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 CHARLES E. SISNEY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Charles Sisney is an inmate at the South Dakota State Penitentiary, where he is confined for life, and petitioner in *Sisney v. Reisch*, No. 09-821. *Amicus* brought suit pursuant Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc *et seq.*, challenging the prison's refusal to allow him to worship in accordance with the dictates of his Jewish faith. The district court, in a comprehensive examination of the circuit split at issue, determined that the Eleventh Amendment did not bar claims for monetary damages. The court found that Section 3 of RLUIPA is a statute prohibiting discrimination by recipients of federal funds and that the Civil Rights Remedies Equalization Act of 1986 (CRREA), 42 U.S.C. § 2000d-7, effectuates a waiver of immunity. The Eighth Circuit reversed, finding that neither RLUIPA nor CRREA effectuates a waiver of Eleventh Amendment immunity.

Amicus filed a petition for a writ of certiorari challenging the Eighth Circuit's decision, which remains pending before this Court.[2]

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[1] Pursuant to Rule 37.6, no counsel for a party has authored this brief and no person or entity, other than *amicus curiae* or his counsel, has made a monetary contribution to its preparation or submission. Letters of consent have been filed with the Clerk of Court.

[2] Respondents' cross-petition in *Sisney v. Reisch*, No. 09-953 challenging the constitutionality of RLUIPA on Spending Clause grounds was opposed by *amicus* and denied. The United States intervened in the proceedings below to defend RLUIPA's constitutionality, and it, too, opposed the cross-petition.

Amicus has a strong, personal and direct interest in obtaining reversal in this case, as resolution of his claims necessarily depends on the outcome of the case at bar. Both cases raise the question whether the Eleventh Amendment bars private suits for money damages by prisoners against state prison officials for violations of Section 3 of RLUIPA.

Amicus strongly urges the Court to reverse the Fifth Circuit on the same grounds asserted in the petition for a writ of certiorari pending in *Sisney v. Reisch*—namely, that CRREA effectuates an unambiguous waiver of Eleventh Amendment immunity for violations of federal statutes prohibiting discrimination by federal funding recipients, including Section 3 of RLUIPA, which provides clear notice to the states that opt to receive federal funds that they must comply with RLUIPA's heightened protection of religious exercise and refrain, at minimum, from substantially burdensome intentional discrimination.

SUMMARY OF ARGUMENT

CRREA unambiguously effectuates waiver of Eleventh Amendment immunity for violations by states who accept federal financial assistance of certain enumerated antidiscrimination statutes, and other federal statutes prohibiting discrimination. By its terms, CRREA extends expressly and unambiguously to monetary awards. The question is whether Section 3 of RLUIPA is a statute prohibiting discrimination, such that states have clear notice that by accepting federal funds, they obligate themselves to comply with

RLUIPA's heightened substantive protections and to refrain from discriminating against religious exercise.

RLUIPA does prohibit discrimination, and states do have clear notice that federal funds cannot be used to support state-sponsored discrimination in prisons.

This Court has recognized that the term "discrimination" is to be construed expansively, and includes a range of discriminatory practices. Discrimination manifests in many forms, including not only purposeful disparate treatment based on animus, but also unjustified disparate-impact discrimination and discriminatory refusals to accommodate.

By its terms, Section 3 categorically bans *all* unjustified substantial burdens on inmates' religious exercise, whether they result from purposeful discrimination, discriminatory effects or frivolous and arbitrary refusals to accommodate. By enacting a categorical ban, which extends not only to facially discriminatory practices but also to substantial burdens imposed by facially neutral rules of general applicability, and by subjecting all such burdens to the highest judicial scrutiny, Congress made clear its intent to establish heightened protection for religious free exercise above what the Constitution requires.

It is equally clear that RLUIPA, like analogous antidiscrimination laws enacted under the Spending Clause, prohibits unjustified refusals to accommodate religious exercise, which this Court and Congress alike have recognized as a form of discrimination.

States who accept federal prison funds are undoubtedly aware that they take the assistance subject to RLUIPA's heightened substantive standards. RLUIPA's plain terms, remedial purpose and extensive history confer clear notice. This Court has recognized that RLUIPA, enacted in response to well-documented arbitrary barriers to religious freedom, accords religious exercise heightened protection from government-imposed burdens. Every circuit court that has considered the question has concluded that RLUIPA unambiguously conditions the receipt of federal funds on the states' agreement to comply with RLUIPA's heightened protection, and that states take assistance subject to those obligations.

Congress certainly has an interest in assuring its funds are not used to promote discrimination in prison, and states cannot reasonably believe otherwise.

RLUIPA need not expressly reference "discrimination" in order to unambiguously prohibit it. This Court has never held that Congress must unambiguously delineate every type of prohibited practice in order to put states on clear notice of the scope of substantive liability. Rather, the test is whether states accept federal funds with informed consent that they could be liable for violations.

Finally, this Court has recognized that *Pennhurst* does not apply to intentional violations of Spending Clause statutes that were enacted to proscribe specified conduct by federal funding recipients. Here, states have clear notice that, at minimum, intentional violations of Section 3 will subject them to liability.

ARGUMENT

I. RLUIPA Is A Statute Prohibiting Discrimination Within The Scope of CRREA, Which Provides Clear And Unambiguous Notice That States Must Comply With RLUIPA's Heightened Protection.

Modeled on analogous Spending Clause legislation aimed at eradicating discrimination in federal funding programs, RLUIPA was enacted to redress frivolous and arbitrary barriers to institutionalized persons' free religious exercise, and was expressly designed to confer heightened standards of protection even more rigorous than what the Constitution requires. By its terms, RLUIPA unambiguously and categorically prohibits *all* unjustified substantial burdens imposed on free religious exercise, whether they arise from intentional discrimination, discriminatory refusals to reasonably accommodate, or facially neutral rules of general applicability that cause discriminatory effects.

In upholding the constitutionality of RLUIPA as a valid exercise of Spending Clause power, the courts of appeals have uniformly agreed that RLUIPA provides states with unambiguous notice that the acceptance of federal funds will require them to adhere to RLUIPA's strict statutory standard and to provide the heightened substantive protection Section 3 demands. *See, e.g.*, *Van Wyhe v. Reisch*, 581 F.3d 639, 650 (8th Cir. 2009), pet. pending, No. 09-821, cert. denied, No. 09-953. Given the express clarity of RLUIPA's substantive conditions, states have clear notice that prison officials are not free to discriminate on the basis of religion.

Whether or not RLUIPA effectuates a waiver of Eleventh Amendment immunity, CRREA, by its express terms, unambiguously effectuates a waiver of immunity from suits for money damages for violations by federal funding recipients of statutes prohibiting discrimination, including Section 3 of RLUIPA.

A. CRREA Broadly Applies To Any Federal Statute Prohibiting Discrimination By Recipients Of Federal Funding Assistance.

CRREA provides:

> (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) (emphasis added).

By its terms, CRREA constitutes an unambiguous waiver of the states' Eleventh Amendment immunity against monetary awards for violations of the expressly enumerated statutes, *see e.g.*, *Lane v. Pena*, 518 U.S. 187, 200 (1996), *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 76 (1992) (Scalia, J., concurring), and it broadly applies to any federal statute prohibiting discrimination by recipients of federal funds.

By its terms, CRREA is not limited to statutes that expressly prohibit intentional discrimination. While Title VI and the other enumerated statutes expressly reference discrimination, CRREA does not define that term, and nothing in the statute purports to limit the scope of proscribed conduct in the catch-all provision to any particular form of discrimination or type of discriminatory practice. And, while this Court has construed Title VI and Title IX to reach only instances of purposeful discrimination, *see Alexander v. Sandoval*, 532 U.S. 275, 279-80 (2001), it has expressly recognized that disparate impacts arising from the failure to reasonably accommodate as required by Section 504 of the Rehabilitation Act also constitute a prohibited form of discrimination. *See, e.g.*, *Alexander v. Choate*, 469 U.S. 287, 294-301 & n.20 (1985).

Indeed, this Court has repeatedly recognized that the term "discrimination" covers a wide range of intentional acts and is to be construed broadly—particularly, where, as in CRREA, Congress enacts a broad, general ban rather than a list of specific prohibited practices. *See Gomez-Perez v. Potter*, 553

U.S. 474, 128 S.Ct. 1931, 1939-41 (2008) (rejecting contention that omission of term "retaliation" from the general statutory ban in the Age Discrimination in Employment Act reflected Congress' intent to limit the scope of the broad antidiscrimination prohibition); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (construing blanket antidiscrimination prohibition in Title IX broadly to include retaliation and stating that "'[d]iscrimination' is a term that covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave the statute a broad reach.")

Employing this rule of broad construction, this Court has found the term discrimination covers a variety of unspecified discriminatory practices, and has found non-federal funding recipients liable for intentional violations based on unspecified acts. *See, e.g.*, *Jackson*, 544 U.S. at 172-73 (finding implied private right of action to enforce antidiscrimination prohibition encompasses suit for damages based on retaliation); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 649-50 (1999) (finding student-on-student harassment is discrimination and funding recipients have adequate notice that intentional violations warrant private suits for damages); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281, 290-91 (1998) (finding deliberate indifference to sexual harassment is form of discrimination under Title IX); *Franklin*, 503 U.S. at 74-75 (finding sexual harassment is form of discrimination and is proscribed with sufficient clarity to satisfy *Pennhurst* notice requirement and support private suits for damages).

The Court has further recognized that discrimination is an expansive concept, which includes not only purposeful discrimination based on animus but also unintentional disparate impacts on protected classes and unjustified refusals to reasonably accommodate persons with disabilities. *See*, *e.g.*, *Olmstead v. Zimring*, 527 U.S. 581, 597-602 (1999) (holding that undue institutionalization without reasonable accommodation of persons with mental disabilities qualifies as discrimination under Title II of the American with Disabilities Act); *Choate*, 469 U.S. at 293-300 (recognizing that discriminatory animus is not necessary to establish discrimination, that Rehabilitation Act was enacted to redress discrimination resulting from "apathetic attitudes" not "affirmative animus," and assuming that it proscribes disparate impacts as well as invidious discrimination); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (noting that disparate-treatment plaintiff must establish discriminatory motive or intent but construing Title VII to include disparate-impact liability and proscribe employers' facially neutral policies that, in fact, are "discriminatory in operation").

Most notably, in *Choate*, this Court distinguished its decisions limiting the reach of Title VI and expressly rejected the contention that federal law proscribes only intentional discrimination under the Rehabilitation Act, one of the statutes enumerated in CRREA. *See Choate*, 469 U.S. at 294-95. Given the purpose of the Rehabilitation Act to eliminate barriers to public places, the deprivation of special services and discriminatory effects of facially neutral job

qualifications, the statute's objectives could not be met if a showing of discriminatory intent were required. *See id.* at 294-300. The Court thus assumed that the Rehabilitation Act would reach at least some conduct that has an unjustifiable disparate impact upon the handicapped. *See id.* at 299 & n.20 (distinguishing provisions designed to remedy past discrimination from those requiring reasonable accommodation, which "relates to the elimination of existing obstacles").

The Court has also expressly recognized that the unjustified refusal to reasonably accommodate persons with disabilities is a form of discrimination. *See Southwestern Cmty. Coll. v. Davis*, 442 U.S. 397, 413 (1979) (stating that a "refusal to modify an existing program might become unreasonable and discriminatory. 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.") And it has expressly rejected the contention that discrimination under Title II of the ADA and the Rehabilitation Act is necessarily limited to disparate treatment of individuals on protected grounds vis-à-vis similarly situated individuals in a comparison class. *See Olmstead*, 527 U.S. at 598 & n.10 ("We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA.").

Congress has followed suit. Codifying this Court's construction of the term "discrimination," Congress amended Title VII, which now expressly prohibits disparate-impact discrimination without regard to

discriminatory intent. Title VII expressly defines unlawful employment practices to include disparate impacts on protected classes, which cannot be justified by business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(i). The question is not whether the conduct was intentionally discriminatory but whether the burden is lawfully justified. *Ricci v. DeStefano*, 129 S.Ct. 2658, 2672-77 (2009). Further, unjustified refusals to reasonably accommodate constitute discrimination under Title VII. 42 U.S.C. §§ 2000e-2(a), 2000e(j).

Under Title II of the ADA, discrimination is expressly defined to encompass among its forms, "outright intentional exclusion, . . . failure to make modifications to existing facilities and practices, . . . [and] segregation. . . ." 42 U.S.C. § 12101(a)(5); *see also* 28 C.F.R. § 35.130(b)(7) ("A public entity shall make reasonable modifications in the policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.").

Under the Rehabilitation Act, discrimination is undefined but its implementing regulations expressly define discrimination to include "exclusion from participation in," or "deni[al] [of] the benefits of" federally funded programs, without regard to unequal treatment or discriminatory intent. 28 C.F.R. §§ 41.51(a), (b)(1)(i), (vi), (vii), (b)(3)(ii), (b)(4)(i)-(ii). The unjustified failure to reasonably accommodate is a prohibited discriminatory practice. 28 C.F.R. § 41.53.

The principal point is that in construing the catch-all provision of CRREA and RLUIPA's broad ban on substantially burdensome practices the Court should reject overly formalistic constructions and look instead to the plain meaning of the statutes' broad prohibitions. Discrimination manifests in many forms and practices, and Congress is not required to use magic words, so long as its intent is plain. *See Gomez-Perez*, 128 S.Ct. at 1936-37 (broad antidiscrimination statute plainly prohibited but did not expressly reference retaliation); *CBOCS W., Inc. v. Humphries*, 128 S.Ct. 1951, 1960-62 (2008) (failure to explicitly reference retaliation does not reflect intent to exclude it); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (finding plain meaning of 42 U.S.C. § 1982 proscribed retaliation, despite absence of term "discrimination").

Equally significant, CRREA was enacted in 1986, after this Court's decisions construing the scope of antidiscrimination civil rights statutes like Title VI, Title VII and the Rehabilitation Act. *See*, *e.g.*, *Choate*, 469 U.S. 287 (construing Rehabilitation Act in 1985); *University of Cal. Regents v. Bakke*, 438 U.S. 265 (1978) (construing Title VI); *Griggs*, 401 U.S. 424 (construing Title VII in 1971). Congress was well aware of the issues surrounding the construction and nature of the term "discrimination" when it enacted CRREA. Had Congress intended to restrict the scope of the term to intentional disparate-treatment discrimination, or to limit proscribed practices to exclude disparate-impact discrimination or discriminatory refusals to accommodate, it could have, and presumably would have, done so expressly.

B. RLUIPA Prohibits Substantially Burdensome Discrimination, Whether Based On Disparate Treatment, Disparate Impacts Or Discriminatory Refusals To Accommodate.

Section 3 of RLUIPA broadly provides:

> (a) General rule.
>
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, *even if the burden results from a rule of general applicability*, unless the government demonstrates that imposition of the burden on that person —
>
> (1) is in furtherance of a compelling government interest; and
>
> (2) is the least restrictive means of furthering that compelling interest.
>
> (b) Scope of application. This section applies in any case in which —
>
> (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
>
> (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

42 U.S.C. § 2000cc-1(a)-(b) (emphasis added).

While it does not expressly mention the term "discrimination," RLUIPA's broad, categorical ban unambiguously prohibits *at least* intentional discrimination, and much more—including, facially neutral but substantially burdensome rules of general applicability that result in disparate impacts on, and unjustified refusals to accommodate, institutionalized persons' religious free exercise. Patterned after analogous Spending Clause legislation like Title IX aimed at eradicating discrimination in federal funding programs, RLUIPA is expressly designed to confer heightened standards for religious free exercise.[3]

RLUIPA, by its plain terms, is a "Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a).

By its terms, Section 3 categorically prohibits the imposition of *all* unjustified substantial burdens on religious free exercise, whether they result from purposeful discrimination or discriminatory effects. By enacting a categorical ban, which extends even to those substantial burdens imposed as a result of facially neutral rules of general applicability, and in restoring and extending the strict scrutiny standard to all such

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[3] *See* 42 U.S.C. § 2000cc-5(6) (defining "program or activity" to include Title VI's definition of "program or activity"); *see also Joint Statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) ("The Spending Clause provisions are modeled directly on similar provisions of other civil rights laws.").

burdens, Congress made clear its intent to establish heightened protection for religious free exercise above and beyond the existing constitutional floor.

At minimum, the Free Exercise Clause prohibits invidious religious discrimination and non-neutral facially discriminatory laws that purposefully target religious beliefs. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-34 (1993) (discussing constitutional rule proscribing laws that discriminate against religious beliefs or regulate religious conduct); *Sherbert v. Verner*, 374 U.S. 398, 402-04 (1963) (stating that under the Free Exercise Clause government may not "penalize or discriminate against individuals or groups because they hold religious beliefs abhorrent to the authorities"); *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (holding that prison's refusal to allow Buddhist to practice faith comparable to opportunity afforded other prisoners of conventional faith constituted "palpable discrimination").

Rules, which by object or purpose, infringe upon or restrict religious practice are neither neutral nor of generally applicability and they must be justified by "the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye*, 508 U.S. at 546; *id.* at 533-34, 542-43; *see also Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987) (stating that the Free Exercise Clause "protect[s] religious observers against unequal treatment.") (Stevens, J., concurring in judgment). However, neutral laws of general applicability need not satisfy strict scrutiny, even if they burden religion. *Church of the Lukumi Babalu Aye*, 508 U.S. at 531-32.

RLUIPA, like its predecessor the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb *et seq.*, proscribes *at least* what the Constitution prohibits. Section 3 of RLUIPA provides considerably more protection for institutionalized persons' religious free exercise than does the First Amendment. *Cf. Turner v. Safley*, 482 U.S. 78, 89 (1987) (prison rules of general applicability upheld against free exercise challenge if reasonably related to legitimate penological interest).

Indeed, the very purpose of RLUIPA was to restore strict scrutiny for all substantially burdensome practices and to require governments to satisfy strict scrutiny to justify such burdens—*regardless* of whether they result from intentional discrimination or facially neutral rules of general applicability. *See generally Cutter v. Wilkinson*, 544 U.S. 709, 714-17 (2005) (discussing purpose and history of RLUIPA and RFRA, *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878-87 (1990), and *City of Boerne v. Flores*, 521 U.S. 507, 532-36 (1997)); *see also* 42 U.S.C. § 2000bb(a)(2) ("laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."); *id.* § 2000bb(b)(1) (restoring pre-*Smith* compelling interest test and "to guarantee its application in all cases where free exercise of religion is substantially burdened").[4]

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[4] While no longer applicable against the states, the substantive provisions in 42 U.S.C. § 2000bb-1 mirror those in Section 3 of RLUIPA and were incorporated therein.

RLUIPA's broad substantial burden ban must be construed to proscribe both disparate-treatment and disparate-impact discrimination, in that it provides heightened protection for religious exercise and expressly prohibits unjustified substantial burdens resulting from generally applicable rules.[5] *Cf. Employment Div. v. Smith*, 494 U.S. at 885-86 & n.3. Such a broad ban, which is not limited to particular discriminatory forms or discriminatory practices, must be given a broad construction—particularly, in light of RLUIPA's well-documented history and purpose.

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[5] The courts of appeals have recognized that RLUIPA provides greater protection than the Constitution requires and that Section 3 prohibits discrimination. *See*, *e.g.*, *Lovelace v. Lee*, 472 F.3d 174, 185-88, 194-95 (4th Cir. 2006); *Warsoldier v. Woodford*, 418 F.3d 989, 994-97 (9th Cir. 2005); *see also Truth v. Kent Sch. Dist.*, 542 F.3d 634, 646 (9th Cir. 2008) ("[W]hen Congress passed [RLUIPA], it not only prohibited discrimination against religious groups as such but also limited governments' abilities to impose even neutral nondiscriminatory policies"); *Koger v. Bryan*, 523 F.3d 789, 796 (7th Cir. 2008); *cf. Westchester Day Sch. v. Village of Mamaroneck*, 504 F.3d 338, 350 (2d Cir. 2007) (observing that neutral land use regulations can impose a substantial burden where they are "arbitrarily, capriciously, or unlawfully" applied to religious institutions, which "may reflect bias or discrimination against religion"); *Guru Nanak Sikh Soc'y v. County of Sutter*, 456 F.3d 978, 989-91 (9th Cir. 2006) (finding substantial burden under Section 2 where policies were "inconsistently applied"); *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005) ("the 'substantial burden' provision [in Section 2] backstops the explicit prohibition of religious discrimination . . ., much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination;" thus unjustified burdens give rise to an inference of hostility to religion, or to a particular sect).

It is equally clear that RLUIPA, like the antidiscrimination civil rights statutes discussed above, prohibits unjustified refusals to accommodate religious free exercise, which Congress and this Court have recognized as a form of discrimination.

"RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens." *Cutter*, 544 U.S. at 714. RLUIPA protects the religious liberty of those confined to state-run institutions in which, as this Court observed: "the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise." *Id.* at 720-21 (RLUIPA "alleviates exceptional government-created burdens on private religious exercise" and protects persons who, "unable freely to attend to their religious needs" are "dependent on the government's permission and accommodation for exercise of their religion.").

In hearings spanning three years, Congress documented that "frivolous or arbitrary" barriers impeded the religious exercise of institutionalized persons. *Cutter*, 544 U.S. at 716 (quoting 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) ("Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways")); *id.* at 716 & n.5 (reciting instances of nationwide disparate treatment by state prison officials of inmates on the basis of their religion).

Evidence before Congress demonstrated that in the absence of federal legislation, prisoners, civil detainees and individuals institutionalized in mental hospitals continued to endure substantial burdens in practicing their religious faiths, whether in the form of discriminatory refusals to accommodate religious exercise, arbitrary and frivolous obstacles imposed on the ability to worship, or outright bias and animosity. *See*, *e.g.*, 146 Cong. Rec. S7774-75 (daily ed. July 27, 2000); 146 Cong. Rec. E1563-64 (daily ed. Sept. 22, 2000); H.R. Rep. No. 106-219, 106th Cong. 1st Sess. (July 1, 1999), at 9-10 (summarizing testimony).

Congress heard testimony from witnesses who recounted cases in which prison officials, arbitrarily and without justification, denied prisoners access to food, clothing or religious articles that were required by the prisoners' faiths. H.R. Rep. No. 106-219, 106th Cong. 1st Sess. (July 1, 1999), at 9-10. For example, congressional testimony demonstrated that prison officials disallowed the lighting of Chanukah candles but allowed votive candles, refused to purchase or allow prisoners to receive matzo, which Jews are required to eat on Passover, and refused to let Jewish prisoners fast when their religion so required or take a sack lunch to break their fast at nightfall. *See Protecting Religious Liberty After Boerne v. Flores (Pt. III): Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 1st Sess. 41, 43 (1998) (statement of Isaac Jaroslawicz, Director of Legal Affairs, Aleph Institute); *see also Cutter*, 544 U.S. at 716 n.5 (citing examples).

Congress heard testimony concerning a case in which officials allowed a prisoner to attend Episcopal services but forbade him from taking communion, (*see* 146 Cong. Rec. S7774, S7775), and a case in which prison rules "without a ghost of a reason," prevented Protestant prisoners from wearing crosses, as in *Sasnett v. Litscher*, 197 F.3d 290, 293 (7th Cir. 1999). *See*, *e.g.*, 146 Cong. Rec. S7775 (citing prison that "discriminated against Protestants" by allowing inmates to wear crosses only if attached to a rosary). Congress was particularly concerned with arbitrary and discriminatory refusals to accommodate the religious exercise of prisoners who practice certain faiths, while granting accommodations to others. RLUIPA is thus most accurately described as a civil rights statute intended to protect the religious liberty of members of minority faiths, and religious inmates.

Based on this testimony, Congress concluded that "[i]nstitutional residents' right to practice their faith is at the mercy of those running the institution." 146 Cong. Rec. S7774, S7775.

In light of these findings, and in order "[t]o secure redress for inmates who encountered undue barriers to their religious observances, Congress carried over from RFRA the 'compelling governmental interest'/'least restrictive means' standard." *Cutter*, 544 U.S. at 716-17. In so doing, Congress mandated a more searching standard of review for religious free exercise burdens than the Constitution itself affords. *Cf. Turner*, 482 U.S. at 89.

In light of RLUIPA's plain text, extensive history and unambiguous purpose to categorically prohibit all unjustified substantially burdensome practices, and given the broad construction this Court accords the term "discrimination," it is not reasonable to conclude that RLUIPA is anything other than a statute prohibiting discrimination against religious exercise.

It is thus not surprising that every circuit court that has considered the question has upheld the constitutionality of Section 3 of RLUIPA as a valid exercise of Congress' Spending Clause power, and several have expressly recognized that Section 3 promotes the general welfare by according heightened statutory protection for religious rights and freedoms. *See*, *e.g.*, *Van Wyhe*, 581 F.3d at 650; *Madison v. Virginia*, 474 F.3d 118, 123-29 (4th Cir. 2006); *Cutter v. Wilkinson*, 423 F.3d 579, 584-90 (6th Cir. 2005); *Benning v. Georgia*, 391 F.3d 1299, 1305-09 (11th Cir. 2004); *Charles v. Verhagen*, 348 F.3d 601, 606-11 (7th Cir. 2003); *Mayweathers v. Newland*, 314 F.3d 1062, 1066-67 (9th Cir. 2002), *cert. denied*, 540 U.S. 815 (2003); *see also Sossamon v. Texas*, 560 F.3d 316, 328-29 (5th Cir. 2009), cert. granted, No. 08-1438 (RLUIPA "was passed pursuant to the Spending Clause"); *Smith v. Allen*, 502 F.3d 1255, 1270, 1274 n.9 (11th Cir. 2007) (RLUIPA "hinges on Congress' Spending Power").

Virtually since its inception, the circuit courts have recognized that RLUIPA, like analogous Spending Clause legislation conditioning the receipt of federal funds on the states' voluntarily-assumed obligation to

refrain from discrimination, is at its core an antidiscrimination statute.

In upholding the constitutionality of Section 3 vis-à-vis the states, the Ninth Circuit observed that:

> [P]rotecting religious worship in institutions from substantial and illegitimate burdens *does* promote the general welfare. The First Amendment, by prohibiting laws that proscribe the free exercise of religion, demonstrates the great value placed on protecting religious worship from impermissible government intrusion. By ensuring that governments do not act to burden the exercise of religion in institutions, RLUIPA is clearly in line with this positive constitutional value. Moreover, by fostering non-discrimination, RLUIPA follows a long tradition of federal legislation designed to guard against unfair bias and infringement on fundamental freedoms. *See*, *e.g.*, Title VI, 42 U.S.C. § 2000d *et seq.* (2002); Title VII, 42 U.S.C. § 2000e *et seq.* (2002); Title IX, 20 U.S.C. § 1681 (2002).

Mayweathers, 314 F.3d at 1066-67 (emphasis in original); *see also Madison*, 474 F.3d at 128 (stating that "Congress has a legitimate interest in seeing how federal funds are spent. Congress also has a legitimate interest in protecting the religious freedoms of inmates and in not funding systems that violate them.").

The Seventh Circuit has agreed:

> RLUIPA follows in the footsteps of a long-standing tradition of federal legislation that seeks to eradicate discrimination and is 'designed to guard against unfair bias and infringement on fundamental freedoms.' . . . Given the Supreme Court's directive to defer substantially to Congress' judgment, we agree with the Ninth Circuit that RLUIPA's attempt to protect prisoners' religious rights . . . falls squarely within Congress' pursuit of the general welfare under its Spending Clause authority.

Charles, 348 F.3d at 607 (citing *Mayweathers*); *see also Cutter*, 423 F.3d at 589 (following *Charles* and *Mayweathers* and stating that "RLUIPA requires states to refrain from acting in a way that interferes with inmates' exercise of religion"); *Benning*, 391 F.3d at 1308-09 (discussing purpose of RLUIPA to protect religious freedom and stating that "RLUIPA . . . 'leaves individual states free to eliminate the discrimination in any way they choose, so long as the discrimination is eliminated.'") (citation omitted).

Just as significantly, the courts of appeals have uniformly recognized that the statutory language of RLUIPA is sufficiently clear to satisfy the second factor in *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)

—-namely, that the *substantive conditions on the receipt of federal funds be set forth unambiguously*.[6]

In the Spending Clause context, Congress has "broad power to set the terms on which it disburses federal money to the States." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). While Congress cannot force the states to enact or administer a federal regulatory scheme, the Spending Clause is a "permissible method of encouraging a State to conform to federal policy choices," because "the ultimate decision" of whether to conform is retained by the states, which can always decline the federal grant. *New York v. United States*, 505 U.S. 144, 168 (1992).

When Congress attaches conditions to the states' acceptance of federal funds, the conditions must be set out "unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). "[L]egislation enacted pursuant to the spending power is much in the nature of a contract," thus, in order for states to be bound by "federally imposed conditions," they must be accepted "voluntarily and knowingly." *Id.* States

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[6] Under *Dole*, this Court placed several restrictions upon Congress' authority to persuade via the Spending Clause: (1) the legislation must be in pursuit of the general welfare, (2) conditions on the state's receipt of federal funds must be set out *unambiguously so that participation is the result of a knowing and informed choice*, (3) conditions on federal funds must be related to the federal interest in particular national projects or programs, (4) conditions must not be prohibited by other constitutional provisions, and (5) the circumstances must not be so coercive that "pressure turns into compulsion." *Dole*, 483 U.S. at 207-11.

accept conditions knowingly and voluntarily where the "statute furnishes clear notice regarding the liability at issue." *See Arlington*, 548 U.S. at 296.

RLUIPA unambiguously conditions the receipt of federal funds on the states' knowing and informed consent to enforce RLUIPA's heightened statutory protection for inmates' religious exercise. There is no dispute among the circuit courts of appeals that the plain text of RLUIPA furnishes clear notice to the states regarding liability for infringing inmates' right to religious exercise and to be free from unjustified substantial burdens on religion as a condition of federal funds. *See*, *e.g.*, *Van Wyhe*, 581 F.3d at 650 ("RLUIPA . . . plainly condition[s] the state's receipt of federal funds on the requirement that the state provide RLUIPA's heightened religious protection to inmates."); *Madison*, 474 F.3d at 125; *Cutter*, 423 F.3d at 585-86; *Benning*, 391 F.3d at 1035-36; *Charles*, 348 F.3d at 607; *Mayweathers*, 314 F.3d at 1067.

Congress has the power to ensure its funds are not expended to support state-sponsored discrimination. In accepting federal financial assistance, participating states voluntarily and knowingly accept the obligation to enforce RLUIPA's substantive provisions, which, given this Court's precedents and the courts of appeals' construction, *cannot reasonably be construed to permit discrimination by recipient states*.[7] RLUIPA unambiguously constitutes clear notice under *Pennhurst* that discrimination, in any form, is barred.

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[7] Every state in the union accepts federal funding for its prisons. *See Cutter*, 544 U.S. at 716 n.4.

C. Section 3 of RLUIPA Need Not Reference "Discrimination" In Order To Prohibit Discrimination Or To Constitute Clear Notice That States Are Liable For Discrimination.

Section 3 of RLUIPA need not include the term "discrimination" in order to unambiguously prohibit discrimination, and to put states on clear notice that by accepting federal funds they agree to refrain from discrimination against inmates on the basis of religion. As discussed, the absence of the term "discrimination" does not render Section 3 ambiguous, or permit a reasonable inference that states that knowingly and voluntarily accept funds can discriminate in any form.

Three circuits have concluded that Section 3 is not a "statute prohibiting discrimination" under CRREA because, unlike the other statutes enumerated in CRREA, Section 3 lacks an express textual reference to the term "discrimination" and thus it does not unambiguously prohibit discrimination. *See*, *e.g.*, *Holley v. California Dep't of Corr.*, 599 F.3d 1108, 1113-14 (9th Cir. 2010); *Van Wyhe*, 581 F.3d at 654-55; *Madison*, 474 F.3d at 133. The Eighth Circuit, for example, reasoned that Section 3 "does not unambiguously prohibit discrimination—it prohibits substantial burdens on religious exercise, without regard to discriminatory intent." *Van Wyhe*, 581 F.3d at 654. "Absent an unequivocal textual indication that CRREA applies to Section 3 institutionalized-person-RLUIPA claims, we will not rely on CRREA to effectuate a knowing waiver of sovereign immunity from money damages on those claims." *Id.* at 655.

But that reasoning is fundamentally flawed and contrary to the precedents of this Court.[8]

Even if the *scope of a waiver* of Eleventh Amendment immunity must extend, like a gratuitous waiver of the United States' federal sovereign immunity, unambiguously to monetary damages in the statutory text, that rule does not apply to the *scope of liability* in the Spending Clause context. Rather, the scope of liability is governed by the clear notice requirement under *Pennhurst* and *Arlington*. This Court has never held that Congress must unambiguously delineate every potential type of prohibited practice in order to put states on notice of the scope of substantive liability. Rather, the test is whether states accept federal funds with informed consent that they could be held liable for violations.

Thus, in *Forest Grove Sch. Dist. v. T.A.*, 129 S.Ct. 2484 (2009), the Court considered whether the Individuals with Disabilities Education Act (IDEA) requires school districts to reimburse the private-school tuition of a student who had been diagnosed with a learning disability. The Court found that reimbursement was authorized, despite the absence of an express textual reference to private education costs.

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[8] As an initial matter, CRREA itself could not contain an express reference to RLUIPA because it was enacted 14 years before RLUIPA was passed. And, as discussed above, the antidiscrimination statutes enumerated in CRREA are not necessarily limited to intentional discrimination, and RLUIPA, by its terms, *does* in fact cover, at least, intentional discrimination.

See id. at 2494. Because the Act was enacted pursuant to the Spending Clause, the question under *Pennhurst* was whether states had notice that they could be liable for reimbursement costs. The Court held that the Act provided unambiguous notice of the reimbursement condition because, although not expressly referenced, state funding recipients had agreed to provide a "free appropriate public education" and thus were on notice that they are responsible for reimbursement costs in the event such education was not provided. *See id.*

The Court further held that: "States have in any event been on notice at least since our decision in *Burlington* that IDEA authorizes courts to order reimbursement of costs of private special education services in appropriate circumstances. *Pennhurst's* notice requirement is thus clearly satisfied." *Id.*; *see also School Comm'n of Burlington v. Dep't of Ed. of Mass.*, 471 U.S. 359, 369 (1985) (holding that reimbursement of costs is authorized under IDEA as "appropriate" relief in light of purpose of the Act).

In contrast, in *Arlington*, 548 U.S. at 294, the Court considered whether IDEA's fee-shifting provision authorizes courts to award expert services fees, which are not expressly referenced in the text of the statute, to prevailing parents in IDEA actions. Because IDEA was enacted pursuant to the Spending Clause, the Court started with *Pennhurst* and queried whether a state official would clearly understand that in accepting federal funds one of the obligations would be to compensate prevailing parents for expert fees. *See id.* at 296.

The Court did not ask whether expert fees were unambiguously referenced in the statutory text. Rather, the Court construed the plain text of the fee-shifting provision, which expressly allowed for prevailing party attorneys' fees as part of costs, as well as other provisions of the Act, and this Court's decisions construing the term "costs." *See id.* at 295-303. The Court held that IDEA did not give states "unambiguous notice" regarding liability for expert fees as a condition of accepting federal funds. *Id.* at 300. Had the rule simply been whether IDEA contained an unequivocal textual reference to expert fees, the Court's analysis of decisional law and statutory construction would have been superfluous.

The issue in *Arlington* and *Forest Grove*, and in any Spending Clause case applying *Pennhurst*, is whether there is unambiguous *notice* to the states, not whether there is an unambiguous express *reference* in the text.

This Court's recent decision in *Gomez-Perez*, 128 S. Ct. 1931, further illustrates the point, albeit in the context of a waiver of federal sovereign immunity. There, this Court considered whether the prohibition in the Age Discrimination in Employment Act against discrimination in the federal sector based on age covered retaliation. This Court construed the plain text of the statute's broad antidiscrimination ban in light of its remedial purpose and the Court's precedents interpreting similar antidiscrimination bans in Title IX and 42 U.S.C. § 1982, and concluded that retaliation was included within the plain meaning of "discrimination based on age." *Id.* at 1936-39.

The Court reached this conclusion despite the fact that the term "retaliation" was not expressly referenced in the federal-sector provision of the Act, and despite the fact that another provision in the statute expressly prohibited retaliation in the private sector. According to the Court, the provisions were not comparable because while the private-sector provision set forth a detailed list of specifically prohibited practices, the federal-sector provisions contained a broad categorical prohibition on discrimination generally.[9] Thus, while an omission of "retaliation" from the detailed list could be interpreted as suggesting that Congress did not want to reach retaliation, the same could not be inferred from the failure to expressly reference retaliation in the federal-sector provision's broad prohibition. *See id.* at 1940-41.

More significantly, the Court expressly rejected the contention that the construction of the Act's substantive provision concerning the scope of liability was subject to the same strict rules governing the scope of waivers of federal sovereign immunity. The Court acknowledged the rule that "'[a] waiver of the Federal Government's sovereign immunity must be

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[9] This reasoning applies with equal force to RLUIPA. That Section 2 expressly references discrimination in the land-use provisions does not render Section 3 ambiguous. Section 3's broad prohibition against all substantially burdensome prison regulations necessarily includes intentionally discriminatory and facially neutral practices, which result in disparate impacts or discriminatory denials of accommodation. Section 2 sets out several specific prohibited practices, including any discriminatory land use practice, even if it does not impose a substantial burden.

unequivocally expressed in statutory text' and 'will be strictly construed, in terms of its scope, in favor of the sovereign.'" *Id.* at 1942-43 (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)). But the Court expressly held that this rule did not apply to the construction of the substantive provision outlawing discrimination. The Court held: "That the waiver [of immunity] in § 633a(c) applies to § 633a(a) [substantive] claims does not mean that § 633a(a) must surmount the same high hurdle as § 633a(c)." *Id.* at 1943; *see also United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472-73 (2003) (where one statutory provision unequivocally provides for a waiver of sovereign immunity to enforce a separate statutory provision, that latter provision "'need not . . . be construed in the manner appropriate to waivers of sovereign immunity'" (quoting *United States v. Mitchell*, 463 U.S. 206, 218-19 (1983))).

Perhaps even more significantly, and in keeping with the Court's decisions in the Spending Clause context, the Court stated that the antidiscrimination ban would cover retaliation *even if the strict rules regarding unequivocal textual waivers of sovereign immunity applied to substantive provisions*. *Id.* The Court held: "But in any event, even if § 633a(a) must be construed in the same manner as § 633a(c), we hold, for the reasons previously explained, that § 633a(a) prohibits retaliation with the requisite clarity." *Id.* Even if the "unequivocally expressed in the statutory text" rule applied, retaliation, which is not expressed, was sufficiently clear to be within the scope of liability.

This reasoning applies with equal force to RLUIPA. The waiver of the states' Eleventh Amendment immunity from private suits for monetary damages is set forth unequivocally in the statutory text of CRREA, and it expressly applies to violations of the provisions of statutes prohibiting discrimination. Section 3 of RLUIPA does not need to include an express reference to discrimination or discriminatory intent in order to find that it is a statute prohibiting discrimination, or to clearly notify states that accept federal funds that religious discrimination is barred. Even if the unequivocal expression rule does apply, for the reasons discussed above, substantially burdensome discrimination is proscribed with sufficient clarity.

Finally, regardless of whether Section 3 expressly applies to discrimination or discriminatory intent, this Court has recognized that *Pennhurst* does not apply to intentional violations of Spending Clause statutes that were enacted to proscribe specified conduct by federal funding recipients. *See*, *e.g.*, *Davis*, 526 U.S. at 642 ("*Pennhurst* does not bar a private damages action under Title IX where the funding recipient engages in intentional conduct that violates the clear terms of the statute."). This Court has observed: "*Congress surely did not intend for federal moneys to be expended to support intentional actions it sought to proscribe by statute*." *Franklin*, 503 U.S. at 75 (emphasis added).

Here, states have clear notice that intentional violations of Section 3 will subject them to liability.

Whether driven by discriminatory intent, or something else, intentionally-imposed unjustified

substantial burdens are unambiguously proscribed by RLUIPA, and *Pennhurst* notice is necessarily satisfied.

In the case at bar, Petitioner alleged that Respondents allowed inmates on disciplinary confinement to leave their cells for secular activities, but not to attend worship services. Pet. App. 3a. In the case of *Sisney v. Reisch*, petitioner alleged that prison officials denied Jewish inmates adequate time for group worship, while Catholics, Christians and Native Americans were given more time for group services, and that petitioner was denied a request to pray in a succah booth during the Jewish festival of Sukkot, while Native Americans had regular access to a sweatlodge, which was located on the prison yard and used by hundreds of inmates. *See Sisney v. Reisch*, 533 F. Supp. 2d 952, 976-80 (D.S.D. 2008). The district court found these facts established a substantial burden on religious exercise, and a question of fact on whether that burden was justified under RLUIPA.[10]

The policies at issue in both cases plainly burdened each inmate's practice of his religion and discriminated against religious inmates in the case of *Sossamon*, and against Jewish inmates in the case of *Sisney*. It is hardly conceivable that states lack clear notice that such substantially burdensome and discriminatory actions, if unjustified by compelling government interests, would violate the plain terms of RLUIPA.

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[10] The Eighth Circuit affirmed the denial of summary judgment on the succah booth claim and reversed the group study ruling.

In sum, the absence of a textual reference to "discrimination" does not render RLUIPA ambiguous. States have notice sufficient for them to knowingly and voluntarily accept federal funds fully cognizant of the consequences of their participation—namely, that they will be subject to RLUIPA's heightened protections. Given the nature of the contractual relationship that arises between Congress and funding recipient states when Congress legislates under the Spending Clause, the plain text and purpose of RLUIPA's categorical ban on all unjustified substantial burdens, and this Court's broad construction of discrimination, RLUIPA cannot reasonably be construed to allow states to knowingly and voluntarily accept federal funds for their prisons and then use those funds to discriminate against inmates, in any form, on the basis of religion.

To suggest that RLUIPA applies to nondiscriminatory substantial burdens but offers no remedy for intentionally discriminatory burdens on religious exercise is to ignore the stated remedial purpose of RLUIPA and to defy common sense.

RLUIPA is a statute prohibiting discrimination, and CRREA unambiguously effectuates a waiver of immunity from monetary damages. At minimum, intentional violations of RLUIPA, like other antidiscrimination statutes enacted under the Spending Clause, give rise to claims for private damages.

CONCLUSION

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

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Respectfully submitted,

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