Congress, and the United States has not participated as a party in this case thus far, a copy of this petition has been served upon the Solicitor General of the United States as required by Rule 29.4(b) of the Rules of this Court. *See also* 28 U.S.C. § 2403(a).

light of the constraints of the Eleventh Amendment and the Spending Clause. This Court's review is necessary to restore uniformity to the law and to uphold RLUIPA's constitutionality.

A. Courts Are Divided Over Whether The Eleventh Amendment Precludes Damages Awards Under RLUIPA Against States And State Officials In Their Official Capacities.

"[A]bsent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court." *Kentucky v. Graham*, 473 U.S. 159, 169 (1985).[4] Congress may, however, condition receipt of federal funds upon a state's waiver of that sovereign immunity so long as Congress makes the condition clear. *See*, *e.g.*, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985).

As both the Fourth and Eleventh Circuits have recognized, and the Fifth Circuit in this case acknowledged, Pet. App. 21a, "[t]o put it mildly, 'there is a division of authority' on th[e] question" whether RLUIPA makes sufficiently clear to the states that acceptance of federal funding for state prisons will render them subject to suits for monetary damages. *Smith v. Allen*, 502 F.3d 1255, 1270 (11th Cir. 2007) (quoting *Madison v. Virginia*, 474 F.3d

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[4] "This bar remains in effect when State officials are sued for damages in their official capacity" because "a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents." *Id*. (citations omitted).

118, 130 n.3 (4th Cir. 2006)); *see also Cardinal v. Metrish*, No. 08-1652, 2009 WL 1098759, at *3 (6th Cir. Apr. 24, 2009) ("There is . . . no consensus among the other Circuits as to whether a State's acceptance of federal prison funds constitutes a waiver of its sovereign immunity as to RLUIPA claims for damages.").

The Eleventh Circuit held in *Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004), that a state waives its sovereign immunity to private suits under RLUIPA by accepting federal funds. *Id.* at 1305-06. In *Smith v. Allen*, 502 F.3d 1255, *reh'g denied*, 277 Fed. Appx. 979 (11th Cir. 2008), the Eleventh Circuit held that the waiver of sovereign immunity in RLUIPA includes suits for money damages. Tracking this Court's decision in *Franklin*, the court of appeals held that "the phrase 'appropriate relief' in section 3 of RLUIPA is broad enough to encompass the right to monetary damages in the event a plaintiff establishes a violation of the statute." 502 F.3d at 1270. As in *Franklin*, the Eleventh Circuit concluded that, "where Congress had not given any guidance or clear indication of its purpose with respect to remedies, federal courts should presume the availability of all appropriate remedies" – including monetary damages. 502 F.3d at 1270 (citing *Franklin*, 503 U.S. at 68-69). "We assume," the Eleventh Circuit explained, "that, when Congress [enacted RLUIPA], it was aware of *Franklin*'s presumption in favor of making all appropriate remedies available to the prevailing party." *Smith*, 502 F.3d at 1271. Accordingly, because Congress "expressed no intent to the contrary," the court concluded that RLUIPA must be construed to authorize "monetary as well as

injunctive relief." *Id*. at 1270-71. Accordingly, in contradistinction to the Fifth Circuit's decision here, the Eleventh Circuit concluded that "the Eleventh Amendment will not shield the state (and [its] agents) from an official capacity action for damages under RLUIPA." *Id.* at 1276 n.12.

In contrast, the Fourth Circuit – like the Fifth Circuit in this case – has held that states do not waive their sovereign immunity to RLUIPA suits for monetary damages by accepting federal funds for their prisons. In *Madison v. Virginia*, the Fourth Circuit acknowledged that, "[w]ith respect to sovereign immunity . . . Congress unambiguously conditioned federal funds on a State's consent to suit." 474 F.3d at 122. The Fourth Circuit nevertheless concluded that the Eleventh Amendment bars claims for monetary relief because "that condition does not clearly and unequivocally indicate that the waiver extends to *money damages*." *Id.* at 122-23 (emphasis added).

The Sixth Circuit has now joined suit. In *Cardinal v. Metrish*, that court rejected an inmate's contention that Michigan, by accepting federal prison funds, had waived its sovereign immunity from RLUIPA claims for money damages. The court acknowledged the contrary holding of the Eleventh Circuit but opted to follow the decisions of the Fourth and Fifth Circuits, holding that, "because RLUIPA's 'appropriate relief' language does not clearly and unequivocally indicate that the waiver extends to monetary damages, the Eleventh Amendment bars plaintiff's claim for monetary relief under RLUIPA." 2009 WL 1098759, at *5.

In sum, had petitioner's claim arisen a few states to the east, the outcome of his case would have been the opposite of the Fifth Circuit's decision here and he would have been permitted to pursue his claim for damages against the states and state officials in their official capacities. By the same token, state governments in Alabama, Georgia, and Florida face liability for damages that their counterparts to the west and north do not.

B. Courts Are Also Divided Over Whether RULIPA Constitutionally Authorizes Damages Suits Against State Officials In Their Individual Capacities.

1. Federal courts are likewise divided over whether RLUIPA authorizes, and the Spending Clause permits, suits for monetary damages against state officials in their individual capacities. *See*, *e.g.*, *Mayfield v. Tex. Dep't of Crim. Justice*, 529 F.3d 599, 605 n.8 (5th Cir. 2008) ("Whether RLUIPA contemplates damages actions against officers in their individual capacity has also created disagreements amongst courts."); *Madison*, 474 F.3d at 130 n.3 (acknowledging disagreement).

The Fifth Circuit in this case accepted that the text of RLUIPA naturally provides for damages claims against officials acting in their individual capacities, Pet. App. 15a-16a, because "appropriate relief" includes damages and "government" includes state officials and individuals acting under color of law. In designing those provisions, the court of appeals recognized, Congress copied the textual design of 42 U.S.C. § 1983, which provides for damage claims against state officials in their

individual capacities. *See* Pet. App. 17a.[5] Nonetheless, the Fifth Circuit refused to give effect to Congress's direction because, in its view, Congress lacks the constitutional authority under the Spending Clause to authorize such relief. Pet. App. 19a-20a. The Eleventh Circuit has reached the same conclusion. *See Smith*, 502 F.3d at 1273 (declining to construe RLUIPA to provide a personal-capacity cause of action for damages because "Congress cannot use its Spending Power to subject a non-recipient of federal funds, including a state official acting [in] his or her individual capacity, to private liability for monetary damages").

As the Fifth Circuit acknowledged, however, "[a] number of circuits appear to have assumed that an individual-capacity cause of action for damages exists because the courts have conducted, or on remand have required that the district court conduct, a qualified immunity analysis" or have applied restrictions on damages under the Prison Litigation Reform Act — analyses that would be "unnecessary" if a private right of action against defendants in their individual capacities for damages were not available. Pet. App. 15a-16a & n.23 (collecting cases); *see also Koger v. Bryan*, 523 F.3d 789 (7th Cir. 2008) (ordering entry of summary judgment against prison officials sued for damages in their individual capacities under RLUIPA); *Salahuddin v. Goord*, 467

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[5] Indeed, if anything Congress provided even more explicitly in RLUIPA that state officials were subject to suit, as Section 1983 merely refers to "any person" acting under color of law, without expressly referring to state officials.

F.3d 263 (2d Cir. 2006) (reversing grant of qualified immunity on RLUIPA claims); *Ahmed v. Furlong*, 435 F.3d 1196 (10th Cir. 2006) (remanding for qualified immunity analysis).[6] Thus, in practice the availability of RLUIPA damages against government defendants in their individual capacities varies widely from circuit to circuit.

The district courts are also deeply divided over the availability of individual-capacity damages under RLUIPA. *See Lovelace v. Lee*, 472 F.3d 174, 196 n.7 (4th Cir. 2006) (collecting cases). In *Agrawal v. Briley*, No. 02 C 6807, 2006 WL 3523750, at *13 (N.D. Ill. Dec. 6, 2006), for example, the court expressly held that "RLUIPA's remedial provision, creating a private cause of action for 'appropriate relief against a government,' authorizes individual-capacity claims for monetary damages." *See also, e.g.*, *Orafan v. Goord*, No. 00CV2022, 2003 WL 21972735, at *9 (N.D.N.Y. Aug. 11, 2003) (holding that the "plain language of the statute" "[c]learly . . . contemplates individual liability" for damages); *Farnsworth v. Baxter*, No. 03-2950-B/V, 2007 WL 2793364 at *2 (W.D. Tenn. Sept. 26, 2007) (same). By contrast, other district courts have held that RLUIPA does not authorize suits for damages against officials in their individual capacities. *See, e.g.*, *Cromer v. Braman*, No. 1:07-cv-009, 2009 WL 806919, at *8 (W.D. Mich.

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[6] *See also Walker v. Iowa Dep't of Corr.*, 298 Fed. Appx. 535 (8th Cir. 2008); *Figel v. Overton*, 263 Fed. Appx. 456 (6th Cir. 2008); *Haley v. Donovan*, 250 Fed. Appx. 202 (9th Cir. 2007); *Sefeldeen v. Alameida*, 238 Fed. Appx. 204 (9th Cir. 2007).

Mar. 25, 2009); *Morris-El v. Menei*, No. Civ.A. 00-200J, 2006 WL 1455592, at *3 (W.D. Pa. May 22, 2006).

2. This wide-ranging conflict reflects a broader confusion and division in the lower courts over the scope of Congress's power under the Spending Clause. The Fifth and Eleventh Circuits have adopted a narrow interpretation of Congress's Spending Clause authority, refusing to recognize the Spending Clause as a source of authority for the enactment of positive law reaching the conduct of third parties. Instead, those courts view the Spending Clause as limiting Congress to attaching conditions to a "contract" that may bind only the recipients of federal funding. *See* Pet. App. 17a ("Spending Clause legislation is not legislation in its operation; instead it operates like a contract."); *Smith*, 502 F.3d at 1274 (concluding that in light of "the limited reach of Congress' Spending Power," the Spending Clause "cannot be used to subject individual defendants, such as state employees, to individual liability in a private cause of action"); *see also United States v. Morgan*, 230 F.3d 1067, 1073 (8th Cir. 2000) (Bye, J., specially concurring) ("While Congress may disburse funds under this grant of power, Congress may not make laws.").

By contrast, other circuits have recognized Congress's affirmative legislative and regulatory power under the Spending Clause. In *Westside Mothers v. Haveman*, 289 F.3d 852, 857-60 (6th Cir. 2002), for example, the Sixth Circuit rejected the assertion that Medicaid Act rights could not be enforced under 42 U.S.C. § 1983 because, as Spending Clause legislation, the Act was merely a

"contract" and not "law" within the meaning of Section 1983. *Id.* at 858. The Sixth Circuit explained that, while "the term 'contract'" has been used "metaphorically, to illuminate certain aspects of the relationship formed between a state and the federal government," that does not mean that Spending Clause legislation "is *only* a contract." *Id.* (emphasis in original); *see also Antrican v. Odom*, 290 F.3d 178, 188 (4th Cir. 2002) (rejecting argument that claims under Medicaid Act fell outside of *Ex parte Young* exception to sovereign immunity because "the Medicaid Act, as Spending Clause legislation, is not 'supreme' law" but merely a contract); *Missouri Child Care Ass'n v. Cross*, 294 F.3d 1034, 1040-41 (8th Cir. 2002) (rejecting same argument with respect to the Child Welfare Act).

Members of this Court, too, have acknowledged the disputed status of Spending Clause legislation. *See Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 683 (2003) (Thomas, J., concurring) (questioning whether private causes of action are permissible under the Medicaid Act because the "contract analogy raises serious questions as to whether third parties may sue to enforce Spending Clause legislation – through pre-emption or otherwise"); *Barnes v. Gorman*, 536 U.S. 181, 191 (2002) (Souter, J., concurring) (noting that "the contract-law analogy may fail to give such helpfully clear answers to other questions that may be raised

by actions for private recovery under Spending Clause legislation").[7]

The decision in this case gives concrete effect to that divergence in court views on a critically important and frequently recurring question of constitutional law. This Court's review is needed to bring stability and uniformity to the law and to the enforcement of federal statutes nationwide.

II. This Court's Review Is Warranted Both To Resolve The Circuit Conflict And To Review The Fifth Circuit's Partial Invalidation Of An Act Of Congress.

The Fifth Circuit's decision warrants review both because it exacerbates long-standing divisions among the federal courts and because it effectively declares unconstitutional a provision of an important federal civil rights statute.

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[7] That same uncertainty is reflected in academic literature. *Compare* David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1 (1994) (arguing that under the Spending Clause, Congress is limited to attaching conditions to federal funding and may not enact positive law), *and* Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1 (2003) (arguing that Congress may not use its Spending Power to enact criminal laws that apply to non-recipients of federal funding), *with* Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345 (2008) (disputing assertion that Congress lacks authority to enact positive law under the Spending Clause)

A. Review Is Warranted To Resolve The Division Of Authority Over The Availability Of RLUIPA Damages Claims Against State Defendants.

1. The division of authority over the scope of RLUIPA's express cause of action is widespread and mature. The multiple conflicting decisions have given significant attention to the question presented, yet have reached flatly contradictory conclusions.

The conflict is also entrenched, capable of resolution only by this Court. The Eleventh Circuit has twice denied rehearing en banc in cases conflicting with the Fifth Circuit's decision, *Smith v. Allen*, 277 Fed. Appx. 979 (11th Cir. 2008) (order denying rehearing); *Benning v. Georgia*, 129 Fed. Appx. 603 (11th Cir. 2005) (same), and reaffirmed its position recently, *see Hathcock v. Cohen*, 287 Fed. Appx. 793, 798 n.6 (11th Cir. 2008). The Fifth Circuit, for its part, reached its decision fully cognizant of the contrary authority, and has already applied its decision in subsequent cases. *See Garner v. Morales*, No. 07-41015, 2009 WL 577755, at *2 (5th Cir. Mar. 6, 2009) (unpublished); *Smithback v. Crain*, No. 07-10274, 2009 WL 552227, at *2 (5th Cir. Mar. 5, 2009) (unpublished).

Thus delaying review will only exacerbate, not eliminate, the circuit conflict. The critical analytical debate has already been fully ventilated, with much of the division turning on debates over the meaning of *this Court*'s precedent. Courts in future cases will simply pick a side without further analysis, as the Sixth Circuit recently did. *See*, *e.g.*, *Cardinal v. Metrish*, No. 08-1562, 2009 WL 1098759 at *2-*3 (6th

Cir. Apr. 24, 2009). Only this Court can bring the needed clarity to its precedent and provide stabilizing direction to the lower courts.

2. As this Court's review four years ago in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), reflected, constitutional and interpretive questions arising under RLUIPA are important both to states and institutionalized persons, and the issues recur with great frequency. As the extensive division in lower courts illustrates, the constitutionally permissible scope of RLUIPA's remedial provision regularly arises in prisoner litigation. That is not surprising because RLUIPA affects inmates throughout the country, many of whom, Congress found, face precisely the kind of "frivolous or arbitrary" barriers to religious exercise that RLUIPA was designed to address. *Cutter*, 544 U.S. at 716 (citation omitted).

Furthermore, the availability of monetary damages under RLUIPA is vital to remedying and deterring violations of the rights Congress intended the statute to provide, not simply to inmates, but also to religious groups facing discriminatory land use practices. *See* 42 U.S.C. § 2000cc.[8] Without a damages remedy, there is a high risk of under-enforcement: as this case illustrates, officials often may avoid liability altogether by complying with the statute once sued. *See* Pet. App. 12a-13a; *see also*,

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[8] *Cf.*, *e.g.*, *Moxley v. Town of Walkersville*, 601 F. Supp. 2d 648, 658-60 (D. Md. 2009) (relying on *Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2007), to find no personal-capacity liability for defendants in land use case).

e.g., *Cardinal*, 2009 WL 1098759, at *2 (finding inmate's claims arising from transfer to prison that did not provide kosher meals moot in light of policy modification and the unavailability of damages remedy); *Watts v. Dir. of Corr.*, No. CV F-03-5365, 2006 WL 2320524, at *7 (E.D. Cal. Aug. 10, 2006) (RLUIPA claim moot in light of a prison's policy modification allowing plaintiff to wear his hair long); *Boles v. Neet*, 402 F. Supp. 2d 1237, 1241 (D. Colo. 2005) (RLUIPA claim moot after prison modified its policy to allow inmates to wear religious garb during transport outside of prison); Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501 (2005).

Moreover, even if the Fifth Circuit were right on the merits, review would still be warranted because states and prison officials across the country continue to be subject to suit for damages under RLUIPA, *see supra* at 12-19 & n.6, bearing a burden that – if the Fifth Circuit is correct – the Constitution forbids Congress to impose upon them.

3. This case presents an appropriate vehicle for resolving the question presented. The Fifth Circuit's opinion below squarely addressed the question. And its answer was outcome determinative with respect to petitioner's claims for damages and to petitioner's cell-restriction challenge in its entirety. *See* Pet. App. 12a, 24a.

B. Review Is Also Warranted Because The Court of Appeals Partially Invalidated An Act Of Congress.

This Court's prompt review is particularly warranted because the Fifth Circuit's decision had the effect of declaring unconstitutional RLUIPA's widely acknowledged textual authorization of compensatory damages.

The court of appeals accepted that RLUIPA's express cause of action reaches states and state officials in their official and individual capacities, Pet. App. 17a, 20a, as has the Eleventh Circuit, *Smith v. Allen*, 502 F.3d 1255, 1270-71 (11th Cir. 2007). Moreover, the Fifth Circuit accepted, as this Court and the Eleventh Circuit have held, that the phrase "appropriate relief" includes damages remedies. *See* Pet. App. 16a-17a; *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 66-68 (1992); *Smith*, 502 F.3d at 1269-71. Nonetheless, both the Fifth and Eleventh Circuits have held that giving the statute its plain meaning would violate the Constitution. *See* Pet. App. 20a; *Smith*, 502 F.3d at 1272-75. As a result, for purposes of this Court's certiorari jurisdiction, the Fifth Circuit's decision in this case, like the Eleventh Circuit's before it, reflects the constitutional nullification of an important provision of an Act of Congress.[9]

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[9] To be sure, the court cast its decision in statutory construction terms, purporting to construe "appropriate relief" narrowly "to avoid the constitutional concerns that an alternative reading would entail." Pet. App. 20a. But while constitutional avoidance principles allow courts to construe a

This Court has consistently granted certiorari to review decisions declaring federal statutes unconstitutional, even when those statutes have far less frequent application than RLUIPA. *See, e.g.*, *United States v. Stevens*, __ S. Ct. __, 2009 WL 1034613 (Apr. 20, 2009); *United States v. Morrison*, 529 U.S. 598 (2000); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *Clinton v. City of New York*, 524 U.S. 417 (1998); *see also* STERN & GRESSMAN, SUPREME COURT PRACTICE 264 (9th ed. 2007) ("Where the decision below holds a federal statute unconstitutional . . . certiorari is usually granted because of the obvious importance of the case."). It should do so again here.

III. Review Is Warranted Because The Court Of Appeals' Decision Conflicts With The Decisions Of This Court.

Review is also warranted because the court of appeals' decision is wrong, based on a misunderstanding of this Court's decisions and the scope of Congress's constitutional powers.

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statute to avoid constitutional difficulties, *see Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001), those principles do not permit courts to go so far as to give a statute an untenable construction simply to avoid a constitutional holding. *See Salinas v. United States*, 522 U.S. 52, 60 (1997) (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996)); *Am. Communications Ass'n v. Douds*, 339 U.S. 382, 407 (1950). Nor should this Court's traditional review of the invalidation of an Act of Congress be avoided by recasting in statutory construction terms what is, at its heart, a constitutional holding.

A. The Eleventh Amendment Does Not Bar RLUIPA Suits For Damages Against States And State Officials In Their Official Capacities.

The Fifth Circuit rightly recognized that Congress clearly conditioned receipt of federal prison funding on a state's waiver of sovereign immunity to RLUIPA suits for "appropriate relief." Pet. App. 14a-15a. *See also Madison v. Virginia*, 474 F.3d 118, 131 (4th Cir. 2006) ("RLUIPA unambiguously conditions federal prison funds on a State's consent to suit."). The court was likewise correct in concluding that states were on notice that "appropriate relief" includes declaratory and injunctive relief. *Id*. The court fundamentally departed from this Court's precedent, however, in deciding that states were not on notice that "appropriate relief" included money damages.

1. In *Barnes v. Gorman*, 536 U.S. 181 (2002), this Court recognized that states have ample notice that the receipt of federal funds binds them to comply with the substantive conditions attached to the funding or face damages liability. *Barnes* addressed the remedies available for violations of Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131 to 12165, which statutorily authorizes recovery of the same remedies provided under Section 505 the Rehabilitation Act of 1973, 29 U.S.C. § 794a. *See* ADA, 42 U.S.C. § 12133. The Rehabilitation Act, in turn, incorporates the remedies available under a Spending Clause statute, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7. *See* Rehabilitation Act, 29 U.S.C. § 794a(a)(2). Title VI does not include an express cause of action (much

less any enumerated list of remedies). However, the Court had previously found an implied private right of action under Title VI. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 703 (1979). And in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court had

> recognized "the traditional presumption in favor of any appropriate relief for violation of a federal right," and held that since this presumption applies to suits under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, monetary damages were available.

Barnes, 536 U.S. at 185 (quoting *Franklin*, 503 U.S. at 73).

The Court in *Barnes* concluded that the same was true of Title VI, *id*., then turned to the central question in that case and this one: what constitutes the "appropriate relief" to which states are subject, explaining that "a remedy is 'appropriate relief,' only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." 536 U.S. at 187 (emphasis in original). Critically, the Court then held that

> 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, citations omitted). This includes, the Court specifically noted, "compensatory damages." *Id*.

The Fifth Circuit's decision is irreconcilable with *Barnes*, which establishes that Texas was on notice that its acceptance of federal prison funds subjected it "to those remedies traditionally available in suits for breach of contract," including "compensatory damages." *Barnes*, 536 U.S. at 187. Thus, even if RLUIPA, like Title VI and Title IX, said nothing about available remedies, Texas would be on notice that accepting funds would subject it to suit for damages under RLUIPA. But Texas had even greater forewarning here because Congress expressly provided in the text of RLUIPA that "appropriate relief" was available, employing a phrase that has a settled meaning in this Court's Spending Clause decisions that has included compensatory damages since the Court's decision almost two decades ago in *Franklin*.

2. The Fourth, Fifth, and Sixth Circuits thus have erred in construing *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), and *Lane v. Pena*, 518 U.S. 187 (1996), as requiring Congress to spell out damages remedies in explicit terms. *Pennhurst* requires that the consequences of accepting federal funding must be clear, 451 U.S. at 17, but *Barnes* and *Franklin* both held that the availability of compensatory damages *is* clear.

Nor is anything in *Lane* to the contrary. There, this Court considered two provisions of the Rehabilitation Act. The first, Section 504(a), prohibits disability discrimination in any federally funded program or under "any program or activity conducted by any Executive agency." 29 U.S.C. § 794(a). However, a separate provision, Section 505(a)(2), establishes the available remedies for a

violation of the latter requirement, providing that the remedies available under Title VI (which, as noted above, include money damages), "shall be available to any person aggrieved by . . . any . . . *Federal provider of [financial] assistance*." 29 U.S.C. § 794a(a)(2) (emphasis added). This Court held that, although the federal defendant before it (the Merchant Marine Academy) was subject to Section 504(a) as an "Executive agency," it was not subject to suit for damages because it did not fall within the narrower term "Federal provider" in Section 505(a)(2)'s remedial provision waiving the federal government's sovereign immunity. 518 U.S. at 192-93.

Lane is thus inapposite here. Texas – a "government" by common understanding and under RLUIPA's express definition – falls squarely within the terms of RLUIPA's remedial provision. And in *Lane*, the Court quite plainly proceeded on the understanding that if the Merchant Marine Academy counted as a "Federal provider" under the Rehabilitation Act (as Texas counts as a "government" under RLUIPA), then Congress would have waived its sovereign immunity to suits for damages by subjecting it to the "appropriate relief" available for suits under Title VI. *See* 518 U.S. at 194-95.

To be sure, in *Lane*, this Court recognized that the otherwise settled meaning of "appropriate relief" could be altered by explicit contrary indications in the text of a statute that expressly addresses available remedies. 518 U.S. at 196-97. But there are no such counterindications in RLUIPA. To the contrary, everything in the statute confirms that

Congress intended the usual rule, including the presumption in favor of damages liability, to apply.

First, in authorizing "appropriate relief," Congress used language with a settled meaning in the Spending Clause context that gave states ample notice of the consequences of their actions. The Fifth Circuit thus was obliged to hew to that established meaning. *See Neder v. United States*, 527 U.S. 1, 21 (1999) (where terms have "accumulated settled meaning," a "court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms") (internal quotation marks omitted).

Second, where Congress intended RLUIPA to depart from that traditional understanding, it did so expressly. In Section 2000cc-2(f), Congress limited the relief available when the federal government brings suit, allowing the United States to sue only "for injunctive or declaratory relief to enforce compliance with this chapter." Had Congress intended the same scope for private suits, it presumably would have used the same language.

Finally, to the extent a state accepted funding in the hope that courts might subsequently give the statute an especially narrow construction, that expectation would have been entirely unreasonable, for Congress provided that the statute "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the

terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g).[10]

B. Congress Did Not Exceed Its Constitutional Authority By Imposing Personal Liability On State Officials Who Violate RLUIPA.

The Fifth Circuit also erred in holding that Congress lacks the constitutional power to impose personal liability on state officials.

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[10] RLUIPA also falls within the scope of 42 U.S.C. § 2000d-7(a), which provides that:

> (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 . . . the provisions of any [] 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.

As a statute forbidding religious discrimination by recipients of federal funds, RLUIPA qualifies as a statute triggering a waiver of state sovereign immunity under this provision. *See Sisney v. Reisch*, 533 F. Supp. 2d 952, 971-72 (D.S.D. 2008), *appeal docketed* Apr. 22, 2008. Although petitioner did not cite to this provision in the lower courts, the Fourth Circuit decision upon which the court of appeals relied discussed the applicability of Section 2000d-7 in detail. *See Madison v. Virginia*, 474 F.3d 118, 132-33 (4th Cir. 2006); Pet. App. 21a-24a.

1. Congress has ample authority under the Spending Clause, supplemented by the Necessary and Proper Clause, to make state officials liable for conduct that interferes with the implementation of valid conditions on federal financing and with the effective implementation of a federal spending program.

Although this Court has sometimes analogized Spending Clause legislation to a contract, the Court has also made clear that the analogy is only partial. *See, e.g.*, *Barnes*, 536 U.S. at 186 (noting that the Court has been "careful not to imply that *all* contract-law rules apply to Spending Clause legislation" (internal citations omitted)). Indeed, this Court has repeatedly recognized that Spending Clause legislation is not simply a contract provision, but rather has the force and status of federal law. *See, e.g.*, *Bennett v. Ky. Dep't of Ed.*, 470 U.S. 656, 669 (1985) ("Unlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy."); *Blum v. Bacon*, 457 U.S. 132, 145-46 (1982) (invalidating under the Supremacy Clause certain provisions of state law that conflicted with federal regulations promulgated under a federal spending program); *Carleson v. Remillard*, 406 U.S. 598, 600, 604 (1972) (same); *Townsend v. Swank,* 404 U.S. 282, 285 (1971) (same).

In enacting positive law under its Spending Power, Congress is not limited to appropriating money, or even to attaching conditions on federal funding. Instead, it may enact any law that is "necessary and proper for carrying into Execution" its

Spending Clause authority. U.S. CONST. art. I, § 8, cl. 18; *see*, *e.g.*, *Sabri v. United States*, 541 U.S. 600, 605 (2004); *New York v. United States*, 505 U.S. 144, 158-59 (1992). Since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this Court has recognized that the Necessary and Proper Clause confers on Congress broad power to ensure the efficacy of the exercise of its enumerated powers: "If the end be legitimate, and within the scope of the constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect." *Id*.

The Necessary and Proper power thus provides Congress authority to remove impediments to the proper and effective exercise of its enumerated powers. Congress's power to regulate commerce, for example, is not limited to regulating only individuals engaged directly in commerce, but also those whose actions might impede commerce or Congress's regulatory regime. *See, e.g.*, *United States v. Coombs*, 37 U.S. 72, 78 (1838) (noting that "[a]ny offence which thus interferes with, obstructs, or prevents such commerce and navigation . . . may be punished by congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers"). Likewise, this Court has held that Congress's power "'to establish post-offices and post-roads'" encompasses the power to regulate individual conduct that interferes with postal services, including the power to "'punish those who steal letters.'" *McCulloch*, 17 U.S. at 417.

So, too, Congress has authority under the Spending Clause not only to spend money on

programs that advance the public welfare, but also to regulate third parties who may impede the effective operation of those programs. Thus, in *Sabri v. United States*, this Court upheld against a Spending Clause challenge a federal statute, 18 U.S.C. § 666(a)(2), that criminalizes bribery of state and local officials of agencies that accept federal funding. 541 U.S. at 610. Although the state officials in *Sabri,* like the individual defendants here, were not "parties to the contract" between the United States and the governmental funding recipient, this Court concluded, without a single dissent, that Congress had the authority to directly regulate individual officials' conduct and to impose personal – indeed, criminal – liability upon those officials who violate those federal limitations. "Congress," the Court emphasized, "does not have to sit by and accept the risk of operations thwarted by local and state improbity." 541 U.S. at 605. Because subjecting state officials to criminal liability for bribery connected to a federal funding program was a rational means to "protect spending objects," this Court rejected Sabri's constitutional challenge. *Id*. at 608.

The same analysis should apply here. Congress acted within its Spending Clause powers when it subjected to personal liability state officials whose personal conduct thwarts Congress's enforcement of civil rights and defeats express conditions and terms imposed on the operation of federally funded prisons. The personal liability provisions of the statute rationally further not only Congress's general interest in ensuring compliance with valid funding requirements, but also Congress's more specific

interest in ensuring the efficacy of the federal funds spent in part to facilitate the rehabilitation of state prisoners. *See*, *e.g.*, *Cutter v. Wilkinson*, 423 F.3d 579, 587 (6th Cir.) (noting that a "prison's compliance with RLUIPA still satisfies one of the statute's main purposes, which is to allow inmates greater freedom of religion in order to promote their rehabilitation"), *rev'd on other grounds*, 544 U.S. 709 (2005).

2. The Fifth Circuit further erred in assuming that Section 2000cc-2(a) of RLUIPA was enacted solely under Congress's Spending Clause authority. *See* H. REP. NO. 106-219, at 27 (1999) (invoking powers under the Spending Clause, Commerce Clause, and Fourteenth Amendment). In particular, Congress had ample authority to apply RLUIPA to state actors pursuant to its power to enforce the requirements of the Fourteenth Amendment. *See*, *e.g.*, Frank T. Santoro, *Section Five of the Fourteenth Amendment and the Religious Land Use and Institutionalized Persons Act*, 24 Whittier L. Rev. 493 (2002).

CONCLUSION

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

Respectfully submitted,

Kevin K. Russell
Counsel of Record
Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814
(301) 941-1913

Patricia A. Millett
Thomas C. Goldstein
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

May 18, 2009

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Harvey Leroy SOSSAMON, III, Plaintiff-Appellant,

v.

The LONE STAR STATE OF TEXAS; Christina Melton Crain, Chairman, Texas Criminal Justice Board; Cathy Clement, Assistant Director, Texas Department of Criminal Justice-Correctional Institutions Division Region VI; Brad Livingston, Executive Director, Texas Department of Criminal Justice, Doug Dretke, Executive Director, Correctional Institutions Division; Reverend R.G. Murphy, Texas Department of Criminal Justice-Correctional Institutions Division Region VI Chaplaincy Regional Program Admin.; Senior Warden Robert Eason, French M. Robertson Unit, Texas Department of Criminal Justice-Correctional Institutions Division; Assistant Warden Stacy L. Jackson, French M. Robertson Unit, Texas Department of Criminal Justice-Correctional Institutions Division; Chaplain Paul J. Klien, French M. Robertson Unit, Texas Department of Criminal Justice-Correctional Institutions Division,
Defendants-Appellees.

No. 07-50632.

Feb. 17, 2009.

OPINION

WIENER, Circuit Judge:

We are asked today to resolve a number of questions concerning the extent to which, based on the special considerations we afford the government in its role as jail-keeper, we will excuse the intrusion of a state, here Texas, on the free exercise of religion by prisoners. We must also address several issues surrounding the remedies available when such an intrusion proves too great to excuse. Convinced that the Religious Land Use and Institutionalized Persons Act ("RLUIPA") demands less intrusion than Texas exercised in one area, we reverse and remand in part; but, discerning no error otherwise, and taking note of the accommodations that Texas has offered the Plaintiff-Appellant Harvey Leroy Sossamon, III during the pendency of this appeal, we also affirm in part and dismiss some of his claims as moot with instructions to vacate.

I. FACTS AND PROCEEDINGS

Sossamon is an inmate of the Robertson Unit of the Texas Department of Criminal Justice (the "TDCJ")-Correctional Institutions Division. He alleges that (1) he has been deprived of access to Robertson's chapel for purposes of his Christian worship (the "chapel-use" claim or policy) and (2) while on cell restriction, he was forbidden to attend any worship services at all (the "cell-restriction" claim or policy).

Concerning the chapel-use claim, Sossamon provided competent summary judgment evidence that he is denied access to Robertson's chapel for Christian worship and that the venues for such worship offered as alternatives to the chapel do not have Christian

symbols or furnishings, such as an altar and cross, which "have special significance and meaning to Christians." This, he insists, prevents him from "kneeling at the alter [sic] in view of the Cross, to pray, or receive holy communion in obedience to Christ Jesus['s] command, to observe the Lord's Supper, by Christian ceremony, in remembrance of the divine sacrifice the Lord God made, for the atonement of plaintiff's sins at Calvary." Sossamon contends that even if this were not so, services and Bible study at the alternative venues are frequently interrupted by security personnel or noise from the prison yard. He alleges that if worshipers refuse to end their prayer or devotion and return to work when ordered, they are subjected to harassment and retaliation by prison guards, such as by strip searches.[1] He surmises that the prison has "evict[ed] and throw[n] God[ ] out of his house." According to Sossamon, this is not so for Muslim prisoners, whom he claims are provided special accommodations for worship, along with special meals, that Christians are not.

Concerning the cell-restriction claim, Sossamon has provided competent summary judgment evidence that inmates on cell restriction for disciplinary infractions were not permitted to attend religious services at all, even though they were permitted to attend work, to eat, to shower, to have medical lay-ins, to attend educational classes, to use the law library, and to participate in other secular activities. On September 15, 2005, Sossamon, who had been found

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[1] Sossamon does not allege that he has been subjected to a strip search and did not file an administrative grievance of this matter to the prison, as required by the Prison Litigation Reform Act ("the PLRA").

guilty of a minor rule infraction, was placed on cell restriction for fifteen days. During that time, he was twice denied permission to attend religious services.

Based on these allegations, Sossamon proceeded *pro se* against the "Lone Star State of Texas" and a number of individuals involved in the TDCJ[2] (collectively referred to as "Texas") under: (1) 42 U.S.C. § 1983, for violations of his First, Eighth,[3] and

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[2] They are: Christina Melton Crain (Chair of the Texas Board of Criminal Justice), Cathy Clement (Assistant Regional Director for Region VI of the TDCJ), Brad Livingston (Executive Director of the TDCJ), Doug Dretke (former Director of the TDCJ-Correctional Institutions Division; Nathaniel Quarterman, the current Director, automatically replaced Dretke as the defendant against whom the official-capacity claims are brought, *see* FED. R.APP. P. 43(c)(2)), Reverend R.G. Muphy (Region V Program Administrator for the Chaplaincy Department, Rehabilitation, and Reentry Programs Director of the TDCJ), Robert Eason (Senior Warden of Robertson), Stacy Jackson (Assistant Warden of Robertson), and Paul Klein (a volunteer chaplain at Robertson). All were sued in their personal and official capacities. Sossamon subsequently moved to dismiss all of his TRFRA individual-capacity claims against all defendants and to dismiss all claims against Murphy, Jackson, and Klein. Those motions were granted. The notice of appeal erroneously listed those defendants as parties, so they appear in our caption, but we note that they are now non-parties over whom we have no jurisdiction. *See Castillo v. Cameron County, Tex.,* 238 F.3d 339, 349-50 (5th Cir. 2001).

[3] The Eighth Amendment claim is completely abandoned on appeal. Mindful of our responsibility to construe *pro se* filings liberally, *see Al-Ra'id v. Ingle,* 69 F.3d 28, 31 (5th Cir. 1995), we nevertheless point out that the claim fails under the test announced in *Farmer v. Brennan,* 511 U.S. 825, 834 (1994). Sossamon has not demonstrated that the chapel-use policy and the cell-restriction policy deprive him of "the minimal civilized measure of life's necessities." *Id.*

Fourteenth Amendment rights; (2) RLUIPA;[4] and (3) the Texas Religious Freedom Restoration Act ("TRFRA").[5] He sought declaratory and injunctive relief against the defendants in their official capacities, along with compensatory and punitive damages from them in their official and individual capacities.

The parties cross-moved for summary judgment. On the cell-restriction policy, Texas noted that after Sossamon filed a grievance on this issue, the warden at Robertson amended the local cell-restriction policy by allowing prisoners at Sossamon's custody level (G-3) to attend worship services while on cell restriction. The Director of the Correctional Institutions Division of the TDCJ, Nathaniel Quarterman, submitted an affidavit during the pendency of this appeal advising that the TDCJ has adopted Robertson's relaxation of the cell-restriction policy for all Texas correctional facilities.

On the chapel-use claim, Texas concedes that

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[4] 42 U.S.C. §§ 2000cc to 2000cc-5 (2006).

[5] TEX. CIV. PRAC. & REM.CODE ch. 110 (Vernon 2007). This claim has been abandoned on appeal. Again mindful of our duty to construe his briefs liberally, we point out that state law cannot be the basis on which a federal court either enters an injunction or an award of monetary relief against a state. *See Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 117 (1984) ("The reasoning of our recent decisions on sovereign immunity thus leads to the conclusion that a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment."). As Sossamon dismissed all of his individual-capacity claims under TRFRA, we have no need to further discuss them.

Sossamon-like all other prisoners-has been denied access to the Robertson chapel for congregational religious services during the entirety of his incarceration at Robertson. In fact, all religious worship is now prohibited at the chapel. The Senior Warden of Robertson, Robert Eason, submitted an affidavit justifying this restriction on safety and security grounds. He averred that Robertson has a policy of physically segregating prisoners in different buildings based on a number of factors. In addition to assignment based on custody level, the prison attempts to suppress gang activity by assignments to different buildings based on gang affiliations. Warden Eason contends that allowing prisoners to gather in one location would undercut his policy of segregating hostile gang members. Also, moving prisoners from building to building taxes the staff and creates security risks, problems that are exacerbated by Robertson's security-personnel staffing levels, which are typically below authorized strength because the work is difficult and the pay is low. By providing religious services at alternative locations[6]-such as in Building 4 of Robertson, where Sossamon is currently housed-prisoners need not be moved from one building to another, thereby relaxing the demands on security personnel and reducing the amount of interaction among segregated prisoners.

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[6] Texas offered competent summary judgment evidence that "numerous hours of religious services and instruction [other than at the chapel] are provided to inmates sharing [Sossamon's] faith."The district court also found that "it is clear ... [that prisoners have] access to religious books and materials ... for the practice of their faith."

Warden Eason also averred that the chapel poses special security concerns. Chaplains and religious volunteers would have to walk through groups of prisoners to lead services from the front of the room. If an incident were to occur, the religious personnel could be trapped. The location of the chapel in the main administrative building also exposes the non-security personnel of the prison (such as secretaries and support staff) to the risk of an incident. Further, the main administrative building has storage spaces that could be used for hiding weapons and contraband. Warden Eason based his concerns in part on his personal experience: While serving as a captain at a correctional facility, a difficult-to-control riot broke out in a chapel with a design similar to that of the Robertson chapel.

Finally, Warden Eason noted that the Robertson chapel can hold only around 75 people at a time, which makes it too small to hold the number of prisoners who routinely attend non-Roman Catholic Christian services. Instead, according to Warden Eason, the prison uses the chapel as a library for religious books, a meeting place for staff, and a facility for teleconferencing. Regarding the merits of Sossamon's claimed need for access to the chapel, the prison chaplain averred that "it is not a basic tenant [sic] of the Christian faith that services must be held in particular locations."

Sossamon replied to Warden Eason's assertions. In an affidavit, he contended that a number of the non-religious purposes for which the chapel is used present the same security risks as would religious services. For example, he contends that the chapel is used for "teaching convicted sexual predators and child molesters how to practice safe sex at TDCJ-sponsored

'Peer Education' classes." These classes are taught by a "small petite" female security officer who is "left alone with a group of men, and groups of men attending these classes are some times [sic] left unsupervised in the chapel." He also contends that prisoners "can enter the chapel for marriage seminars that begin on Friday afternoon and last until Sunday. During these seminars[,] prisoners['] wives are allowed to spend up to twelve (12) hours inside the chapel with them." Prisoners who obtain a GED are given a celebration inside the chapel, "including contact visits with free world members of their family and with friends." Finally, he alleges that prisoners are permitted to use the chaplain's office to make phone calls at night, but not to enter the chapel and pray at the cross.

The district court granted summary judgment to the defendants, reasoning that (1) Eleventh Amendment sovereign immunity bars Sossamon's claims for monetary relief from Texas and the defendants in their official capacities, (2) the defendants are entitled to qualified immunity from suit for damages in their individual capacities because no violation of Sossamon's rights occurred, and (3) Sossamon did not demonstrate that injunctive relief under TRFRA or his federal claims is proper. The district court also refused to appoint counsel. This timely appeal followed, and we appointed appellate counsel.

II. ANALYSIS

1. Mootness

a. Standard of Review

We review *de novo* matters of justiciability, such as mootness, that affect our jurisdiction to hear a case.[7]

b. Merits

Texas contends that Sossamon's claims for injunctive relief based on Robertson's cell-restriction policy are moot because Director Quarterman has certified that Texas has ended the policy of preventing general-population prisoners on cell restriction from attending religious services. We were apprised of the change in policy and Texas's argument that Sossamon's injunctive-relief claims are now moot in a Federal Rule of Appellate Procedure 28(j) letter accompanied by an affidavit from Director Quarterman. As support for the conclusion that its voluntary cessation of the challenged conduct moots the case, Texas cites *Staley v. Harris County, Texas*, in which we held that an appeal raising First Amendment challenges to a New Testament Bible monument became moot after the defendant, Harris County, Texas, removed the monument.[8] We further held in *Staley* that any concern about a possible redisplay of the monument in the future was not yet ripe because "there are no facts before us to determine whether such a redisplay might violate the

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[7] *United States v. Lares-Meraz,* 452 F.3d 352, 355 (5th Cir. 2006) (per curiam).

[8] 485 F.3d 305, 309 (5th Cir. 2007) (en banc) (citing *Harris v. City of Houston,* 151 F.3d 186, 189 (5th Cir. 1998) ("[W]e find it beyond dispute that a request for injunctive relief generally becomes moot upon the happening of the event sought to be enjoined.")).

Establishment Clause."[9]

If the controversy between Sossamon and Texas has resolved to the point that they no longer qualify as "adverse parties with sufficient legal interests to maintain the litigation," we are without power to entertain the case.[10] This general rule is subject to several important exceptions however. For example, the voluntary cessation of a complained-of activity by a defendant ordinarily does not moot a case: If defendants could eject plaintiffs from court on the eve of judgment, then resume the complained-of activity without fear of flouting the mandate of a court, plaintiffs would face the hassle, expense, and injustice of constantly relitigating their claims without the possibility of obtaining lasting relief.

The Supreme Court has recently addressed this exception to mootness. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, the Court said that "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice."[11] Further, "the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to

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[9] *Id.*

[10] *Lares-Meraz,* 452 F.3d at 354 (internal quotation marks omitted).

[11] 528 U.S. 167, 189 (2000) (internal quotation marks omitted).

recur."[12] This is a "heavy burden," which must be born by the party asserting mootness.[13]

On the other hand, courts are justified in treating a voluntary governmental cessation of possibly wrongful conduct with some solicitude, mooting cases that might have been allowed to proceed had the defendant not been a public entity[14]--a practice that is reconcilable with *Laidlaw*. Although *Laidlaw* establishes that a defendant has a heavy burden to prove that the challenged conduct will not recur once the suit is dismissed as moot, government actors in their sovereign capacity and in the exercise of their official duties are accorded a presumption of good faith because they are public servants, not self-interested private parties. Without evidence to the contrary, we assume that formally announced changes to official governmental policy are not mere litigation posturing.

Under this lighter burden to make "absolutely clear" that the cell-restriction condition cannot "reasonably be expected to recur," Director

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[12] *Id.*

[13] *Id.*

[14] *See, e.g., Zepeda v. Boerne Indep. Sch. Dist.,* 294 F. App'x 834, 840 n.9 (5th Cir. 2008) (unpublished) (citing *McCrary v. Poythress,* 638 F.2d 1308, 1310 & n. 1 (5th Cir. 1981); *Ragsdale v. Turnock,* 841 F.2d 1358, 1365 (7th Cir. 1988); 13C CHARLES ALANWRIGHT, ARTHUR R. MILLER & EDWARD H.COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.7 n.6 (West 2008)). Our case that *Zepeda* cites pre-dates *Laidlaw* and only cites to a Supreme Court case that dealt with the "capable of repetition, yet evading review" exception, not the voluntary-cessation exception to mootness. The Seventh Circuit case *Zepeda* cited is on point.

Quarterman's affidavit is sufficient. In it, he swears that the he is the party responsible for enforcing administrative directives of the TDCJ, that the Executive Director of the TDCJ revised the relevant administrative directive, and that prisoners on cell restriction will now be permitted to attend religious services. Any claim that Sossamon might be removed from the general population is too speculative to avoid mooting the case; we cannot foresee how a claim made by a prisoner presenting special security concerns may differ. Further, the fact that the change in policy is now state-wide obviates any concern that local prison officials might change their minds on a whim or that Sossamon might be transferred to a facility with different rules.

We will not require some physical or logical impossibility that the challenged policy will be reenacted absent evidence that the voluntary cessation is a sham for continuing possibly unlawful conduct. The good faith nature of Texas's cessation is buttressed by the fact that Sossamon did not obtain relief below. Had the trial court granted the injunction, we might view any attempt to force a vacatur of such a determination (particularly in favor of a *pro se* prisoner) with a jaundiced eye. As things stand, Texas has given Sossamon that which he did not obtain in the district court and that which there at least existed a possibility he might not have obtained here. We therefore dismiss as moot those parts of the appeal that relate to Sossamon's claims for injunctive and declaratory relief from the erstwhile cell-restriction policy (but not his claims for damages based on the September 2005 enforcement of that restriction) with instructions that the district court vacate these

portions of its opinion as well.[15]

2. RLUIPA

a. Standard of Review

We review a district court's grant of summary judgment (and a district court's statutory interpretation) *de novo,* using the same standards as the district court.[16] "Summary judgment [should be granted] when the pleadings and evidence demonstrate that no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law."[17] The movant's initial burden is "to demonstrate that no genuine issue of material fact exists."[18] If the movant satisfies that initial burden by establishing the "absence of evidence to support an essential element of the non-movant's case, the burden shifts to the party opponent to establish that there is a genuine issue of material fact."[19]

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[15] The rule of automatic vacatur after a finding of mootness on appeal, best expressed in *United States v. Munsingwear, Inc.,* 340 U.S. 36, 39 (1950), was rejected by the Supreme Court in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* 513 U.S. 18, 23-24 (1994). Instead, a vacatur, which is an "extraordinary" and equitable remedy, is to be granted only after a fact-specific balancing of the equities between the parties. *Bancorp,* 513 U.S. at 26. When, however, a party who prevailed below makes the case moot by his unilateral action, a "vacatur must be granted." *Id.* at 23.

[16] FED.R.CIV.P. 56(c); *Condrey v. SunTrust Bank of Ga.,* 429 F.3d 556, 562 (5th Cir. 2005).

[17] *Condrey,* 429 F.3d at 562 (internal quotation marks omitted).

[18] *Id.*

[19] *Id.*

"An issue is 'genuine' if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party."[20] "A fact is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law."[21] At summary judgment, we construe facts in the light most favorable to the non-moving party.[22]

b. Merits

Sossamon seeks damages and equitable relief under RLUIPA from Texas and from the defendants in their individual and official capacities for the enforcement of the cell-restriction and the chapel-use policy against him. To address these claims, we must confront several issues that we have previously left unresolved. We must now determine (1) what, if any, private rights of action does RLUIPA create, (2) what are the limits on any such private rights of action in light of the sovereign immunity enjoyed by states, and (3) what is the interaction between the PLRA and the rights created by RLUIPA.

We begin with a preliminary observation: RLUIPA unambiguously creates a private right of action for injunctive and declaratory relief. In 42 U.S.C. § 2000cc-2(a), Congress granted prisoners permission to "assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." No decision cited by the parties and none of which we are aware holds that RLUIPA's "appropriate relief" language fails to confer

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[20] *Hamilton v. Segue Software, Inc.,* 232 F.3d 473, 477 (5th Cir. 2000) (per curiam).

[21] *Id.*

[22] *Connors v. Graves,* 538 F.3d 373, 376 (5th Cir. 2008).

an individual right to pursue declaratory and injunctive relief. We therefore address whether RLUIPA also authorizes suits for damages against (1) RLUIPA defendants in their individual capacities or (2) the state and its officers in their official capacities, or both. We address each damages question in turn before addressing Sossamon's claims for injunctive and declaratory relief.

A number of circuits appear to have assumed that an individual-capacity cause of action for damages exists because the courts have conducted, or on remand have required that the district court conduct, a qualified immunity analysis.[23] Some circuits have also reached the PLRA issue and held that, because it bars compensatory damages absent physical injury, the question about RLUIPA's remedial scope is irrelevant.[24] Of course, if no private right of action

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[23] The Ninth Circuit appears to have assumed that a cause of action for monetary relief against state actors in their individual capacities exists, but its cases contain no analysis and are unpublished. *See Campbell v. Alameida,* 295 F. App'x 130, 131 (9th Cir. 2008) (mem.) (unpublished); *Von Staich v. Hamlet,* Nos. 04-16011 & 06-17026, 2007 WL 3001726, at *2 (9th Cir. Oct. 16, 2007) (mem.) (unpublished). The Third Circuit has declined to address the issue. *Brown v. Dep't of Corr.,* 265 F. App'x 107, 111 n. 3 (3d Cir. 2008) (per curiam) (unpublished) ("We also find it unnecessary to reach the questions whether individuals may be liable for monetary damages under the RLUIPA and whether qualified immunity applies here."). The Fourth Circuit noted a split in the district courts over the issue, but did not resolve it. *Madison v. Virginia,* 474 F.3d 118, 130 n. 3 (4th Cir. 2006).

[24] *See* cases cited *supra* note 23. This is not true as a general proposition, although it appears to have been accurate for the case that held as much, i.e., the plaintiffs did not request nominal or punitive damages, which are the only damages absent physical injury that the PLRA does not bar. *See Mayfield v. Tex. Dep't of Criminal Justice,* 529 F.3d 599, 605-06 (5th Cir. 2008).

exists against the defendants in their individual capacities, then a qualified immunity or PLRA analysis would be unnecessary. In *Mayfield v. Texas Department of Criminal Justice,* the only case in which we have examined this issue, we appeared to countenance the idea that a cause of action exists, but then expressly declined to resolve the issue.[25] We will assume that if RLUIPA creates an action against defendants in their individual capacities, then it provides for damages.[26] For the reasons that we explain below, we decline to find any authority for individual-capacity actions in the statute.

The Eleventh Circuit is the only circuit that has resolved this issue. After acknowledging a split in the district courts, *Smith v. Allen* held that RLUIPA does not provide for damages from individuals.[27] The plain language of RLUIPA, however, seems to contemplate such relief. Despite providing a cause of action for suits against "a government," the definition of government provided by the statute is expansive.[28] The term "government" means:

(i) a State county, municipality, or other

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[25] 529 F.3d 599 at 605-06 & n.8.

[26] *See Smith v. Allen,* 502 F.3d 1255, 1272 (11th Cir. 2007). For example, the *Smith* court noted that the Supreme Court has instructed us to "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise" or given guidance by a "clear indication of its purpose with respect to remedies." *Id.* at 1270 (internal quotation marks omitted). There is no clear or express indication in RLUIPA that damages are unrecoverable.

[27] *Id.*

[28] 42 U.S.C. § 2000cc-2(a) (2006).

> governmental entity created under the authority of a State; (ii) a branch, department, agency, instrumentality, or *official of an entity* listed in [that] clause ...; and (iii) *any other person acting under color of state law*. . . .[29]

Smith acknowledged that this language appears to create a right against state actors in their individual capacities. It even mirrors the "under color of" language in § 1983, which we know creates an individual-capacity cause of action for damages.[30]

In holding that individuals may nevertheless *not* be sued for damages under RLUIPA, the Eleventh Circuit added an important gloss to a plain-language interpretation of the statute: RLUIPA was enacted pursuant to Congress's Spending Clause power, not pursuant to the Section 5 power of the Fourteenth Amendment.[31] Accordingly, only the grant recipient-the state-may be liable for its violation.[32] Spending Clause legislation is not legislation in its operation; instead, it operates like a contract,[33] and individual RLUIPA defendants are not parties to the contract in their individual capacities.

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[29] *Id.* § 2000cc-5 (emphases added).

[30] *See, e.g., Monroe v. Pape,* 365 U.S. 167, 172 (1961), *overruled on other grounds by Monell v. Dep't of Social Servs.,* 436 U.S. 658 (1978).

[31] *See Cutter v. Wilkinson,* 544 U.S. 709, 715-16 (2005) (mentioning the Spending and Commerce Clauses); *Smith,* 502 F.3d at 1274 n. 9 (Spending Clause only).

[32] *Smith,* 502 F.3d at 1272-73.

[33] *See Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 17 (1981).

We too conclude that RLUIPA, at least as Sossamon asserts a claim under it, was passed pursuant to the Spending Clause,[34] and we too follow the same rule for such legislation.[35] The legislation/contract distinction makes good sense-if a congressional enactment could provide the basis for an individual's liability based only on the agreement of

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[34] Every circuit to consider whether RLUIPA is Spending Clause legislation has concluded that it is constitutional under at least that power. *See Madison v. Virginia,* 474 F.3d 118, 124 (4th Cir. 2006) (approving of enactment under the Spending Clause, but not passing on a Commerce Clause authority); *Cutter v. Wilkinson,* 423 F.3d 579, 584-90 (6th Cir. 2005) (same); *Benning v. Georgia,* 391 F.3d 1299, 1313 (11th Cir. 2004) (same); *Charles v. Verhagen,* 348 F.3d 601, 606-11 (7th Cir. 2003) (same); *Mayweathers v. Newland,* 314 F.3d 1062, 1066-70 (9th Cir. 2002) (same). Only the Eleventh Circuit has explicitly held that RLUIPA is Spending, not Commerce, Clause legislation. *Smith,* 502 F.3d at 1274 n. 9. In light of the Supreme Court's rationale for striking down the prior incarnation of RLUIPA as applied to the states, *see Cutter,* 544 U.S. at 715 (characterizing *City of Boerne v. Flores,* 521 U.S. 507, 532-36 (1997), the case that struck down the Religious Freedom Restoration Act ("RFRA"), as focusing on the absence of a Commerce Clause underpinning or Spending Clause limitation), we agree with the Eleventh Circuit's conclusion (and the implicit conclusion of the other circuits by their uniform choice to select the Spending Clause as the most natural source of congressional authority to pass RLUIPA) when there is no evidence concerning the effect of the substantial burden on "commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. § 2000cc-1(b)(2).

[35] *See Pederson v. LSU,* 213 F.3d 858, 876 (5th Cir. 2000) ("Title IX is Spending Clause legislation, and as a statute enacted under the Spending Clause, Title IX generates liability when *the recipient of federal funds* agrees to assume liability." (emphasis added) (citing *Rosa H. v. San Elizario Indep. Sch. Dist.,* 106 F.3d 648, 654 (5th Cir. 1997))). In fact, *Smith* cited *Rosa H.* as support for its conclusion. 502 F.3d at 1274.

(but not corresponding enactment of legislation by) a state, then important representation interests protected by federalism would be undermined. After passively acquiescing in the regulation of its citizens under a federal standard to receive needed funding from Congress, a state legislature could point its finger at the federal government for tying needed funds to an undesired liability-the regulation or law responsible for such liability not having been enacted by the state. Congress could reciprocate by pointing its finger at the state legislature for accepting the funds and visiting liability on its citizens by the state's own choice, even though the state itself did not enact the law or regulation in question. Such an approach blurs the lines of decisional responsibility; that, in turn, undermines the popular check on both state and federal legislatures. We therefore make explicit that which was implicit in our earlier cases: Congressional enactments pursuant to the Spending Clause do not themselves impose *direct* liability on a non-party to the contract between the state and the federal government.[36] Cases like *South Dakota v. Dole*, despite its lax approach to *indirect* legislation (such as requiring that a state itself pass a particular law) under the Spending Clause, were clearly intended to prevent--in spirit, if not by doctrine--this type of end-run around the limited powers of Congress to directly

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[36] *Cf. Pennhurst,* 451 U.S. at 17 ("The legitimacy of Congress' power to legislate under the spending power ... rests on whether *the State* voluntarily and knowingly accept[ed] the terms of the 'contract.'" (emphasis added)). Perhaps there is an argument to be made that by accepting employment in a federally funded state enterprise, a state official becomes a third-party beneficiary to the contract, or knowingly and voluntarily subjects himself to liability. Sossamon does not make this argument.

affect individual rights.[37] To decide otherwise would create liability on the basis of a law never *enacted* by a sovereign with the power to affect the individual rights at issue. For this reason, as a matter of statutory interpretation and to avoid the constitutional concerns that an alternative reading would entail, we decline to read Congress's permission to seek "appropriate relief against a government" as permitting suits against RLUIPA defendants in their individual capacities.

Having concluded that an action under RLUIPA does not exist for individual-capacity claims, we will assume *arguendo* that an official-capacity damages action exists. Whether or not RLUIPA creates such a cause of action, it is barred by Texas's sovereign immunity. As we noted above, RLUIPA was passed pursuant to the Spending Clause. It is therefore not an attempt by Congress to *abrogate* Texas's sovereign immunity, but to goad Texas to *waive* its sovereign immunity by accepting federal funds conditioned on accepting liability.[38] We recently declined to address

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[37] 483 U.S. 203 (1987).

[38] Sossamon's supplemental brief, prepared by the counsel we appointed him, contends that Texas waived its sovereign immunity for this case by requesting attorneys' fees in its answer to the original complaint. For this proposition, the brief cites *Powell v. Texas Department of Criminal Justice,* 251 S.W.3d 783, 791 (Tex.App.-Corpus Christi 2008, pet. filed). Our waiver inquiry is limited by the Supreme Court to determining whether the state (1) expressly consented to suit in federal court, *see Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 241 (1985), *superseded by statute on other grounds as stated in Pace v. Bogalusa City Sch. Bd.,* 403 F.3d 272, 280 n.29 (5th Cir. 2005) (en banc), or (2) waived its sovereign immunity through litigation conduct, for example, by voluntarily invoking a federal court's subject matter jurisdiction, *see Lapides v. Bd. of Regents of Univ. Sys. of Ga.,* 535 U.S. 613, 619 (2002). Sossamon makes no claim that a

this issue,[39] and there is a circuit split on the question. In *Benning v. Georgia,* the Eleventh Circuit concluded that a state waives its sovereign immunity by participating in RLUIPA's *quid pro quo.*[40] In *Madison v. Virginia,* the Fourth Circuit reached the opposite conclusion.[41]

When deciding the validity of a putative waiver of sovereign immunity through a state's participation in a Spending Clause "contract," we ask whether Congress spoke with sufficient clarity to put the state on notice that, to accept federal funds, the state must also accept liability for monetary damages.[42] The Eleventh Circuit did not dwell long on whether the phrase "appropriate relief" unambiguously notified Georgia that its acceptance of federal funds was conditioned on a waiver of immunity from suit, holding that it did.[43] Against a challenge that *Pennhurst State*

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request for attorneys' fees in an answer is a voluntary invocation of our subject matter jurisdiction like removal, so his *Lapides* waiver argument fails.

[39] *Mayfield v. Tex. Dep't of Criminal Justice,* 529 F.3d 599, 605 n.8 (5th Cir. 2008) ("However, circuit courts are currently split on whether RLUIPA provides for a waiver of state sovereign immunity.... We need not reach [that] issue[ ] to decide this appeal.").

[40] 391 F.3d 1299, 1305 (11th Cir. 2004).

[41] 474 F.3d 118, 131 (4th Cir. 2006).

[42] *See Pennhurst,* 451 U.S. at 17 ("There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." (footnote omitted)).

[43] *Benning,* 391 F.3d at 1305-06.

School & Hospital v. Halderman[44] required more specificity than the quoted language, the *Benning* court held that "[t]he federal law in *Pennhurst* was unclear as to whether the states incurred any obligations at all by accepting federal funds, but RLUIPA is clear that states incur an obligation when they accept federal funds."[45]

The Fourth Circuit, we believe properly, continued the analysis where the Eleventh left off, observing that RLUIPA clearly apprises states that they incur an obligation, to wit, amenability to some sort of suit seeking to enforce the rights RLUIPA creates; however, the question then becomes, "Which kind?" To choose between deciding whether Virginia knew that the cause of action envisioned by Congress permitted damages (which is what we read *Pennhurst* to require) or only knew that it was subjecting itself to equitable remedies, the *Madison* court turned to the rules of construction found in the Supreme Court's waiver jurisprudence. The court pointed out that any alleged waiver must be strictly construed in favor of the sovereign. Further, the waiver may not be enlarged "beyond what the language requires," and ambiguities must be resolved in favor of immunity.[46] With those principles in mind, the opinion concluded that "appropriate relief" is "subject to more than one interpretation," making the language "open-ended and equivocal."[47] This fell short of the requirement that a

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[44] 451 U.S. at 13-14.

[45] *Benning,* 391 F.3d at 1307.

[46] *Madison,* 474 F.3d at 131 (citing *Lane v. Pena,* 518 U.S. 187, 192, 196 (1996)).

[47] *Id.* at 131-32 (internal quotation marks omitted).

textual waiver of immunity must "extend unambiguously to such monetary claims."[48] For the Fourth Circuit, this meant that RLUIPA could not satisfy *Dole*'s requirement that the spending condition be unambiguous. We find the Fourth Circuit's reasoning persuasive, although we conclude that the spending provision is not sufficiently clear in light of the Court's sovereign-immunity jurisprudence, rather than, strictly speaking, under *Dole*.

The rules of construction that the Eleventh Circuit applied to resolve the ambiguities in "appropriate relief" for purposes of the cause-of-action inquiry in *Smith* disappear when we must interpret an ambiguous provision against the backdrop of a state's sovereign immunity. That is, we must presume that Congress intended to afford all ordinary remedies not *expressly disclaimed* when we interpret the ambiguous language it uses to create a cause of action.[49] We may not presume the same when we ask whether a state knowingly waived its immunity from damages when damages are not *expressly provided.* 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.[50] Accordingly, Sossamon's

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[48] *Id.* at 131.

[49] *See Smith v. Allen,* 502 F.3d 1255, 1272 (11th Cir. 2007).

[50] *Cf. Will v. Mich. Dep't of State Police,* 491 U.S. 58, 66-67 (1989) ("This does not mean ... that we think that the scope of the Eleventh Amendment and the scope of § 1983 are not separate issues. Certainly they are. But in deciphering congressional intent as to the scope of § 1983, the scope of the Eleventh Amendment is a consideration, and we decline to adopt a reading of § 1983 that disregards it.").

claims for monetary relief from Texas and its officers in their official capacities are barred.

To briefly recap, we hold that whether or not RLUIPA creates a cause of action for damages against Texas and the defendants in their official capacities, any award of damages is barred by Texas's sovereign immunity. We also hold that RLUIPA does not create a cause of action against defendants in their individual capacities. Accordingly, we need not address Texas's PLRA argument for the RLUIPA claims.[51]

Even though Sossamon may not recover monetary damages, there are genuine issues of material fact about his entitlement to declaratory and injunctive relief from Texas's chapel-use policy.[52] RLUIPA requires that prison officials refrain from (1) substantially burdening an inmate's free exercise of his religion unless, when strictly scrutinized, (2) the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling interest."[53] The

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[51] We have conducted the predicate cause-of-action and sovereign immunity inquiries because it is unclear whether or not Sossamon abandoned on appeal his request for punitive damages. The PLRA does not bar punitive damages, so we would have been required to address these questions at least for punitive damages in any event. *See Mayfield v. Tex. Dep't of Criminal Justice,* 529 F.3d 599, 605-06 (5th Cir. 2008). That we reached the above conclusions for compensatory damages only strengthens the conclusion that punitive damages are (1) unavailable against RLUIPA defendants in their individual capacities and (2) barred by a state's sovereign immunity even if RLUIPA intended to permit them.

[52] As discussed above, any claims for prospective relief based on the old cell-restriction policy are moot.

[53] 42 U.S.C. § 2000cc-1(a) (2006).

initial burden is on the plaintiff "to demonstrate that the government practice complained of imposes a 'substantial burden' on his religious exercise."[54] Bearing that initial burden requires answering two questions in the affirmative: "(1) Is the burdened activity 'religious exercise,' and if so (2) is the burden 'substantial?' "[55]

Religious exercise under RLUIPA is defined very broadly to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[56] A *burden* is *substantial* if "it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs."[57] A burden is not substantial if "it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed."[58]

The practice burdened need not be central to the adherent's belief system, but the adherent must have an honest belief that the practice is important to his free exercise of religion.[59] Even though the statute by its terms does not exempt rules or regulations simply because they are generally applicable,[60] we observed in

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54 *Adkins v. Kaspar,* 393 F.3d 559, 567 (5th Cir. 2004).

55 *Id.*

56 *Id.*

57 *Id.* at 570.

58 *Id.*

59 *Id.*

60 42 U.S.C. § 2000cc-1(a) (2006).

Adkins v. Kaspar that the uniformity of a burden is nevertheless relevant.[61] The inquiry is a "case-by-case, fact-specific inquiry," and we have also considered whether the "rule or regulation ...*directly* prohibits" the practice.[62]

The compelling-governmental-interest issue is not in significant dispute in this case. Effective and affordable prison security at the chapel is a compelling governmental interest.[63] The phrase "least restrictive means" has its plain meaning.

Concerning the first question in our RLUIPA inquiry, *viz.,* whether the claim involves "religious activity," there can be no serious dispute that Sossamon's claimed need for access to the chapel and its symbols relates to the exercise of his religion. As for the second question, we perceive a genuine issue of material fact whether the chapel-use policy creates a substantial burden on Sossamon's free exercise.

There seems to be no question about the genuineness of Sossamon's claimed desire to appear in front of the cross and altar in a room designated for Christian worship. One of the clerical affidavits submitted by TDCJ points out that Christianity, on the chaplain's understanding of it, does not consider

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[61] *Adkins,* 393 F.3d at 571.

[62] *Id.* (emphasis added).

[63] *See Baranowski v. Hart,* 486 F.3d 112, 125 (5th Cir. 2007) ("Courts should apply the compelling governmental interest standard with due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." (internal quotation marks omitted)).

these acts basic tenets of the faith. But, the chaplain's understanding is irrelevant except to the extent that it might call into question Sossamon's good faith, which it does not purport to do. *Adkins* was quite clear that a practice need not be central to an adherent's religion, simply important. No summary judgement evidence contradicts Sossamon's claim that these religious practices are important to *his* practice of Christianity. Prison chaplains are not arbiters of the measure of religious devotion that prisoners may enjoy or the discrete way that they may practice their religion.

Texas nevertheless contends that by making alternative venues available to Sossamon, he cannot claim that denying him access to the chapel and its Christian symbols substantially burdens his religious exercise. This ignores the fact that the rituals which Sossamon claims are important *to him*-without apparent contradiction-are now completely forbidden by Texas.[64] He may go to Christian services, but none

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[64] *See Greene v. Solano County Jail,* 513 F.3d 982, 987-88 (9th Cir. 2008) (clarifying that specific practices of a religion fall within the definition of "*any* exercise of religion" in RLUIPA); *Murphy v. Mo. Dep't of Corr.,* 372 F.3d 979, 988 (8th Cir. 2004) ("[A] substantial burden to free exercise rights may exist when a prisoner's sole opportunity for group worship arises under the guidance of someone whose beliefs are significantly different from his own." (internal quotation marks omitted)). *Smith v. Allen,* 502 F.3d 1255, 1277 (11th Cir. 2007), is not to the contrary. There, after a very extensive review of the prisoner's many requests for religious items, the prison denied the adherent a quartz crystal, but only after the prison granted the adherent "a Thor's hammer necklace; a candle in his cell; a fern tree; a number of religious 'runes' ... as well as permission to have a designated day of the week to practice his Odinism; and permission to recognize four Odinist holidays." *Id.* at 1277 n.13. The denial of the quartz crystal, after a back and forth on supporting documentation, is markedly different from a wholesale denial of what Sossamon

of those services satisfy *his* need to perform what are apparently important aspects of *his* free exercise of Christianity, to wit: "[K]neeling at the alter [sic] in view of the Cross, to pray ...." and the like.

In *Mayfield,* we held that denying runestones to an Odinist created a genuine issue of material fact whether the adherent's religious exercise was substantially burdened.[65] Faced with a claim that all prisoners were barred from having similar items for security reasons, the court held that "TDCJ cannot use what is effectively a compelling interest argument to answer the preceding question of whether Mayfield's religious exercise is substantially burdened."[66] So too in this case: The fact that the chapel is off limits to all congregational worship does not answer whether Sossamon's religious exercise has been substantially burdened. *Mayfield* is even stronger support for Sossamon because the *Mayfield* plaintiff was permitted to possess runestones whenever a lay volunteer was available.[67] Here, Sossamon is never permitted to engage in religious worship in the chapel, at least according to the summary-judgment evidence.

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claims is core to the practice of his Christianity, at least for summary judgment purposes.

[65] 529 F.3d 599, 615-16 (5th Cir. 2008).

[66] *Id.* at 616.

[67] We also found that genuine issues of material fact existed as to the lay-volunteer policy, which precluded Mayfield from forming a group in which to worship without a volunteer present (volunteers came very irregularly). *Id.* at 613-15, 617. Texas responded that Mayfield could worship in his cell, but could not possess all of the worship items he contended were necessary. *Id.* We found that this alternative-solo worship-was inadequate to remedy the burden. *Id.*

Perhaps the best argument in Texas's favor is that Sossamon is simply asking to enjoy some "benefit" or to act in some way "not otherwise allowed." In debunking Texas's prison-security argument, Sossamon alleges that other prisoners are allowed to use the chapel for secular purposes. Thus, when viewed in the light most favorable to Sossamon, chapel access is clearly not something that is generally disallowed or a benefit not generally possessed by prisoners at Robertson. Congregational *worship* is not generally allowed in the chapel, but the key security factor-physical *presence* in the chapel of a group of prisoners engaged in communal activity-is allowed. The fact that the policy directly responsible for this burden bars *all* such religious worship (a fact that we noted was not present in *Adkins*) hardly makes a stronger case for finding no substantial burden when substantial secular use is made of the facility at issue.

Other RLUIPA cases in this circuit have recognized that a genuine issue of material fact exists in determining whether refusing to allow a Native American to let his hair grow out creates a substantial burden on religious exercise.[68] Failure to provide kosher food may also constitute a substantial burden.[69] It is primarily cases in which the small number of available lay volunteers makes religious services less frequent than an adherent would like (but still available on a somewhat regular basis) that a neutrally applied policy does not substantially burden religious exercise.[70] In Sossamon's case, the religious

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[68] *Longoria v. Dretke,* 507 F.3d 898, 903 (5th Cir. 2007) (per curiam).

[69] *Baranowski v. Hart,* 486 F.3d 112, 125 (5th Cir. 2007).

[70] *See id.* at 124-25; *Adkins,* 393 F.3d at 571.

practice that he claims is important to him is denied to him at all times, whether or not volunteers are present. Accordingly, genuine issues of material fact exist on the "substantial burden" question of RLUIPA.

If there is (or could be) a substantial burden, the second RLUIPA question requires us to answer whether the substantial burden is nevertheless justified by a compelling governmental interest achieved through the least restrictive means. Texas obviously has compelling governmental interests in the security and reasonably economical operation of its prisons, but there are genuine issues of material fact as to whether vis-à-vis the chapel it has furthered those interests through the least restrictive means possible. Sossamon produced competent summary-judgment evidence which, when viewed in the light most favorable to him, reveals that the chapel can be and is safely used for other kinds of prisoner gatherings, such as weekend-long marriage training sessions (with outside visitors), sex education, and parties for GED graduates. Texas contends that because Sossamon is allowed to attend religious services elsewhere, it has adopted the least restrictive means of accommodating his religious beliefs because Texas has not banned Christian worship entirely.[71]

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[71] Even this argument fails. For example, Texas could provide a portable altar and a portable set of Christian furnishings that could be used for worship in one of the rooms where congregational services are held. Whether that would satisfy Sossamon is uncertain; he does seem to contend that services in the chapel itself, which to him is God's house, are necessary. Still, providing a portable altar and Christian symbols at the alternative worship venues would restrict his religious exercise less.

This misses the point. Odinist worship was not banned in *Mayfield* either; the prison simply made inadequate accommodations for it. Yet we found a genuine issue of material fact existed as to whether the prison had furthered a compelling governmental interest by the least restrictive means. In contrast, Texas *has* banned the kind of Christian worship Sossamon contends is indispensable to the exercise of *his* Christianity--kneeling in front of the cross and such. Yet in its brief, Texas does not even engage the issue of other groups of prisoners using the chapel. We cannot say that there are no genuine issues of material fact about how prison security might be furthered by the chapel-use policy when Texas essentially asks us to accept the conclusional assertion that a worship service presents significantly more danger than a sex-ed class.

Neither can we see why many of the security concerns voiced by Texas cannot be met by using less restrictive means, even taking into account cost. For instance, shifts of prisoners, segregated by building, could be permitted to worship in the chapel, which would obviate concerns about the mixing of rival gangs and seating capacity. Services might be limited to days when fewer administrative personnel are in the main building (say, on Sundays), which should lessen the risk to non-security personnel of a riot and the strain of frequent prisoner movements. Some of these options might not prove feasible, and there might be as-yet-unarticulated reasons why Texas must ban worship services in the chapel while nevertheless using it for other prisoner gatherings (or that it in fact does not).[72]

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[72] Perhaps only prisoners unlikely to create a security concern are permitted in these other gatherings, if the other

Those issues may be further developed on remand.

Concluding that there are genuine issues of material fact in both steps of the strict-scrutiny analysis that RLUIPA instructs us to apply, we reverse the grant of summary judgment in favor of Texas on this claim and remand for further proceedings consistent with this opinion.

3. Section 1983 Claims

a. Standard of Review

As with the RLUIPA claims, we review the district court's grant of summary judgment on these claims *de novo,* applying the same standards as the district court and construing the evidence in the light most favorable to the non-moving party.[73]

b. Merits

Sossamon's First Amendment claim is, as a practical matter, only relevant in this appeal to his individual-capacity-damages claims under § 1983.[74] RLUIPA, by directing that we apply strict scrutiny, makes injunctive relief easier for Sossamon to obtain than it would be under the First Amendment. In *Turner v. Safley*, which provides the standard for establishing a First Amendment violation in the prison context, the Supreme Court held that so long as actions are "reasonably related to legitimate

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gatherings in fact happen. This would be no excuse for failing to permit such low-risk prisoners from using the chapel for worship as well.

[73] *Condrey v. SunTrust Bank of Ga.,* 429 F.3d 556, 562 (5th Cir. 2005).

[74] Section 1983 does not provide a cause of action against states or state employees in their official capacities for damages. *See Will v. Mich. Dep't of State Police,* 491 U.S. 58, 66-67 (1989).

penological interests,"[75] they are constitutional. That is an easier showing for Texas to make than that its actions pass strict scrutiny. We also perceive no remedial differences between RLUIPA and the Constitution for purposes of an injunction. But, for the same reasons that summary judgment was improper on Sossamon's claims for injunctive and declaratory relief under RLUIPA, we perceive that there are genuine issues of material fact going to the reasonableness of Texas's conduct under even the laxer First Amendment standard. Should the distinction between the two causes of action become important going forward, the district court is free in the first instance to assess anew, after further proceedings, whether the chapel-use policy states a First Amendment violation.

As for the individual-capacity claims for damages under the First Amendment, we note that the defendants who Sossamon sued enjoy qualified immunity as government actors.[76] Whether Sossamon could establish a violation of the First Amendment in addition to RLUIPA is not a question that we resolve today. Instead, we simply note that Sossamon has pointed to no cases that render the defendants' actions-under either the cell-restriction policy or the chapel-use policy-unreasonable in light of clearly established federal law. We therefore affirm on that

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[75] 482 U.S. 78, 89 (1987).

[76] *See Behrens v. Pelletier,* 516 U.S. 299, 205-06 (1996) ("[T]he qualified immunity defense shield [s] [government agents] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (internal quotation marks omitted) (alterations in original)).

basis the grant of summary judgment in favor of the individual defendants for the First Amendment claims.

Although barely briefed on appeal, Sossamon also claims that the provision of special food and religious accommodations to Muslim prisoners violates the Equal Protection Clause. But, for such a claim to succeed, Sossamon must prove "purposeful discrimination resulting in a discriminatory effect among persons similarly situated."[77] *Turner* applies in the equal protection context, and not "every religious sect or group within a prison-however few in numbers-must have identical facilities or personnel."[78]

Other than alleging that Muslim prisoners receive special meals and religious accommodations (requests for which are handled under a consent decree entered into for past discrimination against them),[79] Sossamon has marshaled absolutely no evidence in support of his equal protection claim. Even without the consent decree as an explanation, he fails to allege anything but the "bald, unsupported, conclusional allegations that defendants purposefully discriminated against him" that we found inadequate in *Adkins.*[80] These claims are without merit, so summary judgment in favor of the defendants was proper.

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[77] *Adkins v. Kaspar,* 393 F.3d 559, 566 (5th Cir. 2004) (internal quotation marks omitted).

[78] *Id.*

[79] *See Brown v. Beto,* No. 4:74-CV-069 (S.D.Tex. 1977).

[80] 393 F.3d at 566.

III. CONCLUSION

For the foregoing reasons, we REVERSE the district court's grant of summary judgment to Texas and the other defendants on Sossamon's RLUIPA and First Amendment claims for declaratory and injunctive relief arising out of the chapel-use policy and REMAND for further proceedings consistent with this opinion. We DISMISS AS MOOT so much of the appeal as relates to Sossamon's claims for injunctive and declaratory relief based on the cell-restriction policy with instructions that the district court VACATE those portions of its opinion as well. Otherwise, we AFFIRM the grant of summary judgment in favor of Texas and the defendants in their official and individual capacities on all (1) claims under TRFRA, the Eighth Amendment, and the Fourteenth Amendment; (2) all claims for damages under the First Amendment; (3) and all claims for damages under RLUIPA.

DISMISSED AS MOOT IN PART; REVERSED IN PART; AFFIRMED IN PART; REMANDED.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

HARVEY LEROY SOSSAMON III
#1120297

V.

THE LONE STAR STATE OF TEXAS,
CHRISTINA MELTON CRAIN,
CATHY CLEMENT,
BRAD LIVINGSTON, DOUG DRETKE,
REV. R.C. MURPHY, ROBERT EASON,
STACY L. JACKSON, and
PAUL J. KLIEN

A-06-CA-003-SS

ORDER

Before the Court are Plaintiff's complaint brought pursuant to 42 U. S. C. § 1983 (Document No.1); Plaintiff's Motion for Partial Summary Judgment (Document No. 23); Defendants' Partial Motion to Dismiss (Document No. 28); Defendants' Motion for Summary Judgment (Document No. 29); Plaintiff's response thereto (Document No. 33); Plaintiff's Motion for Dismissal Under the Texas Religious Freedom Act, Against the Defendants in their Personal and Individual Capacities (Document No. 43); and Plaintiff's Motion for Partial Dismissal and Withdrawal to Amend the Original Complaint

(Document No. 48). Plaintiff, proceeding pro se, has been granted leave to proceed in forma pauperis.

I. BACKGROUND

At the time he filed his complaint, Plaintiff was an inmate incarcerated in the Robertson Unit of the Texas Department of Criminal Justice - Correctional Institutions Division. Plaintiff files this action pursuant to the Civil Rights Act, 42 U.S.C. § 1983; the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc through § 2000cc-5; and the Texas Religious Freedom Act ("TRFA"), TEX. CIV. PRAC. & REM. Code Chapter 110. Plaintiff alleges Defendants have violated his rights under the First, Eighth, and Fourteenth Amendments, RLUIPA and TRFA by denying him the opportunity to participate in congregational Christian services: (1) in the chapel at the Robertson Unit; and (2) while on cell restriction at the Robertson Unit. Plaintiff seeks declaratory, injunctive and compensatory relief. He sues the Lone Star State of Texas, Christina Melton Crain (Chairperson of the Texas Board of Criminal Justice), Cathy Clement (Assistant Regional Director for Region VI of TDCJ), Brad Livingston (Executive Director of TDCJ), Doug Dretke (former Director of the Correctional Institutions Division of TDCJ), Reverend R.G. Murphy (Region V Program Administrator for the Chaplaincy Department, Rehabilitation and Reentry Programs Director of TDCJ), Robert Eason (Senior Warden at the Robertson Unit), Stacy Jackson (Assistant Warden at the Robertson Unit), and Paul J. Klien (Volunteer Chaplain at the Robertson Unit). Plaintiff sues the defendants in their individual and official capacities.

Plaintiff was granted leave to amend his complaint. Subsequently, Plaintiff informed the Court

he would not be able to meet the deadline for amending his complaint and requested his request to amend be withdrawn. Plaintiff further requested the Court to go forward with its decisions in this case based on his original complaint. However, Plaintiff moved the Court to dismiss his claims brought pursuant to the TRFA against the defendants in their individual capacities. He further moved the Court to dismiss his claims brought against Defendants Murphy, Jackson and Klien. Plaintiff's requests to dismiss will be granted.

In his original complaint Plaintiff alleges inmates are denied total access to the prison chapel at the Robertson Unit for purposes of religious expression. He further claims Plaintiff and religious inmates wanting access to the chapel are victims of discrimination. Plaintiff explains prison officials allow inmates access to the chapel for non-religious purposes. Plaintiff contends Defendants have exaggerated the need for security in the chapel. Plaintiff complains Defendants have evicted God out of His house and reduced Christian worship services to attendance inside a multi-purpose room. According to Plaintiff, the multi-purpose rooms contain no traditional Christian symbols or furnishings. Plaintiff further asserts their services or Bible studies are often interrupted by security personnel or loud yelling just outside the window to the room. Plaintiff also claims inmates are retaliated against and harassed by security personnel if an inmate worker does not stop worshiping and report to work as ordered. Plaintiff claims the retaliation and harassment may consist of a strip search. However, Plaintiff does not allege he has personally been subjected to a strip search for failing

to report to work, and he did not raise this issue in his prison grievances.

Plaintiff further alleges Christians are discriminated against at the Robertson Unit because they are not provided special accommodations to hold religious ceremonies and do the necessary rituals in the chapel or any other sanctified place for Easter week and the Sunday service unlike Muslims, who receive special accommodations during Ramadan and other Muslim holy days. Plaintiff further complains there are no special meals for Christians to observe any religious holy day or period.

Plaintiff contends Defendants have subjected him to cruel and unusual punishment by causing him spiritual, mental, emotional and physical pain. Plaintiff explains this punishment was caused by denying him the most basic opportunities to express and practice his Christian faith inside the prison sanctuary. Plaintiff asserts he was forced to accept and witness the eviction of God from the chapel and the reducing of God to a time-share deity with anger management prisoners in the multi-purpose room empty of any Christian symbols or furnishings.

In addition to being denied access to the chapel, Plaintiff alleges inmates subjected to cell restrictions as a result of a disciplinary violation are not allowed to attend church services. According to Plaintiff, prisoners are allowed to leave their cells while on cell restriction for many other purposes including going to work, eat, shower, medical lay-ins, educational classes, the law library and other secular activities.

According to Plaintiff, on September 15, 2005, Plaintiff was found guilty of a minor rule infraction. As result, he received 15 days cell restriction and 15 days

loss of commissary privileges. Because of the cell restriction, he was denied permission to attend religious services on September 18, 2005, and September 25, 2005. Plaintiff grieved the issue, and was told by Warden Eason that he would look into the cell restriction policy.

II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants move for summary judgment arguing IDCJ's policies concerning religious practices are reasonably related to legitimate penological interests - safety and security - and do not violate Plaintiffs constitutional rights. Defendants contend the policies are justified by compelling state interests and there is no other way, let alone a less restrictive way, to balance TDCJ's accommodation of religions with the need to ensure the safety and security of offenders and correctional personnel.

III. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff moves for partial summary judgment seeking summary judgment on his claims arising from the cell restriction policy and the denial of access to the chapel.

IV. ANALYSIS

A. Standard of Review Under Fed. R. Civ. P. 56(c)

A court will, on a motion for summary judgment, render judgment if the evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996); *Int'l Shortstop, Inc. v. Rally Inc.,* 939 F.2d 1257,1263 (5th Cir. 1991), *cert. denied,* 502 U.S. 1059, 112 S. Ct. 936 (1992). When a motion for summary

judgment is made and supported, an adverse party may not rest upon mere allegations or denials but must set forth specific facts showing there is a genuine issue for trial. *Ray v. Tandem Computers, Inc.,* 63 F.3d 429,433 (5th Cir. 1995); FED. R. CIV. P. 56.

Both movants and non-movants bear burdens of proof in the summary judgment process. *Celotex Corp. v. Catrett,* 477 U.S. 317,106 S. Ct. 2548 (1986). The movant with the burden of proof at trial must establish every essential element of its claim or affirmative defense. Id. at 322, 106 S. Ct. at 2552. In so doing, the moving party without the burden of proof need only point to the absence of evidence on an essential element of the non-movant's claims or affirmative defenses. *Id* at 323-24, 106 S. Ct. at 2554. At that point, the burden shifts to the non-moving party to "produce evidence in support of its claims or affirmative defenses . . . designating specific facts showing that there is a genuine issue for trial." *Id.* at 324, 106 S. Ct. at 2553. The non-moving party must produce "specific facts" showing a genuine issue for trial, not mere general allegations. FED. R. CIV. P. 56(e); *Tubacex v. M/V Risan,* 45 F.3d 951,954 (5th Cir. 1995).

In deciding whether to grant summary judgment, the Court should view the evidence in the light most favorable to the party opposing summary judgment and indulge all reasonable inferences in favor of that party. The Fifth Circuit has concluded "[t]he standard of review is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the non-moving party based upon the evidence before the court." *James v. Sadler*, 909 F.2d 834, 837 (5th Cir. 1990) (citing Matsushita, 475 U.S. at 586, 106 S. Ct.

l356)). To the extent facts are undisputed, a Court may resolve the case as a matter of law. *Blackwell v. Barton,* 34 F.3d 298, 301 (5th Cir. 1994).

B. Eleventh Amendment Immunity

Plaintiff's claims for monetary damages against the State of Texas and the defendants sued in their official capacities are barred under the Eleventh Amendment because such an action is the same as a suit against the sovereign. *Pennhurst State School Hosp. v. Halderman*, 465 U.S. 89, 104 S. Ct. 900 (1984). The Eleventh Amendment generally divests federal courts of jurisdiction to entertain suits directed against states. *Port Auth. Trans-Hudson v. Feeney*, 495 U.S. 299, 304, 110 S. Ct. 1868, 1871 (1990). The Eleventh Amendment may not be evaded by suing state agencies or state employees in their official capacity because such an indirect pleading remains in essence a claim upon the state treasury. *Green v. State Bar of Texas*, 27 F.3d 1083, 1087 (1994). This includes Plaintiff's request for monetary damages under RLUIPA.

RLUIPA does not contemplate recovering damages from individuals, such as the defendants. Instead, RLUIPA provides for "appropriate relief against a government." 42 U.S.C. § 2000cc-2a. The remedies provided in RLUIPA are complete and omit any mention of damages. The Eastern District of Texas has noted it is unclear whether RLUIPA authorizes damages in addition to injunctive relief. *Gooden v. Crain,* 405 F. Supp. 2d 714,723 (E.D. Tex. 2005). The Middle District of Alabama and the Northern District of Illinois likewise have noted it was unclear whether damages are available. *Smith v. Haley*, 401 F. Supp. 2d 1240, 1245-47 (M.D. Ala. 2005); *Agrawal v. Briley*,

No. 02-C-6807, 2003 WL 164225 at *2 n.2 (N.D. Ill. Jan. 22, 2003). However, other district courts disagree. *See Shidler v. Moore*, 409 F. Supp. 2d 1060, 1071 (N.D. Ind. 2006) (recognizing RLUIPA claims for individual money damages), *Charles v. Verhagen*, 220 F. Supp. 2d 937, 953 (W.D. Wis. 2002) (same), and *Orafan v. Goord*, No. 00CV2022, 2003 WL 21972735, at *9 (N.D.N.Y. Aug. 11, 2003) (same).

Even if monetary damages are available under RLUIPA, damages are not recoverable from the State or the defendants in their official capacities because a state's Eleventh Amendment immunity from suit for damages is not waived in RLUIPA. The Fourth Circuit in a well-reasoned and thorough opinion recently concluded RLUIPA's "appropriate relief against a government" language falls short of the unequivocal textual expression necessary to waive state immunity from suits for damages. *See Madison v. Commonwealth of Va.*, 474 F.3d 118 (4th Cir. 2006). Similarly, in *Webman v. Federal Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006), the D.C. Circuit recently held RFRA's identical "appropriate relief" provision insufficient to waive federal sovereign immunity for damages suits. Accordingly, Plaintiff s claims for monetary damages against the State and the defendants in their official capacities are barred by Eleventh Amendment immunity.

C. Qualified Immunity

The defendants in their individual capacities assert their entitlement to qualified immunity with respect to Plaintiff s claims brought against them for monetary damages. The doctrine of qualified immunity affords protection against individual liability for civil damages to officials "insofar as their conduct does not

violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982). Immunity in this sense means immunity from suit, not merely from liability. *Jackson v. City of Beaumont*, 958 F.2d 616 (5th Cir. 1992). "Qualified immunity is designed to shield from civil liability all but the plainly incompetent or those who violate the law." *Brady v. Fort Bend County*, 58 F.3d 173, 174 (5th Cir. 1995). In general, "qualified immunity represents the norm." *Id.* With respect to a ruling on qualified immunity, the first question a court should address is "whether the plaintiff has alleged a violation of a clearly established constitutional right." *Siegert v. Gilley*, 500 U.S. 226, 231, 111 S. Ct. 1789 (1991); *Hale v. Townley*, 45 F.3d 914, 917 (5th Cir. 1995). If the Plaintiff has alleged a constitutional violation, the court must then determine whether the defendant's conduct was objectively reasonable under legal principles as they existed at the time of the defendant's acts or omissions. *Hale*, 45 F.3d at 917, citing *Brewer v. Wilkinson*, 3 F.3d 816, 820 (5th Cir. 1993), *cert. denied,* 510 U.S. 1123, 114 S. Ct. 1081 (1994); *Spann v. Rainey*, 987 F.2d 1110, 1114 (5th Cir. 1993).

Claims of qualified immunity require a two step analysis. As a threshold matter, the court must consider whether the facts alleged, taken in the light most favorable to the party asserting the injury, show that the official's conduct violated a constitutional right. *Saucier v. Katz*. 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001); *Glenn v. City of Tyler*, 242 F.3d 307, 312 (5th Cir. 2001). If the allegations do not establish the violation of a constitutional right, the official is entitled to qualified immunity. *Saucier,* 533

U.S. at 201, 121 S. Ct. at 2156. If the allegations could make out a constitutional violation, the court must ask whether the right was clearly established--that is, whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202, 121 S. Ct. at 2156. If an official makes a reasonable mistake as to what the law requires, the officer is entitled to immunity. *Id.* at 205, 121 S. Ct. at 2158. As explained below, Plaintiff has failed to establish a violation of his rights. Accordingly, the defendants sued in their individual capacities for monetary damages are entitled to qualified immunity.

D. First Amendment Claims

Plaintiff complains the defendants violated his right to religious freedom by: (1) denying him access to the chapel and (2) denying him access to religious services while on cell restriction.

The Constitution requires an inmate be given a reasonable opportunity to exercise the religious freedoms guaranteed by the First and Fourteenth Amendments. *Cruz v. Beto*, 405 U.S. 319,322, 92 S. Ct. 1079 (1972). An inmate retains his First Amendment right to the free exercise of his religion, subject to reasonable restrictions and limitations necessitated by penological goals. *Turner v. Safley*, 482 U.S. 78, 89-91,107 S. Ct. 2254 (1987); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349-50, 107 S. Ct. 2400 (1987). Prison officials have a duty to accommodate an inmate's religious beliefs unless there is a legitimate penological interest which prevents such accommodation. *Eason v. Thaler*, 14 F.3d 8, 10 (5th Cir. 1994). If a prison regulation impinges on an inmate's First Amendment rights, the regulation is valid only if it is reasonably related to a legitimate

penological interest. *Turner*, 482 U.S. at 87. If the court is reviewing action taken by prison officials rather than a regulation, the same standard is applicable to determine whether the prison official's act is constitutionally permissible. *Jackson v. Cain*, 864 F.2d 1235, 1248 (5th Cir. 1989).

In determining whether a regulation or policy is a valid restriction reasonably related to a legitimate penological interest, the Court considers the following factors:

> (l) whether there exists a valid, rational connection between a restriction and the governmental interest invoked to justify it;
>
> (2) the availability of an alternative means to exercise the restricted right;
>
> (3) the impact on guards, other inmates, and the allocation of prison resources that would result from accommodating the asserted right; and
>
> (4) whether there are ready alternatives to the restriction.

Turner, 482 U.S. at 89-91; *Adkins v. Kaspar*, 393 F.3d 559, 564 (5th Cir. 2004).

In support of summary judgment, Defendants present the following affidavit testimony of Bill Pierce, Director of the TDCJ Chaplaincy Department:

> TDCJ Executive Directive ED-07.29, Religious Policy Statement, mandates that we extend to all offenders as much freedom and opportunity as possible for pursuing individual beliefs and practices, consistent with agency security, safety, order, arid rehabilitation concerns. TDCJ provides many opportunities through which an

> offender may exercise his faith and grow spiritually. Policies concerning religious programming are contained in TDCJ Administrative Directive AD - 07030, "Procedures for Religious Programming."

Defendants also present the following affidavit testimony of Chaplain Archie Scarbrough:

> TDCJ recognizes the significance of purposeful religious ceremony as an important component of numerous religions and tries to provide offenders reasonable opportunities to observe or participate in religious ceremonies consistent with the reasonable constraints of sound penological practices. The extent and frequency for observance of any religious ceremony is determined by consideration of several factors, including the significance of the ceremony, the availability of appropriate supervision, time and space requirement, and the security concerns of the facility. Congregational religious services, activities and meetings are governed by unit or facility rules, regulations, and policies with regard to staff and volunteer safety, security and orderly conditions of the unit, and with regard to offender conduct. Factors considered in scheduling religious activities include staff supervision requirements, unit and individual security concerns as set forth in agency policy, and the availability of TDCJ approved religious program volunteers to assist.

Chaplain Scarborough acknowledges the chapel

at the Robertson Unit may not be used for religious purposes. He states:

> As a result of this prohibition, we conduct over fifty religious programs each month in the buildings used to house offenders. I should point out at this point that it is not a basic tenant of the Christian faith that services must be held in particular locations. I should also point out that if we conducted all our religious programs in the chapel, we would not be able to afford offenders the many activities we now provide to them in the buildings where they live.

Chaplain Scarborough provided a schedule for a typical week of services in the building in which Plaintiff is housed. Included in the schedule is over 25 hours of Christian (non-Catholic) programs and services. In addition, Chaplain Scarborough explains TDCJ allows all offenders to worship according to their faith preference in their cells using allowed items such as sacred texts, devotional items, and materials. Chaplain Scarborough concludes TDCJ provides a wide variety of materials, programs, services, and activities developed to meet the spiritual needs of offenders.

In further support of their Motion for Summary Judgment Defendants also present the following affidavit testimony of Senior Warden Eason:

> Allowing offenders from all the buildings to gather together for congregational religious services at the chapel or another meeting place would defeat our efforts to keep hostile gang members apart. Further, movements of offenders from one area of the prison to

> another create the greatest security risks for the staff. You always want to retain control and keep inmates in small groups so all group movements must be properly supervised. Taking into account the personnel shortages and lack of experienced staff at the Robertson Unit, it is important to the security of the unit to keep movements to a minimum.
>
> Further, the chapel at the Robertson Unit measures approximately 30 by 36 feet and can accommodate approximately 75 people. It is not large enough to hold all the offenders who routinely attend Christian (non[-R]oman Catholic) services.
>
> * * *
>
> As a result of these safety and security concerns—gang activities; unnecessary offender movements; chapel size, location, and design; and the riot at the McConnell Unit—we do not use the chapel at the Robertson Unit for any religious services. We use the room as a library for religious books, as a meeting place for the staff, and as a teleconferencing facility.

With respect to the cell restriction policy, Warden Eason states he directed that beginning in October 2005, cell restrictions would not be imposed on offenders at the custody level held by Plaintiff. Warden Eason explains his personal experience is that the only real effect of cell restrictions is that offenders cannot participate in church services. He opines, if offenders need to be restricted to their cells, then their custody level should be changed to a more restrictive level.

The Fifth Circuit has upheld the constitutionality

of TDCJ's religious accommodation policy as rationally related to legitimate governmental interests. *Freeman v. Texas Dep't of Criminal Justice*, 369 F.3d 854 (5th Cir. 2004). The Fifth Circuit specifically held prison staff and space limitations, as well as financial burdens, are valid penological interests. *Id.* at 861.

Based on the summary judgment record before it, the Court finds TDCJ's accommodation policies and practices as set forth in these affidavits satisfy the Turner factors as to Plaintiffs complaints. The pertinent question is not whether Plaintiff has been denied specific religious accommodations, but whether, more broadly, the prison affords him opportunities to exercise his faith. *Freeman*, 369 F.3d at 861. Plaintiff does not assert Defendants denied or restricted his right to practice his religion in his cell while on cell restriction, or he had no other alternative means of practicing his religious faith. Plaintiff also does not assert Defendants fail to provide numerous alternative opportunities to worship together in their housing areas. Nor has he pointed to some obvious regulatory alternative that fully accommodates his asserted rights while not imposing more than a de minimis cost to TDCJ's valid penological goal of maintaining prison security and discipline and remaining within its financial, personnel, and space restraints, and nondiscriminatory policy. In sum, Plaintiff shows no violation of his free exercise rights.

E. Eight Amendment Claims

Plaintiff contends the denial of religious services in the chapel has subjected him to cruel and unusual punishment. The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones, and it is settled that "the treatment a

prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 1976 (1994) (citations omitted). The Eighth Amendment imposes duties on prison officials to provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter and medical care, and must "take reasonable measures to guarantee the safety of the inmates." *Id.* Being denied access to the prison chapel and missing two Sunday services due to cell restrictions do not amount to violations of the Eighth Amendment.

F. Fourteenth Amendment Claims

Plaintiff claims Defendants violated his equal protection rights by (1) allowing other inmates to use the chapel for non-religious purposes and (2) allowing Muslim inmates special privileges with respect to their religion.

To maintain his claims for violation of equal protection under the Fourteenth Amendment, Plaintiff must allege and prove purposeful discrimination by Defendants resulting in a discriminatory effect among persons similarly situated. *See Muhammad v. Lynaugh*, 966 F.2d 901, 903 (5th Cir. 1992). The Fourteenth Amendment does not demand that every religious sect or group within a prison, however few in numbers, must have identical prison facilities or personnel. *Freeman*, 369 F.3d at 862. Rather, prison administrators must provide inmates with reasonable opportunities to exercise their religious freedoms. *Id.* at 863.

The fact that TDCJ's religious accommodation and related policies and regulations adversely impact

Plaintiff and his religious practices does not, by itself, establish a Fourteenth Amendment violation. "[D]isparate impact, alone, cannot suffice to state an Equal Protection violation; otherwise, any law could be challenged on Equal Protection grounds by whomever it has negatively impacted." *Johnson v. Rodriguez*, 110 F.3d 299, 306 (5th Cir. 1997) (emphasis in original). To maintain an equal protection claim, Plaintiff must allege and prove he received treatment different from that received by similarly situated individuals and the unequal treatment stemmed from a discriminatory intent. *Taylor v. Johnson*, 257 F.3d 470, 472 (5th Cir. 2001).

Plaintiff complains Defendants do not allow any religious services in the chapel. He does not claim Defendants allowed some religious groups to congregate in the chapel while his religious group was not. That the chapel is used for non-religious purposes does not establish an equal protection claim. To state a claim under the Equal Protection Clause, a plaintiff must allege that similarly situated individuals have been treated differently. *Yates v. Stalder*, 217 F.3d 332, 334 (5th Cir. 2000). The inquiry focuses on whether the plaintiff is similarly situated to another group for purposes of the challenged governmental action. *Yates*, 217 F.3d at 334. The summary judgment evidence clearly shows TDCJ does not allow any religious services in the chapel.

Discriminatory purpose in an equal protection context implies the decision maker selected a particular course of action at least in part because of, and not simply in spite of, the adverse impact it would have on an identifiable group. *Johnson v. Rodriguez*, 110 F.3d at 306. Plaintiff does not present any summary judgment evidence that TDCJ's refusal to

hold religious services in the chapel is intended to discriminate against inmates of one religious faith or another. Defendants' evidence, on the other hand, demonstrates that TDCJ's refusal to hold religious services in the chapel is based on space limitations and security concerns.

This same reasoning holds against Plaintiffs claims regarding cell restrictions. Plaintiff provides no summary judgment evidence of "purposeful discrimination resulting in a discriminatory effect among persons similarly situated." *Adkins*, 393 F.3d at 566. Cell restrictions apply to all faiths.

Plaintiff also complains Muslim inmates receive special privileges such as diet. Certain religious rights of TDCJ Muslim inmates are governed by a consent decree entered in *Brown v. Beto*, No. 4:74-CV-069 (S.D. Tex.l977). *See Adkins*, 393 F.3d at 566 (noting that all religious groups, except Muslims, must have a volunteer present, and that members of the Yahweh Evangelical Assembly ("YEA") were not denied equal protection when required to have a volunteer or church elder present at all meetings). Moreover, Plaintiff does not allege Christians require a special diet as part of their religion.

G. RLUIPA and TRFA

The RLUIPA, codified at 42 U.S.C. § 2000cc, provides in pertinent part as follows:

> § 2000cc-l. Protection of religious exercise of institutionalized persons
>
> (a) General rule
>
> 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 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.

An almost identical provision appears in TRFA. *See* TEX. CIV. PRAC. & REM. CODE Ann. § 110.003(a) & (b) (Vernon 2005). Both statutes prohibit the State from imposing a "substantial burden" on the practice of religious faith. A "religious exercise" for purposes of the RLUIPA includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). The Supreme Court recently made it clear that under RLUIPA, accommodation of religious observances is not elevated over a prison's need to maintain order and safety. *Cutter v. Wilkinson*, 544 U.S. 709, 125 S. Ct. 2113, 2122 (2005).

The Fifth Circuit has determined that governmental action or regulation creates a "substantial burden" on a religious exercise if it "truly pressures the adherent to significantly modify his religious behavior and significantly violates his religious beliefs." *Adkins*, 393 F.3d at 570. A governmental action or regulation does not rise to the level of a substantial burden on religious freedom if it "merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed." *Id.*

In this case, Plaintiff fails to present prima facie evidence that Defendants have "substantially

burdened" the practice of his religion by refusing to use the chapel for religious services. That Plaintiff's religious group must use classroom facilities for religious services does not create a substantial burden on Plaintiff's religious practices. The summary judgment evidence shows numerous hours of religious services and instruction are provided to inmates sharing Plaintiff's faith. Moreover, it is clear from the summary judgment evidence that Defendants provide access to religious books and materials to its prisoners for the practice of their faith.

Plaintiff also has not presented any prima facie evidence that Defendants have "substantially burdened" the practice of his religion by not allowing Plaintiff to attend religious services during his cell restriction for 15 days. Plaintiff properly grieved the issue, and as a result, Warden Eason directed that beginning in October 2005, cell restrictions would not be imposed on offenders at the custody level held by Plaintiff. In this instance, the prison grievance system provided Plaintiff the relief he sought.

Alternatively, even assuming Plaintiff were to establish these instances as substantial burdens on the practice of his religion, Defendants' financial, safety, space, and security concerns for the prison, its inmates, and employees, and the goal of maintaining a neutral policy of religious accommodation for all recognized religious faiths, are compelling governmental interests. Defendants have shown, and Plaintiff has not shown to the contrary, that Defendants' regulations and policies are the least restrictive means of furthering those compelling governmental interests. *See Adkins*, 393 F.3d at 567-68. As the Supreme Court noted in *Cutter*, "Should inmate requests for religious accommodations become

excessive, impose unjustified burden on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition." 125 S. Ct. at 2125. No RLUIPA or TRFA violations have been shown.

IV. CONCLUSION

Accordingly, Defendants are entitled to summary judgment.[1]

It is therefore **ORDERED** that the Motion for Dismissal Under the Texas Religious Freedom Act, Against the Defendants in their Personal and Individual Capacities [#43], filed by Plaintiff on July 21, 2006, is **GRANTED.**

It is further **ORDERED** that Plaintiffs claims brought pursuant to the Texas Religious Freedom Act against the defendants in their individual capacities are **DISMISSED WITHOUT PREJUDICE.**

It is further **ORDERED** that the Motion for Partial Dismissal and Withdrawal to Amend Original Complaint [#48], filed by Plaintiff on August 24, 2006, is **GRANTED.**

It is further **ORDERED** that Plaintiff's claims brought against Defendants Murphy, Jackson and Klien are **DISMISSED WITHOUT PREJUDICE.**

It is further **ORDERED** that the Partial Motion to Dismiss [#28], filed by Defendants on April 6, 2006, is **GRANTED.**

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[1] The Court also notes to the extent Plaintiff seeks injunctive relief under the TRFA, a federal court does not have jurisdiction to enjoin the defendants based on state law. *See Earles v. State Bd. of Certified Publ. Accountants of La.,* 139 F.3d 1033, 1039 (5th Cir. 1998).

It is further **ORDERED** that Plaintiffs claims brought pursuant to 42 U.S.C. § 1983 and RLUIPA against the State of Texas and the defendants in their official capacities for monetary damages are **DISMISSED WITHOUT PREJUDICE** as barred by the Eleventh Amendment.

It is further **ORDERED** that the Motion for Partial Summary Judgment [#23], filed by Plaintiff on March 14, 2006, is **DENIED.**

It is further **ORDERED** that the Motion for Summary Judgment [#29], filed by Defendants on April 6, 2006, is **GRANTED** with respect to Plaintiffs remaining claims.

It is further **ORDERED** that all remaining pending motions are **DISMISSED AS MOOT.**

SIGNED this **27th** day of March, 2007.

__/s/_____
SAM SPARKS
UNITED STATES DISTRICT JUDGE