No. 08-1438

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondents acknowledge that the decision in this case conflicts the Eleventh Circuit's holding in *Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2007), that states are not immune to damages claims under RLUIPA. BIO 10. Moreover, they do not dispute that some circuits and district courts have allowed personal-capacity suits against state officials under RLUIPA, while others have held that Congress lacks the power under the Spending Clause to authorize such suits. *See* Pet. 16-19; BIO 16-17 & n.2. At the same time, respondents do not contest that both issues are of recurring importance, given the frequency of RLUIPA litigation. Indeed, since the decision in this case, three more courts of appeals have weighed into the debate. *See Nelson v. Miller*, 570 F.3d 868 (7th Cir. 2009); *Rendelman v. Rouse*, 569 F.3d 182 (4th Cir. 2009); *Cardinal v. Metrish*, 564 F.3d 794 (6th Cir. 2009), petition for cert. filed, __ U.S.L.W. __ (July 23, 2009) (No. 09-109).[1] Nor can respondents dispute the broader significance of the courts' conflicting views of the scope of Congress's enumerated powers and the states' reserved rights.

Nonetheless, respondents oppose certiorari, asserting that the division of the lower courts may resolve itself without the Court's intervention and that this case presents a poor vehicle for resolving the conflict in any event. Neither assertion is well-taken.

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[1] A Westlaw search for cases addressing prisoner RLUIPA claims during the same period yielded well over 150 decisions.

I. There Is No Reason To Think That The Conflict In The Lower Courts Will Resolve Itself Without This Court's Intervention.

1. Respondents argue that the acknowledged conflict between the Eleventh Circuit and four other courts of appeals over the Eleventh Amendment's restriction on RLUIPA damages claims is unworthy of the Court's attention because the Eleventh Circuit may, someday, change its mind. BIO 12. There is no basis for that speculation.

In *Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2007), the Eleventh Circuit expressly acknowledged the conflicting view of the Fourth Circuit in *Madison v. Virginia*, 474 F.3d 118 (4th Cir. 2006), but found its analysis unconvincing. *See Smith*, 502 F.3d at 1270. While other circuits have since disagreed with the Eleventh Circuit's holding, none has added significantly to the reasons given by the Fourth Circuit in *Madison* and rejected by the Eleventh Circuit in *Smith*. *See Nelson*, 570 F.3d at 884 (simply adopting reasoning of Fourth and Fifth Circuits); *Cardinal*, 564 F.3d at 801 (same); Pet. App. 22a-23a (adopting reasoning of Fourth Circuit). The arguments do not become more persuasive through mere repetition.

In fact, the holding of *Smith* has become settled law in the Eleventh Circuit. The court of appeals has twice denied rehearing in cases applying *Smith*, and has expressly reaffirmed its holding within the last year. *See* Pet. 22. Absent intervention by this Court, the conflict will persist, generating dramatically disparate outcomes for prisoners and state defendants alike based on nothing more than happenstance.

Respondents also are wrong in asserting that this division of authority is not "even implicated by the facts of this case" because, they say, "the outcome here would have been exactly the same even in the Eleventh Circuit." BIO 15. This is because, respondents assert, the Eleventh Circuit has held that the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(e), "forbids any damages that RLUIPA otherwise allows" in the absence of any physical injury. BIO 15. But the very authority they cite for this proposition – *Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2008), *see* BIO 15 – expressly held that even absent proof of physical injury, the PLRA permits at least nominal damages for RLUIPA violations. *See* 502 F.3d at 1271.[2] As a result, petitioner's claim would have proceeded in the Eleventh Circuit, but has been barred in the Fifth, on the basis of a fundamental disagreement between the circuits over the meaning of a federal statute, this Court's cases, and the Constitution.

2. The petition also demonstrated that there is much confusion and apparent disagreement among the lower courts over the permissibility of individual capacity suits under RLUIPA. *See* Pet. 16-19. Respondents note that although there is a clear and considered division among the district courts on the question, the courts of appeals that have permitted individual capacity claims to go forward have not "squarely address[ed] the question." BIO 16. But that is insufficient reason to deny review here, given

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[2] And, as discussed below, the Fifth Circuit has held that the PLRA does not bar punitive damages either. *Infra*, at 10.

the close relationship between the individual-capacity question and the court of appeals' plainly certworthy Eleventh Amendment holding; the uncontested and persistent division in the district courts, where individual defendants are, in fact, being subject to, or protected from, individual liability based on accidents of geography, *see* Pet. 18-19; the incorrectness of the decision; and the importance and broader applicability of the underlying constitutional theory.

Respondents attempt to diminish the constitutional significance of the Fifth Circuit's holding, casting the decision as one of statutory construction and offering a textual defense of the decision. BIO 17-20. But the court of appeals did not base its decision on any of the asserted textual grounds, agreeing instead with petitioner and the Eleventh Circuit that the language of the statute "appears to create a right against state actors in their individual capacities" and "mirrors" the formulation of 42 U.S.C. § 1983, which permits individual capacity suits. Pet. App. 17a. The *only* reason the Fifth Circuit gave for construing the statute differently was its conclusion that Congress lacks the constitutional power to "impose *direct* liability on a non-party to the contract between the state and the federal government." Pet. App. 19a (emphasis in original).

The significance of that constitutional ruling is made clear by respondents' defense of it. In contesting the relevance of *Sabri v. United States*, 541 U.S. 600 (2004), respondents insist that the Court did not "squarely address[] nor resolve[] whether Congress could target third parties as a

constitutional *means* of achieving its (otherwise permissible) objective." BIO 20 (emphasis in original). Respondents thus assert that the constitutionality of the federal bribery statute considered in *Sabri* is open to question and, indeed, suggest that the statute is unconstitutional under the constitutional theory the Fifth Circuit applied in this case.

The increasing acceptance of that theory thus has significant implications not only for the implementation of RLUIPA, but also for the constitutionality of other Spending Clause statutes. *See* Pet. 19-20. However characterized, *see* BIO 21-22, decisions restricting the scope of federal statutes based on a novel, narrow view of Congress's legislative authority warrant review by this Court.

II. The Court Of Appeals' Decision Was Wrong.

Review also is warranted because the Fifth Circuit's decision is wrong.

1. The Eleventh Amendment does not preclude construing RLUIPA's authorization of "appropriate relief" against state defendants to include money damages. While standing alone, the phrase may appear ambiguous, this Court has made clear that the language of a Spending Clause statute must be read by funding recipients in legal context. In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66-71 (1992), this Court explained that part of that context is the background presumption that all appropriate relief is available to remedy the intentional violation of federal rights, *id.* at 66-71, even under a Spending Clause statute, *id.* at 74-75 (rejecting argument that "the normal presumption in

favor of all appropriate remedies should not apply because Title IX was enacted pursuant to Congress' Spending Clause power").

Respondents complain that such a presumption is inconsistent with the requirement that Congress make the conditions attached to federal funds clear. BIO 12. But this Court reconciled any tension between the two principles in *Barnes v. Gorman*, 536 U.S. 181 (2002), when it 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," including "compensatory damages." *Id.* at 187.

Respondents assert that *Barnes* and *Franklin* are inapposite because both "involved *non-sovereign* defendants, and so the limits on relief from *sovereign* defendants were simply not present." BIO 13 (emphasis in original). But respondents ignore that the same clear statement rule, articulated in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), applies whether the defendant is a sovereign or not. That is, the requirement that Congress make clear the sovereign immunity consequences of accepting federal funds is simply an application of the more general Spending Clause requirement that Congress make the consequences of accepting federal funds clear to *all* recipients. *See Pennhurst*, 451 U.S. at 17-18 (applying clear statement rule to suit against state institution); *Barnes*, 536 U.S. at 186 (applying *Pennhurst* to suit against city police department and officials); *Franklin*, 503 U.S. at 74-75 (same as to county school). While the rule takes on additional

importance when applied to a sovereign, the application of the rule is the same.

Contrary to respondents' suggestion, *see* BIO 13-14, nothing in *Lane v. Pena*, 518 U.S. 187 (1996), is to the contrary. As the Court in *Barnes* made clear, when sovereign immunity is waived through the acceptance of conditioned federal funding, the scope of the waiver depends on the words of the statute and the background understanding that by accepting funding recipients agree to common law contract remedies, including damages. *Barnes*, 536 U.S. at 187. That principle did not apply in *Lane*, however, because the waiver there arose not from acceptance of federal funding (the defendant was an instrumentality of the federal government itself) but from a statutory consent to suit. In that context, there is no background understanding that when Congress waives the United State's immunity, it submits to all appropriate relief or to traditional contract remedies. *See Lane*, 518 U.S. at 196-97. But this case is plainly different, and governed by *Franklin* and *Barnes*, because here Texas waived its immunity not through a statutory declaration, but by accepting conditioned federal funds.

2. Respondents' defense of the Fifth Circuit's personal-capacity holding is also unconvincing.

First, respondents attempt to defend the result on the basis of the text, read in light of various cannons of construction. BIO 17-20. But none of the cannons apply when the text of a statute is clear, and here the text unambiguously subjects government officials to individual capacity suits. The statute defines "government" with great breadth, expressly including both governments and government

"official[s]." *See* 42 U.S.C. § 2000cc-5(4)(A)(i)-(ii). Because a suit against an official in her official capacity is, by definition, a suit against the government itself, *see Kentucky v. Graham*, 473 U.S. 159, 169 (1985), the only purpose in separately authorizing suits against officials is to create personal-capacity liability. Accordingly, the Fifth Circuit found no personal-capacity cause of action *despite* the language of the statute, and only because of constitutional concerns. Pet. App. 16a-20a.

Those concerns were unfounded. In *Sabri*, this Court rejected the Eighth Circuit's reasoning – which closely tracks the Fifth Circuit's reasoning in this case, *compare* Pet. App. 18a-20a – that 18 U.S.C. § 666 was not valid Spending Clause legislation because it "directly regulates the conduct of third parties and not the recipients of the federal benefits." *United States v. Sabri*, 326 F.3d 937, 947 (8th Cir. 2003); *see Sabri*, 541 U.S. at 605. This Court explained that Congress's power under the Spending Clause, supplemented by the Necessary and Proper Clause, includes not only the power to attach conditions to funds, but also the power to impose liability upon individuals whose actions "undermine[]" or "thwart[]" implementation of a federal spending program. 541 U.S. at 605. While there are surely limits to the reach of that power, there should be no doubt that imposing personal liability upon the officials responsible for implementing funding conditions is a "rational means" for ensuring compliance with those lawful requirements. *Id.*

III. This Case Presents An Appropriate Vehicle For Resolving The Question Presented.

None of the four vehicle problems the State alleges provides any basis for denying certiorari.

1. *Interlocutory Posture.* Although the Fifth Circuit remanded the case for further consideration of the merits of petitioner's chapel-access claim, those proceedings will shed no light on the distinct legal question of what remedies are available for a proven violation. Respondents nonetheless urge that the remand may render the petition "wholly academic" if petitioner's RLUIPA claims fail on the merits. BIO 3. But the remand proceedings will not pass upon the merits of petitioner's strongest claim – that the defendants violated RLUIPA by allowing him to leave disciplinary confinement for secular purposes but not to attend religious services. *See* Pet. 6-7. Rather than defend the legality of that practice on appeal, respondents abandoned it, thereby mooting petitioner's claim for injunctive relief. Pet. App. 9a-13a. As a result, the court of appeals' holding that damages were unavailable finally resolved petitioner's cell-restriction claim. Remand proceedings thus have no possibility of rendering the questions presented in the petition "academic," and the case will present precisely the same questions in precisely the same posture on final judgment.

In such circumstances, delay serves no purpose and the partially interlocutory posture presents no impediment to immediate review. *See* EUGENE GRESSMAN ET. AL, SUPREME COURT PRACTICE § 4.18, at 260 (8th ed. 2002) (noting that certiorari may be granted "to review a nonfinal judgment where there is a conflict on a question of law with another court of

appeals . . . that would justify review of a final decree or judgment").[3]

2. *PLRA*. Respondents further argue that the question presented here is "academic" because the PLRA "stands as an independent bar to any damages award." BIO 4. As noted above, this is simply incorrect. Indeed, the Fifth Circuit specifically noted in its decision that the PLRA does not apply to awards of nominal or punitive damages, which serve to compensate for, and deter, the violation of an inmate's federal rights, not to remedy mental or emotional injuries. *See* Pet. App. 15a n.24 (citing *Mayfield v. Texas Dep't Criminal Justice*, 529 F.3d 599, 605-06 (5th Cir. 2008)); *see also Fegans v. Norris*, 537 F.3d 897, 908 (8th Cir. 2008) (nominal and punitive damages unaffected) (citing *Royal v. Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004)); *Calhoun v. DeTella*, 319 F.3d 936, 940-43 (7th Cir. 2003) (same); *Smith*, 502 F.3d at 1271 (nominal damages unaffected).

3. *42 U.S.C. § 2000d-7*. Respondents further argue that this case is a poor vehicle for deciding any question relating to the Eleventh Amendment because petitioner did not cite to 42 U.S.C. § 2000d-7 below. BIO 6-7. As the petition explains, resort to Section 2000d-7 is unnecessary to resolve the question presented. *See* Pet. 27-32; *see also* BIO 7-8

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[3] To the extent the Court considers the interlocutory posture of this case an impediment, it should grant the related pending petition in *Cardinal v. Metrish*, No. 09-109 (filed July 23, 2009), which arises from a final judgment, and hold this case pending its disposition.

(arguing that provision is inapplicable). But petitioner is not barred from raising it here as an additional argument in support of his basic claim, preserved below, that the Eleventh Amendment does not bar RLUIPA damages awards against the states. *See Lebron v. National Railroad Passenger Corp.*, 513 U.S. 375, 379 (1995) (explaining that this Court's "traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below'") (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)).

4. *Qualified Immunity*. Finally, respondents argue that "because qualified immunity would almost certainly bar any damages RLUIPA would otherwise allow, this is not a suitable vehicle for resolving the individual-capacity damages question." BIO 8. In particular, respondents point out that the court of appeals found petitioner's First Amendment claim barred by qualified immunity and suggest that there is no reason why petitioner's RLUIPA claim would not suffer a similar fate. *Id.*

There is no basis for that assumption. The First Amendment subjects prison rules that infringe on religious freedoms to nothing more than rational basis review, while RLUIPA applies strict scrutiny, "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). *See* Pet. App. 24a-25a, 32a-33a (explaining relevant standards). Indeed, this Court held that RLUIPA's predecessor, the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.*, exceeded Congress's constitutional authority precisely because the "stringent test" it imposed (and RLUIPA imposes)

would render illegal a great many practices allowed by the First Amendment. *See City of Boerne*, 521 U.S. at 533-34.

Respondents make no attempt to defend the legality of the cell-restriction policy under RLUIPA. Indeed, no official could reasonably believe that denying inmates on disciplinary confinement access to religious services was the least restrictive means of serving the prison's security or administration interests when respondents were allowing inmates to leave their cells 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." Pet. App. 3a. In such circumstances, the lack of on-point case law is no ground for qualified immunity. *See, e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 740 (2002).

In any event, the fact that respondents may have alternative defenses to liability is no reason to deny review of the grounds upon which the case was actually decided when those grounds are the source of recurring disagreement in the lower courts and have broad significance to the administration of federal law.

CONCLUSION

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

Respectfully submitted,

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