

No. 08-1438

In the Supreme Court of the United States

HARVEY LEROY SOSSAMON, III,
Petitioner,

v.

TEXAS, ET AL.,
Respondents.

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

**BRIEF OF FLORIDA, ALABAMA, ALASKA, ARIZONA,
CALIFORNIA, COLORADO, GEORGIA, HAWAII, IDAHO,
ILLINOIS, INDIANA, MAINE, MARYLAND, MICHIGAN,
MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW
HAMPSHIRE, NORTH DAKOTA, OHIO, OKLAHOMA,
PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA,
SOUTH DAKOTA, UTAH, VIRGINIA, WISCONSIN, AND
WYOMING AS AMICI CURIAE IN SUPPORT OF
RESPONDENT**

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QUESTION PRESENTED

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

TABLE OF CONTENTS

QUESTION PRESENTED..... i

TABLE OF AUTHORITIES..... iii

STATEMENT OF AMICI INTEREST1

SUMMARY OF ARGUMENT.....2

ARGUMENT4

 I. The principles and purposes of sovereign immunity require a narrow reading of the States’ waiver of immunity under RLUIPA.4

 A. Throughout the development of sovereign immunity jurisprudence, this Court has never departed from the requirement that waivers must be express and unambiguous.5

 B. Federal and state sovereign immunity doctrines share a similar history and purpose, and their critical import requires a narrow reading of a statute alleged to waive that immunity.12

 C. Practical and policy implications counsel in favor of a limited reading of any statutory text alleged to waive a sovereign’s immunity.....16

CONCLUSION24

TABLE OF AUTHORITIES**Cases**

<i>Alden v. Maine</i> , 527 U.S. 706 (1999).....	15
<i>Atascadero State Hosp. v. Scanlon</i> , 473 U.S. 234 (1985).....	6, 7, 9
<i>Barnes v. Gorman</i> , 536 U.S. 181 (2002).....	22
<i>Bell v. Hood</i> , 327 U.S. 678 (1946).....	8
<i>Block v. North Dakota</i> , 461 U.S. 273 (1983).....	10
<i>Brown v. Sec’y of the Army</i> , 78 F.3d 645 (D.C. Cir. 1996).....	13, 15
<i>Cardinal v. Metrish</i> , 564 F.3d 794 (6th Cir. 2009).....	18
<i>Cardiosom, LLC v. United States</i> , 91 Fed. Cl. 659 (Fed. Cl. 2010).....	11
<i>Chisholm v. Georgia</i> , 2 U.S. (2 Dall.) 419 (1793)	14
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997).....	18

<i>Cohens v. Virginia</i> , 19 U.S. 264 (1821).....	2
<i>Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.</i> , 527 U.S. 666 (1999).....	9
<i>Davis v. Monroe Cnty. Bd. of Educ.</i> , 526 U.S. 629 (1999).....	8, 9, 17, 18
<i>Edelman v. Jordan</i> , 415 U.S. 651 (1974).....	5, 10, 15, 23
<i>Fed. Mar. Comm'n v. S.C. State Ports Auth.</i> , 535 U.S. 743 (2002).....	13, 15, 17
<i>Franklin v. Gwinnett Cnty. Pub. Schs.</i> , 503 U.S. 60 (1992).....	22
<i>Friends of the Earth, Inc v. Laidlaw Envtl. Servs. (TOC), Inc.</i> , 528 U.S. 167 (2000).....	21
<i>Hans v. Louisiana</i> , 134 U.S. 1 (1890).....	13, 14
<i>Holley v. Cal. Dep't of Corr.</i> , 599 F.3d 1108 (9th Cir. 2010).....	19
<i>Lane v. Pena</i> , 518 U.S. 187 (1996).....	<i>passim</i>

<i>Lapides v. Bd. of Regents of the Univ. Sys. of Ga.</i> , 535 U.S. 613 (2002).....	14
<i>Lynch v. United States</i> , 292 U.S. 571 (1934).....	10
<i>Madison v. Virginia</i> , 474 F.3d 118 (4th Cir. 2006).....	17, 18, 22
<i>Nelson v. Miller</i> , 570 F.3d 868 (7th Cir. 2009).....	19
<i>Pennhurst State Sch. & Hosp. v. Halderman</i> , 451 U.S. 1 (1981).....	6, 7, 8
<i>Pennhurst State Sch. & Hosp. v. Halderman</i> , 465 U.S. 89 (1984).....	5, 16
<i>Richlin Sec. Serv. Co. v. Chertoff</i> , 553 U.S. 571 (2008).....	6
<i>Shea v. Rockland</i> , 810 F.2d 27 (2d Cir. 1987)	22
<i>Smith v. Allen</i> , 502 F.3d 1255 (11th Cir. 2007).....	20
<i>South Dakota v. Dole</i> , 483 U.S. 203 (1987).....	8
<i>Spector v. Norwegian Cruise Line Ltd.</i> , 545 U.S. 119 (2005).....	22

<i>Tindal v. Wesley</i> , 167 U.S. 204 (1897).....	9-10
<i>United States v. Heth</i> , 7 U.S. (3 Cranch) 399 (1806)	18
<i>United States v. King</i> , 395 U.S. 1 (1969).....	11
<i>United States v. Nordic Vill., Inc.</i> , 503 U.S. 30 (1992).....	5, 6, 9, 23
<i>United States v. Sherwood</i> , 312 U.S. 584 (1941).....	<i>passim</i>
<i>United States v. Williams</i> , 289 U.S. 553 (1933).....	12, 13, 14
<i>Van Wyhe v. Reisch</i> , 581 F.3d 639 (8th Cir. 2009).....	19
<i>Webman v. Fed. Bureau of Prisons</i> , 441 F.3d 1022 (D.C. Cir. 2006).....	19
<i>Welch v. Tex. Dep't of Highways & Pub. Transp.</i> , 483 U.S. 468 (1987).....	14
<i>West v. Gibson</i> , 527 U.S. 212 (1999).....	7

Statutes

28 U.S.C. § 41	20
42 U.S.C. § 2000cc et seq.	i, 3

42 U.S.C. § 2000cc-2(a)20
42 U.S.C. § 2000cc-2(f)20
42 U.S.C. § 2000cc-3(e).....20

Other Authorities

Hamilton, The Federalist, No. 81 11, 13
National Conference of State Legislatures,
State Balanced Budget Requirements,
Executive Summary, (1999) [http://www.ncsl.org/
default.aspx?tabid=12660](http://www.ncsl.org/default.aspx?tabid=12660)..... 15
National Conference of State Legislatures,
State Constitutional and Statutory Requirements
For Balanced Budgets, [http://www.ncsl.org/
Default.aspx?TabId=12612](http://www.ncsl.org/Default.aspx?TabId=12612) 16
Restatement (Second) of Contracts § 345..... 11

STATEMENT OF AMICI INTEREST

The Amici States have a significant interest in this case because the petitioner's argument, if accepted, would greatly diminish the level of clarity in federal statutes that purport to condition the grant of funds on the States' waiver of sovereign immunity. Rather than looking to and relying upon the absence of explicit waiver language in a funding statute as their guide, States would now have to consider the oftentimes uncertain language of the statute and its background principles. If they incorrectly interpret the language or principles, States will be subject to litigation they did not anticipate and damage awards for which they did not prepare. The Amici States did not anticipate that the broad term "appropriate relief" in the Religious Land Use and Institutionalized Persons Act (RLUIPA) would waive their sovereign immunity to damages actions. To subject the States to damages actions on the basis of the ambiguous phrase "appropriate relief" would offend well-established principles of federalism and stare decisis.

SUMMARY OF ARGUMENT

The sovereign immunity of the States, though “universally received,” *Cohens v. Virginia*, 19 U.S. 264, 411 (1821), is not universally secure. It is beyond contention that when this Court examines a claim that state sovereign immunity has been waived or abrogated in a federal statute, it has required that the statutory language purporting to waive that immunity be clear and express. Sovereign immunity may be relinquished voluntarily by statute, or the federal government may abrogate state immunity in accordance with its Fourteenth Amendment powers, or a State may waive immunity by its acceptance of federal funds. Regardless of the manner by which sovereign immunity is relinquished, the requirement that it be express and via unambiguous language is immutable.

The Court has viewed state and federal sovereign immunity waiver principles similarly, both evolving from the same common law doctrine that requires a strict construction. That doctrine forms a critical element in the functioning and dignity of each sovereign by ensuring that each government’s operations are not thwarted or undermined by the burdens and expense of litigation and damage awards. To ensure that these purposes are fulfilled, the Court has not deviated from the strict construction that it has always required when a waiver of sovereign immunity is alleged.

Given the shared history and purposes of federal and state sovereign immunity, the requirements for demonstrating waiver should

remain the same and not be compromised. This Court can only fulfill the promise of the Eleventh Amendment and protect dual sovereignty by maintaining that a State's waiver by Spending Clause legislation must be premised on express and unambiguous language. Adherence to this principle is particularly important in this case due to the reliance of the States in accepting federal funds subject to conditions; when Congress uses language in a Spending Clause statute that is intended to waive state sovereign immunity, it should do so with the same clarity required to waive its own immunity. Here, the statute at issue, the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc, *et seq.*, provides that the States are subject to actions for "appropriate relief," language that is not sufficiently clear and unambiguous to waive immunity for compensatory damages. Because it is susceptible to at least two plausible readings, States could not have known that they were consenting to lawsuits for damages. The Fifth Circuit's decision should be affirmed.

ARGUMENT

I. The principles and purposes of sovereign immunity require a narrow reading of the States' waiver of immunity under RLUIPA.

It has long been the law that statutory language purporting to waive the immunity of a sovereign entity must be unequivocal. Petitioner claims that sovereign immunity principles applicable to the federal government apply here, but his legal arguments would make the States equivalent to other private entities under RLUIPA by eliminating the requirement of unequivocal language for a State's immunity waiver. Pet'r Br. 37. This Court's jurisprudence, however, has unfailingly required an unambiguous, textual expression of the intent to waive this sovereign prerogative. The shared history and purposes of state and federal sovereign immunity support the conclusion that States receive the same benefit of strict construction as the federal government. The language of RLUIPA, providing for "appropriate relief," is not a clear and unequivocal waiver of the States' immunity to damages for the reasons set out below.

A. Throughout the development of sovereign immunity jurisprudence, this Court has never departed from the requirement that waivers must be express and unambiguous.

1. To find that the States have waived their sovereign immunity to damages actions under RLUIPA would require this Court to depart from well-established law. Repeatedly, and in a variety of contexts, this Court has set forth that waivers must be unequivocally expressed by statutory text. *Lane v. Pena*, 518 U.S. 187, 192 (1996) (applying principle to the federal government); *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 37 (1992) (same); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (when participating in a federal program, State waives its immunity “only where stated by the most express language or by such overwhelming implication from the text as (will) leave no room for any other reasonable construction.”) (quotation marks and citation omitted); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (*Pennhurst II*) (requiring an “unequivocal expression of congressional intent to overturn the constitutionally guaranteed immunity of the several States.”) (quotation marks and citation omitted).

Even when waiver is unequivocally expressed, the Court still narrowly reads the terms of the waiver. *See, e.g., United States v. Sherwood*, 312 U.S. 584, 590 (1941) (applying the Tucker Act, through which the United States consented to damages suits for contract violations, and reading the waiver

narrowly as to in which court an action could be brought under its terms). This cornerstone of immunity jurisprudence applies no matter the sovereign involved — be it the federal or a state government — or the manner by which sovereign immunity is relinquished — be it by statutory waiver, contract, abrogation, or a waiver conditioned on the acceptance of funds. *Id.*; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (it is a requirement “well established in [the Court’s] cases, that Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court.”); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24 (1981) (*Pennhurst I*) (“Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds”). Indeed, when Spending Clause waivers are at issue, there can “be no knowing acceptance if a State is unaware of the conditions” it will face if a statute is violated. *Pennhurst I*, 451 U.S. at 17.

The “sovereign immunity canon” yields only if “there is no ambiguity left ... to construe.” *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008). A waiver is ambiguous if the relevant language is capable of more than one meaning. *Nordic Vill., Inc.*, 503 U.S. at 34-37 (because statute was susceptible to two conflicting interpretations, Court held it did not waive the federal government’s immunity to monetary damages). The term “appropriate relief,” therefore, may waive the States’ sovereign immunity to compensatory damages actions under RLUIPA when they accept federal funds only if the statute is

clear that there can be no other plausible meaning for the term. *See West v. Gibson*, 527 U.S. 212, 218 & 222 (1999) (“appropriate” relief included, and federal sovereign immunity was waived for, damages actions when the statute specifically authorized compensatory damages relief).

2. Petitioner and the United States as amicus curiae assert that the clarity threshold for overcoming sovereign immunity is less stringent when sovereign immunity is waived by a State’s acceptance of federal funds than by a unilateral federal statutory waiver. Pet’r Br. 31-33; U.S. Br. 9, 21. They seek to distance the analysis in this case from the strict construction applied to the federal government’s waiver of its own immunity. *Lane*, 518 U.S. at 192. The United States even contends that a State’s sovereign immunity waiver in exchange for conditional funds is “not at all equivalent” to a voluntary federal government waiver. U.S. Br. 21.

But this Court’s caselaw reveals no basis for changeable levels of the clarity required in a waiving statute. In every situation, the Court requires “an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment.” *Atascadero State Hosp.*, 473 U.S. at 238 n.1; *see also Pennhurst I*, 451 U.S. at 17 (“if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously”). Waivers in Spending Clause legislation must therefore state in unambiguous language any conditions placed on state recipients, so that the States can “exercise their choice knowingly, cognizant of the consequences of their

participation.” *Pennhurst I*, 451 U.S. at 17; *see also South Dakota v. Dole*, 483 U.S. 203, 207 (1987). Indeed, the very “legitimacy of Congress’ power to legislate under the spending power ... rests on whether the state voluntarily and knowingly accepts the terms.” *Pennhurst I*, 451 U.S. at 17.

Spending Clause legislation, therefore, does not require less clarity to waive state sovereign immunity. As Texas provides in its brief, the cases cited by the petitioner in support of his claim to the contrary actually invoke the Spending Clause as a *limit* on the broad presumption for the typical relief available under *Bell v. Hood*, 327 U.S. 678 (1946). Resp. Br. 30. Moreover, the clear statement rule has all the greater import in Spending Clause legislation, because “the requirement that, when Congress imposes a condition on the States’ receipt of federal funds, it must do so unambiguously” is a “vital safeguard for the federal balance.” *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 655 (1999) (Kennedy, J., dissenting) (“Only if States receive clear notice of the conditions attached to federal funds can they guard against excessive federal intrusion into state affairs and be vigilant in policing the boundaries of federal power.”); *see also infra* pp. 16-18. “Accordingly, the Court must not imply a private cause of action for damages unless it can demonstrate that the congressional purpose to create the implied cause of action is so manifest that the State, when accepting federal funds, had clear notice of the terms and conditions of its monetary liability.” *Davis*, 526 U.S. at 656-57 (Kennedy, J., dissenting). The “watered-down version of the Spending Clause

clear-statement rule,” *id.* at 686, that the petitioner seeks is not what the Constitution requires.

In analyzing allegations of waiver, the Court does not hesitate to rely on principles from cases among the spectrum of categories by which sovereign immunity may be relinquished. In *Atascadero*, for instance, this Court analyzed claims that the relevant statute either abrogated the States’ immunity or conditioned waiver on the States’ acceptance of federal funds. 473 U.S. at 240. In rejecting the argument that the State waived its immunity by accepting federal funds, the Court noted that it had already determined that the Act did not abrogate immunity, and held that the “Act likewise falls far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State’s consent to waive its constitutional immunity.” *Id.* at 247. *See also Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (“in the context of *federal* sovereign immunity — obviously the closest analogy to the present case — it is well established that waivers are not implied. ... We see no reason why the rule should be different with respect to state sovereign immunity.”); *Lane*, 518 U.S. at 200 (noting language used to abrogate state immunity showed that Congress did not intend to waive federal immunity in same statute); *Nordic Vill., Inc.*, 503 U.S. at 37 (in analyzing federal claims of sovereign immunity, the Court provided: “As in the Eleventh Amendment context, ... the ‘unequivocal expression’ of elimination of sovereign immunity that we insist upon is an expression in statutory text.”); *Tindal v. Wesley*, 167 U.S. 204, 213

(1897) (“But it cannot be doubted that the question whether a particular suit is one against the state, within the meaning of the constitution, must depend upon the same principles that determine whether a particular suit is one against the United States.”).

Petitioner and the United States suggest that principles applicable to the interpretation of contracts should guide the interpretation of statutes imposing conditions on the States’ acceptance of federal funds. Pet’r Br. 33-34; U.S. Br. 11, 22. Sovereign immunity, however, is a jurisdictional matter, one that requires an elevated level of clarity to be waived. *Edelman*, 415 U.S. at 673, 678. It is well established that statutory interpretation principles do not trump the requirements of sovereign immunity. *Block v. North Dakota*, 461 U.S. 273, 288 (1983) (refusing to give precedence to a canon of statutory construction over the principle of sovereign immunity).

Moreover, as Texas asserted, the contract analogy does not further petitioner’s argument, because even in that context, a clear statement of waiver is required. Resp. Br. 31. Sovereign immunity provides a special defense that exists outside of, and separate and apart from, contract law. *See Lynch v. United States*, 292 U.S. 571, 580-581 (1934) (“Contracts between individuals or corporations are impaired within the meaning of the Constitution ... whenever the right to enforce them by legal process is taken away or materially lessened. *A different rule prevails in respect to contracts of sovereigns.* ... “The contracts between a Nation and an individual are only binding on the conscience of the sovereign, and

have no pretensions to compulsive force. They confer no right of action independent of the sovereign will.’ The rule that the United States may not be sued without its consent is all-embracing.”) (emphasis added) (footnotes omitted) (quoting Hamilton, *The Federalist*, No. 81).

The federal government must still expressly waive its sovereign immunity to damages claims under its contracts, as it does through the Tucker Act. *See* Resp. Br. 33; *Sherwood*, 312 U.S. at 590. As Texas states in its brief, the Tucker Act “only confirms the need for a textual waiver of sovereign immunity that is clear as to the scope of relief” because there “Congress expressly consented to a damages remedy for a breach of federal contracts.” Resp. Br. 32. And this waiver is not because of underlying notions of contract law, but rather because of the Tucker Act’s creation of jurisdiction over the federal government’s contract violations with the United States Court of Federal Claims. *Id.* at 33. In addition, if petitioner’s argument was carried to its logical conclusion, all contract remedies would be available against the United States under the Tucker Act, including specific performance. Restatement (Second) of Contracts § 345. Certainly, the federal government would not concede that it has waived its sovereign immunity to actions seeking specific performance under the Tucker Act. *See United States v. King*, 395 U.S. 1, 2-3 (1969) (jurisdiction of the Federal Claims Court is limited to damages actions); *Cardiosom, LLC v. United States*, 91 Fed. Cl. 659, 663 (Fed. Cl. 2010) (“Federal district courts consistently hold that the Tucker Act impliedly prohibits district courts from ordering

specific performance by United States on its alleged contractual obligations.”).

No principled reason exists to require a lesser standard of clarity for Spending Clause legislation that conditions federal funds on States’ waiver of their sovereign immunity. It is beyond dispute that statutes must clearly and unequivocally authorize or impose waivers of immunity, including the scope of such waivers, no matter the sovereign involved or the category of relinquishment.

B. Federal and state sovereign immunity doctrines share a similar history and purpose, and their critical import requires a narrow reading of a statute alleged to waive that immunity.

As explained in the previous section, to find that the States have waived their sovereign immunity to damages actions under RLUIPA, this Court would have to ignore its traditional sovereign immunity doctrine. A close look at the purpose and history of federal and state sovereign immunity reveals that the two doctrines originated from the same source, and therefore deserve a similar construction. The history and purpose also show that a strict construction is required to ensure that the States maintain their unique constitutional status.

1. Sovereign immunity derives from the common law of England, where it required a strict and unyielding construction. *United States v.*

Williams, 289 U.S. 553, 573 (1933) (“in the light of the rule, then well settled and understood, that the sovereign power is immune from suit, the conclusion is inadmissible that the framers of the Constitution intended to include suits or actions brought against the United States.”); *Brown v. Sec’y of the Army*, 78 F.3d 645, 649-50 (D.C. Cir. 1996) (“From an historical perspective, the doctrine rests upon the notion that ‘it would contradict the sovereignty of the king to allow him to be sued as of right in his own courts.’ The sovereignty of the king has been succeeded by the sovereignty of the people, acting through their elected delegates, but the rule of strict construction still serves to insure that courts defer to the precise terms of their consent.”) (citation omitted). Such immunity is “inherent in the nature of sovereignty.” *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) (quoting Hamilton, *The Federalist*, No. 81).

The common law principle carried over to both the fledgling federal and state governments. *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002) (“States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union ‘with their sovereignty intact.’”) (citation omitted); *Williams*, 289 U.S. at 577 (“The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, (that is to say, as applied to the present case, of suits against the United States) was not contemplated by the Constitution when establishing the judicial power of the United States.’ ... This language applies with equal force to suits against a state and those brought against the United States.”) (quoting *Hans*,

134 U.S. at 15). The States are sovereign, and incur the same benefits and responsibilities that sovereignty brings to the federal government. *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 477 (1987) (“the constitutional role of the States sets them apart from other employers and defendants.”). Indeed, “[t]he suability of a state, without its consent, was a thing unknown to the law.” *Hans*, 134 U.S. at 16.

Any doubt as to the States’ right to be free from suit and liability was quickly put to rest with the passage of the Eleventh Amendment. *Id.* at 11 (“[The Eleventh Amendment], expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the supreme court [in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)]. It did not in terms prohibit suits by individuals against the states, but declared that the constitution should not be construed to import any power to authorize the bringing of such suits.”); *see also Williams*, 289 U.S. at 574. Though the Eleventh Amendment is “a specific text with a history that focuses upon the State’s sovereignty vis-à-vis the Federal Government,” *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 623 (2002), the sovereign immunity it crystallizes for the States is as powerful and important as the federal government’s sovereign immunity and therefore requires equivalent clarity when purportedly waived by federal statute.

2. Sovereign immunity survived in the United States because of the critical protection it provides to sovereign governments. That protection is not only

from the indignities of litigation, *Fed. Mar. Comm'n*, 535 U.S. at 760 (“The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”); *United States v. Sherwood*, 312 U.S. 584, 591 (1941) (sovereign immunity protects the United States from “the embarrassments” of litigation), but also ensures that the sovereigns are only subjected to the expense and diversions from their usual responsibilities when their immunity is properly waived.

Also critical to both sovereigns is the protection of funds appropriated for other pressing needs. *Fed. Mar. Comm'n*, 535 U.S. at 765 (“state sovereign immunity serves the important function of shielding state treasuries and thus preserving ‘the States’ ability to govern in accordance with the will of their citizens’”) (quoting *Alden v. Maine*, 527 U.S. 706, 750-51 (1999)); *Brown*, 78 F.3d at 650 (“The rule of strict construction is thus arguably necessary, as we once put it, to ‘protect [] the United States Treasury from potentially excessive liabilities which Congress did not anticipate.’”) (citation omitted). Public funds are to be protected, and the diminishing of those funds due to unwaived liabilities are prohibited by the Eleventh Amendment. *Edelman*, 415 U.S. at 663. This interest is all the more critical to the States because, unlike the federal government, nearly all States are required to balance their budgets.¹

¹ See National Conference of State Legislatures, State Balanced Budget Requirements, Executive Summary, (1999) <http://www.ncsl.org/default.aspx?tabid=12660>, (last visited (Continued...))

Being steeped in a common law tradition of strict construction, state sovereign immunity today requires no less deference than federal immunity. Language alleged to waive that immunity must therefore be strictly construed. To read RLUIPA as petitioner urges would cast aside the States' critical interests and place them on the same "footing" as private parties in a manner that the United States would not be subjected to. *Lane*, 518 U.S. at 196. Petitioner's argument runs afoul of the history and purpose of sovereign immunity, and should be rejected.

C. Practical and policy implications counsel in favor of a limited reading of any statutory text alleged to waive a sovereign's immunity.

Federalism concerns also require a narrow reading of a statute allegedly waiving state sovereign immunity. This Court has called the protection of state immunity "vital" to federalism. *Pennhurst II*, 465 U.S. 89, 99-100 (1984) ("This jurisdictional bar applies regardless of the nature of the relief

Sept. 27, 2010) ("All the states except Vermont have a legal requirement of a balanced budget. Some are constitutional, some are statutory, and some have been derived by judicial decision from constitutional provisions about state indebtedness that do not, on their face, call for a balanced budget."); *see id.* at State Constitutional and Statutory Requirements For Balanced Budgets, <http://www.ncsl.org/Default.aspx?TabId=12612> (list of each state's provisions).

sought.”). That concern is heightened in the case of a State’s acceptance of funds conditioned on a waiver of its immunity. *Madison v. Virginia*, 474 F.3d 118, 128 (4th Cir. 2006) (“To be sure, a Spending Clause statute that conditions an entire block of federal funds on a State’s compliance with a federal directive raises coercion concerns.”); *see also Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 655 (1999) (Kennedy, J., dissenting) (noting that the clear statement rule in Spending Clause legislation is a “concrete safeguard in the federal system.”). When states accept funds, they do so at the mercy of the words Congress has written, and must be able to rely on the rule that only the plain and express language regarding that waiver and its limitations will be enforced. *Fed. Mar. Comm’n v. S.C. Ports Auth.*, 535 U.S. 743, 769 (2002) (“By guarding against encroachments by the Federal Government on fundamental aspects of state sovereignty, such as sovereign immunity, we strive to maintain the balance of power embodied in our Constitution and thus to reduce the risk of tyranny and abuse from either front.”) (quotation marks and citation omitted).

By contrast, Congress itself writes the statutes that waive federal immunity. Congress has the power to amend those statutes if a court interprets their provisions too broadly and nullifies federal sovereign immunity. States lack that power; they cannot directly rectify the federal statute or otherwise undue the mischief done. Given the power of Congress to control and amend federal law, it is counterintuitive to permit *less* clarity (or greater ambiguity) in federal statutes that purportedly waive

state sovereign immunity. When Congress crafts statutory language that is meant to waive a State's immunity, it must do so with the same clarity required to waive its own immunity. *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806) (Paterson, J.) (“the words of a statute, if dubious, ought, in cases of the present kind, to be taken most strongly against the lawmakers”); *see also* Resp. Br. 16 (“This clear statement rule provides an important constitutional check on Congress as well.”). For, if the Spending Clause power is “wielded without concern for the federal balance,” it “has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach.” *Davis*, 526 U.S. at 654-55 (Kennedy, J., dissenting). Justice Kennedy's fears have special purchase in this case, because Congress enacted RLUIPA precisely for this purpose — to impose regulations through the Spending Clause that “otherwise would lie outside its reach” in light of this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997). *See* Resp. Br. 6.

The States have understood the term “appropriate relief” to exclude damages as reflected in the decisions of circuits nationwide. *See, e.g., Madison*, 474 F.3d at 132 (“[T]he fact that ‘appropriate relief’ is open-ended forecloses any argument that the statute waives immunity for monetary relief.”); *Cardinal v. Metrish*, 564 F.3d 794, 801 (6th Cir. 2009) (“We hold that, because RLUIPA's ‘appropriate relief’ language does not clearly and unequivocally indicate that the waiver

extends to monetary damages, the Eleventh Amendment bars plaintiff's claim for monetary relief under RLUIPA."); *Nelson v. Miller*, 570 F.3d 868, 884 (7th Cir. 2009) ("The term 'appropriate relief' is open to several interpretations and does not provide the 'unequivocal textual expression' necessary to effect a sovereign's waiver to suits for damages."); *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 the federal money."); *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.") (citation, quotation marks, and alterations omitted).

The decisions listed above and arguments of the States rely on this Court's immunity decisions, *Lane v. Pena*, 518 U.S. 187, 197 (1996) (adopting the government's position that "[w]here a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived"), and the loose terminology in RLUIPA of "appropriate relief." *Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006) (appropriate relief is "not the sort of unequivocal waiver that our precedents demand ..., because that broad term is susceptible to more than one interpretation.") (quotation marks and citation omitted). Texas is not alone in the

arguments it makes herein. Moreover, it plus the thirty other States in these circuits have come to rely on the decisions of their respective Courts of Appeals holding that RLUIPA is ambiguous and does not waive state sovereign immunity to damages. 28 U.S.C. § 41 (listing states in each judicial circuit).

The only circuit court to have considered this issue and imposed damages on a State under RLUIPA did not specifically address the clarity required for immunity waivers. *Smith v. Allen*, 502 F.3d 1255, 1270 (11th Cir. 2007). Rather, the Eleventh Circuit presumed that a damages remedy was available, finding the phrase “appropriate relief” broad. *Id.* It did not consider whether its presumption of damages outweighed the presumption that an ambiguous statute cannot waive sovereign immunity.

Petitioner compares the appropriate relief provided for in section 2000cc-2(a) of RLUIPA to the specific “injunctive or declaratory relief” authorized for federal government enforcement under section 2000cc-2(f). He contends that because language in the latter section expressly limits the relief available in actions against the States by the federal government, the former section must anticipate broader relief. Pet’r Br. 21. But that same principle of statutory construction could also counsel against a finding of waiver. To construe section 2000cc-2(a) in compliance with section 2000cc-3(e) and maintain internal statutory consistency would require a conclusion that RLUIPA *does not* authorize damages claims. Section 2000cc-3(e) provides that “[a] government may avoid the preemptive force of any

provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise” Damages are recovered for past conduct and cannot be avoided by later behavior.² This provision indicates that under RLUIPA, States are only subject to forward-looking relief. These conflicting passages do not provide States unambiguous notice that they waived their immunity to damages actions under RLUIPA’s terms. *See also* Resp. Br. 24-25.

Moreover, this Court has stated in the context of federal sovereign immunity that “the lack of a perfect correlation in the various provisions does not indicate ... that the reading proposed by the Government is entirely irrational.” *Lane*, 518 U.S. at 196. Because principles of statutory interpretation make the scope of relief available ambiguous, no

² The United States contends that, text aside, damages are necessary to prevent RLUIPA claims from becoming moot. U.S. Br. 16-17. But the choice of remedies is a quintessential policy judgment for Congress, not the courts, to determine. And in any event, as Texas points out, mootness is not necessarily a bad development. Resp. Br. 35. When an RLUIPA case becomes moot, it is often because the State has acknowledged that the plaintiff has identified a valid claim and has acted to cure it. Put simply, there is nothing wrong with a case becoming moot because the State has voluntarily adopted real change. Present mootness doctrines ensure that States do not moot cases by insincere or fraudulent expressions of change. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Evtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (applying a “stringent” standard and “heavy burden” on litigants to show that it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.”) (citation omitted).

unequivocal waiver by the States of their immunity to damages can exist.

It is not enough for waiver purposes that the petitioner and the United States are able to state a plausible argument that a damages action may be pursued against the States under RLUIPA. *See* Pet'r Br. 14-16 (citing *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60 (1992), and *Barnes v. Gorman*, 536 U.S. 181 (2002)). The meaning of the term "appropriate relief" is not, as they allege, well-settled, for courts have recognized that "[i]t is at least equally plausible that, in other contexts, the term might be read to preclude them." *Madison*, 474 F.3d at 132; *see also* *Shea v. Rockland*, 810 F.2d 27, 29 (2d Cir. 1987) (the phrase "other appropriate relief" does not include compensatory damages); Resp. Br. 19 (the meaning of this term "is entirely indeterminate in the absence of context."). As the Fourth Circuit held, the fact that the phrase appropriate relief is open-ended forecloses any argument that the statute waives immunity for monetary relief. *Madison*, 474 F.3d at 132.

Even if rules of contract construction could resolve the ambiguity were this a case involving a private fund recipient, it does not follow that no ambiguity exists sufficient to implicate sovereign immunity. *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 141 (2005) (recognizing "the distinction between a canon for choosing among plausible meanings of an ambiguous statute and a clear statement rule that implies a special substantive limit on the application of an otherwise unambiguous mandate."). The presence of two plausible readings

“is enough to establish that a reading imposing monetary liability on the Government is not ‘unambiguous’ and therefore should not be adopted.” *Nordic Vill. Inc.*, 503 U.S. at 32. Room is left for two conflicting reasonable constructions, and that ambiguity may not be resolved against the sovereign State. *Edelman*, 415 U.S. at 673.

Finally, it is pertinent to note that Congress had at its fingertips language that could have been used to unequivocally waive the States’ immunity to damages actions, but did not use it. *Lane*, 518 U.S. at 198 (statute clearly waived sovereign immunity for the states by providing: “In a suit against a State ... remedies (including remedies both at law and in equity) are available for such a violation to the same extent such remedies are available for such a violation in a suit against any public or private entity other than a State.”) (quoting § 1003 of the Rehabilitation Act Amendments of 1986); *United States v. Sherwood*, 312 U.S. 584, 587 (1941) (noting that the Tucker Act waives the United States’ sovereignty to “all claims not exceeding \$10,000 founded ... upon any contract”) (citation omitted). Because Congress chose not to use language that would render unambiguous the scope of relief available, a State accepting funds under RLUIPA could conclude that it was not waiving its immunity to damages actions. *See, e.g., Lane*, 518 U.S. at 194 (“This provision likewise illustrates Congress’ ability to craft a clear waiver of the Federal Government’s sovereign immunity against particular remedies for violations of the Act. The clarity of these provisions is in sharp contrast to the waiver *Lane* seeks to tease out of [other sections] of the Act.”).

CONCLUSION

For all of the above reasons, this Court should affirm the Fifth Circuit's decision.

Respectfully submitted,

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