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 FOR THE PETITIONER

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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*.

PARTIES TO THE PROCEEDINGS

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

Respondents are the State of Texas; Christina Melton Crain, Chairman, Texas Criminal Justice Board; Cathy Clement, Assistant Director, Texas Department of Criminal Justice, Correctional Institution Division Region VI; Brad Livingston, Executive Director, Texas Department of Criminal Justice; Doug Dretke, Executive Director, Correctional Institutional Division; Senior Warden Robert Eason, French M. Robertson Unit, Texas Department of Criminal Justice, Correctional Institutional Division.[*]

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[*] The caption in the court of appeals erroneously included three other defendants who have been dismissed from this action. *See* Pet. App. 4a n.2.

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BRIEF FOR THE PETITIONER

Petitioner Harvey Leroy Sossamon, III, respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

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 App. 36a-57a) is unpublished.

JURISDICTION

The court of appeals entered judgment on February 17, 2009. Pet. App. 1a. Petitioner filed a timely petition for a writ of certiorari on May 18, 2009, which this Court granted on May 24, 2010. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

I. Constitutional Provisions

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

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

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

II. Statutory Provisions

The relevant provisions of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq*., and the Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7, are reproduced in a statutory appendix to this brief.

STATEMENT OF THE CASE

1. The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc *et seq*., is a civil rights law designed to protect against religious discrimination, unequal religious accommodations, and unjustified infringement of the free exercise of religion in two specific contexts. Section 2 of the Act applies to land use regulation. *See id*. § 2000cc. Section 3, the provision at issue in this case, protects the free exercise of religion by persons in federally funded state institutions. *See id*. § 2000cc-1.

Section 3 directs that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," *id*. § 2000cc-1(a), unless the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means" of furthering that interest,

id. §§ 2000cc-1(a)(1), (2). RLUIPA defines "government" to include a "State" or a state "official." *Id*. § 2000cc-5(4)(A). "[R]eligious exercise" is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A).

Congress enacted these provisions in response to substantial evidence, collected during three years of hearings, showing that persons institutionalized in state mental hospitals, nursing homes, group homes, prisons, and detention facilities face religious discrimination and "'frivolous or arbitrary' barriers" to their religious exercise. *Cutter v. Wilkinson*, 544 U.S. 709, 716 (2005) (citation omitted). Congress found that religious discrimination and unequal treatment in such institutions was commonplace, ranging from practices like permitting the lighting of votive candles but not Chanukah candles,[1] to banning Protestants from possessing crosses "without the ghost of a reason," while allowing others to wear crosses if attached to a rosary.[2]

In other cases, institutions refused to make reasonable modifications to procedures that would allow individuals to practice the basic tenets of their faiths, even though the accommodation would not

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[1] *Protecting Religious Freedom After* Boerne v. Flores*: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 41 (1998) (*Post*-Boerne *Hearing*) (statement of Isaac Jaroslawicz).

[2] *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. 16,698, 16,699 (2000) (*Joint Statement*).

interfere with security or any other significant governmental interest. Examples included the taping of confessions between priest and penitent, prohibiting prisoners from missing meals on religious fast days, and refusing to distribute donated unleavened bread to Jewish inmates during Passover.[3]

Wanting to prevent federal funding from contributing to such discriminatory and unreasoned burdens on religious exercise, Congress invoked its Spending Clause authority, U.S. CONST. art. I, § 8, cl. 1, to require compliance with RLUIPA's heightened statutory protection for religious exercise in any "program or activity that receives Federal financial assistance." 42 U.S.C. § 2000cc-1(b)(1).

To ensure effective enforcement of the Act, Congress created an express private right of action, authorizing individuals to "obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a) (emphasis added). In the same provision, Congress authorized enforcement actions by the federal government, but only for "injunctive or declaratory relief." *Id*. § 2000cc-2(f).

2. Petitioner is an inmate at the Robertson Unit of the Texas Department of Criminal Justice Correction Institutions Division. In 2006, he filed suit in the U.S. District Court for the Western District of Texas against the State of Texas and

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[3] See *Joint Statement* at 16,699; 146 Cong. Rec. 14,284 (2000) (statement of Sen. Hatch); *Post*-Boerne *Hearing* at 43 (statement of Isaac Jaroslawicz).

various prison officials in their official capacities alleging, among other things, violations of RLUIPA. Pet. App. 36a-37a.[4]

Petitioner challenged two practices at the prison. First, he alleged that the prison violated RLUIPA by precluding inmates in disciplinary confinement from leaving their cells to attend religious services, even though they were allowed to "attend educational classes, to use the law library, and to participate in other secular activities." Pet. App. 3a.

Second, petitioner challenged a rule barring inmates from using the prison chapel for religious services under any circumstances – even when not on cell restriction – while allowing the chapel to be used for non-religious purposes, including "weekend-long marriage training sessions (with outside visitors), sex education, and parties for GED graduates." Pet. App. 30a. Inmates were also allowed to use the chaplain's office at night to make phone calls, but nonetheless could not enter the chapel to worship or pray. Pet. App. 8a. Instead, inmates were relegated to attending worship services in a "multi-purpose room," Pet. App. 38a, which lacked "Christian symbols or furnishings, such as an altar and cross, which have special significance and meaning to Christians." Pet. App. 2a-3a (internal quotation marks omitted). Petitioner was thus prevented from engaging in basic aspects of Christian worship, such as kneeling at an

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[4] Petitioner also sued the officials in their individual capacities, and alleged federal constitutional and state statutory violations. Pet. App. 4a-5a. Those claims are not at issue in this Court.

altar or receiving Holy Communion in view of a cross. Pet. App. 3a.

Petitioner's complaint sought declaratory and injunctive relief, as well as compensatory and punitive damages. Pet. App. 5a. The district court granted the State's motion for summary judgment, holding, as relevant here, that Texas's sovereign immunity barred damages claims against the state or its officers in their official capacities. Pet. App. 55a, 57a.

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

The court of appeals accepted that RLUIPA provides an express cause of action for "appropriate relief" against states and state officials in their official capacities. Pet. App. 16a-17a. It further noted that "appropriate relief" ordinarily includes damages. Pet. App. 16a n.26. Referring to this Court's decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Fifth Circuit explained that "the Supreme Court has instructed us to 'presume the availability of all appropriate remedies unless Congress has clearly indicated otherwise' or given guidance by a 'clear indication of its purpose with respect to remedies.'" Pet. App. 16a n.26 (quoting *Smith v. Allen*, 502 F.3d 1255, 1270 (11th Cir. 2007) (citing *Franklin*, 503 U.S. at 68-69)). And in this case, the court of appeals observed, "[t]here is no clear or express indication in RLUIPA that damages are unrecoverable." Pet. App. 16a n.26.

Nonetheless, the court ruled that even if "RLUIPA creates such a cause of action, it is barred by Texas's sovereign immunity." Pet. App. 20a.

"When deciding the validity of a putative waiver of sovereign immunity through a state's participation in a Spending Clause 'contract,'" the court stated, "we ask whether Congress spoke with sufficient clarity to put the state on notice that to accept federal funds, the state must also accept liability for money damages." Pet. App. 21a (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). The court accepted that the phrase "appropriate relief" unambiguously includes injunctive and declaratory relief. Pet. App. 14a. The court further acknowledged that under this Court's decision in *Franklin*, the phrase "appropriate relief" ordinarily encompasses damages. Pet. App. 23a. The court concluded, however, that the *Franklin* rule of construction "disappear[s] when we must interpret an ambiguous provision against the backdrop of a state's sovereign immunity." Pet. App. 23a. Accordingly, the court held that although "RLUIPA is clear enough to create a right for damages on the cause-of-action analysis," it was "not clear enough" to overcome "state sovereign immunity from suits for monetary relief." Pet. App. 23a.

Applying that holding to this case, the Court affirmed the district court's entry of summary judgment against petitioner's claims for damages. The court further held that petitioner's request for an injunction against the prison's cell-restriction policy had been mooted by the State's post-litigation abandonment of that practice. Pet. App. 9a-13a. However, the court found that "there are genuine issues of material fact about [petitioner's] entitlement to declaratory and injunctive relief from Texas's chapel-use policy." Pet. App. 24a. As a result, the

court remanded the case for further proceedings on that claim.

4. This Court granted certiorari limited to the question whether damages are available under RLUIPA against a state or state officials in their official capacities. 130 S. Ct. 3319 (2010).

SUMMARY OF ARGUMENT

Texas does not dispute that in accepting federal funds for its prisons, it waived its sovereign immunity to private suits for "appropriate relief" under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc *et seq*. Having been sued for violating the statute, the State now complains that it was not on notice that the suits to which it agreed would include claims for money damages. That complaint is unfounded.

First, in this context, the phrase "appropriate relief" has an established meaning in the law, one that unambiguously encompasses damages. In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), and *Barnes v. Gorman*, 536 U.S. 181 (2002), this Court used that phrase as a term of art to describe the remedies available under a number of the nation's foremost civil rights statutes prohibiting discrimination in federally funded programs. And in those cases, this Court made clear that compensatory damages are the quintessentially "appropriate relief" for the violation of individuals' statutory civil rights.

In fact, the Court's decision in *Barnes* establishes that even if RLUIPA said nothing about available remedies, Texas nonetheless would have been "on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but

also to those remedies traditionally available in suits for breach of contract," including "compensatory damages." 536 U.S. at 187.

That Congress intended this result is confirmed by other aspects of RLUIPA's text and by legal tradition. For example, elsewhere in the Act, Congress provided a right of action for the federal government, but only for injunctive and declaratory relief. Texas could not have reasonably believed that the two enforcement provisions, using dramatically different language, nonetheless authorized the same, limited equitable relief. Nor would such a statute bear any resemblance to other major civil rights statutes, which provide for damages remedies. And there is nothing in RLUIPA indicating that Congress intended to treat religious liberty as a second-class civil right, unworthy of the full remedial protection afforded victims of other forms of discrimination proscribed by federal statute.

In light of all this, the State appears to concede that city jails and county correctional facilities are on notice that when they accept federal funds, they are subject to damages suits under RLUIPA. The State nonetheless contends that what is clear enough for local governments is not clear enough for a state. That assertion has no basis in this Court's cases. Although only states are protected by sovereign immunity, local governments and private individuals are also entitled to unambiguous notice of the conditions attached to federal financing. And this Court has applied the same clear notice rule – derived from *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981) – to all Spending Clause conditions, including conditions requiring

waivers of sovereign immunity. That is perfectly sensible. So long as a state is on notice of the consequences of its actions – even when the consequences are made clear in part by a decision of this Court, like *Barnes* – the state is able to make informed decisions about the costs and benefits of accepting federal funding and be held accountable for those choices by its citizens.

This Court's decisions regarding waivers of federal sovereign immunity support that conclusion. The Court has required a clear indication that Congress has consented to a damages remedy against the federal government. But it has not required Congress to express that consent through any particular formulation, or prohibited courts from construing statutory language in the light of legal tradition. For example, the Court has construed a federal statute authorizing "appropriate remedies" in administrative proceedings against federal agencies charged with employment discrimination to permit damage awards. Likewise, consistent with *Barnes*, this Court has held that by consenting to breach of contract suits, the United States has consented to traditional contract damages remedies, even though no statute expressly authorizes that relief.

Second, Congress provided the State additional notice of its amenability to RLUIPA damages actions in the Rehabilitation Act Amendments of 1986, which provides that states accepting federal funding waive immunity to damages actions otherwise available against non-state defendants under any "Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7. RLUIPA plainly falls within that description. While

the State focuses on the fact that RLUIPA requires accommodations to religious practices, it ignores that the statute also prohibits the most familiar forms of religious discrimination, such as allowing Catholics but not Protestants to wear crosses in a jail, or as in this case, allowing inmates out of segregation for secular, but not comparable religious, purposes. Moreover, the accommodation requirement is itself a well-recognized form of antidiscrimination mandate, found in a number of prominent civil rights statutes, including the Rehabilitation Act (which is specifically enumerated as an antidiscrimination statute covered by Section 2000d-7) and Title VII (which defines failure to accommodate the religious beliefs of employees without adequate justification as a form of unlawful discrimination on the basis of religion).

ARGUMENT

Every year since the enactment of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc *et seq*., the State of Texas has accepted millions of dollars from the federal government for its prisons. It is undisputed that in doing so, Texas waived its sovereign immunity to private suits for "appropriate relief" under RLUIPA. *See*, *e.g.*, *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 678 n.2, 686 (1999) (confirming that a state's acceptance of funds clearly conditioned on a state's submission to private litigation waives the state's sovereign immunity); *see also Alden v. Maine*, 527 U.S. 706, 755 (1999) (same); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246-47 (1985) (same). The court of appeals nonetheless held that Texas lacked adequate notice that the suits for "appropriate relief" would include claims for money damages. That conclusion is doubly wrong.

First, the "appropriate relief" language of RLUIPA – read in the context of the broader statute, legal tradition, and this Court's cases – provided the State unambiguous notice of its amenability to a damages remedy, enabling it "to exercise [its] choice knowingly, cognizant of the consequences of [its] participation" in federal spending programs. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Second, the Civil Rights Remedies Equalization provision of the Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7, separately notified Texas in unmistakable terms that its

acceptance of federal funds would subject it to the same damages remedy available against non-state defendants.

I. RLUIPA Unambiguously Conditions Receipt Of Federal Funds On States' Consent To Damages Actions.

While it is true that a waiver of sovereign immunity "will be strictly construed, in terms of its scope, in favor of the sovereign," *Lane v. Pena*, 518 U.S. 187, 192 (1996), the "sovereign immunity canon is just that – a canon of construction," *Richlin Security Svc. Co. v. Chertoff*, 128 S. Ct. 2007, 2019 (2008). "It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction." *Id*. Thus, when ordinary means of statutory interpretation eliminate any alleged ambiguity, the strict construction canon has no role to play, *id*., and instead the waiver of immunity will be given the full scope Congress intended. *See*, *e.g.*, *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94 (1990) ("[W]e must be careful not to assume the authority to narrow the waiver that Congress intended, or construe the waiver unduly restrictively.") (citations and internal quotation marks omitted).

In this case, ordinary tools of statutory construction make plain that the "appropriate relief" to which the State consented includes compensatory damages.

A. The Term "Appropriate Relief" Has An Established Meaning In This Court's Cases, One That Clearly Includes Money Damages.

As Justice Frankfurter once observed, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Evans v. United States*, 504 U.S. 255, 260 n.3 (1992) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)). Consequently, where terms employed in a statute have "accumulated settled meaning," a "court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Neder v. United States*, 527 U.S. 1, 21 (1999) (internal quotation marks omitted). Here, the phrase "appropriate relief" has an established meaning in the law – one that unambiguously includes damages – when referring to the remedies available in a private right of action to enforce a Spending Clause civil rights statute.

1. In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), this Court considered the proper remedies for a violation of Title IX of the Education Act Amendments of 1972, 42 U.S.C. §§ 1681 *et seq.*, a Spending Clause statute with an implied private right of action. Although the statute did not expressly address available remedies, this Court confirmed the "general rule," based on more than a century of precedent, that "absent clear direction to the contrary by Congress, the federal courts have the power to award any *appropriate relief*

in a cognizable cause of action brought pursuant to a federal statute," 503 U.S. at 70-71 (emphasis added), including damages, *id*. at 75-76.[5]

The Court reaffirmed that damages are appropriate relief for the violation of Spending Clause civil rights statutes in *Barnes v. Gorman*, 536 U.S. 181 (2002). In that case, this Court considered the remedies available under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131 *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. Both statutes provide an express private right of action that incorporates by reference the remedies available under Title IX. *See* 536 U.S. at 185.[6] As a result, the Court explained, *Franklin* dictated that both statutes be construed to authorize suits for "appropriate relief," including damages. *Id*. Treating compensatory damages as "appropriate relief" made sense, the Court explained, because Spending Clause legislation operates "much in the nature of a *contract*." 536 U.S. at 186 (quoting

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[5] The Court explained that this interpretive principle "has deep roots in our jurisprudence." 503 U.S. at 66; *see id*. at 66-68 (discussing origins of tradition).

[6] Title II of the ADA expressly incorporates the remedies of the Rehabilitation Act. 42 U.S.C. § 12133. The Rehabilitation Act, in turn, expressly incorporates the remedies of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq*. *See* 29 U.S.C. § 794a(a)(2). Title VI has no express private right of action, but the Court has "interpreted Title IX consistently with Title VI." *Barnes*, 536 U.S. at 185. Consequently, the Court treated the remedies available under Title VI, Section 504, and Title II of the ADA as governed by the Court's Title IX decision in *Franklin*. *Id*.

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)) (emphasis in original). Because the legitimacy of Spending Clause legislation turns on recipients' voluntary acceptance of the funding condition, Congress must make the consequences of accepting federal funds unambiguous. *Id*. (citing *Pennhurst*, 451 U.S. at 17). That includes, the Court held, putting recipients on notice of the remedies available in a private suit under the statute. *Id*. at 187. Accordingly, "a remedy is 'appropriate relief' only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Id*. at 187 (citation omitted) (emphasis in original).

As in *Franklin*, generations of legal practice provided the required notice, even in the absence of a specific enumeration of remedies in the text of the statutes. The Court held that a "funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract." *Id*. Those remedies include, the Court observed, both "compensatory damages" and injunctions (but not punitive damages). 536 U.S. at 187.

2. In *Barnes* and *Franklin*, this Court concluded that damages were "appropriate" relief even under a statute that made no mention of remedies. It should come as little surprise, then, that when the Congress *has* expressly authorized private actions for "appropriate" relief, this Court has construed that authorization to permit an award of compensatory damages as well, even against a sovereign.

For example, in *International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, AFL-CIO v. Hardeman*, 401 U.S. 233 (1971), this Court held that in authorizing "such relief (including injunctions) as may be appropriate," to remedy a violation of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 412, Congress had provided a damages remedy in addition to any right to injunctive or declaratory relief. *Id*. at 239-40. "If anything," the Court observed, the provision "contemplates that damages will be the usual, and injunctions the extraordinary form of relief." *Id*.

Likewise, in *West v. Gibson*, 527 U.S. 212 (1999), this Court held that a statutory phrase nearly identical to RLUIPA's "appropriate relief" encompassed compensatory damages clearly enough to overcome any sovereign immunity canon of strict construction. As originally enacted, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*., prohibited employment discrimination on the basis of race, sex, and religion, but only in the private sector. In 1972, Congress extended Title VII's prohibitions to the federal government. 42 U.S.C. § 2000e-16(a). Congress gave the Equal Employment Opportunity Commission authority to enforce the new provisions against federal agencies "through *appropriate remedies*." *Id*. § 2000e-16(b) (emphasis added). This Court ruled in *West* that this provision waived the United States' sovereign immunity from damages even though the statute did not "explicitly refer to compensatory damages" claims. *Id*. at 217. Given the language Congress used, the statute's purpose and history, and Congress's express provision of a

damages remedy against all defendants in litigation, the Court held that Congress spoke with sufficient clarity to meet any "specially strict standard" for finding a waiver of sovereign immunity. *Id*.[7]

3. That "appropriate relief" means the same thing in RLUIPA is confirmed by Congress's long tradition of authorizing damages for violations of civil rights statutes. In *Barnes*, this Court held that damages are available under Title IX, Title VI, Section 504 of the Rehabilitation Act, and Title II of the ADA. 536 U.S. at 185. Congress likewise has authorized monetary relief under the Age Discrimination in Employment Act,[8] the Fair Housing Act,[9] the Equal Credit Opportunity Act,[10] and the Equal Pay Act.[11] Of particular note, Congress has also allowed damages actions to enforce Title VII's bar on religious discrimination in employment,[12] including the failure to provide reasonable accommodations for employees' religious practices.[13]

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[7] That *West* involved a waiver of the United States' sovereign immunity, rather than a state's, is of no moment. As respondents note (BIO 13), this Court's federal waiver decisions inform the resolution of state sovereign immunity questions. *See California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506-07 (1998).

[8] 29 U.S.C. § 633a(c).

[9] 42 U.S.C. § 3613(c)(1).

[10] 15 U.S.C. § 1691e(a).

[11] 29 U.S.C. §§ 206(d)(3), 216(b).

[12] 42 U.S.C. § 1981a(a).

[13] 42 U.S.C. §§ 2000e(j), 2000e-2(a)(2).

There was no basis for Texas to think that Congress would have intended to treat states differently under RLUIPA. To the contrary, Congress has repeatedly subjected states to damages remedies under civil rights statutes. *See*, *e.g.*, *Tennessee v. Lane*, 541 U.S. 509 (2004) (Title II of the ADA); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Title I of the ADA); *Kimel v. Fl. Bd. of Regents*, 528 U.S. 62 (2000) (ADEA); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Title VII); *see also* 42 U.S.C. § 2000d-7 (confirming that states are subject to suit for damages under Title VI, Title IX, Section 504, and the Age Discrimination Act, 42 U.S.C. §§ 6101 *et seq*.). Indeed, it is difficult to find a modern civil rights statute made applicable to the states that does not include a damages remedy.

4. In light of this tradition and the Court's prior precedents, the court of appeals erred in concluding that RLUIPA's authorization of "appropriate relief" was insufficient to put states on notice that accepting federal funds would subject them to suit for damages under the Act.

First, this Court's decision in *West* belies the court of appeals' conclusion (Pet. App. 23a) that a phrase like "appropriate relief" is too inherently ambiguous to satisfy a sovereign immunity clear statement rule. To the contrary, *West* demonstrates that RLUPA's language must be construed in legal context. In this case, legal tradition shows that if "appropriate relief" means anything, it includes money damages, *see Int'l Bhd. of Boilermakers*, 401 U.S. at 239-40, especially in the context of civil rights statutes enacted under the Spending Clause, *see Barnes*, 536 U.S. at 187.

Second, had RLUIPA said nothing about available remedies, *Barnes* would hold that that a damages remedy is available and that Texas was on notice of that remedy at the time it accepted federal funding. 536 U.S. at 187.

Third, even if the State were right that *Barnes* does not apply to a state funding recipient – which is is incorrect, *see infra* Section I(C) – that would not matter. When Congress uses a term of art in a statute – even when that term is borrowed from an otherwise inapplicable line of cases or area of the law – that term carries its established meaning into the new statute. *See*, *e.g.*, *Neder*, 527 U.S. at 21; *Evans*, 504 U.S. at 260 n.3; *United States v. Merriam*, 263 U.S. 179, 187 (1923). In this case, the phrase "appropriate relief" is obviously transplanted from *Franklin*, which used it repeatedly as a term of art to describe the scope of available relief under a Spending Clause statute. See 503 U.S. at 66, 68, 69, 70-71, 73, 74; *see also Barnes*, 536 U.S. at 184, 185, 187 (same). At the same time, RLUIPA is transparently modeled on the Spending Clause statutes construed in *Barnes* and *Franklin*.[14] Texas therefore had every reason to know that the same term, used in the same context, would bear the same meaning.

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[14] *See* 42 U.S.C. § 2000cc-1(b)(1) (applying RLUIPA's requirements to any "program or activity that receives Federal financial assistance"); *id*. § 2000cc-5(6) (incorporating by reference Title VI's definition of "program or activity"); *see also Joint Statement* at 16,699 ("The Spending Clause provisions are modeled directly on similar provisions of other civil rights laws.").

Fourth, the court of appeals' decision creates a seriously anomalous statute. For one thing, in assuming that injunctions are "appropriate relief," but damages are not, the court reversed the ordinary rules governing the relationship between legal and equitable remedies. Because an "injunction is a drastic and extraordinary remedy," *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2761 (2010), "it is axiomatic that a court should determine the adequacy of a remedy at law before resorting to equitable relief." *Franklin*, 503 U.S. at 75-76. The court of appeals' abandonment of the usual understanding of when an injunction is "appropriate relief" is particularly unwarranted here because when Congress wanted to limit RLUIPA plaintiffs to equitable relief, it did so expressly, using very different language. In Section 2000cc-2(f), Congress authorized the federal government to "bring an action for injunctive or declaratory relief." Congress would not have authorized the same relief, using entirely different language, for private litigants. *See*, *e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.") (citation omitted). The stark contrast in language underscored for states that private actions for "appropriate relief" encompassed more than the "injunctive or declaratory relief" made available to the federal government.

The decision below also leads to the untenable conclusion that the meaning of the single phrase "appropriate relief" changes significantly depending on nothing more than the identity of the defendant.

Under the court of appeals' holding, if the defendant is a state, "appropriate relief" means only injunctive and declaratory relief. Yet both the court of appeals and the State appear to acknowledge that under *Barnes*, if the defendant is a county or municipality, the same language in the same phrase of the same provision of the statute would encompass damages as well. *See* Pet. App. 23a; BIO 13. That is not how Congress writes statutes, or this Court construes them. *See Clark v. Martinez*, 543 U.S. 371, 380 (2005) (refusing to "giv[e] the *same* [statutory] provision a different meaning" for different parties, even though the parties' different legal statuses raised different constitutional concerns) (emphasis in original). To the contrary, where Congress intended RLUIPA to afford different relief depending on the identity of a party, it created a separate cause of action with its own separate list of remedies. *See* 42 U.S.C. § 2000cc-2(f) (separately defining relief available in suits by the Attorney General).

B. Everything Else In The Text, History, And Purposes Of The Statute Supports The Conclusion That "Appropriate Relief" Includes Damages.

RLUIPA as a whole confirms that "appropriate relief" means exactly what this Court has long said it means.

First, RLUIPA's reference to the Prison Litigation Reform Act (PLRA) supports the conclusion that Congress meant "appropriate relief" to include damages. In RLUIPA, Congress expressly provided that "nothing in this [statute] shall be construed to amend or repeal the Prison Litigation

Reform Act of 1995." 42 U.S.C. § 2000cc-2(e). As the State has noted, a principal purpose of the PLRA was to limit compensatory damage awards to prisoners. *See* BIO 4-5. If RLUIPA authorized only injunctive and declaratory relief, its reference to the PLRA would have been largely pointless.

Second, Congress foreclosed the court of appeals' unprecedentedly cramped reading of "appropriate relief" by instructing that "[t]his chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g).

Third, as in *West*, an examination of the purposes of the statute confirms that the normal understanding of "appropriate relief" is the correct one. *See* 527 U.S. at 218. Congress enacted RLUIPA because it concluded, after extensive legislative study and hearings, that freedom from religious discrimination and the right to free exercise deserved the same statutory protection afforded other basic civil rights. The legislative history and findings defy any argument that Congress intended RLUIPA to create a second-class civil right. Nor is there any evidence that Congress believed that victims of RLUIPA violations were less deserving of the law's longstanding tradition of make-whole remedies.

To be sure, RLUIPA applies to state correctional institutions, a sensitive context. But Congress fully considered and carefully balanced the important state interests involved, particularly by retaining the limitations on remedies in the Prison Litigation Reform Act. *See Cutter v. Wilkinson*, 544 U.S. 709, 722-23, 725-26 (2005). In any case, concerns about

the prison environment cannot drive construction of RLUIPA's remedial provision, which applies equally to all individuals protected by RLUIPA, including landowners and people in government-run nursing homes, mental health facilities, and group homes. *See* 42 U.S.C. §§ 1997, 2000cc-1.

In all of these settings, failing to provide a damages remedy would have significantly undermined the statute's effectiveness. *See*, *e.g.*, Brief of ACLU *et al*. § I(B). Claims for injunctive relief are easily, and frequently, mooted in the institutional and zoning contexts, not only by the cessation of the allegedly illegal conduct (as happened in this case, *see* Pet. App. 9a-13a),[15] but also by victims' release from custody or transfer to another facility.[16] Indeed, one of the reasons this Court held in *Franklin* that "appropriate relief" extends beyond equitable remedies is that often "prospective relief accords [the victim] no remedy at all." 503 U.S. at 76. Congress knew that concern would apply with particular force to land use and institutional cases. In fact, courts that have refused to recognize a damages remedy under RLUIPA have acknowledged that, as a consequence, in many cases the "appropriate relief" the statute authorizes against all defendants, in practice amounts to no relief at

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[15] *See also*, *e.g.*, *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 260-61 (3d Cir. 2007) (land-use claim for injunctive relief mooted by change in defendant's zoning rules).

[16] *See*, *e.g.*, *Cardinal v. Metrish*, 564 F.3d 794, 798-99 (6th Cir. 2008), *cert. pending*, No. 09-109; cases cited in n.17, *infra*.

all.[17] That is not what Congress passed RLUIPA to accomplish.

C. The Rule That Funding Recipients Are On Notice That Appropriate Relief Includes Damages Applies To States.

Both the court of appeals and the State appear to acknowledge that if applicable, the Court's decisions in *Franklin* and *Barnes* would compel the conclusion that RLUIPA's "appropriate relief" includes damages. *See* Pet. App. 23a; BIO 13. But both suggest that those decisions are incompatible with the clear statement rule this Court applies to waivers of sovereign immunity. As an initial matter, this argument is ultimately insufficient to sustain the judgment below. As already noted, even if *Franklin* and *Barnes* did not apply of their own force, Congress incorporated their definition of "appropriate relief" as surely as if it had expressly provided that the "remedies set forth in Title IX shall be available for violations of RLUIPA." *See supra* at 25. But in any case, the rule of *Franklin* and *Barnes* does apply to states.

1. The court of appeals reasoned that the *Franklin* presumption in favor of the availability of damages was incompatible with the *Pennhurst* clear statement rule, which requires that Congress speak

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[17] *See, e.g.*, *Nelson v. Miller*, 570 F.3d 868, 883, 885 (7th Cir. 2009); *Rendelman v. Rouse*, 569 F.3d 182, 187 (4th Cir. 2009); *Cardinal*, 564 F.3d at 798-801; *Berryman v. Granholm*, 343 Fed. Appx. 1, 3-4 (6th Cir. 2009); *Harris v. Schriro*, 652 F. Supp. 2d 1024, 1028-33 (D. Ariz. 2009).

"with sufficient clarity to put the state on notice that, to accept federal funds, the state must also accept liability for monetary damages." Pet. App. 21a (citing *Pennhurst*, 451 U.S. at 17); *see also* Pet. App. 21a-23a.

But this Court considered – and rejected – that very assertion in *Franklin* itself. In that case, the school district and the United States as amicus asserted that "the normal presumption in favor of all appropriate remedies should not apply because Title IX was enacted pursuant to Congress's Spending Clause power." 503 U.S. at 74. The Court acknowledged that the "point" of the *Pennhurst* rule is to ensure that a funding recipient will have "notice that it will be liable for a monetary award." *Id*. (citing *Pennhurst*, 451 U.S. at 17). But the "notice problem" addressed in *Pennhurst* "does not arise in a case such as this," the Court concluded. *Id*. at 74-75.

The Court elaborated on that conclusion in *Barnes*. There, the Court expressly recognized that any remedy provided under a Spending Clause statute must be consistent with the *Pennhurst* clear statement rule, acknowledging that "a remedy is 'appropriate relief,' . . . only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." 536 U.S. at 187; *see also id*. at 186 (quoting *Pennhurst* on clear statement standard). Of course, in *Barnes*, none of the relevant statutes expressly identified what kinds of relief were available. At best, the ADA and Section 504 could be read as incorporating by reference the "appropriate relief" remedy implied by *Franklin* into Title IX, putting those statutes on the same footing as RLUIPA. Nonetheless, that did not lead this

Court to conclude that *Pennhurst* precluded an award of damages. Instead, the Court reconciled the *Franklin* presumption with the *Pennhurst* clear statement rule by announcing that because "Spending Clause legislation [is] 'much in the nature of a contract,'" a "funding recipient is generally *on notice* that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract," including compensatory damages. 536 U.S. at 187 (quoting *Pennhurst*, 451 U.S. at 17).

2. The State points out that neither *Franklin* nor *Barnes* involved state defendants entitled to sovereign immunity. BIO 13-14. That might be a compelling point if the clear statement rule applied in those cases was less strict than the clear statement rule applied to waivers of sovereign immunity. But, in fact, the standards are the same.

In *College Savings Bank* and *Alden v. Maine*, this Court recognized that Congress has "the authority [and] means to seek the States' voluntary consent to private suits," *Alden*, 527 U.S. at 755, pointing to the Court's prior decision in *South Dakota v. Dole*, 483 U.S. 203 (1987). *See Alden*, 527 U.S. at 755; *College Sav. Bank*, 527 U.S. at 686-687. In *Dole*, this Court held that Congress may condition receipt of federal funding on a state's agreement to conditions Congress could not unilaterally impose through the exercise of its other enumerated powers. 483 U.S. at 207. But the Court held that this Spending Clause authority is subject to important limitations, one of which is the clear statement rule from *Pennhurst*: "if Congress desires to condition the States' receipt of

federal funds, it 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consquences of their participation.'" *Id*. at 207 (quoting *Pennhurst*, 451 U.S. at 17).[18]

This Court's decisions therefore judge the validity of a Spending Clause waiver under the clear statement rule of *Pennhurst*, the same standard this Court applied in *Barnes*. In fact, the court of appeals and the State have admitted as much, both citing *Pennhurst* as establishing the governing clear statement rule for Spending Clause waivers. *See* Pet. App. 21a & n.43, 22a; BIO 12, 16.

Respondents nonetheless insist that what was clear enough for local governments in *Barnes* is not clear enough for a state. But neither the State nor the court of appeals has identified any reason for this Court to establish a hierarchy of clear statement rules.[19] *Pennhurst*'s requirement that funding conditions be "unambiguous" is quite sufficient to

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[18] The other requirements are that "the exercise of the spending power must be in pursuit of 'the general welfare'"; that the condition be related to the federal interest in a particular federal project or program; and that the condition not violate any other constitutional provision. *Id*. at 207-08.

[19] To be sure, a statute conditioning federal funds on a state's amenability to suit implicates an interest protected by the Constitution. But that does not distinguish this case from *Dole*. There, the Court applied the *Pennhurst* test even though it accepted that Congress had conditioned federal highway funds on states' waiver of their sovereign right under the Twenty-First Amendment to be the sole regulators of alcohol within their borders. 483 U.S. at 205-06.

serve the purpose of this Court's sovereign immunity waiver rules, which is not to make Congress jump through verbal hoops, but to ensure that state waivers are knowing and intentional. *See*, *e.g.*, *College Sav. Bank*, 527 U.S. at 680.[20] When a state is on notice of the consequences of accepting federal funding, the federal structure is preserved, allowing states to make independent decisions for which they can be held politically accountable to their citizens. *See Alden*, 527 U.S. at 750-51, 755; *Bell v. N.J. & Penn.*, 461 U.S. 773, 774 (1983) (enforcing spending clause conditions "voluntarily assumed" by states "does not intrude on their sovereignty").

This is true even when the consequences of a particular course of state action are made clear in part through the decisions of this Court rather than from legislative text read in isolation. For example, in *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002), this Court unanimously held that a state waives its Eleventh Amendment immunity by removing to federal court state law claims for which it has waived immunity in its own courts. That principle, the court explained, was consistent similar rules established in this Court's cases, defining conduct that, as a matter of federal law, constitutes a waiver of sovereign immunity, even if the state in taking that action did

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[20] In this way, the *Pennhurst* rule conforms to the standard for waiving individual constitutional rights. *See*, *e.g.*, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (waiver of a constitutional right requires the "intentional relinquishment or abandonment of a known right or privilege").

not intend to relinquish its immunity. *Id*. at 619. The Court rejected Georgia's argument that such rules were inconsistent with "more recent cases, which have required a 'clear' indication of the State's intent to waive its immunity.'" *Id*. at 620. Given the clarity of the judicially announced rule, it was appropriate to conclude that a state taking the specified action has consented to suit in federal court. *Id*. at 620, 623-24.

The rule recognized in *Franklin* and *Barnes* is no different. It is not too much to require states (like counties, municipalities, and private individuals) to consider the language of federal funding statutes in light of this Court's decisions. *Cf. United States v. Lanier*, 520 U.S. 259, 266 (1997) (explaining that criminal defendants' constitutional right to fair warning of the meaning of a criminal statute may be provided through judicial construction of ambiguous statutory language). Had Texas done so, it would have easily seen that it could not both accept federal funding and preserve its immunity from RLUIPA damages actions.

3. Some courts have read this Court's decision in *Lane v. Pena*, 518 U.S. 187 (1996), to imply that the *Franklin* presumption has no application in a case involving the waiver of a state's sovereign immunity. *See*, *e.g.*, *Holley v. Cal. Dep't of Corr.*, 599 F.3d 1108, 1113 (9th Cir. 2010); *Van Wyhe v. Reisch*, 581 F.3d 639, 653-54 (8th Cir. 2009), *cert. pending*, No. 09-821; *Cardinal*, 564 F.3d at 800-01. That argument badly overreads *Lane* and ignores the Court's broader federal immunity case law, which is entirely consistent with applying the *Franklin* presumption in Spending Clause cases.

In *Lane*, this Court considered whether a federal defendant, the Merchant Marine Academy, was amenable to suit for damages under the Rehabilitation Act. It concluded that the statutory provision authorizing damages against a "Federal provider of [financial] assistance," 29 U.S.C. § 794a(a)(2), did not apply to the Academy because it did not disburse money to funding recipients. 518 U.S. at 192.[21] In the course of the decision, the Court rejected the plaintiff's reliance on *Franklin* to support a broader reading of the phrase "Federal provider." *Id*. at 196-97. Among other things, the Court explained that "[w]here a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived." *Id*. at 197.

That statement has no application here. For one thing, as shown above, RLUIPA – unlike the statute in *Lane* – uses express language with a settled meaning that includes damages. The State's notice arises from that settled meaning, even if *Franklin* itself has no application. *See supra* at 20.

More importantly, the argument ignores that *Lane* involved the United States' unilateral consent to suit, not a contracted-for waiver of immunity in

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[21] That holding is of no assistance to respondents here. There is no question that Texas is a "government" as defined under RLUIPA, 42 U.S.C. § 2000cc-2(a), or that it received federal funds for the "program or activity" in which petitioner's religious exercise was burdened, *id*. § 2000cc-1(b)(1). The statutory gap in *Lane* thus has no parallel in this case.

exchange for federal funds. *See*, *e.g.*, *Petty v. Tenn.-Mo. Bridge Comm'n*, 359 U.S. 275, 278-79 (1959) (emphasizing the difference between a case in which "the alleged basis of waiver of the Eleventh Amendment's immunity is a state statute" and one in which the waiver arises to the state's agreement to an interstate compact). *Barnes* explained that given the contractual nature of Spending Clause legislation, recipients are on notice, as a matter of law, that acceptance of federal funds subjects them to traditional contract remedies, including damages. 536 U.S. at 188. That principle is entirely reasonable, but completely inapplicable to cases in which a sovereign unilaterally waives its immunity. Parties rarely address the remedies for breach of their agreement in the body of the contract itself; rather, traditional contract remedies, which quintessentially include damages actions, apply unless the contract specifies otherwise. *See*, *e.g.*, *United States v. Winstar Corp.*, 518 U.S. 839, 885 (1996) (plurality) ("[D]amages are always the default remedy for breach of contract.") (citing RESTATEMENT (SECOND) OF CONTRACTS § 346, cmt. a (1981)). Consequently, a party to a contract who agrees to submit contract disputes to litigation has consented to a damages remedy if a breach is found.

On the other hand, when a sovereign unilaterally waives its own immunity by enacting a statute, as the United States did in *Lane*, there often is no traditional damages remedy or background remedial framework that governs. But when a sovereign consents to be sued for violation of contract-like obligations, that agreement naturally and

unambiguously includes consent to submit to traditional contract remedies, including damages.

This Court's other federal immunity cases reflect this distinction. For example, in *United States v. Nordic Village, Inc.,* 503 U.S. 30 (1991), the Court addressed another unilateral waiver of federal immunity. Looking at the text of the Bankruptcy Code, the Court held that a provision waiving the Government's immunity failed to "establish unambiguously that the waiver extends to monetary claims." *Id*. at 34. There being no relevant background legal tradition to illuminate the text, the Court was left with the statutory language, which it found unclear.

In sharp contrast, the Court has long found a waiver of the federal government's immunity to damages for breach of contract even in the absence of an express statutory provision authorizing that remedy. The United States has consented to suit for breach of federal contracts through the Tucker Act, 28 U.S.C. § 1491.[22] However, the "Tucker Act itself is only a jurisdictional statute . . . and does not create a substantive right to money damages." *Hatzlachh Supply Co., Inc. v. United States*, 444 U.S. 460, 465 n.5 (1980). Nor does any other statute expressly

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[22] The Tucker Act provides that "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1).

provide that the United States consents to a damages remedy for breach of contract. However, that has not led this Court to hold that the United States retains immunity from contract damages claims. *See id*. Instead, the longstanding legal tradition of money damages as the primary remedy for breach of contract provides the necessary clarity.

The parallel between this Court's federal contract cases and *Barnes* is obvious and important. In both contexts, a government has entered into a contract, the traditional remedy for the breach of which is money damages. Although the Court requires a clear indication that the government has agreed to submit to a damages remedy for breach of contract, the tradition of that relief in this context is so strong that the Court has had no difficulty in concluding that by agreeing to be sued for breach of the agreement, the government has necessarily, and unambiguously, submitted to that traditional remedy as well.

The distinction between unilateral waivers of sovereign immunity, on the one hand, and Spending Clause waivers, on the other, is no mere formalism. When a waiver is effected by the federal government (or a state) unilaterally subjecting itself to suit, respect for sovereign prerogatives points in a single direction, counseling the strictest plausible construction of the waiver in order to ensure that the courts do not enlarge the waiver beyond what the sovereign intended. But Spending Clause waivers implicate the important interests of *two* sovereigns – the interest of the state in deciding for itself whether to waive its immunity and the United States' equally weighty interest in ensuring that federal funds are distributed only to those recipients willing to comply

with the conditions established by Congress. The Constitution gives Congress the authority to decide under what conditions the allocation of federal funds to state programs will serve the "general welfare." U.S. CONST. art. I, § 8, cl. 1. Congress can, and often does, decide that the general welfare requires both the imposition of substantive conditions *and* the authorization of private litigation for damages in order to ensure that states adhere to those conditions. The constitutional authority to make that judgment would be frustrated by a rule that allows states to accept federal funds, while refusing to comply with conditions Congress intended, solely because Congress did not use the right words in making the conditions clear.

4. In any event, even in the context of unilateral waivers of the United States' immunity (the context of *Lane*), this Court has not required Congress to authorize damages remedies expressly in the text of the statute where, as here, legal tradition or other indicia of legislative intent make sufficiently clear Congress's willingness to submit the federal government to suits for damages.

First, as already discussed, in *West v. Gibson*, 527 U.S. 212 (1999), this Court found that language nearly identical to RLUIPA's "appropriate relief" provision waived the United States' immunity from damages claims.

Second, as also noted above, the Court's federal contracting decisions under the Tucker Act cannot be squared with any rule requiring express enumeration of remedies or any prohibition against relying on legal traditions to discern the scope of available remedies against a sovereign.

Third, the Court has also relied on tradition in other contexts to discern the scope of remedies to which the United States has consented. For example, in *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003), the Court considered a federal statute that directed the federal government to hold certain lands in trust for an Indian Tribe. *Id*. at 468-69. The Court explained that the terms of the United States' waiver of immunity "must be 'unequivocally expressed.'" *Id*. at 472 (citations omitted). But the Tucker Act itself made no mention of remedies. Nor did the federal statute the United States had allegedly violated. Nonetheless, the Court recognized that the statute imposed something akin to a trust law fiduciary duty. And because damages are a traditional remedy for violation of fiduciary duties, the Court held that Congress has consented to a damages action. *See id*. at 475-76; *see also United States v. Mitchell*, 463 U.S. 206, 226 (1983).[23]

In a number of other cases as well, the Court has looked beyond the bare text of a statute waiving the United States' immunity to determine the scope of the waiver. *See*, *e.g.*, *Richlin Sec. Svs. Co. v. Chertoff*, 128 S. Ct. 2007, 2014-15 (2008) (in construing scope of Government's waiver of immunity to attorney's

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[23] These rulings were no aberration. The Court has recently explained that as a general matter, the source of law enforced through a Tucker Act suit "need not *explicitly* provide that the right or duty it creates is enforceable through a suit for damages." *United States v. Navajo Nation*, 129 S. Ct. 1547, 1552 (2009). It is enough that the source of law "can fairly be interpreted as mandating compensation by the Federal Government." *Id*. (citations omitted).

fees and costs, Court looked to its prior decisions addressing relief available against state and private defendants under 42 U.S.C. § 1988); *id*. at 2015 (considering arguments based on "legislative history and public policy"); *Irwin*, 498 U.S. at 95 (construing statute of limitations, a condition of the United States waiver of sovereign immunity, in light of customary availability of equitable tolling in suits between private litigants); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683 (1983) (looking to "long-standing fee-shifting principles" to construe scope of United States' waiver of immunity to attorney's fee awards in "appropriate" circumstances). Ordinary meaning, not magic words, is all this Court's precedent requires.

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In light of the foregoing, the court of appeals got it exactly backwards when it concluded that the rule of *Franklin* and *Barnes* "disappears" when sovereign immunity is at stake. Pet. App. 23a. To the contrary, this Court's decisions make clear that the sovereign immunity cannon comes into play only if ordinary methods of construction – like the interpretative rules this Court applied in *Barnes* – fail to resolve apparent ambiguity in the text. *See*, *e.g.*, *Richlin*, 128 S. Ct. at 2019. Because *Franklin* and *Barnes*, together with the broader text and legal background, render the meaning of "appropriate relief" unambiguous, it is the strict construction cannon that disappears and has no role to play in this case.

II. The Rehabilitation Remedies Act Amendments of 1986 Separately Put State Recipients On Notice That They Are Amenable To RLUIPA Suits For Damages.

Even if RLUIPA itself did not sufficiently notify states that acceptance of federal funding would constitute a waiver of sovereign immunity to RLUIPA damages suits, Congress independently provided that unambiguous notice in the Civil Rights Remedies Equalization provision of the Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7. *See generally* Brief of Amicus Curiae Charles E. Sisney in Support of Petitioner.

That provision states:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit

> against any public or private entity other than a State.

42 U.S.C. § 2000d-7(a).

By its terms, this provision gives states explicit and unambiguous notice that accepting federal funds will subject them to the same remedies available against non-state defendants – including remedies "at law" (that is, damages) – for violations of a "Federal statute prohibiting discrimination by recipients of Federal financial assistance." Contrary to the State's argument (Resp. Supp. Br. 7-8), RLUIPA is a statute "prohibiting discrimination" within the meaning of Section 2000d-7.

1. As Texas admits, Section 2 of RLUIPA expressly forbids discrimination and unequal treatment of religious organization in the land-use context. *See* Resp. Supp. Br. 8; 42 U.S.C. §§ 2000cc(b)(1)-(2). And while Section 3 does not use the word "discrimination," it nonetheless prohibits the same kind of discriminatory conduct. For example, refusing to provide an inmate kosher food because of animosity toward Jews would be a form of religious discrimination, *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542-43 (1993), and would undoubtedly violate RLUIPA by imposing an unjustified substantial burden on the inmate's exercise of his religion. Similarly, refusing to let Quakers use the law library, or placing all Muslims in administrative segregation, would be a familiar form of religious discrimination also forbidden by RLUIPA, given that punishing inmates simply for adhering to their religious beliefs unquestionably imposes a substantial and unjustified burden on religious exercise. A prison also engages

in religious discrimination prohibited by RLUIPA when it provides accommodations for some favored religions, but not for others, or when it favors secular over equivalent religious activities without adequate justification. Here, for example, respondents allowed inmates in disciplinary confinement to leave their cells for a wide range of secular activities, but not to attend worship services. Pet. App. 3a. That policy both burdened petitioner's practice of his religion and discriminated against religious inmates.

This kind of discrimination was one of the evils RLUIPA was intended to address. *See*, *e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 716 n.5 (2005) (noting that legislative record included example of a "state prison in Ohio [that] refused to provide Moslems with Hallal food, even though it provided Kosher food," and of a Michigan prison prohibiting Jewish inmates from lighting Chanukah candles "even though 'smoking' and 'votive candles' were permitted") (citations omitted); *Joint Statement* at 16,699 (noting record of "bigotry" against minority religions); *Id.* (giving example of *Sasnett v. Sullivan*, 197 F.3d 290 (7th Cir. 1999), in which prison allowed inmates to wear crosses only if attached to a rosary, as example of "discriminat[ion] against Protestants"); *Post*-Boerne *Hearing* (examining prevalence of discriminatory accommodations).

To be sure, as the State stresses (Resp. Supp. Br. 8), RLUIPA additionally prohibits other forms of conduct imposing burdens on the free exercise rights of institutionalized persons. But that hardly distinguishes RLUIPA from other statutes expressly identified in Section 2000d-7. Section 504 of the Rehabilitation Act, for example, prohibits both

invidious discrimination against individuals with disabilities and failure to provide reasonable accommodations. *See*, *e.g.*, *Alexander v. Choate*, 469 U.S. 287, 299-300 & n.20 (1985). That RLUIPA requires religious accommodations *in addition* to prohibiting ordinary discrimination on the basis of religion does not change its status as a "statute prohibiting discrimination." 42 U.S.C. § 2000d-7(a).

2. In any event, RLUIPA's accommodation requirement is easily classified as a prohibition against discrimination as well. "Discrimination," this Court has observed, is a "broad term." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). As used in a number of well-known civil rights statutes, the term encompasses not only the unequal treatment of similarly situated individuals,[24] but also, in some circumstances, the unjustified refusal to make reasonable accommodations.

For example, this Court has long recognized that Section 504's accommodation requirement is a form of antidiscrimination protection. *See*, *e.g.*, *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 413 (1979) ("Identification of those instances where a refusal to accommodate the needs of a disabled person *amounts to discrimination* against the handicapped [is] an important responsibility of HEW.") (emphasis added); *see also Choate*, 469 U.S. at 299-300. Congress

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[24] Courts thus have recognized that RLUIPA's proscription against "discrimination" and "unequal treatment" in the land-use context is broader than simply requiring equal treatment of identically situated parties. *See*, *e.g.*, *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230-31 (11th Cir. 2004).

shares that judgment. When it enacted the Americans with Disabilities Act, modeled on Section 504, it found that people with disabilities "continually encounter various *forms of discrimination*, including . . . failure to make modifications to existing facilities and practices." 42 U.S.C. § 12101(5) (emphasis added). Thus, in *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581 (1999), this Court rejected the contention that the discrimination prohibited by the ADA and Section 504 "necessarily requires uneven treatment of similarly situated individuals." *Id*. at 598. "We are satisfied that Congress had a more comprehensive view of the concept of discrimination." *Id*.; *see also id*. at 598 & n.10.

Congress likewise defined failure to make reasonable accommodations for religious practice without adequate justification a form of unlawful employment discrimination in Title VII. As originally enacted, Title VII simply prohibited discrimination "because of [an individual's] . . . religion." 42 U.S.C. § 2000e-2(a)(2). In 1972, however, Congress amended Title VII "to illuminate the meaning of religious discrimination under the statute," *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 63 n.1 (1986), by requiring employers to "reasonably accommodate to an employee's . . . religious observance" unless doing so would impose an "undue hardship." 42 U.S.C § 2000e(j).

Finally, RLUIPA's accommodation requirement advances the Act's nondiscrimination purpose in much the same way as the disparate impact provisions of other prominent antidiscrimination statutes, including Section 504 and Title VII. *See*

Choate, 469 U.S. at 299-300 (Section 504); 42 U.S.C. § 2000e-2(k) (Title VII). These disparate impact provisions, like RLUIPA, require covered entities to alter policies that while "facially neutral in their treatment of different groups . . . in fact fall more harshly on one group than another" without adequate justification. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977).

"The principle of *ejusdem generis* suggests that" a catchall phrase at the end of a list "should be understood to refer to items belonging to the same class that is defined by the more specific terms in the list." *Holder v. Hall*, 512 U.S. 874, 917 (1994). In this case, the statutes enumerated in Section 2000d-7 impose the same kinds of requirements as RLUIPA does, to the same kinds of funding recipients, for the same basic purpose. The State thus had no grounds to doubt that RLUIPA was a "Federal statute prohibiting discrimination" following "in the footsteps of a long-standing tradition of federal legislation that seeks to eradicate discrimination" by federal funding recipients. *Charles v. Verhagen*, 348 F.3d 601, 607 (7th Cir. 2003).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

I. RLUIPA

The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc et seq.*, provides, in relevant part:*

§ 2000cc. PROTECTION OF LAND USE AS RELIGIOUS EXERCISE.

(a) SUBSTANTIAL BURDENS-

(1) GENERAL RULE- No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) SCOPE OF APPLICATION- This subsection applies in any case in which--

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect,

commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) DISCRIMINATION AND EXCLUSION-

(1) EQUAL TERMS- No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) NONDISCRIMINATION- No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) EXCLUSIONS AND LIMITS- No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

§ 2000cc-1. PROTECTION OF RELIGIOUS EXERCISE OF INSTITUTIONALIZED PERSONS.

(a) GENERAL RULE- No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) SCOPE OF APPLICATION- This section applies in any case in which--

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

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

§ 2000cc-2. JUDICIAL RELIEF.

(a) CAUSE OF ACTION- A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) BURDEN OF PERSUASION- If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) FULL FAITH AND CREDIT- Adjudication of a claim of a violation of section 2 in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) Omitted

(e) PRISONERS- Nothing in this Act shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) AUTHORITY OF UNITED STATES TO ENFORCE THIS ACT- The United States may bring an action for injunctive or declaratory relief

to enforce compliance with this Act. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) LIMITATION- If the only jurisdictional basis for applying a provision of this Act is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

§ 2000cc-3. RULES OF CONSTRUCTION.

(a) RELIGIOUS BELIEF UNAFFECTED- Nothing in this Act shall be construed to authorize any government to burden any religious belief.

(b) RELIGIOUS EXERCISE NOT REGULATED- Nothing in this Act shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) CLAIMS TO FUNDING UNAFFECTED- Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this Act may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) OTHER AUTHORITY TO IMPOSE CONDITIONS ON FUNDING UNAFFECTED- Nothing in this Act shall--

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act.

(e) GOVERNMENTAL DISCRETION IN ALLEVIATING BURDENS ON RELIGIOUS EXERCISE- A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) EFFECT ON OTHER LAW- With respect to a claim brought under this Act, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this Act.

(g) BROAD CONSTRUCTION- This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.

(h) NO PREEMPTION OR REPEAL- Nothing in this Act shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this Act.

(i) SEVERABILITY- If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.

§ 2000cc-4. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the 'Establishment Clause'). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. In this section, the term 'granting', used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

§ 2000cc-5. DEFINITIONS.

In this Act:

(1) CLAIMANT- The term 'claimant' means a person raising a claim or defense under this Act.

(2) DEMONSTRATES- The term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion.

(3) FREE EXERCISE CLAUSE- The term 'Free Exercise Clause' means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) GOVERNMENT- The term 'government'--

(A) means--

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 4(b) and 5, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) LAND USE REGULATION- The term 'land use regulation' means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) PROGRAM OR ACTIVITY- The term 'program or activity' means all of the operations of any entity as described in paragraph (1) or (2) of section 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-4a).

(7) RELIGIOUS EXERCISE-

(A) IN GENERAL- The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) RULE- The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious

exercise of the person or entity that uses or intends to use the property for that purpose.

II. Rehabilitation Act Amendments of 1986

The Civil Rights Remedy Equalization provision of the Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7, provides in relevant part:

§ 2000d-7. Civil rights remedies equalization

(a) General provision

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State. . . .