

No. 08-1438

In the Supreme Court of the United States

HARVEY LEROY SOSSAMON, III, PETITIONER

v.

TEXAS, ET AL.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF FOR THE RESPONDENTS

GREG ABBOTT
Attorney General of Texas

JAMES C. HO
Solicitor General
Counsel of Record

DANIEL T. HODGE
First Assistant Attorney
General

DANIEL L. GEYSER
JAMES P. SULLIVAN
Assistant Solicitors
General

DAVID S. MORALES
Deputy First Assistant
Attorney General

OFFICE OF THE ATTORNEY
GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
James.Ho@oag.state.tx.us
(512) 936-1700

BILL COBB
Deputy Attorney General
for Civil Litigation

QUESTION PRESENTED

Whether an individual may sue a State or a state official in his official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.*

II

TABLE OF CONTENTS

| | Page |
|--|------|
| Question presented..... | I |
| Opinions below | 3 |
| Jurisdiction..... | 3 |
| Constitutional and statutory provisions involved | 4 |
| Statement..... | 4 |
| Summary of argument | 11 |
| Argument | 13 |
| Congress has failed to provide any indication—much less the required <i>unequivocal</i> indication—that States accepting federal funds waive their immunity to prisoner suits under RLUIPA for damages | 13 |
| I. RLUIPA’s reference to “appropriate relief”—without any textual hint of what relief is indeed “appropriate”—is insufficient to establish a waiver of State sovereign immunity for money damages..... | 14 |
| A. Congress’s use of the phrase “appropriate relief” does not explicitly authorize damages actions against sovereign entities..... | 14 |
| B. Petitioner’s efforts to find clear meaning in textual ambiguity and congressional silence are all unavailing | 21 |
| 1. Nothing in the plain text casts any doubt on the correctness of the Fifth Circuit’s decision—and, indeed, the text emphatically confirms the lack of a damages | |

III

remedy in actions against the States 21

2. Petitioner and the federal government are incorrect that the Spending Clause backdrop (or the contractual nature of the States’ obligations) supply the clarity that was lacking textually in the statute itself..... 27

3. The statutory purpose is consistent with limiting remedies against sovereign entities to equitable relief. 34

II. Having failed to identify the requisite waiver of immunity in RLUIPA, petitioner cannot now shoehorn his substantial-burden claim into 42 U.S.C. 2000d-7’s catch-all waiver for Spending Clause provisions “prohibiting discrimination” 36

A. As a matter of plain text, common parlance, and legal precedent, RLUIPA’s provision targeting substantial burdens is not a provision “prohibiting discrimination” 37

B. Contrary to petitioner’s contention, the fact that RLUIPA may incidentally “prevent” discrimination does not overcome the fact that RLUIPA does not, by design, “prohibit” discrimination 44

C. Petitioner’s reading is barely plausible, much less unmistakably clear as required to overcome sovereign immunity 46

IV

III. In light of new concessions from both petitioner and the federal government regarding the PLRA, the Court may alternatively dismiss the writ as improvidently granted..... 48
Conclusion..... 50

TABLE OF AUTHORITIES

Cases: Page

Alden v. Maine, 527 U.S. 706 (1999) 17
Alexander v. Choate, 469 U.S. 287 (1985)..... 42
Alexander v. Sandoval, 532 U.S. 275 (2001) 42
Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239-240, 242 (1985)..... passim
Barnes v. Gorman, 536 U.S. 181 (2002) passim
Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001)..... 27
Bell v. Hood, 327 U.S. 678 (1946) passim
BFP v. Resolution Trust Corp., 511 U.S. 531 (1994) 40
Blatchford v. Native Vill. of Noatak, 501 U.S. 775 (1991) 32
Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263 (1993) 45
Burlington Sch. Comm. v. Ma. Dep’t of Educ., 471 U.S. 359 (1985) 21
California v. Deep Sea Research, Inc., 523 U.S. 491 (1998) 14, 17
Cardinal v. Metrish, 564 F.3d 794 (6th Cir. 2009) 19, 40
Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 578 (1993) 5, 43
City of Boerne v. Flores, 521 U.S. 507 (1997) passim
Clark v. Martinez, 543 U.S. 371 (2005) 27
Coll. Sav. Bank v. Fla. Prepaid Postsecondary

| | |
|--|--------------|
| <i>Educ. Expense Bd.</i> , 527 U.S. 666 (1999)..... | 14, 15, 16 |
| <i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005)..... | 4, 26 |
| <i>Dellmuth v. Muth</i> , 491 U.S. 223 (1989)..... | 14, 15 |
| <i>Dolan v. USPS</i> , 546 U.S. 481 (2006)..... | 41, 42 |
| <i>Employees of the Dep't of Pub. Health & Welfare</i> <i>v. Dep't of Pub. Health & Welfare</i> , 411 U.S. 279 (1973)..... | 25 |
| <i>Employment Division v. Smith</i> , 494 U.S. 872 (1990)..... | 4, 5, 43, 44 |
| <i>Evans v. United States</i> , 504 U.S. 255 (1992)..... | 21 |
| <i>Franklin v. Gwinnett County Pub. Sch.</i> , 503 U.S. 60 (1992)..... | passim |
| <i>Geiger v. Jowers</i> , 404 F.3d 371 (5th Cir. 2005) (per curiam)..... | 48 |
| <i>Gomez-Perez v. Potter</i> , 128 S. Ct. 1931 (2008)..... | 38, 40 |
| <i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991)..... | 16, 28 |
| <i>Hoffman v. Conn. Dep't of Income Maint.</i> , 492 U.S. 96 (1989) (plurality op.)..... | 14 |
| <i>Holder v. Hall</i> , 512 U.S. 874 (1994)..... | 42 |
| <i>Holley v. Cal. Dep't of Corr.</i> , 599 F.3d 1108 (9th Cir. 2010)..... | 19, 46 |
| <i>Int'l Bhd. of Boilermakers, Iron Shipbuilders,</i> <i>Blacksmiths, Forgers & Helpers, AFL-CIO v.</i> <i>Hardeman</i> , 401 U.S. 233 (1971)..... | 24 |
| <i>Jackson v. Birmingham Bd. of Educ.</i> , 544 U.S. 167 (2005)..... | 37, 38, 41 |
| <i>Jarecki v. G.D. Searle & Co.</i> , 367 U.S. 303 (1961)..... | 41 |
| <i>Lane v. Pena</i> , 518 U.S. 187 (1996)..... | passim |
| <i>Library of Congress v. Shaw</i> , 478 U.S. 310 (1986)..... | 17, 26, 34 |
| <i>Madison v. Virginia</i> , 474 F.3d 118 (4th Cir. 2006)..... | 10, 19, 47 |
| <i>Mayfield v. Tex. Dep't of Criminal Justice</i> , 529 F.3d 599 (5th Cir. 2008)..... | 48 |
| <i>Medtronic, Inc. v. Lohr</i> , 518 U.S. 470 (1996)..... | 20 |
| <i>N. Ins. Co. of N.Y. v. Chatham County</i> , 547 U.S. 189 (2006)..... | 27 |
| <i>Neder v. United States</i> , 527 U.S. 1 (1999)..... | 21 |
| <i>Nelson v. Miller</i> , 570 F.3d 868 (7th Cir. 2009)..... | 19 |

VI

Nev. Dep't of Human Resources v. Hibbs, 538
U.S. 721 (2003)..... 15
Olmstead v. L.C., 527 U.S. 581 (1999)..... 38
Pennhurst State Sch. & Hosp. v. Halderman, 465
U.S. 89 (1984)..... 15
Raygor v. Regents of the Univ. of Minn., 534 U.S.
533 (2002) 15, 18
Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983) .18, 21
Russello v. United States, 464 U.S. 16 (1983)..... 40
Safford Unified Sch. Dist. No. 1 v. Redding, 129
S. Ct. 2633 (2009)..... 20
Seminole Tribe v. Florida, 517 U.S. 44 (1996) 15
Sherbert v. Verner, 374 U.S. 398 (1963) 5
Southeastern Community College v. Davis, 442
U.S. 397 (1979)..... 39
Spector v. Norwegian Cruise Line Ltd., 545 U.S.
119 (2005) (plurality op.) 16
United States v. Alire, 73 U.S. (6 Wall.) 573
(1868) 33
United States v. Jones, 131 U.S. 1 (1889) 33
United States v. Mitchell, 463 U.S. 206 (1983)..... 33
United States v. Navajo Nation, 129 S. Ct. 1547
(2009) 33
United States v. Nordic Vill., Inc., 503 U.S. 30
(1992) 14, 17, 31
Van Wyhe v. Reisch, 581 F.3d 639 (8th Cir. 2009)19, 47
Washington v. Davis, 426 U.S. 229 (1976) 44
Webman v. Federal Bureau of Prisons, 441 F.3d
1022 (D.C. Cir. 2006) 20, 21
West v. Gibson, 527 U.S. 212 (1999)..... 23
Will v. Mich. Dep't of State Police, 491 U.S. 58
(1989) 15, 16
Wilson v. Layne, 526 U.S. 603 (1999) 20
Wisconsin v. Yoder, 406 U.S. 205 (1972) 5

Statutes

20 U.S.C. 1681 41

VII

| | |
|---|-----------|
| 28 U.S.C. 1491(a)(1)..... | 32, 33 |
| 29 U.S.C. 794 | 41 |
| 42 U.S.C. 1997e(e) | 48 |
| 42 U.S.C. 2000bb(a)(2)..... | 43 |
| 42 U.S.C. 2000cc(b)(2) | 5, 39 |
| 42 U.S.C. 2000cc-1 | 5, 39, 45 |
| 42 U.S.C. 2000cc-2(a)..... | passim |
| 42 U.S.C. 2000cc-2(e)..... | 26 |
| 42 U.S.C. 2000cc-2(f) | 24 |
| 42 U.S.C. 2000cc-3(g)..... | 25 |
| 42 U.S.C. 2000d | 41 |
| 42 U.S.C. 2000d-7(a)(1) | passim |
| 42 U.S.C. 6101 | 41 |
| Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. 1997e..... | 48 |
| Religious Freedom Restoration Act of 1993 (RFRA)..... | 2 |
| The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)..... | 1 |
| Other Authorities | |
| <i>Black's Law Dictionary</i> (7th ed. 1999)..... | 26 |
| <i>Black's Law Dictionary</i> (9th ed. 2009)..... | 21, 38 |

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BRIEF FOR THE RESPONDENTS

To establish a waiver of sovereign immunity, petitioner must identify “unmistakably clear” statutory text that put state officials on notice that, by accepting federal funds, they consented to suits for money damages. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-240, 242 (1985). So it is not enough for petitioner to offer a reasonable interpretation of the relevant statute. To prevail, he must offer the *only* plausible interpretation—a standard he cannot meet.

The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) creates a private cause of action for “appropriate relief against a government.” 42 U.S.C. 2000cc-2(a). The phrase “appropriate relief” is a textbook example of ambiguity—not unmistakable clarity. It does not clearly waive immunity in damages suits. Relief that is

“appropriate” in one context may not be “appropriate” in another. Moreover, the phrase originates from the Religious Freedom Restoration Act of 1993 (RFRA). RFRA indisputably does not override sovereign immunity in damages suits, as lower courts have unanimously concluded, and as petitioner does not contest. See also U.S. Amicus Br. 24 n.7.

For his part, petitioner invokes the traditional presumption from *Bell v. Hood*, 327 U.S. 678, 684 (1946), that if a statute is silent or unclear, courts may impose any remedy they deem appropriate. But this presumption has no place in suits against sovereigns, as the Court made plain in *Lane v. Pena*, 518 U.S. 187, 196-197 (1996). In suits against States, courts construe ambiguous statutes in favor of sovereign immunity—not liability.

Petitioner tries to avoid *Lane* by claiming that the traditional presumption from *Bell* somehow has special force as applied to Spending Clause statutes. But that gets it exactly backwards: the presumption has less force, not more, in Spending Clause cases. See *Barnes v. Gorman*, 536 U.S. 181, 185-188 (2002) (reversing \$1.2 million punitive damage award that would be available outside the Spending Clause context); see also *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 74-75 & n.8 (1992) (invoking Spending Clause as potential limitation on *Bell*). Not surprisingly, then, *every* court of appeals to have considered *Lane* has concluded that it precludes RLUIPA suits for damages against States.

Alternatively, petitioner offers an entirely new argument in this Court. Having failed below to identify an unmistakably clear statement respecting damages in RLUIPA, he now contends that no such statement is necessary after all. He does so by in-

voking a 1986 law concerning “provisions * * * prohibiting discrimination.” 42 U.S.C. 2000d-7(a)(1). But Section 3 of RLUIPA is not a provision “prohibiting discrimination.” On its face, it targets only “substantial burdens”—not “discrimination.” It requires favorable treatment, not equal treatment, of religious exercise. Indeed, the Court struck down RFRA (on which RLUIPA is based), as applied to state and local governments, precisely because it is *not* a statute prohibiting discrimination. See *City of Boerne v. Flores*, 521 U.S. 507, 517, 535 (1997). Once again, *every* court of appeals to have considered the 1986 law has concluded it does not apply to RLUIPA.

So petitioner has an unenviable task. He must prove that RLUIPA puts state prison officials on “unmistakably clear” notice of damages liability, when the overwhelming consensus has been to the contrary, both during Congressional hearings and in the courts of appeals. The judgment should be affirmed.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 560 F.3d 316. The opinion of the district court (Pet. App. 36a-57a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2009. The petition for a writ of certiorari was filed on May 18, 2009, and granted on May 24, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in petitioner's brief (at 1-2) and in the appendix to petitioner's brief (at 1a-10a).

STATEMENT

1. The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803, codified at 42 U.S.C. 2000cc *et seq.*, is the second attempt by Congress to accord heightened statutory protection to religious exercise in the wake of *Employment Division v. Smith*, 494 U.S. 872 (1990). Congress first enacted the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488, codified at 42 U.S.C. 2000bb *et seq.* But the Court invalidated RFRA as applied to state and local governments, holding that it exceeded Congress's power under Section 5 of the Fourteenth Amendment. See *City of Boerne v. Flores*, 521 U.S. 507 (1997). In response, Congress enacted RLUIPA pursuant to its Commerce and Spending Clause authority. See generally *Cutter v. Wilkinson*, 544 U.S. 709, 714-717 (2005).

a. Among other things, RLUIPA addresses two distinct forms of state action affecting religious exercise: "Discrimination" and "Substantial Burdens."

Section 2 of RLUIPA, concerning land use, incorporates both concepts. 42 U.S.C. 2000cc. Section 2(a) targets "Substantial Burdens" by forbidding any land use regulation that "imposes a substantial burden" on religious exercise, unless imposition of the burden is the "least restrictive means of furthering" a "compelling governmental interest." 42 U.S.C. 2000cc(a)(1). Section 2(b), entitled "Discrimination

and Exclusion,” provides, *inter alia*, that “[n]o government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.” 42 U.S.C. 2000cc(b)(2).

By contrast, Section 3 of RLUIPA, concerning institutionalized persons, only restricts state actions that “impose a substantial burden” on religious exercise, unless imposition of the burden is the “least restrictive means of furthering” a “compelling governmental interest.” 42 U.S.C. 2000cc-1. A plaintiff thus need not allege discrimination to state a claim under Section 3.

This terminology is not unique to RLUIPA, but instead borrows heavily from judicial opinions and prior legislation. In *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court held that the Free Exercise Clause forbids government from burdening religion without a compelling reason. But in *Smith*, the Court declined to apply *Sherbert* to a neutral law of general applicability, despite the law’s imposition of a substantial burden on religion. 494 U.S. at 878. As Justice Blackmun later observed, “*Smith* * * * treated the Free Exercise Clause as no more than an antidiscrimination principle.” *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 578 (1993) (Blackmun, J., concurring). See also *City of Boerne*, 521 U.S. at 546, 550 (O’Connor, J., dissenting).

Congress was troubled that “[*Smith*] virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.” 42 U.S.C. 2000bb(a)(4). Accordingly, it enacted RFRA “to restore the compelling interest test as set forth in [*Sherbert*] and

[*Yoder*] and to guarantee its application in all cases where free exercise of religion is substantially burdened.” 42 U.S.C. 2000bb(b)(1).

But the Court struck down RFRA as applied to state and local governments. It observed that RFRA shielded religious activities not from discrimination, but from any substantial burden caused by state action. And for that reason, RFRA exceeded Congress’s power under Section 5 of the Fourteenth Amendment. See *City of Boerne*, 521 U.S. at 517, 535 (explaining that “RFRA’s substantial-burden test” is not a discrimination test, or “even a discriminatory-effects or disparate-impact test”).

Congress responded by enacting RLUIPA, which adopted the same “substantial burden” standard as in RFRA, pursuant to its powers under the Commerce and Spending Clauses.

b. RLUIPA authorizes a private cause of action for “appropriate relief against a government.” 42 U.S.C. 2000cc-2(a). Here, too, the language is not unique to RLUIPA. Congress considered its options in the wake of *City of Boerne* and ultimately used the same phrase as in RFRA. 42 U.S.C. 2000bb-1(c).

On May 5, 1999, Representative Canady introduced H.R. 1691, the Religious Liberty Protection Act (RLPA), invoking Congress’s Commerce and Spending Clause powers. Like RFRA before it, RLPA authorized a private cause of action for “appropriate relief against a government.” Congressional testimony confirmed that this language in RLPA would not override state sovereign immunity in suits for damages—just as courts had universally

held under RFRA.¹ In addition, Senator Hatch asked whether RLPA should be amended to expressly *preserve* state sovereign immunity. Witnesses unanimously confirmed that such language was unnecessary, because the legislation already lacked the clear statement necessary to override sovereign immunity.²

On July 13, 2000, Representative Canady and Senator Hatch jointly introduced H.R. 4862 and S. 2869—what is known today as RLUIPA. Congress enacted S. 2869 into law, without amendment. As with both RFRA and RLPA before it, RLUIPA au-

¹ See, e.g., *Religious Liberty*, S. Hrg. 106-689, at 91, 145 (June 23 & Sept. 9, 1999) (statement of Douglas Laycock) (“[S]tates and their state-wide instrumentalities are immune from any claim for damages * * * . The Court does not interpret statutes to abrogate state sovereign immunity unless Congress makes an excruciatingly clear statement in statutory text; general language is not enough. * * * RLPA’s general language authorizing appropriate relief against a government does not come close to satisfying this standard, as the cases under RFRA repeatedly held.”); *id.* at 160 (statement of Chai R. Feldblum) (“I have no doubt that suits for damages against the states are not authorized under RLPA”); *id.* at 170 (statement of Gene C. Schaerr) (“RLPA does not contain a clear legislative statement of intent to subject unconsenting states to damage suits, and will therefore be presumed not to authorize such suits.”).

² See *id.* at 145 (statement of Laycock) (“Such a disclaimer will be surplusage”); *id.* at 160 (statement of Feldblum) (“There is no need for such a clarification. Unless Congress *expressly states* that the legislation it passes abrogates state sovereign immunity, such abrogation will not occur.”); *id.* at 170 (statement of Schaerr) (“I do not believe such a disclaimer is necessary. Courts already presume, in the absence of a ‘clear legislative statement’ to the contrary, that a statute does not abrogate a state’s constitutional sovereign immunity.”).

thorizes a private cause of action for “appropriate relief against a government.” 42 U.S.C. 2000cc-2(a).

2. Petitioner Harvey Leroy Sossamon, III, has been incarcerated since 2002 in the French M. Robertson Unit of the Texas Department of Criminal Justice, Correctional Institutions Division (TDCJ). Pet. App. 2a. A self-described “Christian Jew,” D. Ct. R. 36, petitioner practices his religion by kneeling at an altar to pray in view of a cross. Pet. App. 2a-3a. He objected to two TDCJ policies that prevented him from observing this tenet of his faith: the “chapel-use” policy and the “cell-restriction” policy. *Ibid.*

a. The chapel-use policy concerned the location of worship services within the prison. Pet. App. 2a-3a. The Robertson Unit comprises separate buildings, some of which are used to house inmates and another of which serves as the main administrative building. *Id.* at 6a-7a. The administrative building contains a chapel. *Ibid.* Until recently, TDCJ prohibited congregational worship in the chapel, due to various security concerns. *Id.* at 5a-6a, 48a-49a. According to an affidavit from the former warden of the Robertson Unit, allowing inmates to congregate in a centralized meeting place can yield hostility among members of rival gangs, who are housed in separate buildings to avoid contact. *Id.* at 48a. The administrative building also contains spaces in which inmates can hide contraband. *Id.* at 7a. Incidents of violence in the administrative building can endanger non-security personnel, as occurred during a riot in the similarly configured chapel at TDCJ’s McConnell Unit. *Id.* at 7a, 49a.

TDCJ instead allowed inmates to conduct religious services in multi-purpose rooms located inside the housing buildings. *Id.* at 6a, 48a; D. Ct. R. 37,

39. Petitioner objected that these multi-purpose rooms lacked the furnishings and symbols required by his religious beliefs. D. Ct. R. 24. He also alleged that TDCJ allowed prisoners to engage in secular activities in the chapel. Pet. App. 7a-8a.

As of March 6, 2010, TDCJ has abandoned the chapel-use policy. Inmates are now permitted to attend scheduled worship services in the chapel. D. Ct. R. 563-564. To address security concerns, inmates who choose to worship in the chapel must undergo a strip search of the sort routinely employed at the Robertson Unit. *Ibid.*

b. Under the cell-restriction policy, an inmate confined to his cell for disciplinary infractions was not permitted to leave his cell to attend religious services, but was allowed out to participate in various secular activities. Pet. App. 3a. Pursuant to this policy, petitioner was twice prevented from worshipping outside his cell. *Id.* at 3a-4a.

Upon receiving petitioner's grievance on this point, the warden amended local policy to allow inmates at petitioner's custody level to attend worship services while on cell restriction at the Robertson Unit. Pet. App. 5a. As of October 1, 2008, TDCJ has abandoned the cell-restriction policy for all its prison facilities. Inmates in general population may now attend worship services while on cell restriction. *Ibid.*; C.A. App. tabs 8, 9.

3. Proceeding *pro se* and *in forma pauperis*, petitioner filed a complaint in the United States District Court for the Western District of Texas, D. Ct. R. 16, claiming, *inter alia*, that the chapel-use and cell-restriction policies violate Section 3 of RLUIPA, D. Ct. R. 23-24. He named the State of Texas as a defendant, along with several TDCJ officials in both

their official and individual capacities. D. Ct. R. 28. Petitioner sought declaratory and injunctive relief; compensatory damages of \$10,000 per year since 2002; punitive damages of \$25,000; and attorney's fees and costs. D. Ct. R. 28-30.

Invoking the Eleventh Amendment, respondents moved to dismiss petitioner's claims for damages against Texas and the TDCJ officials in their official capacities. D. Ct. R. 154-160. Both sides moved for summary judgment. Pet. App. 40a.

The district court granted respondents' motion to dismiss. Pet. App. 56a-57a. The court held that sovereign immunity prevented petitioner from seeking damages under RLUIPA from the State or from TDCJ officials in their official capacities. *Id.* at 42a-43a. As to the remaining claims, the court granted summary judgment for respondents. *Id.* at 56a-57a. It concluded that respondents did not violate petitioner's rights, under RLUIPA or otherwise, *id.* at 54a-56a, and that RLUIPA does not create a damages action against officials sued in their individual capacities, *id.* at 42a-43a.

4. The United States Court of Appeals for the Fifth Circuit affirmed in part and reversed in part. Pet. App. 35a. The court of appeals agreed with the district court that acceptance of federal funds does not waive sovereign immunity against private damages suits under RLUIPA. *Id.* at 20a-24a. The court based this conclusion on the clear statement rule announced in this Court's sovereign immunity jurisprudence. See, *e.g.*, *id.* at 22a & n.46 (citing *Madison v. Virginia*, 474 F.3d 118, 131 (4th Cir. 2006) (citing *Lane v. Pena*, 518 U.S. 187 (1996))). Finding the term "appropriate relief" to be too ambiguous to sat-

isfy the clear statement rule, the court affirmed the dismissal based on sovereign immunity. *Id.* at 35a.

The court also affirmed the grant of summary judgment as to the individual-capacity damages claims, concluding that RLUIPA authorizes no such claims. Pet. App. 16a. In addition, the court held moot the claims for prospective relief concerning the cell-restriction policy, in light of TDCJ's "good faith * * * cessation" of that policy. *Id.* at 9a-13a. Finally, the court reversed the grant of summary judgment as to the chapel-use policy and remanded for further proceedings regarding declaratory and injunctive relief on that claim. *Id.* at 32a; see also *id.* at 14a (noting that "RLUIPA unambiguously creates a private right of action for injunctive and declaratory relief"). These proceedings are ongoing in district court, with trial scheduled for December 2010. D. Ct. R. 408.

5. Petitioner sought review in this Court, both as to sovereign immunity and as to individual capacity suits under RLUIPA. Br. in Opp. i (noting two questions presented); U.S. Cert. Amicus Br. I (same). The Court granted certiorari limited to the first question presented: "Whether an individual may sue a State or state official in his official capacity for damages for violations of [RLUIPA]." *Sossamon v. Texas*, 130 S. Ct. 3319 (2010).

SUMMARY OF ARGUMENT

In authorizing a private cause of action for "appropriate relief against a government," 42 U.S.C. 2000cc-2(a), RLUIPA does not unequivocally condition a State's acceptance of federal funds upon a waiver of its immunity against a damages suit. The indeterminate phrase "appropriate relief" cannot satisfy the clear statement rule established in this

Court's sovereign immunity jurisprudence, notwithstanding petitioner's various attempts to find clarity amidst ambiguity. Petitioner's reliance on *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992), and *Barnes v. Gorman*, 536 U.S. 181 (2002), is misplaced, as explained in *Lane v. Pena*, 518 U.S. 187 (1996). Nor does the fact that RLUIPA is a Spending Clause statute provide the requisite clarity. After all, the Spending Clause cuts against, not in favor of, the traditional presumption of appropriate remedies where Congress is silent or unclear. Tellingly, every court of appeals to have considered *Lane* has concluded that it precludes suits against States for money damages under RLUIPA.

Having failed below to locate unmistakably clear language of waiver in RLUIPA, Petitioner now maintains, for the first time in this Court, that no such clear statement is required after all. His theory is that a 1986 law, 42 U.S.C. 2000d-7, authorizes his damages claim, even if RLUIPA does not. His claim fails, because Section 2000d-7 applies only to "provisions * * * prohibiting discrimination." The Court's precedents confirm that, even under its broadest conception, "discrimination" is defined as unequal, differential treatment. This conclusion is further reinforced by the fact that Section 2000d-7 explicitly references Title VI of the Civil Rights Act, which prohibits only intentional discrimination. The established definition of discrimination is thus fatal to petitioner's Section 2000d-7 claim. Section 3 of RLUIPA is not a "provision prohibiting discrimination," because it requires favorable—not equal—treatment. Accordingly, every court of appeals to have considered the 1986 law has concluded it does not apply to Section 3 of RLUIPA.

The Court should affirm the judgment below. But there is another option. It is now undisputed that petitioner's claim for damages is destined to fail in all events, because it is barred by the Prison Litigation Reform Act. As a result, the Court may alternatively dismiss the writ as improvidently granted.

ARGUMENT

CONGRESS HAS FAILED TO PROVIDE ANY INDICATION—MUCH LESS THE REQUIRED *UNEQUIVOCAL* INDICATION—THAT STATES ACCEPTING FEDERAL FUNDS WAIVE THEIR IMMUNITY TO PRISONER SUITS UNDER RLUIPA FOR DAMAGES

In light of the constitutional interests at stake, the Court has repeatedly held that only “unmistakable” expressions of legislative intent are sufficient for Congress to extract a waiver of state sovereign immunity as a condition of receiving funds under a Spending Clause statute. See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985). Congress may not *presume* that the full panoply of judicial relief will be available in the course of requiring a waiver from suit. On the contrary, “[t]o sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims,” *Lane v. Pena*, 518 U.S. 187, 192 (1996)—a rule that, as a matter of law and logic, governs state and federal sovereign immunity alike.

Contrary to petitioner's contentions, Congress has failed to provide the requisite clear directive extracting waivers of immunity for damages awards under RLUIPA. First, under its plain terms, RLUIPA itself is insufficiently clear because it says *nothing* explicitly about damages; and second, 42 U.S.C. 2000d-7,

which does explicitly mention remedies but does *not* apply to Section 3 of RLUIPA, does not supply the clarity that RLUIPA itself lacks.

I. RLUIPA’S REFERENCE TO “APPROPRIATE RELIEF”—WITHOUT ANY TEXTUAL HINT OF WHAT RELIEF IS INDEED “APPROPRIATE”—IS INSUFFICIENT TO ESTABLISH A WAIVER OF STATE SOVEREIGN IMMUNITY FOR MONEY DAMAGES

A. Congress’s Use Of The Phrase “Appropriate Relief” Does Not Explicitly Authorize Damages Actions Against Sovereign Entities

RLUIPA nowhere authorizes damages actions in suits against sovereigns. Under controlling precedent, statutory text must be unmistakably clear before a court will presume Congress intended to condition the receipt of federal funds on a waiver of immunity. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999); *Atascadero*, 473 U.S. at 247. Because that presumption extends not only to immunity from suit, but also to immunity from damages, petitioner’s theory must fail unless the text of RLUIPA unambiguously authorized such relief. See, e.g., *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992) (so holding in a case involving federal sovereign immunity). See also *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506-507 (1998) (recognizing “a correlation between sovereign immunity principles applicable to States and the Federal Government”); *Hoffman v. Conn. Dep’t of Income Maint.*, 492 U.S. 96, 102 (1989) (plurality op.) (construing provision not to extend in scope to “monetary recovery from the States”). RLUIPA fails this standard.

1. State sovereign immunity is “an essential component of our constitutional structure.” *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989). Accordingly, courts will not presume that Congress has swept it aside—or conditioned federal funds on extracting a corresponding waiver from the States—unless it expresses an intent to do so unambiguously in the statutory text. See *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 541 (2002); *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65 (1989). Absent an “unequivocal indication” that a State has consented to waive its immunity, the State has *not* waived its immunity. *Atascadero*, 473 U.S. at 238 n.1; cf. *Nev. Dep’t of Human Resources v. Hibbs*, 538 U.S. 721, 726 (2003) (“For over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against non-consenting States.”); *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909).

These principles enforce important constitutional limitations on the power of the courts. Because “the principle of sovereign immunity limits the grant of judicial authority in Art. III,” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984); see also *Seminole Tribe v. Florida*, 517 U.S. 44, 64-65 (1996), the judicial power to adjudicate any matter involving a State is limited to the terms of the waiver setting aside the jurisdictional bar, see, e.g., *Pennhurst II*, 465 U.S. at 99 (“A State’s constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued.”). Courts accordingly require evidence that is both “unequivocal and textual” to guard against accidental expansion of the judiciary’s own power at the expense of a “constitutionally grounded principle.” *Coll. Sav.*

Bank, 527 U.S. at 684 (describing “state sovereign immunity”). See also *Dellmuth*, 491 U.S. at 230 (“evidence of congressional intent must be both unequivocal and textual”).

This clear statement rule provides an important constitutional check on Congress as well. “In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” *Will*, 491 U.S. at 65 (internal quotation marks omitted). To the extent the Court “has left primarily to the political process the protection of the States against intrusive exercises” of federal power, courts “must be absolutely certain that Congress intended such an exercise. [T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking [intended] to protect states’ interests.” *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). See also *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005) (plurality op.) (Kennedy, J.) (“These clear statement rules ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation.”).

The federal government (Br. 24) has implied that the requirement of unmistakable clarity, as applied to state sovereign immunity, does not extend to the *scope* of relief—as it plainly does regarding principles of federal sovereign immunity, see, *e.g.*, *Lane*, 518 U.S. at 192. The federal government is mistaken.

The logic of the Court’s decisions applies with equal force to each setting. Neither petitioner nor

the United States have identified any principled reason to treat each entity's immunity any differently in this regard. Indeed, this Court has repeatedly acknowledged the common features and characteristics of state and federal sovereign immunity. See *Coll. Sav. Bank*, 527 U.S. at 682 (finding “no reason why the rule should be different with respect to state sovereign immunity”); *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506-507 (1998) (recognizing the correlation); *Nordic Vill.*, 503 U.S. at 37 (equating principles from “the Eleventh Amendment context” to principles applicable to federal sovereign immunity); see also Pet. Br. 18 n.7. And for good reason. As a starting proposition, even the federal government would surely agree with the following: in the same way that the United States' sovereign immunity from suit operates as a jurisdictional limit on the judiciary's power, so too does the States' sovereign immunity from suit. But if the *scope* of the waiver on the federal side has the same jurisdictional consequences as its initial waiver from suit, see, e.g., *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986), it stands to reason that the scope of the States' waiver shares the same jurisdictional effect. The federal government has not offered any basis for concluding otherwise.

“Our sovereign immunity precedents establish that suits against nonconsenting States are not properly susceptible of litigation in courts, and, as a result, that the entire judicial power granted by the Constitution does not embrace authority to entertain such suits in the absence of the State's consent.” *Alden v. Maine*, 527 U.S. 706, 754 (1999) (internal quotation marks, brackets, and citations omitted). If the State's consent is limited in scope to a certain set

of remedies, then the judicial power is so limited as well. That is the rule that applies to the federal government, and there is no basis for applying a different rule to the States.

2. The clear-statement requirement dooms petitioner's case. He contends that all damages are automatically available unless Congress clearly says otherwise. See Pet. Br. 14-15. Accordingly, rather than asking whether RLUIPA's text expressly and unequivocally authorizes damages, petitioner asks whether the text explicitly *limits* damages as a remedy. This has the controlling standard exactly backwards. When viewing possible waivers of immunity, the judiciary searches for "a clear statement of what the rule *includes*, not a clear statement of what it *excludes*." *Raygor*, 534 U.S. at 546. And looking at what the law includes, it is plain that Congress has not authorized damages actions against the States: "appropriate relief"—the only guidance Congress provided under RLUIPA's enforcement action—is ambiguous at best.

Indeed, the phrase is entirely question-begging: it simply asks whether damages relief would be *appropriate* in this context. Congress could have authorized damages in any number of ways—and could have done so explicitly using terms like "compensatory damages," "money damages," and perhaps even "remedies at law." But the phrase Congress chose instead offers no "meaningful guidance" to courts or to the States. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683 & n.2 (1983) (also favorably quoting Judge Wilkey as noting "the absence of any clue as to the meaning of 'appropriate'" in 42 U.S.C. 7607(f), and further noting that the term lacked any "comprehensible or principled meaning"). Because "appro-

appropriate” means “specially suitable,” “fit,” or “proper,” it is entirely indeterminate in the absence of context. *Id.* at 683. And the only context in this case cuts *against* petitioner’s theory: where the defendant is a sovereign entity, monetary relief is distinctly *inappropriate* unless the text unmistakably says otherwise, not the other way around.

3. It is thus unsurprising that six courts of appeals have now squarely held that the phrase “appropriate relief” does not “provide the ‘unequivocal textual expression’ necessary to effect a sovereign’s waiver to suits for damages.” *Nelson v. Miller*, 570 F.3d 868, 884 (7th Cir. 2009); see also *Holley v. Cal. Dep’t of Corr.*, 599 F.3d 1108, 1112 (9th Cir. 2010) (“The phrase ‘appropriate relief’ does not address sovereign immunity specifically at all, let alone ‘extend [a waiver of sovereign immunity] unambiguously to * * * monetary claims’ in particular.”); *Van Wyhe v. Reisch*, 581 F.3d 639, 654 (8th Cir. 2009) (“RLUIPA’s ‘appropriate relief’ language does not unambiguously encompass monetary damages so as to effect a waiver of sovereign immunity from suit for monetary claims under Section 3 by acceptance of federal money.”); *Cardinal v. Metrish*, 564 F.3d 794, 801 (6th Cir. 2009) (“RLUIPA does not contain a clear indication that Congress unambiguously conditioned receipt of federal prison funds on a State’s consent to suit for monetary damages”); Pet. App. 23a (“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.”); *Madison v. Virginia*, 474 F.3d 118, 131 (4th Cir. 2006) (“We conclude that RLUIPA’s ‘appropriate relief against a government’ language falls short of

the unequivocal textual expression necessary to waive State immunity from suits for damages.”). The D.C. Circuit has also reached the same conclusion in the context of the Religious Freedom Restoration Act and the federal government’s sovereign immunity. See *Webman v. Federal Bureau of Prisons*, 441 F.3d 1022, 1023 (D.C. Cir. 2006) (RFRA’s provision for “appropriate relief” does “not provide the kind of clear and unequivocal waiver of sovereign immunity governing precedent requires”); see also *id.* at 1026 (Tatel, J., concurring) (“although appellants rightly point out that the term ‘appropriate relief’ ordinarily ‘confers broad discretion on the Court’ to fashion a remedy, such sweeping statements have no applicability in the sovereign immunity context”) (citation omitted).

This overwhelming judicial consensus alone suggests that “appropriate relief” fails to satisfy the clear-statement standard. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2644 (2009) (citing “differences of opinion” in “well-reasoned majority and dissenting opinions” as one factor counseling in favor of qualified immunity); *Wilson v. Layne*, 526 U.S. 603, 618-619 (1999) (“If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.”); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495 (1996) (“[t]he different views expressed by the Courts of Appeals [on the statute at issue] demonstrate that the language of that section is not entirely clear”). Petitioner is simply incorrect that the State should have been expected to reach the opposite (and wrong) conclusion on its own.

B. Petitioner’s Efforts To Find Clear Meaning In Textual Ambiguity And Congressional Silence Are All Unavailing

1. Nothing in the plain text casts any doubt on the correctness of the Fifth Circuit’s decision—and, indeed, the text emphatically confirms the lack of a damages remedy in actions against the States

a. As an initial matter, petitioner is simply wrong that “appropriate relief” is a term of art. See Pet. Br. 14-22. A true “term of art” is a “word or phrase” with a “specific, precise meaning in a given specialty, apart from its general meaning in ordinary contexts.” *Black’s Law Dictionary* 1610 (9th ed. 2009). Yet “appropriate relief” is not “specific” or “precise” in any way. Quite unlike a peculiar or conspicuous phrase—such as “res ipsa loquitur,” see *ibid.*—it is hard to imagine a phrase more generic or more commonplace than “appropriate relief.” As *Ruckelshaus* confirmed, it lacks any established definition, see 463 U.S. at 683, and instead must take its meaning from its surroundings, see, e.g., *Burlington Sch. Comm. v. Ma. Dep’t of Educ.*, 471 U.S. 359, 369 (1985) (“The type of relief is not further specified, except that it must be ‘appropriate.’ Absent other reference, the only possible interpretation is that the relief is to be ‘appropriate’ in light of the purpose of the Act.”); see also *Webman*, 441 F.3d at 1026 (describing the phrase as “open-ended and equivocal”). This, accordingly, is *not* a term that has “a well-settled meaning at common law.” *Neder v. United States*, 527 U.S. 1, 22 (1999); see also *Evans v. United States*, 504 U.S. 255, 259-260 (1992) (looking for terms with “widely accepted definitions” and imbued with “the legal tradition and meaning of centuries of practice”). On the contrary, it is unthink-

able that Congress consciously debated confirming the availability of damages under RLUIPA, and deliberately chose to add this meaningless phrase as a way to “include an additional layer of clarity” (U.S. Amicus Br. 15)—rather than a common phrase far more direct (such as, for example, “compensatory damages”) to accomplish its objective.

Nor, for that matter, is petitioner correct that *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992), was using the phrase “appropriate relief” as a term of art. See Pet. Br. 14-17. *Franklin* did invoke that phrase, but it also employed variations of the same language, including “appropriate *remedies*” and (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)) “*available* remedy.” 503 U.S. at 66. If “appropriate relief” were intentionally used as a term of art, one would have expected the Court to stick to it; the variations, however, suggest a much more likely explanation: the Court was using generic words to describe a basic concept, not to create shorthand for a specific set of judicial remedies. (And, indeed, even *Franklin* itself never purported to articulate a categorical rule: by announcing only a “general” standard, the Court itself accounted for the possibility of exceptions and variations in appropriate circumstances. See 503 U.S. at 70-71.) The decision in *Barnes v. Gorman*, 536 U.S. 181 (2002), readily confirms this: “*Franklin* * * * did not describe the scope of ‘appropriate relief.’” 536 U.S. at 185.

Petitioner’s reliance on *Franklin* is flawed for yet another reason. According to petitioner, Congress must have modeled the “appropriate relief” language from snippets of that opinion. Pet. Br. 20 (“the phrase ‘appropriate relief’ is obviously transplanted from *Franklin*”). The problem with this theory is

that the phrase “appropriate relief” in RLUIPA was obviously transplanted *from RFRA*. Those two statutes shared a common origin, and they both employ the identical language. Since RFRA was *not* premised on Congress’s Spending power—and had nothing to do with the specific context of *Franklin*—petitioner is wrong to presume that Congress necessarily had *Franklin* in mind while drafting RLUIPA.

Petitioner’s final two attempts to bolster his “term of art” argument also fall flat. He relies first on *West v. Gibson*, 527 U.S. 212 (1999), as an example of this Court construing another statute with comparable language and authorizing a damages remedy. Not only does *West* fail to support petitioner’s argument, however, but it in fact proves respondents’ point. *West* held that damages were available under Title VII because Congress *explicitly* made damages available in the text of the statute. See 527 U.S. at 217-218. That is precisely the kind of textual clear statement required before presuming any damages remedy against a sovereign (and that was *not* the work of “appropriate remedies” as a term of art). In addition, *West* held that the *identical* “appropriate” remedies language meant *two different things at two different times*—one before the 1991 Compensatory Damages Amendment and something else after it. Instead of confirming the phrase as a term of art with a set and specific meaning, *West* read “[t]he meaning of the word ‘appropriate’” to “permit[] its scope to expand to include Title VII remedies that were not appropriate before 1991, but in light of legal change are appropriate now.” *Id.* at 218.

Nor does *Int’l Bhd. of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, AFL-CIO*

v. *Hardeman*, 401 U.S. 233 (1971), support petitioner’s theory. *Hardeman* involved a non-sovereign plaintiff suing a non-sovereign defendant, and accordingly its holding is hardly relevant here. Nor, in any event, did any party clearly dispute the availability of damages in that case. Finally, the statutory language at issue there, unlike RLUIPA’s language here, at least was slightly more suggestive: the statutory phrase, which provided for appropriate relief “*including* injunctions,” suggested that relief was not *limited* to injunctions. 401 U.S. at 240-241. *Hardeman* alone cannot satisfy petitioner’s burden.

b. The federal government does not directly label “appropriate relief” as a term of art, but it does suggest that the “well-worn” phrase has a clear meaning. The federal government, however, cannot truly mean what it says—otherwise RFRA, which employs the same language in its statutory cause of action, would *unambiguously* overcome the sovereign-immunity defense that the federal government contends applies to actions under that statute. See U.S. Amicus Br. 24 n.7. Either the phrase has an established legal meaning or not. It cannot shift definitions depending on whether the federal government is on one side of the “v.”

c. Nor is petitioner correct that other provisions of RLUIPA supply the clarity missing from the operative “appropriate relief” clause. First, the fact that the United States is restricted to seeking declaratory and injunctive relief (42 U.S.C. 2000cc-2(f))—a limitation not expressly included in the provision authorizing private-party suits—is wholly beside the point. Contra Pet. Br. 21; U.S. Amicus Br. 16. When the United States sues a State, *there is no immunity defense*. See, e.g., *Employees of the Dep’t*

of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279, 286 (1973). Because the default in such suits is the same as the default in suits against non-sovereign defendants, it is entirely sensible that Congress would be forced to *affirmatively* exclude relief it had *implicitly* excluded under the private-party provision.

Nor is there anything unusual about Congress employing “appropriate relief” for the private-party action and “declaratory and injunctive relief” in the U.S. suit provision. For one, if damages are available against non-sovereign entities, Congress would have sensibly included a malleable phrase (like “appropriate relief”) to preserve the default rule in private-party actions. For another, Congress sensibly used the broader phrase under subsection (a) (read: “appropriate relief”) because subsection (a) itself has a broader scope: while only *affirmative* suits may be brought by the United States under subsection (f), subsection (a) also contemplates parties invoking RLUIPA’s protections “as a defense.” Congress’s use of this broader language ensures that courts can react to a valid RLUIPA defense in “appropriate” ways (such as dismissing a claim) that does not necessarily involve the technical equivalent of awarding “declaratory or injunctive relief.”

Second, the provision authorizing a “broad construction” of RLUIPA’s text (see 42 U.S.C. 2000cc-3(g)) is best understood as addressing the *substantive* standards in the statute, and not the scope of available relief. In any event, under the clear-statement rules, the “maximum extent” of relief permitted under the Court’s precedents is whatever Congress provided with unmistakable clarity in the text itself. Otherwise, it is not readily apparent that

the political branches contemplated (as they must) the serious incursion into the federal-state balance by opening state treasuries to damages actions by state prisoners. See *Library of Congress v. Shaw*, 478 U.S. 310, 321 (1986) (“policy, no matter how compelling, is insufficient, standing alone, to waive * * * immunity”).

Finally, Congress’s explicit incorporation of the Prison Litigation Reform Act of 1995, see 42 U.S.C. 2000cc-2(e), does not prove that damages are available lest the PLRA reference become “largely pointless.” Pet. Br. 23. Petitioner simply ignores that the PLRA includes a host of other provisions, including, for example, exhaustion requirements that this Court itself cited in *Cutter v. Wilkinson*, 544 U.S. 709, 723 n.12 (2005).

d. Nor can petitioner account for other statutory provisions that cut against a damages remedy. Section 2000cc-2(a), for example, provides that a person may assert a violation of the act “as a claim *or defense*” and obtain “appropriate relief.” 42 U.S.C. 2000cc-2(a) (emphasis added). Since a party never obtains damages from a winning *defense*, this casts further doubt on petitioner’s understanding of the statute as employing a “term of art” authorizing monetary relief. In addition, the statutory text says “appropriate *relief*,” not “appropriate *remedies*”—and there is a difference. “Relief” is a term used for redress that is “esp[ecially] equitable in nature.” *Black’s Law Dictionary* 1295 (7th ed. 1999). If Congress were thinking carefully about authorizing a damages remedy across the board, it presumptively would have opted for that very word—“remedy”—rather than “relief.”

e. Finally, petitioner is simply incorrect that the State’s understanding of “appropriate relief” would violate the principle announced in *Clark v. Martinez*, 543 U.S. 371 (2005), that courts may not “give the same statutory text different meanings in different cases.” 543 U.S. at 386. That fact that relief “appropriate” in one setting maybe not be “appropriate” in another does not change *the meaning of the statutory term “appropriate” itself*.

2. Petitioner and the federal government are incorrect that the Spending Clause backdrop (or the contractual nature of the States’ obligations) supply the clarity that was lacking textually in the statute itself

a. Because Congress did not unmistakably authorize a damages remedy in RLUIPA’s actual text, RLUIPA necessarily does *not* authorize damages in suits against sovereigns. Contrary to petitioner’s contention, *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), and *Barnes v. Gorman*, 536 U.S. 181 (2002), do not hold otherwise. Pet. Br. 26-28. Both cases involved *non-sovereign* defendants, and so the limits on relief from sovereign entities were simply not present. See, *e.g.*, *Lane v. Pena*, 518 U.S. 187, 196-197 (1996); see also *Barnes*, 536 U.S. at 187 (“We have also applied the contract law analogy in finding a damages remedy available in *private* suits under Spending Clause legislation.”) (emphasis added). Where a defendant is a county or municipality—and is not protected from immunity—monetary relief may very well be “appropriate.” *E.g.*, *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 (2001); *N. Ins. Co. of N.Y. v. Chatham County*, 547 U.S. 189, 193-194 (2006). But as the Court held in *Lane*, the opposite rule applies in suits,

such as the one here, against a sovereign entity. 518 U.S. at 196-97.

Petitioner and the federal government purport to distinguish *Lane* on the ground that it involved the federal government itself—and accordingly did *not* involve a contract-law analogy or a Spending Clause enactment. But that explanation has no foundation anywhere in *Lane*'s rationale. *Lane*, after all, did not turn on the presence of a *federal* defendant, but rather on a *sovereign* defendant. See 518 U.S. at 195-197. The fact that the case involved the federal government was relevant only to the extent that the federal government happens to be a *sovereign* entity: “Petitioner’s reliance on [*Franklin*] * * * is misplaced,” because “when it comes to an award of money damages, *sovereign immunity* places the Federal Government on an entirely different footing than private parties.” *Id.* at 196 (emphasis added). “[W]here a cause of action is authorized against the federal government, the available remedies are not those that are ‘appropriate,’ but only those for which *sovereign immunity has been expressly waived.*” *Id.* at 197 (emphasis added). These principles apply equally to States, as petitioner himself acknowledges (see Br. 18 n.7). In order to “sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims. *Lane*, 518 U.S. at 192. (The need for the clear-statement rule, after all, is no less when Congress is acting under its Spending Power. There is still the same interest in ensuring “the efficacy of the procedural political safeguards” designed to protect the States against “intrusive exercises” of federal power. *Gregory*, 501 U.S. at 464.)

b. Not only was the Spending Clause context irrelevant to *Lane's* rationale, but petitioner's reliance on it reflects a fundamental misunderstanding of Spending Clause cases. Both petitioner and the federal government presume that States are presumptively subject to damages under Spending Clause enactments (and other contract-law arrangements) unless the cause of action in question explicitly *limits* the available relief—in other words, unless “the traditional presumption” in favor of a court's power to award all available relief is explicitly overturned. *Franklin*, 503 U.S. at 70. This argument misreads the core doctrinal foundation of *Franklin* and *Barnes*.

Under a plain reading of *Franklin* and *Barnes*, it is apparent that the default presumption—all damages are available unless Congress expressly says otherwise—comes directly, and explicitly, from the line of cases associated with *Bell v. Hood*: once Congress creates a cause of action, the federal judiciary presumptively has the background authority to award any relief available in the traditional panoply of judicial remedies. See *Barnes*, 536 U.S. at 185; *Franklin*, 503 U.S. at 68. Yet that logic *has nothing to do* with the fact that the enactments at issue arose under the Spending Clause—or that such Spending Clause enactments share a contract-law analogy. On the contrary, the “traditional presumption” has everything to do with the *Bell* presumption that would operate in exactly the same way even if the statute were enacted under any other enumerated power in Article I or elsewhere in the Constitution. In other words, the authority to invoke all “appropriate remedies” was not the product of the Spending Clause or contracts—it was the product of having *any* federal

cause of action against a private party in federal court.

Indeed, where these decisions did discuss the Spending power, they did so as a potential way to *limit* the available relief, not to expand it. In *Franklin*, for example the Court simply rejected the Spending Clause context as a reason *not* to rely on the *Bell v. Hood* presumption: it said that the Spending backdrop was not a basis for cutting back (read: *limiting*) the relief traditionally available when federal courts have jurisdiction over any federal action. See 503 U.S. at 74-75.

Barnes proceeded along identical lines. The Court again invoked *Franklin's* background presumption from *Bell v. Hood*, see *Barnes*, 536 U.S. at 185, and looked to the Spending Clause context again only to *limit* damages otherwise available: and, in fact, it held that punitive damages were barred under the statute (even though such damages were presumptively available elsewhere outside the Spending context) because parties to a contract would not expect it. See *id.* at 187-189. The Spending backdrop, accordingly, did not *authorize* or *increase* the scope of relief parties presumptively should have anticipated. On the contrary, private parties, under the traditional default presumption, were automatically on notice of the full panoply of judicial remedies ordinarily available in federal actions to enforce federal rights. The Spending Clause context, in both *Franklin* and *Barnes*, was merely a possible means of narrowing, not expanding, the scope of otherwise available relief.

This therefore proves petitioner's error and the federal government's error in relying so heavily on the Spending Clause as a means for *increasing* liabil-

ity. The contract-like character of these enactments are not now, and have never been, a basis for treating spending recipients differently (and *worse*) than defendants in suits brought under non-spending federal statutes. And for good reason: it would be an odd rule that treats parties *less* favorable in a clear-notice context.

In sum, this reveals that petitioner's theory must stand or fall on the strength of applying the *Bell v. Hood* presumption in cases against a sovereign entity. Yet that would be a truly breathtaking consequence. The inherent powers of the judiciary to fashion or formulate relief have never extended to declaring relief available against sovereign entities. For those entities, immunity stands as a categorical answer to any requests for relief unless the legislative body has unmistakably abrogated that immunity or secured a proper waiver extending explicitly in scope to the particular kind of relief in question.

c. This, of course, does not suggest that the clear-statement requirement is more demanding in cases involving sovereign defendants. On the contrary, it simply recognizes that Congress must be clear as to each element of its Spending enactments: because private parties are not protected by sovereign immunity, Congress's decision to authorize a suit is sufficient to put all private parties on notice of their potential liability. When it comes to sovereign defendants, however, Congress cannot simply authorize the same cause of action (or raise the possibility of the same relief) and stop; the provision authorizing a judicial action must also address possible *defenses* to that action, including jurisdictional defenses related to sovereign immunity. See, *e.g.*, *Nordic Vill.*, 503 U.S. at 38 (“The fact that Congress grants *jurisdic-*

tion to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim. The issues are wholly distinct.”) (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 787 n.4 (1991)).

Unless there is clear statutory text demonstrating that Congress confronted this question and induced States to waive their immunity from both suit and retrospective money damages, the States continue to have a valid defense (and the courts continue to lack jurisdiction) regarding any claim brought pursuant to the general statute.

Nor, accordingly, is the State asserting a “magic words” requirement. There is no set formulation that Congress must invoke. But Congress must say at least *something* with respect to the scope of damages, and the corresponding scope of any waiver of immunity, when authorizing actions against State defendants.

d. In an effort to show that immunity against damages suits somehow melts away when a contract is breached, petitioner (Br. 33-34) and the federal government (Br. 22-24) invoke the Tucker Act, codified at 28 U.S.C. 1491(a)(1). That statute only confirms the need for a textual waiver of sovereign immunity that is clear as to the scope of relief. By enacting the Tucker Act and its antecedents, Congress expressly consented to a damages remedy for breaches of federal contracts. There being no such statute here, the proposed analogy does not further petitioner’s cause.

Petitioner correctly notes (Br. 33) that “[t]he United States has consented to suit for breach of federal contracts through the Tucker Act.” See 28 U.S.C. 1491(a)(1). But he errs in stating (Br. 34) that the remedial scope of this waiver is defined by

“the longstanding legal tradition of money damages * * * for breach of contract.” It is the Tucker Act itself, not the law of contracts, that waives federal sovereign immunity against damages suits.

The Tucker Act effects this waiver by providing jurisdiction to the United States Court of Federal Claims. See *United States v. Navajo Nation*, 129 S. Ct. 1547, 1551-1552 (2009); *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Such jurisdiction has long been limited to ordering money judgments against the federal government, as required by the text of the Tucker Act and its predecessor statutes. See, e.g., *United States v. Jones*, 131 U.S. 1, 14-18 (1889) (construing the Act of Mar. 3, 1887, 24 Stat. 505, known as the Tucker Act); *United States v. Alire*, 73 U.S. (6 Wall.) 573, 575-576 (1868) (construing the Act of Feb. 24, 1855, 10 Stat. 612).

Congress thus allows private litigants to sue the United States for various claims, including breaches of contract, in a court whose sole function it is to award money damages and whose very existence operates to waive federal sovereign immunity. In this way, the Tucker Act itself provides the requisite clear statement waiving sovereign immunity.³ And having *explicitly* provided a waiver for damages ac-

³ In quoting the Tucker Act, the federal government declines to mention (Br. 23) that the jurisdiction of the Court of Federal Claims extends to “any claim against the United States * * * for liquidated or unliquidated damages in cases not sounding in tort,” 28 U.S.C. 1491(a)(1). Construing the Tucker Act just two years after its passage, the Court construed the phrase “[d]amages in cases not sounding in tort” to mean “damages for breach of contract.” *Jones*, 131 U.S. at 16.

tions, it was not necessary to identify a *second* waiver hidden somewhere in contract principles.

e. The federal government, finally, has it exactly backwards in suggesting that the identical phrase (“appropriate relief”) in RFRA is insufficient to authorize damages against the U.S. while the same language in RLUIPA is sufficient to authorize damages against the States. The standard applicable when the federal government regulates its own conduct is not less stringent than the standard applicable when the federal government purports to regulate State entities. Only the latter threatens the delicate balance of our system of dual sovereignty. It would stand the law on its head to suggest that less is required when an additional constitutional dimension is at stake.

3. The statutory purpose is consistent with limiting remedies against sovereign entities to equitable relief.

a. As an initial matter, petitioner is incorrect to cite his view of the statutory purpose in an effort to overcome the fact that the text itself does not waive immunity for damages. When sovereign immunity is at stake, the only *relevant* indicator of legislative intent is the language Congress employed in the statute itself. Broad presumptions about congressional purpose—unsupported, of course, by any explicit statutory text—are meaningless in this context: such assumptions fail to reveal that the political branches confronted the difficult question to waive immunity to damages suits, and any unstated congressional objective fails to put States on unmistakable notice of a waiver of a constitutional prerogative. See, *e.g.*, *Shaw*, 478 U.S. at 321.

b. In any event, petitioner's view of the statutory objective is incorrect. The PLRA bar on non-physical injuries (see Part III, *infra*), for example, emphatically confirms that Congress did not consider damages as an essential enforcement mechanism under the statute.

c. Nor does the lack of compensatory damages otherwise undercut the statute's effectiveness. Amici contend, for example, that "non-monetary remedies are woefully inadequate on their own to safeguard prisoners' rights." ACLU Amicus Br. 7. But this system of "non-monetary remedies" strikes the same balance this Court has struck between protecting principles of sovereign immunity and securing the supremacy of federal law. The *Ex parte Young* doctrine authorizes prospective, equitable relief, but forbids any kind of retrospective award, including those involving damages. If that settled practice has proved highly effective in guaranteeing the supremacy of federal law (read: effective compliance with federal rights), there is little reason to believe that a comparable rule limiting RLUIPA relief against States would prove inadequate. And, in fact, the opposite is true: the wealth of examples collected by petitioner and his amici reveal States typically altering their conduct wherever possible to accommodate an inmate's religious practice in accordance with RLUIPA's mandate. That is strong evidence of the statute working exactly as it was intended. There is little reason to conclude Congress would have nonetheless encouraged additional prisoner litigation to resolve problems that have already been fixed.

II. HAVING FAILED TO IDENTIFY THE REQUISITE WAIVER OF IMMUNITY IN RLUIPA, PETITIONER CANNOT NOW SHOEHORN HIS SUBSTANTIAL-BURDEN CLAIM INTO 42 U.S.C. 2000D-7'S CATCH-ALL WAIVER FOR SPENDING CLAUSE PROVISIONS "PROHIBITING DISCRIMINATION"

Petitioner maintains, for the very first time, that no clear statement in RLUIPA is required after all. He now claims that a 1986 law, 42 U.S.C. 2000d-7, authorizes his damages claim, even if RLUIPA does not. See Pet. Br. 38-43; see also U.S. Amicus Brief 25-33. Section 2000d-7 explicitly waives sovereign immunity in damages suits based on violations of "section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or *the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.*" 42 U.S.C. 2000d-7(a)(1), (2) (emphasis added). Petitioner contends that this final, catch-all clause sweeps in RLUIPA as a statute "forbidd[ing]" discrimination by recipients of federal funds. Pet. Br. 39. He is mistaken.

Section 3 of RLUIPA, addressing "substantial burdens" on institutionalized persons, is not an "antidiscrimination" provision under any ordinary understanding of that term. Section 3 does not require a showing of unequal treatment. Quite the contrary: Section 3 requires States to provide *favored* treatment to religious exercise, excusing inmates even from neutral rules of general applicability. Because that kind of accommodation is far afield from "discrimination," petitioner's theory fails under any fair reading of Section 2000d-7. And that means his theory is doomed at the outset: immunity is

waived only if the statutory text unambiguously compels that conclusion, so his inability to offer even a plausible reading of Section 2000d-7 stops this argument before it starts. There is no backdoor waiver of immunity under Section 2000d-7's catch-all clause prohibiting "discrimination."

A. As A Matter Of Plain Text, Common Parlance, And Legal Precedent, RLUIPA's Provision Targeting Substantial Burdens Is Not A Provision "Prohibiting Discrimination"

Petitioner's first error is his failure to recognize the critical difference between a statute proscribing the imposition of a "substantial burden" and a statute prohibiting "discrimination." That error renders petitioner's theory incompatible with a plain reading of the statutory text and this Court's precedent.

1. Both petitioner (Br. 41) and the United States (Br. 30) contend that "discrimination" is a "broad term" that sweeps in all manner of conduct that is not, in fact, overtly discriminatory. They are incorrect. Discrimination is indeed a "broad" term, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005), but it is not limitless. It has core features that are identifiable under its ordinary definition and under this Court's precedent—neither of which supports the unduly expansive understanding of that term raised in support of petitioner here.

As an initial matter, the United States has recently submitted a brief to this Court stating its objective view of the "ordinary" understanding of "discrimination"—and it is exactly what one would expect in everyday conversation: "The ordinary meaning of the word 'discrimination' is the 'failure to treat all persons equally when no reasonable distinction can be found between those favored and those not

favored.” U.S. Amicus Br. 13, *CSX Transp., Inc. v. Ala. Dep’t of Revenue* (No. 09-520) (quoting *Black’s Law Dictionary* 534 (9th ed. 2009)). And even in this case, the United States, while advocating for a “broad” construction of “discrimination” under Section 2000d-7, acknowledges that the term is limited to “intentional unequal treatment.” U.S. Amicus Br. 30 (quoting *Jackson*, 544 U.S. at 175).

The “ordinary meaning” of discrimination offered by the United States in *CSX* is correct—and devastating to its position here. The Court has defined “discrimination” interchangeably as “intentional unequal treatment” or “differential treatment.” See, e.g., *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1936-1937 (2008) (retaliation is a “form of discrimination because the complainant is being subjected to differential treatment”) (internal quotation marks omitted); *Jackson*, 544 U.S. at 175 (“‘Discrimination’ is a term that covers a wide range of intentional unequal treatment”); see also *Olmstead v. L.C.*, 527 U.S. 581, 614 (Kennedy, J., concurring in the judgment) (describing “the normal definition of discrimination” as “differential treatment of similarly situated groups”).

“Discrimination” does not, in any ordinary sense, target neutral rules of general applicability. And it certainly does not target such laws in a way that requires States to create discriminatory *exemptions* in favor of conduct that the State otherwise has valid reasons to forbid.

The federal government, much like petitioner, is therefore wrong to contend that the State’s argument turns on such semantics as RLUIPA’s failure to “use the *word* ‘discrimination,’” U.S. Amicus Br. 28 (emphasis added)—although the federal government underestimates the importance of focusing on the words

Congress chooses, see Part II.A.2-II.A.3, *infra*. It is Congress’s failure to invoke the *concept* of discrimination under its “ordinary” definition that distinguishes Section 3 of RLUIPA from a provision truly “prohibiting discrimination.”⁴

2. Not only has petitioner failed to prove that Congress abandoned the usual understanding of the term “discrimination,” but he cannot even explain how his understanding of that term is consistent with the surrounding provisions in RLUIPA itself.

Section 3 of RLUIPA, the provision at issue, targets government action that imposes certain “substantial burden[s]” on religious exercise, even when resulting from “a rule of general applicability.” 42 U.S.C. 2000cc-1(a). In Section 2 of RLUIPA, by contrast, Congress specifically targets “[d]iscrimination,” including regulations “that discriminate[]” against religious organizations. 42 U.S.C. 2000cc(b)(2). Congress thus imposed two different standards on state action in two different contexts: one targets overt discriminatory activity (Section 2) and the other targets laws that impose substantial burdens on religious exercise, even if only

⁴ Petitioner cannot override the ordinary definition of “discrimination” by relying on cases such as *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). See Pet. Br. 41. The fact that, at times, a refusal to accommodate certain individuals or practices will become “arbitrar[y],” and hence potentially discriminatory, *Davis*, 442 U.S. at 412, does not suggest that a statute subjecting State rules to a *strict-scrutiny standard*—and hence invalidating legitimate policies enacted in good faith—is “discriminatory” in character notwithstanding its lack of any focus on the State’s intent and its inclusion of “general[ly] applicab[le]” rules, 42 U.S.C. 2000cc-1(a).

incidentally in the course of enforcing otherwise legitimate rules (Section 3). Congress’s invocation of two different standards in adjacent provisions of the same statute confirms that Congress both knew and understood the difference between “discrimination” and “substantial burden.” See, *e.g.*, *Gomez-Perez*, 128 S. Ct. at 1940; *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 536 (1994). And, of course, Congress’s conspicuous omission of any “antidiscrimination” provision in Section 3 indicates that Congress intentionally refused to slap a “discrimination” label on the conduct it was targeting in that provision, see, *e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983)—the very label that, notwithstanding this clear textual directive, petitioner attempts to employ.

Neither petitioner nor the federal government can answer this argument. In fact, the federal government has abandoned its previous effort to reconcile the two provisions at the petition stage. See U.S. Amicus Brief 13 n.8, *Cardinal v. Metrish* (No. 09-109) (suggesting at the time that the “close proximity” of these contrasting provisions shows “Congress saw the two as of a piece”). And for good reason: Congress did not use different language in adjacent sections of the same act because it intended for them to mean the same thing. The failure to account for this inconsistency, however, is hardly a mark of confidence in their effort to establish “unmistakable” congressional intent that States have waived their immunity under Section 2000d-7 for claims under Section 3 of RLUIPA. See Part II.C, *infra*.⁵

⁵ To the extent Amicus Curiae National Association of Evangelicals suggests (Br. 8-12) that Section 3 of RLUIPA is caught in Section 2000d-7’s catch-all because *Section 2* of RLUIPA

3. Just as petitioner cannot account for the neighboring provisions in RLUIPA (Sections 2 and 3), he also cannot account for the statutes expressly enumerated in Section 2000d-7.

It is an established canon of construction that “[a] word is known by the company it keeps”—a rule that “is often wisely applied where a word is capable of many meanings in order to avoid the giving of *unintended breadth* to the Acts of Congress.” *Dolan v. USPS*, 546 U.S. 481, 486-487 (2006) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)) (emphasis added). That rule squarely applies here.

Each of the enumerated provisions in Section 2000d-7 prohibits, textually and explicitly, intentional disparate treatment. See 20 U.S.C. 1681 (prohibiting “discrimination”); 29 U.S.C. 794 (prohibiting “discrimination”); 42 U.S.C. 2000d (prohibiting “discrimination”); 42 U.S.C. 6101 (prohibiting “discrimination”). Each, however, does *not* sweep past that core prohibition to attack neutral laws of general applicability. Indeed, this Court has repeatedly held that “Title VI itself prohibits only intentional discrimination.” *Jackson*, 544 U.S. at 178; see also

renders the entire statute one “prohibiting discrimination,” Amicus is plainly incorrect. That argument overlooks a critical phrase in the operative clause from Section 2000d-7: the statute does *not* say “any other statute prohibiting discrimination,” but instead “the *provisions* of any other Federal statute prohibiting discrimination.” 42 U.S.C. 2000d-7(a)(1) (emphasis added). The appropriate analysis, accordingly, is whether the *provision* (here, Section 3) prohibits discrimination, not whether the “statute” (or any other part of it) prohibits discrimination.

Alexander v. Sandoval, 532 U.S. 275, 280-281 (2001); *Alexander v. Choate*, 469 U.S. 287, 293 (1985).

That alone is sufficient to show that Section 2000d-7's catch-all clause is necessarily limited to the core conduct (read: *intentional discrimination*) common to each of the enumerated provisions. If Title VI fails textually to reach “disparate impact” prohibitions, see *Sandoval*, 532 U.S. at 281, then surely there is no reason to construe “discrimination” in the catch-all clause even more expansively, to reach neutral rules imposing substantial burdens on certain rights. It is the *related* meaning that controls. See *Dolan*, 546 U.S. at 487. The common denominator of all four listed statutes is, and only is, a prohibition of the kind of intentional discrimination that is *not* the focus of RLUIPA's Section 3.

Both petitioner and the federal government attempt to expand the catch-all clause's reach by focusing on Section 504 of the Rehabilitation Act and 42 U.S.C. 2000e-2(a) in Title VII. See Pet. Br. 41-43 (contending both extend to accommodations); U.S. Amicus Br. 30-32 (same). But the flaws of this approach are plain. Focusing on only two provisions (only one of which, Section 504, is *even listed* in Section 2000d-7) hardly explains the common core of *each* enumerated provision. The point of the *ejusdem generis* canon is not to expand a catch-all clause to the furthest reaches of each item in a list, but rather to limit the general term to the common elements shared by all. See *Holder v. Hall*, 512 U.S. 874, 917 (1994).

4. Petitioner's final mistake on this score is his refusal to acknowledge the strong judicial precedent—in this context and elsewhere—drawing a sharp distinction between “discrimination” provi-

sions and those imposing “substantial burdens” or requiring accommodations.

And, indeed, there is a clear distinction, as a matter of law and logic, between provisions requiring accommodations (like Section 3 of RLUIPA) and those prohibiting discrimination (like the sections specified in Section 2000d-7). The entire point of RLUIPA, after all, was to reenact, in the wake of *City of Boerne*, RFRA’s attempt to restore protection against “neutral” laws that nonetheless “burden religious exercise.” 42 U.S.C. 2000bb(a)(2). But there is a central and fundamental difference between placing an incidental *burden* on religion and intentionally *discriminating* against religion, a point this Court has repeatedly reinforced. See, e.g., *City of Boerne*, 521 U.S. at 535 (“RFRA’s substantial-burden test, however, is not even a discriminatory effects or disparate-impact test. * * * When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.”); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 535 (1993) (“a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice”; “a social harm may have been a legitimate concern of government for reasons quite apart from discrimination”); *Smith*, 494 U.S. at 890; see also *City of Boerne*, 521 U.S. at 546 (O’Connor, J., dissenting) (explaining how the “substantial burden” standard extends past “an antidiscrimination principle”).

Nor has the Court restricted this doctrinal distinction to the free-exercise context. On the contrary, it has been applied in a variety of settings. See, *e.g.*, *Smith*, 494 U.S. at 878-879, 886 & n.3, 890 (citing examples); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact”).

Section 3 of RLUIPA falls squarely within the category of accommodations, given its focus on neutral rules and the removal of substantial burdens. There is no reason the Court should abandon the doctrinal distinction now and hold that discrimination, for purposes of Section 2000d-7 alone, extends far beyond acts of intentional disparate treatment—and renders “discriminatory” precisely what *Smith* held did not violate the Constitution in the first place.

B. Contrary To Petitioner’s Contention, The Fact That RLUIPA May Incidentally “Prevent” Discrimination Does Not Overcome The Fact That RLUIPA Does Not, By Design, “Prohibit” Discrimination

Because petitioner and the federal government cannot prove that the relevant provision of RLUIPA actually “prohibit[s] discrimination,” they instead attempt to show that, in certain instances, the statute may sweep in instances of discrimination—not according to the design of the statute on its face, but by chance occurrence. See Pet. Br. 39-40; U.S. Amicus Br. 29. In other words, according to petitioner and the federal government, if a provision that does *not* prohibit discrimination (under any ordinary understanding of that word) by happenstance sweeps in

some discriminatory conduct, the entire provision is transformed into a prohibition of discrimination.

That is an odd way to read the statute. A statute prohibits discrimination if *its terms* prohibit discrimination: the language must forbid acts treating similarly situated individuals in an unequal manner on the basis of a protected characteristic. See Part II.A.1, *supra*. Although that describes a portion of Section 2 (42 U.S.C. 2000cc(b)), it does not describe any portion of Section 3 (42 U.S.C. 2000cc-1(a)).

No one would describe an anti-arson law that forbids *all* arsons as a provision “prohibiting discrimination”—and that is so even though the law would incidentally punish arsonists who specifically target churches because of the congregants’ race or religion. The enforcement of the law may *prevent* the latter kind of discrimination, but the anti-arson law itself still does not *prohibit* discrimination. Cf. *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 269-270 (1993).

The federal government suggests that the cell-restriction claim in this very case proves their point (Br. 30), but it proves the opposite. Imagine, for example, if the cell-restriction policy restricted inmates from attending any activities, whether religious or secular. The merits of petitioner’s claim would remain the same. The substantial burden alleged by petitioner is his inability to attend religious services, not the prison’s decision to permit the attendance of any other activities. After all, the availability of those other activities would have no impact on any alleged burden on petitioner’s desire to “attend worship services.” Once again, Section 3 precludes the imposition of certain “substantial burdens,” but it is still not a provision “prohibiting discrimination.”

C. Petitioner’s Reading Is Barely Plausible, Much Less Unmistakably Clear As Required To Overcome Sovereign Immunity

Because petitioner’s understanding of Section 2000d-7 and RLUIPA is not unambiguously compelled by either statutory text, his theory fails for yet another fundamental reason: Section 2000d-7’s language, as applied to RLUIPA, is not so unmistakably clear that it commands the conclusion that immunity has been waived. This lack of unequivocal clarity itself independently undermines petitioner’s claim. See *Lane*, 518 U.S. at 199-200 (applying clear statement rule to Section 2000d-7).

Petitioner has failed to eliminate other “reasonable constructions” of the statute in multiple respects. See *Atascadero*, 473 U.S. 239-240 (internal quotation marks omitted). As discussed above (see Part II.A), there is no reason to depart from the “ordinary” meaning of discrimination, or from the Court’s settled precedent recognizing stark lines between substantial burdens and discriminatory practices. The enumerated statutes surrounding the catch-all clause do not uniformly apply to acts beyond intentional discrimination, so it is certainly reasonable, if not required, to construe the catch-all as limited to the common denominator of those statutes (read: intentional discrimination, not substantial burdens). For these and other reasons, Congress did not “manifest[] a clear intent” that Section 2000d-7 would trigger waivers of immunity under Section 3 of RLUIPA. *Atascadero*, 473 U.S. at 247.

Unsurprisingly, then, all three federal courts of appeals to have considered the question have concluded that Section 2000d-7 does not include Section 3 of RLUIPA. See *Holley v. Cal. Dep’t of Corr.*, 599

F.3d 1108, 1113 (9th Cir. 2010) (contrasting Section 2 from Section 3 of RLUIPA and finding the lack of an unequivocal textual waiver); *Van Wyhe v. Reisch*, 581 F.3d 639, 654-655 (8th Cir. 2009) (same); *Madison v. Virginia*, 474 F.3d 118, 132-133 (4th Cir. 2006) (explaining that, unlike RLUIPA, the statutes enumerated in Section 2000d-7 explicitly prohibit “discrimination” and mandate equal treatment, not “religious accommodation”).⁶

⁶ Petitioner’s Section 2000d-7 argument is not only splitless; it was neither presented nor passed upon in either court below. Petitioner below claimed only that RLUIPA itself contained a clear statement waiving immunity in damages suits. In this Court, petitioner contends that sovereign immunity against damages need not be waived in RLUIPA, it having already been waived pursuant to a law enacted fourteen years earlier. Respondents have previously explained (see Supp. Br. 6-7) how this Court does not traditionally consider this kind of new claim, see *United States v. United Foods, Inc.*, 533 U.S. 405, 416-417 (2001), and why this case lacks any reason for departing from the ordinary practice, see *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 457 (1995). Accordingly, it is well within the Court’s discretion not to address this claim as a matter of prudence.

Tellingly, the federal government responds that the Section 2000d-7 claim was adequately addressed below, because the panel opinion—which did not even acknowledge Section 2000d-7’s existence—“relied in large part” on a Fourth Circuit decision (*Madison*) that “did consider and reject this argument.” U.S. Amicus Br. 27-28 n.8. Under this view, any time a case is cited in an opinion—even for an entirely *separate* proposition, in a different section, involving different statutory authority—the court is deemed to have “addressed” it. That is senseless. The Court’s reasons for requiring prior consideration of a claim are satisfied by actual, reasoned analysis of the question presented. That plainly has not occurred here.

III. IN LIGHT OF NEW CONCESSIONS FROM BOTH PETITIONER AND THE FEDERAL GOVERNMENT REGARDING THE PLRA, THE COURT MAY ALTERNATIVELY DISMISS THE WRIT AS IMPROVIDENTLY GRANTED

As the State explained in its brief in opposition (at 4-6) and supplemental brief (at 2-3), even if petitioner were to prevail on the question presented in this Court, any damages he would be authorized to pursue under RLUIPA would be immediately forbidden under the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. 1997e. Both petitioner and the federal government now apparently agree.

Under the PLRA, Congress categorically foreclosed prisoner suits seeking damages for non-physical injuries: “[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.” 42 U.S.C. 1997e(e). And, in fact, the Fifth Circuit has already construed the PLRA to preclude any damages awarded for non-physical injuries under RLUIPA. See *Mayfield v. Tex. Dep’t of Criminal Justice*, 529 F.3d 599, 605-606 & n.8 (5th Cir. 2008) (finding it unnecessary to decide whether RLUIPA authorizes compensatory damages because the PLRA barred plaintiff’s “claims for damages”); see also *Geiger v. Jowers*, 404 F.3d 371, 374 (5th Cir. 2005) (per curiam) (finding even constitutional claims under the First Amendment barred by the PLRA’s “physical injury requirement”). Since petitioner has asserted only non-physical injuries here, see Pet. App. 2a-3a, the prevailing rule in the court below would preclude any compensatory

damages in this action, no matter how this Court ultimately resolves the question presented.

Both the federal government and petitioner have now acknowledged the inevitability of this outcome. For his part, petitioner (Br. 23) has recognized that “a principal purpose of the PLRA was to limit compensatory damage awards to prisoners.” And the federal government (Br. 18) has explained that, absent a physical injury, “States will often be subject only to nominal damages” under RLUIPA after application of the PLRA. See also *Becket Fund For Religious Liberty Amicus Br. 12* (“the PLRA bars the vast majority of suits for compensatory damages; thus as a practical matter RLUIPA primarily authorizes suits for nominal damages”).

In light of these concessions, it is apparent that this case was effectively over before it began. In light of the controlling circuit law, it is clear how this case would be resolved upon any remand. Petitioner has not sought nominal damages, and it is far from obvious that this specific form of relief would be authorized, against a sovereign entity, under RLUIPA. Nor could the possibility of awarding punitive damages secure a meaningful, ongoing dispute, as punitive damages are unavailable as a matter of law under *Barnes v. Gorman*, 536 U.S. 181, 190 (2002).

This case was about, and clearly has always been about, compensatory damages—which petitioner is barred by the PLRA from receiving even if he is successful here. Because this case accordingly raises the question presented in only an academic sense—a fact brought into sharp relief after merits briefing—the Court may wish to consider dismissing the writ as improvidently granted.

CONCLUSION

The judgment of the court of appeals should be affirmed. In the alternative, the Court may wish to consider dismissing the writ of certiorari as improvidently granted.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

JAMES C. HO
Solicitor General
Counsel of Record

DANIEL T. HODGE
First Assistant Attorney
General

DANIEL L. GEYSER
JAMES P. SULLIVAN
Assistant Solicitors
General

DAVID S. MORALES
Deputy First Assistant
Attorney General

OFFICE OF THE ATTORNEY
GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
James.Ho@oag.state.tx.us
(512) 936-1700

BILL COBB
Deputy Attorney General
for Civil Litigation

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