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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Petitioner and the State agree on one thing. The phrase "appropriate relief" necessarily "asks whether damages relief would be appropriate *in this context*." Resp. Br. 18 (emphasis changed). But the relevant context is not, as Texas assumes, the context that would exist if the State had forgone federal funding. That would be an empty inquiry because, without the acceptance of funds, *no* relief would be appropriate, not even an injunction. Instead, the question is whether damages are appropriate to enforce a Spending Clause civil rights statute against a state that has already voluntarily surrendered much of its sovereign immunity in exchange for federal funds, consenting to be sued on the same terms as private entities and local governments that are subject to the same private right of action for the same "appropriate relief."

To be sure, even in this context, damages are an appropriate remedy only when the statute unambiguously provides for them. But that is true whether the defendant is a state, clothed in sovereign immunity, or a local government, protected by the limitations of the Spending Power. And in *Barnes v. Gorman*, 536 U.S. 181 (2002), this Court concluded that two statutes materially indistinguishable from the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.* – each also authorizing appropriate relief against funding recipients – unambiguously provided for damages remedies.

The State insists that this conclusion does not apply to state defendants under RLUIPA because

RLUIPA's open-ended statutory language permits courts to take into account a defendant's sovereign status in deciding what constitutes "appropriate relief." But that argument cannot be squared with this Court's decisions or the text of the statute. This Court has repeatedly construed the remedial scope of waivers by employing traditional tools of statutory construction to decide how a statute would apply to the ordinary defendants with whom a state has thrown its lot in exchange for federal funds. The sovereign status of the defendant is taken into account not *during* the process of statutory construction, but at the *end*, by resolving any remaining ambiguity in the sovereign's favor. In this case, ordinary tools of construction lead to the same result this Court reached in *Barnes*: if "appropriate relief" means anything, it means money damages.

In any event, the Rehabilitation Act Amendments of 1986 independently put the State on notice that it was subject to the same damages remedy as private defendants under any "statute prohibiting discrimination" by recipients of federal funds. 42 U.S.C. § 2000d-7. Texas is mistaken in asserting that Section 3 of RLUIPA is not a provision "prohibiting discrimination." Tellingly, the State admits that Section 3, *in fact*, pervasively prohibits discrimination. This is not, as the State would have it, an accident. The text and legislative history demonstrate that Congress crafted RLUIPA to both encompass the kind of discrimination that violates the First Amendment and to provide additional protection against failures to reasonably accommodate religious practices.

In this way, RLUIPA is indistinguishable from Section 504 of the Rehabilitation Act, which Section 2000d-7 specifically enumerates as a statute "prohibiting discrimination." Both Section 504 and RLUIPA reflect Congress's determination that sometimes, in order to provide equal opportunity to all, governments must treat differently situated people differently. This Court need not embrace that view of discrimination as a constitutional matter in order to acknowledge that RLUIPA is a "*statute* prohibiting discrimination" within the meaning of Section 2000d-7.

I. RLUIPA Unambiguously Warns States That The "Appropriate Relief" To Which They Are Consenting Includes Damages.

The State makes a seemingly simple argument: waivers of sovereign immunity must be clear; the words "appropriate relief" are not self-defining; therefore the phrase cannot authorize a damages remedy. Resp. Br. 18-19. But even the State cannot fully embrace its own argument. If "appropriate relief" is too ambiguous to authorize damages, it is also too ambiguous to encompass injunctions, declaratory relief, or indeed any remedy at all. Unwilling to admit that its consent to suits for "appropriate relief" was an empty promise, Texas seems to acknowledge that despite its "entirely question-begging" nature, Resp. Br. 18, RLUIPA's remedial provision must include at least prospective injunctive relief, *see* Resp. Br. 35.

That concession is well-founded, but incomplete. The remedial scope of a waiver of immunity is determined by applying ordinary tools of statutory

construction to decide which remedies are clearly encompassed by the statute. And RLUIPA's remedial provision, so construed, unambiguously embraces both equitable and legal relief. *See infra* Section I(B). But this case is even easier than that. This Court has already held, in *Barnes v. Gorman*, that damages are appropriate relief to enforce *any* Spending Clause statute. And the State has identified no convincing reason why that precedent does not apply to resolve this case.

A. The Court's Decision In *Barnes v. Gorman* Applies To State Recipients Of Federal Funds.

In *Barnes*, this Court held that a federal funding recipient is "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. The State seems to accept that in light of that holding, damages must be considered "appropriate relief" under RLUIPA as well, at least as applied to every other non-state defendant. Resp. Br. 27. Texas argues, however, that the meaning of the single statutory phrase "appropriate relief" changes back and forth, meaning "no damages" for state defendants and "yes damages" for all others, even if they are both defendants in the same action. That vacillating meaning, the State argues, is compelled by the Eleventh Amendment and a passage in *Lane v. Pena*, 518 U.S. 187 (1996). It is not.

1. *The Decision In* Barnes *Did Not Turn On The Identity Of The Defendant As A Local Rather Than A State Government.*

Texas argues first that *Barnes* does not apply here because, unlike local governments, a state is subject to suit for damages only if its waiver of sovereign immunity "extend[s] unambiguously to such monetary claims." Resp. Br. 13 (quoting *Lane*, 518 U.S. at 192).

But the local governments in *Barnes* enjoyed the same protection, although it arose from the limits of the Spending Clause rather than from principles of sovereign immunity. Both the Eleventh Amendment and the Spending Clause prohibit subjecting defendants to damages actions absent their consent. *Compare Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (Spending Clause), *with Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246-47 (1985) (Eleventh Amendment). And as the State admits, Resp. Br. 31, this Court has implemented these identical constitutional protections through the same clear statement rule, intended to ensure that state and local governments alike may "exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst*, 451 U.S. at 17.

As a result, Texas is no different than the defendants in *Barnes*, who equally could have asserted that "monetary relief is distinctly *inappropriate* unless the text unmistakably says otherwise, not the other way around." Resp. Br. 19. Yet, this Court in *Barnes* concluded that Title II of the Americans with Disabilities Act and Section 504 – both of which, like RLUIPA, contained express

remedial provisions, which the Court construed to authorize "appropriate relief," *see* Petr. Br. 15 & n.6 – unambiguously authorize a damages remedy. *Barnes*, 536 U.S. at 187.

While Texas may disagree with that holding, it cannot distinguish it. To be sure, when a state consents to suit, it gives up a constitutional privilege other defendants do not enjoy. *See* Resp. Br. 31-32. But as long as a state has clearly agreed to damages suits, it makes no difference whether it otherwise could raise one constitutional objection to the trial or ten. It necessarily waives them all by accepting federal funds conditioned on submission to such suits. The only question is whether the condition is unambiguous, which turns on the clarity of the statute, not the identity of the defendants.

2. Lane v. Pena *Does Not Preclude Applying* Barnes *To States.*

The State nonetheless argues that *Lane v. Pena* precludes applying *Barnes* to a state. Resp. Br. 27-28. But the question of what constitutes appropriate relief against a sovereign was not even before the Court in *Lane* and, if anything, the decision supports the opposite conclusion.

In *Lane*, as in *Barnes*, this Court construed the enforcement provision of Section 504 of the Rehabilitation Act.[1] The question in *Lane*, however, was what kinds of federal agencies were appropriate *defendants,* not what kinds of remedies were

[1] *See Lane*, 518 U.S. at 192; *Barnes*, 536 U.S. at 184-85.

appropriate *relief*. *See* 518 U.S. at 192-93. In fact, the Court expressed no doubt that if the defendant in *Lane* had been a "federal provider" of financial assistance, Section 504 would have authorized damages against it, consistent with the Court's later decision in *Barnes*. *See id.* at 191 (explaining that Section 504 expressly incorporates the remedies of Title VI, which "provides for monetary damages awards"); *id*. at 193 (holding that the Rehabilitation Act "does not, without more, establish that Congress has waived the Federal Government's immunity *beyond the narrow category of § 504(a) violations committed by federal funding agencies acting as such – that is, by 'Federal provider[s]'*") (emphasis added). Indeed, if the Court had believed, as Texas insists, that the language of the Act were too ambiguous to authorize damages against *any* sovereign defendant, the central question addressed by the Court – what kinds of federal agencies were subject to Section 504 remedies – would have been beside the point.

Thus, *Lane*'s statement that "the Federal Government's sovereign immunity prohibits wholesale application of *Franklin* [*v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992)] to actions against the Government," 518 U.S. at 196-97, cannot be read to imply that the Court was refusing to apply *Franklin*'s conception of appropriate relief to sovereign defendants. To the contrary, the Court relied on *Franklin* for the proposition that Section 504 authorized damages actions against appropriate federal defendants. *Id*. at 191 (citing *Franklin*, 503 U.S. at 70). Instead, the Court was simply rejecting Lane's assertion that *Franklin* supported inferring a cause of action against federal defendants who were

mentioned nowhere in the text of the waiver. *Id*. at 196.

Moreover, applying *Barnes* to a state is entirely consistent with *Lane*'s observation that "the available remedies" against the United States "are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived." 518 U.S. at 196-97 (citation and internal quotation marks omitted). Petitioner does not ask this Court to imply an "appropriate remedies" clause into RLUIPA (as *Franklin* did for Title IX). RLUIPA's remedial provision is express.

The State is thus wrong to insist that petitioner's case depends on a presumption, imported from *Bell v. Hood*, 327 U.S. 678 (1946), that "all damages are available unless Congress expressly says otherwise." Resp. Br. 29. RLUIPA's express remedial provision renders the presumption entirely unnecessary here. Thus, petitioner does not rely on *Bell* at all, and he relies on *Franklin* only for the separate teaching, later confirmed in *Barnes*, that damages constitute "appropriate relief" for the violation of a Spending Clause statute. And, contrary to the State's insistence, the Court did not hesitate in *Lane* to apply that same understanding to a federal sovereign.

3. Barnes' *Analysis Comports With Eleventh Amendment Principles.*

The State suggests that *Barnes*' determination of what constitutes appropriate relief cannot apply to states because the Court employed a mode of interpretation – relying on an analogy to contract remedies – that is inconsistent with the form of

statutory analysis required by the Eleventh Amendment. Resp. Br. 27-31. Precedent forecloses that argument at every turn.

1. Because a waiver of sovereign immunity must be "unequivocal and textual," Resp. Br. 15 (citation omitted), Texas contends that a statute authorizing "appropriate" relief can never satisfy the sovereign immunity clear statement rule because, it says, the phrase "appropriate relief" is "entirely question-begging" and "offers no 'meaningful guidance' to courts or to the States," Resp. Br. 18 (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683 & n.2 (1983)).

That argument, however, defies the very authority on which the State relies. In *Ruckelshaus*, after observing that the word "appropriate," standing alone, did not determine when attorney's fees should be awarded against the United States under the Clean Air Act, the Court followed the same analysis as *Barnes* – it looked to what awards were considered "appropriate" in similar suits involving private parties. *Ruckelshaus*, 463 U.S. at 683-86.

Likewise, in *West v. Gibson*, 527 U.S. 212 (1999), the Court did not conclude that the phrase "appropriate remedies" was too ambiguous to authorize compensatory damages against the federal government. Instead, the Court concluded that the phrase included damages in light of the statute's "language, purposes, and history." *Id.* at 217. The State insists that *West* recognized a damages remedy because "Congress *explicitly* made damages available in the text of the statute." Resp. Br. 23. But that is simply not true. While the text of Title VII explicitly provided for compensatory damages in *lawsuits* by

private plaintiffs, that provision said nothing about the remedies available in administrative proceedings. *See West*, 527 U.S. at 220-21 (noting that the litigation provision "says nothing about the EEOC"); *id*. at 222 (declining to decide whether litigation waiver was sufficient to waive immunity to damages in administrative proceedings).

2. In fact, the Court has repeatedly explained that once a sovereign has voluntarily submitted to suit, courts must apply ordinary principles of statutory construction to construe the scope of a sovereign's waiver. *See, e.g.*, *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589-90 (2008) (collecting cases); *see also, e.g.*, *Gomez-Perez v. Potter*, 553 U.S. 474, 487-88 (2008) (looking to legislative history and the Court's prior cases construing similar language to determine scope of federal waiver under Age Discrimination in Employment Act); *Orff v. United States*, 545 U.S. 596, 602-04 (2005) (drawing on prior judicial understanding of term of art and the Federal Rules of Civil Procedure to analyze federal waiver under Reclamation Reform Act); *United States v. Williams*, 514 U.S. 527, 532 (1995) (construing federal waiver in light of the "broad common-law remedy the statute displaced"); *Ardestani v. INS*, 502 U.S. 129, 136-37 (1991) (considering legislative purpose to analyze waiver of federal immunity in administrative proceedings under Equal Access to Justice Act); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (reading federal waiver to encompass judicially developed doctrine of equitable tolling); *Ruckelshaus*, 463 U.S. at 686-93 (considering "historic fee-shifting principles" and legislative

history to construe federal waiver under Clean Air Act).

Sovereignty is respected not by jettisoning established principles of statutory construction, but by resolving any ambiguity that remains at the end of the statutory analysis in the sovereign's favor. *Richlin*, 553 U.S. at 589-90.[2]

Barnes thus did not depart from sovereign immunity principles by relying on an analogy to private contract remedies. To the contrary, in looking to analogs, the Court has repeatedly asked whether a *private party* would be liable for monetary relief, not – as Texas would have it – whether the relief would be appropriate against an unconsenting sovereign. *See, e.g.*, *Richlin*, 553 U.S. at 580-82 (looking to treatment of paralegal costs under analogous fee-shifting statutes, as applied against non-sovereign defendants, to define the scope of the United States' waiver for attorney's fees); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475-76 (2003) (analogizing to private trust law to determine damages were available against United States); *Ruckelshaus*, 463 U.S. at 683-84 & nn.3-5 (looking to analogous statutes authorizing fee awards against non-sovereign defendants to determine when

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[2] The Court has applied a more stringent test in determining whether a sovereign has consented to suit at all. *See, e.g.*, *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682-84 (1999); *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). But Texas does not dispute that the text of RLUIPA meets that test. *See* Resp. Br. 14; *see also* 42 U.S.C. §§ 2000cc-2(a) , 2000cc-5(4)(A)(i) .

fee awards are "appropriate" against United States); *cf. Gomez-Perez*, 553 U.S. at 487-88, 490 n.6 (relying on interpretation of "discrimination" in private race discrimination cases to find that federal government's waiver of immunity to age "discrimination" suits encompasses retaliation claims).[3]

Thus, this Court has recognized that damages are an appropriate remedy against the United States for breach of contract – even though neither the Tucker Act nor any other federal statute specifically authorizes that relief – because damages are a traditional remedy in private contract suits. Petr. Br. 33-34. Having consented to private contract litigation, the federal government could hardly argue, as the State does here, that its sovereign status should be taken into account to render ordinary contract remedies inappropriate. By the same token, in consenting to suit for "appropriate relief" for violations of a Spending Clause contract, Texas

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[3] In some instances, there will be no relevant analog to which the Court could turn. *See, e.g.*, *United States v. Nordic Vill., Inc.*, 503 U.S. 30 (1991) (construing Bankruptcy Act). And the appropriate analog obviously depends on context – the contract analogy applied in *Barnes*, for example, would have no application to a statute that unilaterally waives a sovereign's immunity. *See* Petr. Br. 31-33. The contract analogy thus did not apply in *Lane*, not because the case involved a *federal* defendant, *contra* Resp. Br. 28, but because it involved a *unilateral* waiver of immunity. The analogy would be equally inapt to construe a state statute unilaterally waiving Eleventh Amendment immunity.

unambiguously agreed to traditional contract remedies for violations of RLUIPA.

Texas claims that the federal contracting example is inapt, arguing that the Tucker Act itself implicitly creates a cause of action for breach of contract damages. Resp. Br. 32-34. But this Court has repeatedly recognized that the Tucker Act does not create any cause of action or authorize any form of relief. *See, e.g.*, *Hatzlachh Supply Co., Inc. v. United States*, 444 U.S. 460, 465 n.5 (1980) (explaining that the Act is "only a jurisdictional statute . . . and does not create a substantive right to money damages"). Indeed, if the Tucker Act created a cause of action for damages for every category of claim enumerated in the statute, it would create a right of damages against the United States for the violation of "any Act of Congress," 28 U.S.C. § 1491(a)(1), even if the underlying statute itself provided no such relief. But this Court has repeatedly rejected that proposition. *See, e.g.*, *United States v. Mitchell*, 463 U.S. 206, 216 (1983) (requiring plaintiff to demonstrate that the statute authorizes a damages claim against the federal government).

B. The Text, Context, And Purposes Of RLUIPA Confirm That "Appropriate Relief" Includes Damages Actions Against States.

Texas suggests that even if *Barnes* generally applies to states under other Spending Clause statutes, RLUIPA is different because its use of the word "appropriate" allows for variable treatment of different kinds of defendants. Resp. Br. 18-19. But that argument is inconsistent with the Court's

general approach to resolving the remedial scope of waivers, which asks what relief is clearly authorized against non-sovereign defendants in order to determine what remedies the sovereign has accepted by submitting to suit on par with other defendants. *See supra* at 11-13. Moreover, the text, structure, and purposes of RLUIPA belie any suggestion that Congress intended to give states special dispensation from the damages remedy that applies to every other RLUIPA defendant.

First, by the time Congress enacted RLUIPA, this Court had used the phrase "appropriate relief" as shorthand to describe the set of remedies presumptively available to enforce Spending Clause civil rights statutes, which includes damages. *See* Petr. Br. § I.A. The State points out that the phrase "appropriate relief" was also used in RLUIPA's immediate predecessor, the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*, which is not a Spending Clause statute. Resp. Br. 23. True enough. But that proves nothing about what "appropriate relief" meant under RFRA,[4] and it proves even less about what "appropriate relief" means when it is used in legislation self-consciously modeled on other Spending Clause civil rights legislation, a context in which the phrase has a well-established meaning under this Court's precedent. *See* Petr. Br. 14; *Joint Statement of Senator Hatch*

[4] Texas implies that damages were not considered "appropriate relief" against states under RFRA, Resp. Br. 6-7, but cites only a single case against the federal government, decided six years after RLUIPA was enacted, Resp. Br. 20.

and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000, 146 Cong. Rec. 16,698, 16,699 (2000) ("The Spending Clause provisions are modeled directly on similar provisions in other civil rights laws.").[5]

Second, Texas's reading of "appropriate relief" ignores the longstanding tradition in the law that damages, rather than equitable relief, are the presumptively appropriate (and sufficient) remedy for the violation of individual rights. *See* Petr. Br. 21. Nor does Texas even acknowledge that Congress has consistently authorized damages as an appropriate remedy for violations of federal civil rights statutes, even against states. *See* Petr. Br. 18-19.

Third, Texas seems to acknowledge that "appropriate relief" must mean *something* – otherwise there would be no point to subjecting states to suit – and so accepts that the phrase includes equitable and declaratory relief. But that makes the

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[5] The State points to several statements made by witnesses in support of an unenacted predecessor to RLUIPA, to the effect that the prior bill would not "abrogate" states' sovereign immunity. Resp. Br. 6-7 & nn.1-2. When those comments were made, Congress had recently removed a provision from the bill that would have unilaterally abrogated states' immunity to certain RLUIPA claims whether the state accepted federal funds or not. *Compare* H.R. 1691, 106th Cong. § 4(a) (1999), *with* H.R. 4019, 105th Cong. § 4(d)(1) (1998). The witnesses' apparent belief that this amendment precluded any finding of unilateral abrogation says nothing about whether the subsequent Congress that enacted RLUIPA intended to condition receipt of federal funds on a state's voluntary waiver of immunity to damages claims.

cause of action entirely redundant because injunctive and declaratory relief are already available against state officials in their official capacities. *See* 42 U.S.C. §§ 2000cc-2(a), 2000cc-5(4)(A)(ii); *see generally Ex parte Young*, 209 U.S. 123 (1908). This Court, however, does not treat statutory language as a redundancy "with no job to do, and [that] accordingly accomplishes nothing." *Doe v. Chao*, 540 U.S. 614, 623 (2004).

Moreover, when Congress intended to limit relief to equitable remedies, it said so expressly. *See* 42 U.S.C. § 2000cc-2(f) (authorizing federal government to bring suits for "injunctive or declaratory relief"). That Congress went further in Section 2000cc-2(a), and authorized all "appropriate relief" against states, thus necessarily authorizes more than injunctive relief because, as Texas says, "Congress did not use different language in adjacent sections of the same act because it intended for them to mean the same thing." Resp. Br. 40. Texas tries to explain this anomaly away as a congressional effort to prevent the United States from obtaining damages when it sues states. Resp. Br. 24-25. But the federal suit provision limits *all* suits by the United States, not simply suits against states. Thus Congress's remedial limitation cannot be attributed to a concern unique to states.

In fact, Section 2000cc-2(f) proves the opposite of what Texas argues. It shows that Congress decided to subject states and local governments to the *same* remedies in suits brought by the United States, just at it chose to include states and local governments in a common definition of the term "government," 42 U.S.C. § 2000cc-5(4)(A)(i), and to subject all

"government" defendants, state and local, to the same private cause of action for the same "appropriate relief," *id.* § 2000cc-2(a). The constant thread throughout RLUIPA is remedial equivalency between states and all other defendants – the exact opposite of Texas's insistence that the same words "appropriate relief" can have dramatically different meanings depending on the identity of the litigant. *See Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (different constitutional concerns raised by different parties "cannot justify giving the *same* detention provision a different meaning").

Fourth, the State's cramped reading of "appropriate relief" cannot be reconciled with the statute's purposes. Indeed, it is in the custodial setting in particular that equitable remedies are commonly least effective due to the frequent mooting of cases by prisoner transfers or releases. *See*, *e.g.*, Brief of Becket Fund §§ II(B)-(D). The State's argument also ignores that RLUIPA was enacted not simply to stop ongoing violations of federal law, but also to provide victims of unlawful conduct "relief" for their injuries. 42 U.S.C. § 2000cc-2(a). In fact, Congress has repeatedly authorized make-whole remedies in civil rights statutes like RLUIPA, even against states. *See* Petr. Br. 19. There is no basis to believe that Congress intended RLUIPA, alone among modern civil rights statutes, to leave victims without compensation for the violation of their fundamental statutory rights.

II. The Rehabilitation Act Amendments Of 1986 Separately Put The State On Notice That Acceptance Of Federal Funding Would Constitute Consent To RLUIPA Damages Suits.

Even apart from the notice provided by RLUIPA itself, the Rehabilitation Act Amendments of 1986 left the State no room to doubt that accepting federal funds would subject it to damages suits under RLUIPA.[6]

A. Section 3 Of RLUIPA Is A Provision Of A Statute Prohibiting Discrimination, Even Under Respondents' Narrow Definition Of "Discrimination."

1. Section 3 is a provision that prohibits "discrimination," even under the State's definition of the term. After all, the State does not deny that Section 3 prohibits treating similarly situated inmates differently because of their religion. Texas appears to concede (Resp. Br. 44-45), for example, that a state would violate Section 3 if it were to provide kosher food to Jewish inmates while simultaneously denying a vegetarian diet to Seventh Day Adventists because of their religion. *Cf. Cutter v. Wilkinson*, 544 U.S. 709, 716 n.5 (2005). Indeed, the State is unable to identify any example of religious "discrimination" as it understands the word

[6] Petitioner is not barred from raising this additional argument in support of his general claim that damages are available against the State. *See* Pet. 32 n.10; Pet. Reply 10-11. *Contra* Resp. Br. 47 n.6.

that is *not* prohibited by Section 3. It is thus difficult to understand respondents' insistence that Section 3 is not a provision of a statute "prohibiting discrimination." 42 U.S.C. § 2000d-7(a)(1).

The State's only response is to claim that although Section 3 does prohibit discrimination, it does so only by "happenstance," in the same way an arson statute might, on rare occasion, punish a racially motivated church burning. Resp. Br. 44-45. That analogy bears no resemblance to Section 3's textual or practical operation.

For one thing, Section 3's proscription of the most basic and invidious forms of religious discrimination is hardly the occasional accident the State's analogy suggests. In fact, this Court recognized in *Cutter* that Congress enacted RLUIPA in reaction to a record that included not only unreasonable refusals to accommodate, but also acts of unequal treatment against disfavored religions. *See Cutter*, 544 U.S. at 716 n.5; Petr. Br. 40. It is inconceivable that Congress would have responded to that record with a statute that reached neutral rules but not the most egregious forms of religious discrimination.[7] Texas points to no other civil rights statute that prohibits *only* conduct outside the scope of the relevant constitutional protection.

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[7] Although such conduct is also prohibited by the First Amendment, only RLUIPA's substantial burdens provision provides institutionalized persons a cause of action against a state for such violations. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989) (states not subject to suit under 42 U.S.C. § 1983).

RLUIPA's text also belies the central premise of the State's argument – *i.e.*, that Section 3 is targeted solely at neutral rules of general applicability. Resp. Br. 36, 41-44. By its terms, Section 3 prohibits unjustified burdens on religious exercise "*even if* the burden results from a rule of general applicability," 42 U.S.C. § 2000cc-1(a) (emphasis added), thereby making clear that the provision is not limited to requiring accommodations to neutral rules, but reaches other forms of discrimination as well.

Likewise, the statute shifts the burden of persuasion to the defendant 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]." 42 U.S.C. § 2000cc-2(b). Thus, Congress structured the statute around its expectation that some conduct violating Section 3 would also violate the Free Exercise Clause, which, the State acknowledges, prohibits "discrimination," however narrowly defined. *See* Resp. Br. 5, 43.

In addition, the State is wrong to assert that Section 3 never requires plaintiffs to prove unequal treatment in order to establish a violation. *See* Resp. Br. 5, 45. If, for instance, prison officials were to put all Muslim inmates in administrative segregation, undoubtedly the inmates' practice of religion would be substantially burdened, and Section 3 therefore violated, even if the inmates were allowed to practice all the tenets of their faith while in lockdown. The inmates' RLUIPA claims would depend entirely on proof that the unequal imposition of harsh conditions that, while not preventing them from engaging in religious practices, nonetheless imposed a substantial burden because it inflicted a secular cost on the

inmates' adherence to their faith. *See, e.g.*, *McAlister v. Livingston*, 348 Fed. Appx. 923, 936-37 (5th Cir. 2009). Disparate application of a prison rule is also relevant to whether the challenged practice is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000cc-1(a)(2); *see, e.g.*, *McAlister*, 348 Fed. Appx. at 937 (non-neutral application of prison rule "call[s] into question whether the [imposition] is narrowly tailored to the [prison's] asserted interests") (citation and internal quotation marks omitted).

2. The State nonetheless argues that Section 3 cannot prohibit discrimination within the meaning of Section 2000d-7 because a different provision of RLIUPA, Section 2, addresses "substantial burdens" and "discrimination" in separate subparagraphs. Resp. Br. 39-40.

The State is incorrect. Congress did not enact Section 2(b)'s "Equal terms" and "Nondiscrimination" provisions because it believed that such discrimination fell outside the scope of Section 2(a)'s "Substantial burdens" protection. Instead, Section 2(b) extends a subset of Section 2(a)'s broad prohibition against discrimination to *all* state and local governments (even those that do not accept federal funding) pursuant to Congress's power to enforce the Fourteenth Amendment.[8] By breaking

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[8] *Compare* 42 U.S.C. § 2000cc(a)(2) (applying "Substantial burdens" provision only to states that accept federal funds, whose challenged actions affect interstate commerce, or who impose the burden while administering a system of individualized assessments), *with id.* 2000cc(b) (applying

out only claims that universally involve unconstitutional intentional discrimination, Congress ensured that its extension of Section 2 to all state and local governments would pass muster as a proper exercise of its legislative power under Section 5 of the Fourteenth Amendment, *see City of Boerne v. Flores*, 521 U.S. 507 (1997). That does not mean that Section 2(a) is not also an anti-discrimination provision. It simply means that it is not confined to *facially unconstitutional* intentional discrimination like Section 2(b).

3. Finally, the State suggests that even if Section 3 prohibits discrimination, it is not a provision "prohibiting discrimination" within the meaning of Section 2000d-7 because it also requires reasonable accommodations. Resp. Br. 41-42. Pointing to the list of statutes specifically enumerated in Section 2000d-7, the State insists that Congress intended the catchall to include only statutes that "focus" on discrimination narrowly construed, and to exclude statutes that both prohibit discrimination and "attack neutral laws of general applicability." Resp. Br. 41. That is wrong for two reasons.

First, the statute does not refer to provisions "prohibiting *only* discrimination," and a provision that pervasively prohibits discrimination and other conduct that creates a risk of discrimination is still a

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"Equal terms" and "Nondiscrimination" provisions to all governments).

provision "prohibiting discrimination" under any reasonable understanding of that language.

Second, the State's construction is incompatible with Congress's express enumeration of Section 504, which this Court has recognized prohibits both "intentional discrimination" against individuals with disabilities and failure to make reasonable accommodations. *See* Petr. Br. 41-42. RLUIPA focuses no less on discrimination, narrowly construed, than does Section 504, which the State must concede is a statute "prohibiting discrimination."

B. RLUIPA's Accommodation Mandate Prohibits Discrimination Within The Meaning Of Section 2000d-7.

Texas is, in any event, incorrect to insist that a statute requiring reasonable accommodations is not a "statute prohibiting discrimination" within the meaning of Section 2000d-7.

The State's argument relies entirely on a constitutional definition of discrimination, when the operative question is whether RLUIPA is a "*statute* prohibiting discrimination." 42 U.S.C. § 2000d-7(a)(1) (emphasis added). And it is uncontested that however the Constitution might conceive of "discrimination," Congress regularly uses the term more broadly, including to encompass failing to accommodate a particular practice or trait. *See* Petr. Br. 41-43. Texas thus ignores that the "discrimination" prohibited by Title VII includes unreasonable refusals to accommodate religious practices, *see Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 63 n.1 (1986), and that in enacting the

Americans with Disabilities Act, Congress took a "comprehensive view of the concept of discrimination," which embraces denials of reasonable accommodations, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598 (1999); *see* 42 U.S.C. § 12101(a)(5); *see also Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring) (statute that "calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices" is reasonably "perceive[d] . . . as an anti-discrimination law").

Most significantly, the State cannot escape that Section 504 likewise defines "discrimination" to encompass both invidious discrimination and unreasonable failures to accommodate. *See* Petr. Br. 41-42. Instead, Texas argues that under the canon of *ejusdem generis* the Court should ignore Section 504's more expansive conception of discrimination and limit Section 2000d-7's catchall to statutes that prohibit only the "core conduct" (*i.e.*, "intentional discrimination") that is the sole object of four of the five statutes enumerated in Section 2000d-7. Resp. Br. 41-42. But it would be an odd application of the canon to conclude that even though it is enumerated in the text, Section 504 does not itself qualify as a statute "prohibiting discrimination." While a catchall should not be given "unintended breadth," Resp. Br. 41 (citation and internal quotation marks omitted), it must at least encompass the enumerated examples. *See., e.g.*, *Cleveland v. United States*, 329 U.S. 14, 16-18 (1946).

Unless the Court is prepared to declare that Section 504 is not a statute "prohibiting

discrimination" within the meaning of Section 2000d-7, the inescapable conclusion is that the materially indistinguishable requirements of RLUIPA's Section 3 also fall within the scope of the State's waiver. [9]

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[9] In its final gambit, the State asks the Court to dismiss this case as improvidently granted, purporting to find an excuse to rehash its certiorari-stage argument in petitioner's alleged concession that his damages claims are precluded by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997(e). Resp. Br. 48-49. Not so. While petitioner acknowledges that the PLRA limitations on "mental" and "emotional" injuries apply to RLUIPA claims, Petr. Br. 22-23, he has consistently maintained in this Court that those limitations do not restrict damages for the violation of religious freedom. Pet. Supp. Br. 7. Nor has petitioner ever accepted the State's unsupported assertion, Resp. Br. 49, that a pro se litigant's failure to separately request nominal (in addition to compensatory) damages bars that relief.

CONCLUSION

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

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