No. 08-1438

In the Supreme Court of the United States

HARVEY LEROY SOSSAMON, III,
PETITIONER,
v.
TEXAS, ET AL.,
RESPONDENTS.

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

BRIEF FOR *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION; ACLU OF TEXAS; UPTOWN PEOPLE'S LAW CENTER; WASHINGTON LAWYER'S COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; AMERICAN JEWISH COMMITTEE; BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY; AND THE INTERFAITH ALLIANCE FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether an individual suing a state or state official under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq*. (2000 ed.), may seek compensatory damages.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

Amici strongly believe that religious freedom is one of our most fundamental rights; that prisoners are among the most vulnerable to government incursions on their conscience; and that Congress, when it enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), justly sought to provide prisoners with a meaningful remedy against unnecessary barriers to their religious exercise.

Congress intended RLUIPA to be a strong remedy against pervasive restrictions on religious exercise in prisons. Acting under its Spending Clause authority, Congress thus sought to ensure that Federal funds are not used to burden religious exercise. As with many other civil rights statutes, Congress afforded aggrieved prisoners a cause of action against state prisons. And Congress empowered prisoners to seek all "appropriate relief"—a term of art that has long included both injunctive and monetary remedies. *Amici*, who are described in Appendix A, believe this broad remedial provision is central to the statute's ability to protect prisoners' rights to practice their religions.

The State of Texas nevertheless claims not to have understood that its acceptance of federal funds subjected it to suits for damages. But that position is implausible—both because the term of art Congress

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[*] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

used would easily have been understood to create a damage remedy and because the absence of a damage remedy would fundamentally undermine RLUIPA's purpose. As examples from cases around the country make clear, the absence of a damage remedy would leave many prisoners with no remedy at all. It is all too easy for officials to moot prisoners' injunctive claims by transferring or releasing them, injuring them only once, or selectively granting them an accommodation. Without a damage remedy, RLUIPA thus often cannot effectively deter prison misconduct. *Amici* respectfully suggest that the Court should enforce the statute according to its terms, and in so doing permit it to achieve the purposes that Congress intended.

STATEMENT OF THE CASE

Petitioner Harvey Leroy Sossamon, III, is an inmate in a Texas prison who was denied a fair opportunity to engage in Christian worship services. He was one of several inmates in disciplinary confinement who was not permitted to leave his cell to attend religious services, even though inmates were allowed to "attend educational classes, to use the law library, and to participate in other secular activities." Pet. App. 3a.

Sossamon was also one of several prisoners who was barred by prison rules from using the prison chapel for religious services, even though inmates were allowed to use the chapel for non-religious purposes, such as "weekend-long marriage training sessions (with outside visitors), sex education, and parties for GED graduates." Pet. App. 30a. Instead, Sossamon and others were relegated to attending worship services in a room that lacked "Christian

symbols or furnishings, such as an altar and cross, which have special significance and meaning to Christians." Pet. App. 2a-3a (quotations omitted). He was therefore unable to take part in various aspects of Christian worship, such as kneeling at an altar or receiving Holy Communion in view of a cross. Pet. App. 3a.

Challenging these impediments to the exercise of his faith, Sossamon sued the State of Texas and its prison officials. In so doing he requested declaratory, injunctive, and monetary relief. Pet. App. 5a. Sossamon alleged that the prison's restrictions violated RLUIPA, which directs that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden "is the least restrictive means" of furthering "a compelling governmental interest." 42 U.S.C. §§ 2000cc-1(a)(1), (2).

The district court granted Texas's motion for summary judgment, holding in relevant part that sovereign immunity barred claims for damages against Texas and its officers.

The Fifth Circuit affirmed the dismissal of Sossamon's damage claims, reasoning that Texas did not waive its sovereign immunity in exchange for Federal funds. The court found that "RLUIPA is clear enough to create a right of action for damages," but that its authorization of claims for "appropriate relief" was "not clear enough" to effect a waiver of state sovereign immunity. Pet. App. 23a. Having dismissed Sossamon's claim for damages, the court then went on to reject Sossamon's request for an injunction against the prison's cell-restriction policy. That claim, the court held, had been mooted by the prison's

mid-litigation decision to abandon its policy. Finally, the court remanded for further proceedings on Sossamon's request for an injunction against the prison's chapel-use policy.

SUMMARY OF ARGUMENT

RLUIPA, as we explain in Part I, was prompted by evidence that prisons throughout the country were placing unjustified restrictions on religious exercise. Congress needed a strong remedy. And as we also explain in Part I, damages are a critical part of the remedy that Congress crafted. In many cases where prisons can easily moot claims for injunctive relief, damages are the only effective remedy. Moreover, as we explain in Part II, RLUIPA gave Texas and other states ample notice that damages were part of its remedial scheme.

ARGUMENT

I. The Availability Of Monetary Relief Is Essential To RLUIPA's Purpose Of Deterring Pervasive And Unjustified Burdens On Religious Exercise.

In enacting RLUIPA, Congress sought "to protect the religious exercise of a class of people particularly vulnerable to government regulation"—persons involuntarily confined to prisons and similar institutions. *Statement of Representative Canady*, 146 Cong. Rec. H7191 (daily ed. July 27, 2000). Perhaps more than anyone else, prisoners depend on the government to provide for their basic needs; and prisoners can do almost nothing without government permission. When operating prisons, government "exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise." *Cutter* v. *Wilkinson*, 544 U.S. 709, 720-21 (2005).

Recognizing that a prisoner's "right to practice [his] faith is at the mercy of those running the institution," Congress aimed to "protect the civil rights of institutionalized persons" by alleviating undue restrictions on religious observance. *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (hereinafter, "*Joint Statement*"). If a state prison chooses to accept federal funds, its federally assisted programs or activities must make reasonable accommodations for sincere religious exercise. See 42 U.S.C. §§ 2000cc-1(a)-(b).

As we now show, these provisions were expressly designed to protect prisoners from pervasive, unjustified burdens on their religious exercise. And RLUIPA's damage remedy was and is central to that scheme.

A. Congress enacted RLUIPA to protect prisoners from pervasive and unjustified burdens on religious exercise.

Congress found that RLUIPA's protections were badly needed: "Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." *Joint Statement* at S7775. In nine hearings over the course of three years, Congress documented all manner of "frivolous and arbitrary" burdens on religious exercise that were "frequently occurring" in prisons around the country. *Id*. at S7774-S7775.

In one case, for example, officials at an Oregon prison had deliberately recorded the sacrament of confession between a prisoner and a Roman Catholic chaplain. See *id*. at S7775 (citing *Mockaitis* v. *Har-*

cleroad, 104 F.3d 1522 (9th Cir. 1997)). Indeed, Donald W. Brooks, Director of the Prison Ministry of the Catholic Dioceses of Oklahoma, described finding a prison atmosphere in that State "charged with anti-Catholic religious bigotry." *Protecting Religious Freedom After* Boerne v. Flores *(Part II): Hearing Before Subcomm. On the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 55 (1998).

In another case, Wisconsin officials forbade prisoners from wearing religious jewelry, such as crosses, "'without the ghost of a reason.'" See *Joint Statement* at S7775 (quoting *Sasnett* v. *Sullivan*, 197 F.3d 290 (7th Cir. 1999)). Elsewhere, Colorado officials let a prisoner attend Episcopal worship services but forbade him from taking communion. See *Ibid*.

And in Michigan, prison officials would not allow Jewish inmates to receive matzo on Passover—even though a Jewish organization had offered to provide the matzo for free. See H. Rep. No. 106-219, at 9-10 (1999). In Texas, moreover, Isaac M. Jaroslawicz of the Aleph Institute described how prison officials seemed to "fight everything Jewish," and how they treated religious requests of Jewish inmates "with suspicion, contempt, [and] hostility." *Protecting Religious Freedom After* Boerne v. Flores *(Part III): Hearing Before Subcomm. On the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 39-41 (1998) (hereinafter, "Jaroslawicz Testimony").

Similar instances of indifference—or worse—pervaded prisons throughout the country. See*, e.g.*, *Cutter*, 544 U.S. at 717 n.5 (listing additional examples from congressional hearings).

Congress thus enacted RLUIPA to deter prison officials from burdening religious exercise and to "se-

cure redress for inmates who encountered undue barriers to their religious observances." *Cutter*, 544 U.S. at 716-17. In the words of Senators Hatch and Kennedy, RLUIPA was to "provide a remedy" to safeguard prisoners' religious freedom. *Joint Statement* at S7775.

B. Without a damage remedy, RLUIPA could not effectively deter prison misconduct.

The availability of monetary relief was and remains a critical component of the remedy that Congress crafted, and a necessary deterrent of the activity over which Congress was concerned. Although RLUIPA allows prisoners to seek injunctive and declaratory relief, those non-monetary remedies are woefully inadequate on their own to safeguard prisoners' rights.

The fundamental problem is that it is all too easy for prison officials to moot prisoners' claims for injunctive relief and, if no damages are available, avoid judicial scrutiny of misconduct. Only a claim for damages can save a cause from mootness. *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 8 (1978). And so, as this Court has acknowledged, injunctive relief alone may provide "no remedy at all" to civil rights plaintiffs. *Franklin* v. *Gwinnett County Pub. Schools*, 503 U.S. 60, 76 (1992). A multitude of examples demonstrate the inadequacy of injunctive relief and the critical necessity of RLUIPA's damage remedy.

1. The most common situation in which injunctive relief provides no remedy arises when an inmate is released or transferred to another facility. Such releases or transfers typically moot any prospective

relief against prisons that no longer house these inmates.

Congress was well aware of this problem when it drafted RLUIPA, having learned of one inmate's disturbing experience:

> One inmate in Texas, Brett Cook, declared himself Jewish and requested accommodation. After refusing to withdraw a religious freedom lawsuit, he suddenly found himself transferred from a minimum to maximum security prison, where, apparently, neo-Nazi skinheads were alerted as to his imminent arrival. Within 15 minutes of his being placed on the compound, he was set upon by members of a gang and killed.

Jaroslawicz Testimony at 42. Without monetary relief, Cook (or his heirs) would have no remedy. And equally important, RLUIPA would provide no deterrent to such horrific, religiously motivated conduct by prison officials.

In the years since RLUIPA's enactment, other prisoners have routinely been denied injunctive relief after transfer from an offending facility. For example, while housing two Muslim patients awaiting trial, an Illinois mental health facility prevented the patients from attending worship services. The facility's failure to provide a halal diet, particularly during Ramadan, also caused one patient to suffer malnourishment and thirty pounds' weight loss in three weeks. The facility also refused to provide a Muslim imam—despite paying for Christians and Jews to minister to its patients.

But when the patients brought a RLUIPA suit, they were unable to pursue injunctive relief because

one patient had been transferred to a different facility and another had been acquitted and released. See *Banks* v. *Dougherty*, No. 07-CV-5654, 2010 U.S. Dist. LEXIS 17443, *16-19 (N.D. Ill. Feb. 26, 2010) (dismissing, as "only speculation," the possibility that "they will, at some point in the future, be subject to the same alleged deprivations"). Because the Seventh Circuit had held that damage claims could not be brought under RLUIPA, the suit was dismissed. Not only were the two patients in this case left without any redress, but the unavailability of monetary relief effectively stripped RLUIPA's protections from all inmates who were awaiting trial or nearing the end of their sentences, and thus were likely to be transferred or released.

Similar cases abound, and the following are just a few of many other instances where transfer or release have mooted claims for injunctive relief:

- In *Quillar* v. *Cal. Dep't of Corr.*, No. S-04-1203, 2007 U.S. Dist. LEXIS 50894 (E.D. Cal. July 13, 2007), California prison officials disciplined a prisoner for wearing a beard in accordance with the dictates of his religion. The officials argued that the prisoner was "never prevented from engaging in conduct mandated by his faith" because he could "choose" to keep his beard and "suffer the consequences." *Id.* at *3-4. That so-called choice, the court held, "flies in the face of Supreme Court and Ninth Circuit precedent." *Id.* at *4 (quotation omitted). But despite finding that the alleged facts were "sufficient to establish a violation of RLUIPA," the court was obliged to rule that the prisoner's transfer to a dif-

ferent facility mooted his claims for injunctive relief. *Id*. at *10.

- In *Tyson* v. *Giusto*, No. 06-1415-KI, 2010 U.S. Dist. LEXIS 56526 (D. Ore. June 4, 2010), Oregon prison officials prevented a Muslim inmate from holding worship services with a volunteer imam—despite allowing Christian inmates to hold similar worship services. Prison officials could not explain "why allowing Muslims to pray in their units on Fridays, just as the Christians do, is not an acceptable alternative." *Id*. at *11. Nevertheless, the prisoner's release from prison mooted his request for injunctive relief.

- In *Henderson* v. *Ayers*, No. 06-4348-VBF(RC), 2008 U.S. Dist. LEXIS 108034 (C.D. Cal. Mar. 14, 2008), California officials also prevented a Muslim inmate from attending worship services. The court denied the officials' motion to dismiss, and discovery ensued—only to have the complaint dismissed as moot when the prisoner was transferred to a different facility.

- In *Simmons* v. *Herrera*, No. 09-0318-JSW(PR), 2010 U.S. Dist. LEXIS 39819 (N.D. Cal. Mar. 26, 2010), officials denied a prisoner access to Native American religious services, while services for other faiths were allowed. His suit for injunctive relief was dismissed when he was transferred to a different prison.

In all of these cases, courts are powerless to order injunctive remedies. And so, without a damage rem-

edy, the unfortunate message to prison officials would be clear: You may violate these temporary prisoners' religious rights with impunity, for no remedy protects them.

2. Transfer and release, however, are only two of many ways prison officials can evade injunctive remedies. Indeed, without monetary damages, prisoners would generally have *no* remedy for violations of their religious rights that occur only once. See *O'Shea* v. *Littleton*, 414 U.S. 488, 495-96 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief * * * if unaccompanied by any continuing, present adverse effects.").

A California mental hospital, for example, denied an involuntarily committed patient access to kosher meals for Passover. Jews observe the Passover holiday for eight days, during which time they follow special kosher dietary restrictions. Although the institution *promised* to provide the Jewish patient with kosher meals during the Passover holiday, in fact the meals were not provided. *Sokolsky* v. *W.T. Voss*, No. 07-CV-594, 2009 U.S. Dist. LEXIS 67070, *3 (E.D. Cal. July 24, 2009). Then, when the patient notified officials that he was not receiving the promised meals, they subjected him to discipline for his complaints. *Id*. at *4.

What is more, the patient was faced with a stark choice: As the court put it, "he was forced to either violate his sincerely-held beliefs or starve." *Id*. at *10. He followed his beliefs—and went unfed for eight days. *Id*. at *9.

The court could "hardly imagine a burden on religious exercise that is more substantial" than the

forced choice between religious conscience and starvation. *Id.* at *10. Yet, there was no strong indication that the patient's eight days of suffering would likely recur with the "level of probability" needed for an injunction; indeed, the plaintiff did not even attempt to obtain injunctive relief. *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982). Nor, of course, could a prospective remedy redress the starvation he had endured. Without a damage remedy, then, the patient had no remedy at all.[1]

For this plaintiff and other institutionalized persons in similar situations, the absence of a damage remedy would render RLUIPA a dead letter. And once again, the absence of such a remedy deprives RLUIPA of the deterrent effect that Congress intended.

3. Another common way prison officials have mooted claims for injunctive relief has been to grant a religious accommodation only after being sued—sometimes on the eve of trial. Indeed, in this very case, prison officials changed their rules to permit inmates such as Sossamon to attend worship services while on cell restriction. This change came not when Sossamon first brought his grievance to the prison's attention, nor as a settlement or accommodation when he filed his suit. Rather, Texas changed its policy only years later, while Sossamon's suit was pending on appeal. Although a defendant's voluntary cessation of unlawful behavior generally will not moot a claim unless the behavior cannot reasonably be ex-

[1] Although the court permitted the plaintiff's individual-capacity claim for damages to proceed, many circuits, including the Fifth Circuit below, have refused to allow individual-capacity claims under RLUIPA. *See* Pet. App. 18a-20a.

pected to recur, the court of appeals subjected Texas to a "lighter burden" by *assuming* that the State's actions were "not mere litigation posturing." Pet. App. 11a. Having held that Sossamon had no damage remedy, the court dismissed Sossamon's cell-restriction claim as moot—leaving him no recourse to challenge the deprivation of his rights.

Sossamon's experience, moreover, is hardly unique. The following are just a few of many examples where prison officials have mooted claims for injunctive relief by changing their policies:

- In *Figel* v. *Overton*, No. 2:03-CV-216, 2006 WL 625862 (W.D. Mich. Mar. 9, 2006), Michigan officials confiscated—on five separate occasions—religious texts a prisoner had ordered from the Philadelphia Church of God. Because the court held that a change in policy mooted claims for injunctive and declaratory relief, the court noted that only the possibility of damages under RLUIPA and the First Amendment protected the "public interest in having the legality of a practice settled." *Id.* at *2.
- In *Williams* v. *Beltran*, 569 F. Supp. 2d 1057, 1059 (C.D. Cal. 2008), California prison officials forced a Muslim prisoner to shave his beard in violation of the requirements of his religion. The court held that a change in policy mooted the claims for injunctive relief, and that "[a]bsent the availability of monetary relief, Plaintiff lacks any remedy for his alleged RLUIPA claim." *Id.* at 1065.

- In *Dawson* v. *Burnett*, 631 F. Supp. 2d 878, 881, 894 (W.D. Mich. 2009), a Buddhist prisoner, who "submitted numerous exhibits which tend to demonstrate that his religious beliefs are sincere," was denied the vegan diet required by his religion. The prison mooted injunctive claims under RLUIPA by reversing course. *Id.* at 887.

In these circumstances, prisoners receive no redress for the past abuses they have suffered, and they receive no court-ordered injunction to assure their rights in the future. Their religious freedom is reduced to an indulgence, not a right. And RLUIPA ceases to provide a deterrent if prisoners' claims can be ignored, then belatedly granted simply to make the resulting litigation go away.

4. Worse still is the potential for prison officials to deliberately moot the claims of particular inmates as a means of insulating an unlawful *policy* from review. For example, as of 2005, the Texas Department of Criminal Justice was one of few prison systems in the country that refused to provide kosher food to Jewish inmates. Brief of Plaintiff-Appellant 10, *Moussazadeh* v. *Texas Dep't of Criminal Justice*, No. 9-40400 (5th Cir.). A Jewish inmate thus sought an injunction requiring that kosher food be provided. But after more than a year of litigation—just before discovery was to begin—Texas transferred the prisoner to a facility that *would* provide him kosher food, and then persuaded the trial court to dismiss the prisoner's claim as moot. *Moussazadeh* v. *Texas Dep't of Criminal Justice*, No. G-07-574, 2009 U.S. Dist. LEXIS 25568 (S.D. Tex. Mar. 26, 2009).

The State's Jewish dietary policy, however, was not changed to offer kosher meals to all Jewish inmates statewide. Indeed, the policy provided that kosher meals shall only be offered in an "Enhanced Jewish Designated Unit" to which not every Jewish inmate would be entitled to transfer. Brief of Plaintiff-Appellant 12, *Moussazadeh* v. *Texas Dep't of Criminal Justice*, No. 9-40400 (5th Cir.).

At the same time that Texas mooted the claim of this prisoner, who was represented by counsel, the State offered no accommodation to a *pro se* prisoner who brought the same claim. The State instead litigated that claim to a favorable judgment. See *Baranowski* v. *Hart*, 486 F.3d 112 (5th Cir. 2007).

A second example of insulating an unlawful policy by mooting individual claims can be found in Illinois. For many years, the Illinois Department of Corrections has refused to offer special meals for prisoners with religious dietary restrictions unless a prisoner's faith "*requires* adherence to a particular diet." 20 Ill. Adm. Code § 425.70(c). That rule is flatly outlawed by RLUIPA, which protects religious exercise "whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).[2] Al-

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[2] Congress had good reason to expressly forbid officials from inquiring into the "requirements" of any particular religion. For one thing, it would disfavor many religions that do not conceptualize their faith in terms of "requirements." *Cf. Frazee v. Ill. Dep't of Employment Sec.*, 489 U.S. 829, 834 (1989) ("[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."). And for another, it would put the government in a position of deciding what constitutes "true" religious observance. *Cf. Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981) (warning that "religious beliefs need not be acceptable, logical, consistent, or com-

though courts have repeatedly indicated that the regulation is unlawful, efforts to moot prisoner claims have prevented courts from enjoining it.

In one case, for example, a court held that the regulation required a prisoner "to establish exactly what RLUIPA does not require"—namely, the centrality of a religious belief to a faith. *Koger* v. *Bryan*, 523 F.3d 789, 798 (7th Cir. 2008). Yet, the prisoner's release rendered moot his request for an injunction. *Id*. at 804.

Soon thereafter, the *same violation* happened again. This time, a Lutheran chaplain denied a Catholic inmate a meatless diet, because, in the chaplain's estimation, abstaining from meat is not "true" penance. *Nelson* v. *Miller*, 570 F.3d 868, 872 (7th Cir. 2009). Although two Catholic priests wrote to the Lutheran chaplain in support of the prisoner's request—explaining that it was consistent with a rule espoused by St. Benedict, who had been the patron saint of the prisoner's childhood parish and school—the chaplain "did not give the letters from [the priests] any weight." *Id*. at 871, 873. Without the vegetarian diet, the prisoner abstained from the meat served in his standard diet. As a result, he lost over forty pounds, his "bones began to protrude," and he had to be hospitalized for losing so much weight. *Id*. at 874, 880. Yet here too, injunctive relief was denied because the warden ultimately ordered that the inmate receive a vegetarian diet. *Id*. at 882. Without a damage remedy, the State cannot be made to pay for its policy, and the policy persists.

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prehensible to others in order to merit First Amendment protection").

As the above examples attest, monetary damages are critical to safeguarding the rights RLUIPA seeks to protect. Indeed, damages are often the *only* available remedy for prisoners who suffer violations of their religious rights.[3] And they are sometimes the *only* way to induce a prison to comply with RLUIPA's substantive requirements. It would subvert Congress's purpose to strip RLUIPA of that remedy.

II. By Authorizing All Appropriate Relief For Violations Of RLUIPA, Congress Gave States Ample Notice That They Could Be Sued For Damages.

That the damage remedy was a key part of RLUIPA's remedial scheme should have been obvious to Texas when it chose to accept federal funds for its prisons. Congress provided an express right of action for prisoners to "assert a violation of this Act" against state governments. 42 U.S.C. §§ 2000cc-2(a), -5(4)(A). Congress made clear to states that they could be sued so long as they chose to accept federal funds. 42 U.S.C. § 2000cc-1(b)(1). And Congress authorized courts to grant all "appropriate relief." 42 U.S.C. § 2000cc-2(a).

Thus, nobody disputes that Texas knowingly waived its immunity from suit. Rather, the issue for

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[3] Although some courts have held that the Prison Litigation Reform Act (PLRA) bars compensatory damages unless the plaintiff alleges a physical injury, many RLUIPA claims *do* involve physical injury. And even where no physical injury occurs, nominal damages—at a minimum—are nevertheless available under the PLRA. Even those limited damages serve to avoid outright dismissal of a suit and ensure jurisdiction for a declaratory judgment. *See, e.g.*, *Keup v. Hopkins*, 596 F.3d 899, 904 (8th Cir. 2010).

this Court is simply whether the right of action Congress indisputably created gave states sufficient notice that they could be sued *for damages*. Whether the analysis springs from the Spending Clause or the Eleventh Amendment, this Court has focused on whether a state's choice to subject itself to suit is made "knowingly, cognizant of the consequences of [its] participation" in a Federal spending program. *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987); see also *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992) (requiring "unambiguous" expression). As we explain, it would have been obvious to states that RLUIPA's authorization of all "appropriate relief" subjected them to damages.

1. The most significant error in the Fifth Circuit's analysis was to assume that RLUIPA's term "appropriate relief" was ambiguous—thereby requiring that such ambiguity be "resolved" by the canon calling for strict construction of waivers of sovereign immunity. Pet. App. 23a. But the term "appropriate relief" is *not* ambiguous; it is a term of art from this Court's jurisprudence that has long been understood to refer to both injunctive and monetary relief.

For example, in *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), this Court considered a civil rights statute that had been construed to contain an implied right of action. Unlike the RLUIPA statute here, the statute in *Franklin* made no express reference to remedies—or even to any cause of action. The Court nevertheless read the statute to make available "all appropriate relief," which included damages. *Id.* at 68. The Court explained that its decision to imply those remedies was "hardly revolutionary," tracing such implied remedies back to English common law and through centuries of this

Court's decisions. *Id.* at 66. The "traditional presumption in favor of all appropriate relief," the Court explained, "has been the prevailing presumption in our federal courts since at least the early 19th century." *Id.* at 71-72.

Franklin's principal significance for this case, however, is not the fact that the Court chose to read "all appropriate remedies" into the statute at issue—for it need not do so here. Rather, *Franklin* is significant because it made clear that the term "appropriate relief" has long been understood to include monetary damages.

This Court reaffirmed *Franklin* in *Barnes* v. *Gorman*, explaining that the "appropriate relief" it would imply into a civil rights statute enacted pursuant to the Spending Clause are "those remedies traditionally available in suits for breach of contract." 536 U.S. 181, 187 (2002). The Court held that "appropriate relief" did not include punitive damages, but *did* include "injunction" *and* "compensatory damages." *Id.* at 187.

By using a term of art borrowed from this Court's decisions, Congress thus drafted RLUIPA to *expressly include* a reference to the "appropriate relief" that this Court had previously only implied in other statutes. And given a century of precedent using that term to refer to compensatory as well as injunctive relief, there could be no confusion about the meaning of the term.

Indeed, in employing such a term of art, Congress relied on this Court's longstanding rule that, "where Congress borrows terms of art," the term retains "the meaning its use will convey to the judicial mind." *Morissette* v. *United States*, 342 U.S. 246, 263 (1952);

see also, *e.g.*, *Buckhannon Bd. & Care Home, Inc.* v. *W. Va. Dep't of Health & Human Resources*, 532 U.S. 598, 615 (2001) ("Words that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning."); *Carter* v. *United States*, 530 U.S. 255, 266 (2000) ("[W]e have not hesitated to turn to the common law for guidance when the relevant statutory text does contain a term with an established meaning at common law."); *Neder* v. *United States*, 527 U.S. 1, 21 (1999) (referring to "well-established rule of construction" that terms of art are accorded their settled meaning); *Cmty. for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739 (1989) ("* * * Congress means to incorporate the established meaning of [terms of art]."); *Standard Oil Co. of N.J.* v. *United States*, 221 U.S. 1, 59 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense.").

2. The only way to read RLUIPA's language as ambiguous is thus to tear it away from all legal context and treat the words as though they were invented for the first time by RLUIPA's drafters. Of course, most every word is ambiguous when shorn of its context, and these words are no different. But that is not how this Court typically construes statutes, nor is it how a state—or anyone else—reads them. *E.g.*, *Johnson* v. *United States*, 130 S.Ct. 1265, 1270 (2010) ("[u]ltimately, context determines meaning"). It is one thing to require that states receive fair notice of the consequences of taking Federal dollars, but it is quite another to presume a state's ignorance of terms commonly used by this Court.

It is no wonder, then, that this Court has deemed other civil rights statutes to have waived federal sovereign immunity when they used language similar to the language Congress used here. When, for example, Congress authorized "such relief (including injunctions) as may be appropriate" to remedy a violation of the Labor-Management Reporting and Disclosure Act, this Court deemed that language sufficient to permit suits for damages. *Int'l Bhd. of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, AFL-CIO* v. *Hardeman*, 401 U.S. 233, 239-40 (1971). And when Congress authorized "appropriate remedies"—language almost identical to the phrase used in RLUIPA—to remedy a violation of Title VII of the Civil Rights Act of 1964, this Court found the language enough to waive federal sovereign immunity for damages. *West* v. *Gibson*, 527 U.S. 212 (1999).

The result in this case should be no different.

CONCLUSION

The limitation that the court below engrafted onto RLUIPA's remedy provision flatly contravenes *both* the statute's plain language and Congress' plain intention to craft an effective means for protecting prisoners' religious freedom. The judgment below should be reversed.

Respectfully submitted.

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APPENDIX A:
LIST OF *AMICI*

The *American Civil Liberties Union* (ACLU) is a nationwide, non-profit, non-partisan organization with over 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The *ACLU of Texas* is one of its statewide affiliates. Throughout its 90-year history, the ACLU has been deeply involved in protecting religious rights, as well as the rights of prisoners, and has appeared before this Court in numerous cases involving those issues, both as direct counsel and as *amicus curiae*. To further its work in these areas, the ACLU has created both a National Prison Project and a Program on Freedom of Religion and Belief.

The *Uptown People's Law Center* is a not-for-profit legal clinic founded in 1975. In addition to providing legal representation, advocacy and education for poor and working people in Chicago, the Law Center also provides legal assistance to people housed in Illinois' prisons in cases related to their confinement. The Law Center has provided direct representation to over 100 prisoners, including in several cases alleging violation of religious rights under RLUIPA. Most recently, the Law Center represented the plaintiff in *Nelson* v. *Miller*, 570 F.3d 868, 872 (7th Cir. 2009), the circumstances of which are discussed in this brief.

The D.C. Prisoners' Project of the *Washington Lawyer's Committee for Civil Rights and Urban Affairs* (the "Prisoners' Project"), a non-profit public interest organization, has sought to eradicate discrimination and fully enforce the nation's civil rights laws for over 40 years. Since the Prisoners' Project was

founded in 1989, it has engaged in broad-based litigation, improving medical and mental health services, reducing overcrowding, protecting access to courts and the ability to participate in religious activities, and seeking to improve overall conditions at correctional facilities wherever District of Columbia inmates are held. Individuals serving felony sentences under the D.C. Code are held under the supervision of the federal Bureau of Prisons (BOP), which can house D.C. prisoners in any of 137 different BOP facilities and in any number of state prisons with which the BOP has cooperative arrangements.

Americans United for Separation of Church and State is a 75,000-member national, nonsectarian public interest organization committed to the preservation of the constitutional principles of religious liberty and separation of church and state. Since its founding in 1947, Americans United has regularly been involved—as a party, as counsel, or as an amicus curiae—in church-state cases before this Court and other federal and state courts throughout the nation.

The *American Jewish Committee* was founded in 1906 to protect the civil and religious rights of Jews and is dedicated to the defense of religious rights and freedoms of all Americans.

The *Baptist Joint Committee for Religious Liberty* ("BJC") is a 74-year-old education and advocacy organization that serves fifteen cooperating Baptist conventions and conferences in the United States, with supporting individuals and churches across the nation. The BJC deals exclusively with religious liberty and church-state separation issues and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to ensuring

religious liberty for all Americans. The BJC has participated as *amicus curiae* in many of the major religious liberty cases before this Court. The BJC specifically has advocated for the religious liberty rights of prisoners, leading the broad coalition that urged Congress to enact the Religious Land Use and Institutionalized Persons Act of 2000.

The Interfaith Alliance Foundation celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance has 185,000 members across the country made up of 75 different faith traditions, as well as members from no faith tradition. Interfaith Alliance supports people who believe their religious freedoms have been violated as a vital part of its work promoting and protecting a pluralistic democracy. The Interfaith Alliance Foundation joins this *amicus* brief, is a 501(c)(3) non-profit organization. Its parent organization is The Interfaith Alliance, Inc., which is a 501(c)(4) organization. No publicly-held corporation owns ten percent or more of The Interfaith Alliance Foundation or The Interfaith Alliance, Inc.