

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 HARVEY LEROY SOSSAMON, III, :

4 Petitioner :

5 v. : No. 08-1438

6 TEXAS, ET AL. :

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8 Washington, D.C.

9 Tuesday, November 2, 2010

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11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 11:06 a.m.

14 APPEARANCES:

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16 Petitioner.

17 SARAH E. HARRINGTON, ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.; on
19 behalf of the United States, as amicus curiae,
20 supporting Petitioner.

21 JAMES C. HO, ESQ., Solicitor General, Austin, Texas; on
22 behalf of Respondents.

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1 P R O C E E D I N G S.

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 09-400, Staub v. Proctor Hospital.
5 Mr. Schnapper.

6 MR. RUSSELL: Actually, it's Mr. Russell.

7 CHIEF JUSTICE ROBERTS: Oh, I'm sorry. I'm
8 looking ahead. And, oh, I've got the argument wrong,
9 too.

10 We will hear argument in 08-1438,
11 Sossamon v. Texas.

12 You don't look like Mr. Schnapper. Mr.
13 Russell.

14 ORAL ARGUMENT OF KEVIN K. RUSSELL

15 ON BEHALF OF THE PETITIONER

16 MR. RUSSELL: By accepting Federal funds for
17 its prisons, Texas consented to suit for appropriate
18 relief for violations of the Religious Land Use and
19 Institutionalized Persons Act. The question in this
20 case is whether that appropriate relief encompasses
21 damages. If you simply asked what kind of relief is
22 generally appropriate against a State, the answer would
23 be no relief, not even an injunction, because States
24 ordinarily are not subject even to suit without their
25 consent. And so RLUIPA necessarily asks a more precise

1 question, and that is what relief is appropriate against
2 a State that has consented to be sued for violations of
3 this sort. Damages, for example, are perfectly
4 appropriate against a State that has consented to be
5 sued for breach of contract.

6 JUSTICE GINSBURG: Now, what would it be,
7 Mr. Russell, if there were a suit under RFRA because a
8 Federal penal institution was not allowing for the
9 religious practices that the act protects?

10 MR. RUSSELL: In --

11 JUSTICE GINSBURG: In a suit under RFRA,
12 could there be -- would damages be an appropriate
13 remedy?

14 MR. RUSSELL: In our view they are, although
15 it's a different context, and we recognize that the
16 government disagrees with us on that. We can't point to
17 the Spending Clause-contract analogy that applies with
18 respect to Spending Clause legislation as RFRA applies
19 to the Federal Government. But there are other
20 indications, including for example the long tradition of
21 damages being appropriate relief for the violation of
22 civil rights.

23 JUSTICE GINSBURG: Well, could we back up.
24 You are saying you could get them against the Federal
25 Government too, but the government doesn't think so?

1 MR. RUSSELL: That is our view, although we
2 recognize that RLUIPA is different in this respect, in
3 that it's a Spending Clause statute under which -- and
4 this Court's decision in Barnes v. Gorman makes clear
5 that damages are traditionally appropriate relief for
6 the violation of any Spending Clause statute.

7 Of course, there is also a tradition that
8 damages are for the violation of civil rights. Take
9 statutes like Title VI, Title VII, Title IX, section 504
10 of the ADA, the list goes on and on, where Congress has
11 created damages as the quintessential remedy to enforce
12 civil rights, and when Congress has subjected States to
13 suits under such statutes, it has always put them on
14 equal footing with other defendants and subjected them
15 to damages as well. But even beyond that --

16 JUSTICE SCALIA: But did it use such
17 language as "appropriate relief"?

18 MR. RUSSELL: Well, for example --

19 JUSTICE SCALIA: I mean, that's the
20 question. Our cases say it has to be clear to the State
21 when they go into one of these schemes, it has to be
22 clear what liability they are subjecting themselves to.
23 And in these other cases I think it was clear. I don't
24 think it's clear with simply the word "appropriate
25 relief."

1 MR. RUSSELL: No, we are not saying that the
2 word "appropriate relief" in itself supplies the
3 clarity. It's looking at that language and the way the
4 court interprets statutes generally, among other things,
5 looking at the tradition of what constitutes appropriate
6 relief for a violation of this sort.

7 We do think that Barnes v. Gorman is
8 appropriate precedent in telling the court -- in telling
9 Texas what kind of relief is generally thought
10 appropriate to satisfy Congress's desire to remedy
11 violations of a Spending Clause statute.

12 We recognize, of course, that Barnes didn't
13 involve sovereign defendants, but the local governments
14 in that case had the same rights as a State would. It
15 just comes out of the Spending Clause rather than the
16 Eleventh Amendment. That is, both constitutional
17 provisions prohibit Congress from subjecting defendants
18 to damages suits under Spending Clause legislation
19 without their consent. And this Court has enforced that
20 identical constitutional right with the same clear
21 statement test derived from Pennhurst v. Halderman.

22 Even more, the contract analogy the Court
23 relied on in Barnes is no less apt simply because one of
24 the recipients is a State.

25 CHIEF JUSTICE ROBERTS: The contract

1 analogy, I suppose, would provide that the meaning of
2 the contract is interpreted against the drafter. Right?

3 MR. RUSSELL: That would have been true in
4 Barnes as well.

5 CHIEF JUSTICE ROBERTS: Yes. So to the
6 extent the State is arguing for a restrictive
7 interpretation, it gets at least a little help from the
8 fact that the Federal Government wrote the statute.

9 MR. RUSSELL: Well, it gets the same amount
10 of help that the local governments got in Barnes, which
11 wasn't enough. And Not only does the analogy, I think,
12 apply; so does the remedy. Damages are a quintessential
13 appropriate remedy for breach of contract by a State so
14 long as the State has agreed to be sued for violation of
15 a contract.

16 JUSTICE GINSBURG: Mr. Russell, the State
17 looks at this statute and says, oh, this statute
18 preserves the PLRA, and under the PLRA there are no
19 damages without having a physical injury. So putting
20 the PLRA together with "appropriate relief," PLRA is
21 telling us it's not appropriate relief when there is no
22 physical injury.

23 MR. RUSSELL: Well, I would say two things
24 about that. One, keep in mind that the PLRA limitations
25 only apply to incarcerated individuals. It doesn't

1 apply to the people RLUIPA protects in State-run nursing
2 homes or mental health facilities. So Congress wouldn't
3 have been thinking that appropriate relief is defined in
4 some sense by the scope of the PLRA.

5 In addition, we think that the fact that
6 Congress expressly said that the PLRA applies to limit
7 the relief that's otherwise available under RLUIPA shows
8 that Congress didn't think that the PLRA itself made the
9 relief inappropriate. It's simply that there is some
10 relief that is otherwise appropriate that will be
11 limited in some circumstances by the PLRA.

12 JUSTICE GINSBURG: But in the prison
13 setting, then, isn't it an academic question, because
14 there are not going to be damages anyway?

15 MR. RUSSELL: No, that's not true, for a
16 couple of reasons. One, there are many cases involving
17 pecuniary damages. There is destruction of religious
18 items that won't be subject to the PLRA limitation.

19 There are -- there are cases that give rise
20 to pecuniary claims. So there is destruction of a
21 religious item, a Bible or something like that.

22 There are also cases in which the violation
23 will result in a physical injury. There are cases where
24 people are deprived of food for long periods of time.
25 There is a case where a prison refused to transport an

1 inmate for medical treatment outside the facility
2 because he wouldn't take off his yarmulke. Congress, I
3 don't think would have thought that the PLRA limitations
4 rendered a damages remedy unimportant. And at the very
5 least --

6 JUSTICE SOTOMAYOR: Does it include punitive
7 damages?

8 MR. RUSSELL: Excuse me?

9 JUSTICE SOTOMAYOR: Does it include punitive
10 damages?

11 MR. RUSSELL: The statute, I think, does not
12 in light of Barnes, because Barnes said that you get
13 traditional contract remedies and punitive damages are
14 not a traditional contract remedy.

15 Beyond that tradition, though, there's also
16 textual cues in the statute itself. There are three of
17 them that I would like to focus on. I'll list them and
18 then discuss them.

19 One is the definitions section, which lumps
20 States in together with local governments in the
21 definition of "government." The second is the Federal
22 enforcement provision, which specifically allows suits
23 by the United States, but only for the equitable and
24 declaratory relief that the State says is the only thing
25 that's available under appropriate relief. And finally

1 is the fact that the statute separately already
2 authorizes suits for injunctive relief against State
3 officials, making the addition of suits against States
4 effectively surplusage unless some other kind of relief
5 is available against the State.

6 Beginning with the definitions section, this
7 Court recognized in the United States v. Nordic Village
8 that where Congress, in the Bankruptcy Act, defined
9 "governmental unit" to include both the United States
10 and a State, that Congress was making clear, quote, that
11 "States and Federal sovereigns are to be treated the
12 same for immunity purposes."

13 I think the same lesson comes out of the
14 fact that RLUIPA defines "governments" to include not
15 only States, but local governments, and subjects all
16 governments to the same cause of action for the same
17 appropriate relief. Congress was expressing there as
18 clear as it could that there was a definitional
19 equivalence between States and local government.

20 JUSTICE SCALIA: Yeah, but -- but, I mean,
21 that means either that the Federal Government -- that
22 the State government is liable for damages just as
23 municipalities are, or that municipalities are immune to
24 suit for damages just as the States are.

25 I mean, that -- you don't know which way

1 that cuts, do you?

2 MR. RUSSELL: Well, I will point you to
3 other provisions of the statute.

4 JUSTICE SCALIA: Well, maybe let's talk
5 about them, then.

6 MR. RUSSELL: Okay. One is the fact that,
7 as I mentioned before, the statute -- and I think the
8 State agrees -- already allows suits for injunctive
9 relief against State officials in their official
10 capacity. The only thing that adding States as
11 defendant would accomplish in light of that would simply
12 be a change in the caption of the lawsuit, unless States
13 are subject to some relief that State officials under Ex
14 parte Young are not.

15 JUSTICE SOTOMAYOR: Well, except this would
16 be a violation of a statute, not a violation of a
17 constitutional right. So under Ex parte Young they
18 couldn't necessarily get an injunction.

19 MR. RUSSELL: Well, I would set aside the
20 question of whether Ex parte Young applies of its own
21 force. I think by defining "officials" as a form of
22 government and authorizing suits for appropriate relief
23 against officials, I think everybody agrees that that
24 authorizes suits against the officials for at least
25 injunctive relief.

1 And then the question is, well, what does it
2 accomplish to also authorize suits against States? And
3 I think the obvious answer is it authorizes a damages
4 claim against the State. And even in light of Barnes,
5 the State seems to acknowledge that damages are
6 appropriate relief against local governments under this
7 statute.

8 JUSTICE SCALIA: Well, I can conceive of a
9 case where -- where the State's violation of RLUIPA
10 consists of a State statute that simply deprives the
11 individual of his rights under RLUIPA.

12 What State official would you -- would you
13 sue? It seems to me you couldn't sue the State
14 legislature, so it would make sense to have an
15 injunction against the State.

16 MR. RUSSELL: I think it's common in that
17 circumstance to sue the State attorney general for Ex
18 parte Young relief, for example, if you have a
19 constitutional claim against the statute, as may very
20 well have happened in the California case, or the
21 governor, I guess. So I don't think that naming --
22 having a State as a defendant is necessary for that
23 purpose here.

24 In addition, as I mentioned before, I think
25 even the State acknowledges that damages are appropriate

1 relief against local governments, but Congress made
2 clear that when it intended the identity of a party to
3 result in a dramatically different scope of relief, it
4 did so expressly, and you can see that in the U.S.
5 enforcement provision. There, Congress specially
6 authorized suits by the United States and had its own
7 remedial provision which provides only for declaratory
8 and injunctive relief.

9 And that shows both that Congress didn't
10 expect courts to simply figure out that different kinds
11 of defendants would be subject to different appropriate
12 relief, but also --

13 JUSTICE ALITO: Isn't it argued that a
14 possible purpose of that was to make it clear that the
15 Federal Government couldn't sue a State to recover money
16 that had been given to it?

17 MR. RUSSELL: Well, the fact -- I would say
18 two things about that. One is Congress didn't limit
19 that provision to suits against States. It's anybody
20 who gets sued by the United States is limited to
21 equitable injunctive relief.

22 And that's, again, an example of Congress
23 treating States the same as everybody else. Whether
24 they are sued by the United States or sued by a private
25 party, it is the same relief. It's the same remedial

1 provision and we think that suggests the same relief.

2 That provision also kind of -- the language
3 of that provision, "injunctive or declaratory relief,"
4 stands in pretty stark contrast to the facially broader
5 phrase "appropriate relief" in the general provision.

6 In addition to RLUIPA itself, I think it's
7 also worth pointing out that the State had independent
8 notice under section 2000(d)(7) -- this is the
9 Rehabilitation Act Amendments of 1986, where Congress
10 made clear to Texas that it would be subject to suit for
11 damages under any statute that -- under a section of any
12 statute that prohibits discrimination by Federal funding
13 recipients.

14 And I think the question here boils down to
15 whether RLUIPA is materially distinguishable from
16 section 504, which is listed in section 2000(d)(7) as an
17 example of a statute prohibiting discrimination. And
18 if -- I think that means that the catch-all has to at
19 least be broad enough to encompass section 504, and in
20 our view, the two statutes are not distinguishable.
21 Both prohibit both the kind of disparate treatment of
22 similarly-situated individuals that the State
23 acknowledges constitutes discrimination and requires
24 accommodations in some circumstances.

25 JUSTICE ALITO: You addressed the -- the

1 effect of the issue here on persons who are in State
2 institutions other than penal institutions.

3 What would be -- what's the effect of the
4 issue here on land use restrictions? Are there many
5 cases in which issues involving land use restrictions
6 are -- are raised in litigation against the State as
7 opposed to a municipality?

8 MR. RUSSELL: It's quite rare. I am aware
9 of one pending case in Vermont where there is a
10 challenge to a -- a State environmental regulation, but
11 for the most part it isn't.

12 But if this Court were to, you know,
13 section -- the provision that we are talking about here
14 applies to land use as well as to institutionalized
15 persons, and one would ordinarily think that the statute
16 would have the same meaning depending on context.

17 I recognize that the State's basic argument
18 is that the meaning changes depending on who the
19 defendant is, and I suppose if you accept that it could
20 also depend on -- on what provision is being applied.
21 But that's not normally how statutes work.

22 JUSTICE GINSBURG: But the answer to
23 Justice Alito's question is that in the land use area,
24 zoning for example, those are mostly cases against
25 municipalities or counties?

1 MR. RUSSELL: That is correct.

2 JUSTICE GINSBURG: Not against the State.

3 MR. RUSSELL: That is correct.

4 JUSTICE KENNEDY: The government is going to
5 tell us that the standard for waiver with respect to the
6 Federal Government is different from the standard with
7 respect to the State. Do you -- I think that's what
8 they are going to tell us. Do you agree with that?

9 MR. RUSSELL: No. I actually don't
10 understand them to be making that argument, either. But
11 I know for sure that that's not our position. And the
12 Court's decision in Barnes I think, for example, is
13 entirely consistent with the Court's recent decisions,
14 including for example in Richlin, where it's made clear
15 that when you are considering the scope of waiver of
16 sovereign immunity, you engage in ordinary statutory
17 interpretation and then the sovereign is respected. If
18 at the end of that interpretation the statute remains
19 unclear, you know, certainly the sovereign wins. But --

20 JUSTICE KENNEDY: But it seems to me that
21 the States are in need of special protection. With --
22 with the Congress, if it's a Federal immunity, the
23 Congress can always -- always change its law.

24 MR. RUSSELL: Well --

25 JUSTICE KENNEDY: That just can't happen

1 with the State.

2 MR. RUSSELL: I don't know that this Court's
3 cases support the idea that -- that heightened clear
4 statement rule for States versus the Federal Government.
5 If anything, I think they suggest the opposite, but so
6 long as the statute is clear.

7 JUSTICE KENNEDY: It's the suggestion of the
8 opposite that -- that I am trying -- I am trying to
9 explore.

10 You have your white light on.

11 MR. RUSSELL: Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, Mr.
13 Russell.

14 Ms. Harrington.

15 ORAL ARGUMENT OF SARAH E. HARRINGTON,
16 FOR THE UNITED STATES, AS AMICUS CURIAE,
17 SUPPORTING THE PETITIONER

18 MS. HARRINGTON: Mr. Chief Justice, and may
19 it please the Court:

20 The Respondent in this case agrees that when
21 it accepts Federal funds for its correctional system it
22 voluntarily waives its sovereign immunity to private
23 suits in Federal court to enforce RLUIPA, and it is
24 clear under this Court's decisions in cases such as
25 Franklin and Barnes that that voluntary waiver

1 encompasses a waiver to suits for money damages.

2 JUSTICE ALITO: Suppose Congress passes a
3 statute that creates a private right of action against
4 both the Federal Government and against the States and
5 in both instances authorizes all appropriate relief.
6 Are damages available in the action against the Federal
7 Government as well as the State government?

8 MS. HARRINGTON: Well, it would depend on
9 the context to answer both questions.

10 JUSTICE ALITO: Well, the State -- the State
11 provision is a Spending Clause provision.

12 MS. HARRINGTON: Then the answer would be
13 yes as to the States. This Court has been clear in
14 cases such as Franklin and Barnes that in the Spending
15 Clause context, unless Congress indicates an intent to
16 rebut the presumption somehow --

17 JUSTICE ALITO: And what about the Federal
18 Government?

19 MS. HARRINGTON: In the Federal Government
20 probably not, although this Court has looked to
21 background principles in interpreting words such as
22 "appropriate."

23 JUSTICE ALITO: What sense does it make?
24 Other than -- I know you are representing a client and
25 so special pleading for your client is -- is to be

1 expected, but I find that very difficult to accept. If
2 "all appropriate relief" includes damages as against the
3 State that accepts Federal money, then you know, what's
4 good for the State should be good for the Federal
5 Government.

6 MS. HARRINGTON: Well, I would say two
7 things. First, in both cases what you want is a clear
8 statement of an intent to waive the sovereign's
9 immunity, either by the Federal Government or the State
10 government. And also that it's important to keep in
11 mind that in cases such as Franklin and Barnes, this
12 Court was construing statutes that did not say anything
13 about what remedies were appropriate, didn't mention
14 remedies whatsoever.

15 And so we don't rely so much on RLUIPA's use
16 of the phrase "appropriate relief" as we do on the
17 Spending Clause context.

18 JUSTICE GINSBURG: But those cases did not
19 involve States, right?

20 MS. HARRINGTON: Those cases did not involve
21 States, that's true. But --

22 JUSTICE GINSBURG: And I think that the --
23 the core question here is the State -- and Justice Alito
24 just posed it: the State is being treated with less
25 dignity than the Federal Government, because your

1 position is that the Federal Government is shielded by
2 its sovereign immunity, and you say the State is not.

3 MS. HARRINGTON: On the contrary, as to the
4 dignity point, Your Honor, if -- the State voluntarily
5 waives its immunity when it accepts Federal funds that
6 clearly condition the acceptance of the funds on the
7 waiver of its immunity. The State in this case doesn't
8 contest that it has waived its sovereign immunity
9 voluntarily to some universe of suits to enforce RLUIPA.

10 JUSTICE KENNEDY: But we are talking about
11 general principles of interpretation and the proposition
12 that we are suggesting is that the State surely should
13 be entitled to the same dignity, the same protection
14 against suits as the Federal Government, and you suggest
15 just the opposite.

16 MS. HARRINGTON: No, Your Honor.

17 JUSTICE KENNEDY: And it seems to me that's
18 contrary to standard principles of the Federal -- of
19 protecting the Federal balance.

20 MS. HARRINGTON: If you were construing a
21 State statute that voluntarily waived its own immunity,
22 then you might -- we might say the use of appropriate
23 relief in that statute should be construed the same as
24 the use of appropriate relief in RFRA. But in this case
25 you are not talking about a State's waiver of its

1 immunity through its -- through statutory language. The
2 Court said in College Savings Bank that when a -- when a
3 State takes Federal funds that are conditioned on a
4 waiver of immunity, it is the act of accepting the funds
5 that is the waiver and it waives its immunity to suits
6 to the extent that it has noticed that it is doing so.

7 JUSTICE KENNEDY: But it's -- but it's only
8 because they accept the funds at all that the Spending
9 -- that the Spending Clause is even operative.

10 MS. HARRINGTON: That's right. But again,
11 it's -- it's the act of accepting the funds that are
12 clearly conditioned that constitutes the waiver. So
13 that the waiver --

14 JUSTICE GINSBURG: But the waiver -- I mean,
15 on the State side they can say it says "appropriate
16 relief." All right; we accept that we are going to be
17 vulnerable to an injunction suit. But we're the State
18 and it's our treasury, and it is not appropriate relief.
19 We didn't waive it. It's not -- doesn't say in the
20 Spending Clause legislation that we open up our
21 treasury.

22 MS. HARRINGTON: But there is no basis in
23 either the Eleventh Amendment or the statutory
24 provisions in RLUIPA for distinguishing relief of an
25 injunctive nature from relief in damages against the

1 State. The Eleventh Amendment talks about suits in law
2 and in equity, and there is nothing in RLUIPA that would
3 give the States notice that they are waiving their
4 immunity to suits for injunctive relief, but not give
5 them notice that they are waiving their immunity to
6 suits for money damages. This Court --

7 JUSTICE SCALIA: The word "appropriate" --
8 the word "appropriate" would -- would suggest that to
9 me. If -- if I'm a State attorney general, and I -- I
10 know that the rule is sovereign immunity and -- and
11 especially with regard to raids on the State treasury, I
12 think it would be at least plausible that I would -- I
13 would read "appropriate relief" not to include monetary
14 relief.

15 And we have said -- the language from our
16 cases -- Lane says a waiver of sovereign immunity must
17 be unequivocally expressed in the statutory text and
18 will be strictly construed in terms of its scope in
19 favor of the sovereign. That's -- that's a high test.

20 MS. HARRINGTON: But even --

21 JUSTICE SCALIA: And -- and although I might
22 sit down and come out with a conclusion after intensive
23 study that yes, maybe the best reading of this statute
24 is that it allows money damages, I find it hard to say
25 that it is unequivocally expressed in the statutory

1 text.

2 MS. HARRINGTON: Well, two things if I
3 could, Your Honor. In Lane v. Pena, the question before
4 the Court was it wasn't -- it was outside the Spending
5 Clause context, because the question was whether section
6 504 of the Rehabilitation Act applied to the Federal
7 Government, and when the Federal Government applies,
8 even in the Spending Clause context, conditions on
9 itself there is no contract-like relationship. But the
10 second thing this Court said in Barnes --

11 JUSTICE SCALIA: You -- you deny that it has
12 to be unequivocal?

13 MS. HARRINGTON: It has to be unequivocal,
14 but -- but the context in which you are construing
15 whether -- whether the sovereign is expressing its
16 intent to waive its immunity is different when you are
17 talking about the Federal Government applying
18 obligations on itself than when you are talking about
19 the Federal Government offering money to a State in --
20 in exchange for its agreeing to comply with --

21 JUSTICE SOTOMAYOR: But that has nothing to
22 do with whether the language is clear or not to
23 constitute a waiver. There is no principle of law that
24 you are articulating that says it -- it has to be --
25 this is not clear enough for the Federal Government, but

1 it is clear enough for the State. "Appropriate relief"
2 either has a meaning or it doesn't.

3 MS. HARRINGTON: Right. And again, we are
4 not relying so much on the use of the phrase
5 "appropriate relief" in the statute. What that -- the
6 work that does is it affirms that the background
7 presumption of the Bell v. Hood cases applies to proper
8 defendants under RLUIPA, which include State
9 governments.

10 But as this Court said in Barnes, when a --
11 when a recipient of Federal funds takes the funds, it is
12 on notice that it is going to be subject not only to the
13 remedies explicitly provided in the text of the relevant
14 legislation, but also to remedies that are traditionally
15 available in suits for breach of contract, and those
16 include compensatory damages and injunctive relief.

17 Now the State would have this Court turn
18 that presumption, in terms of traditional contract
19 rules, on its head by saying that this -- that this
20 Court should hold that the State presumptively waived
21 its immunity to suits for injunctive relief but not for
22 damages.

23 JUSTICE BREYER: What do you say about -- I
24 think I read in one of these briefs that what I think is
25 the most relevant similar statute, RFRA, has been held

1 not to encompass the same word -- not to encompass the
2 monetary relief, and also there was some legislative
3 history where people testified and told Congress at the
4 time that the word "appropriate" won't encompass
5 monetary relief. Am I remembering that correctly?

6 MS. HARRINGTON: Well, I would give you the
7 same answer I just gave, which is that we are not
8 pointing so much to the use of the -- using the phrase
9 "appropriate relief" in the statute as we are to the
10 Spending Clause context. And this Court has held that
11 when there is these conditions placed on Federal funds,
12 the recipient of the funds understands when it takes the
13 money that when it intentionally violates the conditions
14 to which it has agreed it will be subject to suit for
15 money damages.

16 JUSTICE GINSBURG: But then you're
17 bracketing the State with counties and municipalities.
18 It really comes down to a question -- who decides
19 whether the state fisc is touched. And why isn't it
20 most appropriate for this Court to say, Congress can
21 call it either way, but our rule is, Congress, if you
22 want to reach the State treasury, you have to say so
23 explicitly. And then there is no doubt when the State
24 enters a contract that it's going to be subject to money
25 damages as well as injunctive relief.

1 MS. HARRINGTON: Well, this Court has
2 consistently applied a clear notice requirement to
3 conditions that Congress places on Federal funds. That
4 clear notice requirement arose out of cases like
5 Pennhurst and South Dakota v. Dole, in which there were
6 State recipients of Federal funds. And the Court said
7 that the validity of Congress's constitutional action in
8 exercising its Spending Clause authority depends on it
9 giving the recipients of the funds clear notice of the
10 conditions that they are agreeing to because of the
11 contract-like nature of Spending Clause legislation.

12 Now, that same rule was applied in Franklin
13 and Gebser and Davis and Dole, even though the
14 defendants in those cases were not sovereigns. It's
15 still the same notice requirement and there is no reason
16 to think that a county government would be able to
17 understand, would be on notice that it would be subject
18 to compensatory damages suits, and a State government
19 would not. To be sure, the State government has more to
20 give up. It might be a harder choice for the State
21 about whether to take the money or not. But the choice
22 is the State's, and when it says yes, I'm going to take
23 this money, it agrees to the conditions that are
24 attached to the money.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 MS. HARRINGTON: Thank you.

2 CHIEF JUSTICE ROBERTS: Mr. Ho.

3 ORAL ARGUMENT OF JAMES C. HO

4 ON BEHALF OF THE RESPONDENTS

5 MR. HO: The phrase "appropriate relief" is
6 a textbook example of ambiguity, not unmistakable
7 clarity. And that should end the inquiry.

8 JUSTICE SOTOMAYOR: If it is, why is
9 injunctive relief included at all? Meaning, what you
10 seem to be saying to me is that no relief should be
11 appropriate, because no relief is clear whether it's
12 injunctive relief or damages?

13 MR. HO: We agree with the U.S.'s reading of
14 RFRA. The same should attach here. There is an express
15 cause of action. So that cause of action has to do
16 something and we are applying to that express cause of
17 action the narrowest reading, which is --

18 JUSTICE SOTOMAYOR: Some would say that
19 injunctive relief attaches more to the public FISC than
20 compensatory relief. Because future conduct or change
21 of conduct can have an enormous intrusion on the public
22 FISC, so why do we draw the line between saying one is
23 more intrusive than the other?

24 MR. HO: Two answers, Your Honor. The
25 traditional line drawing that you see in sovereign

1 immunity is injunctive relief. Any prospective relief
2 is less intrusive on sovereign immunity than any form of
3 retrospective relief, damages and that sort of thing.
4 But especially true in this context, because when you
5 talk about the Spending Clause, we can walk away from
6 injunctive relief, from an injunction at any time. We
7 can simply stop receiving the funds and stop accepting
8 the funds and the injunction evaporates, but we can't
9 walk away from a damage remedy. So we are construing
10 the express cause of action in RLUIPA, like in RFRA, to
11 do the judicial minimum. Which is that judicial relief
12 which requires states to do what we are already required
13 to do, which is to comply with the substantial burden
14 mandatory under RLUIPA. So the fact that appropriate
15 relief is essentially inherently ambiguous should end
16 the analysis, because after all, the Court is required
17 unmistakably clear text and rejected merely permissible
18 inferences for two reasons, to ensure both careful,
19 robust deliberation by Congress before disturbing the
20 federal state balance of power, as well as to ensure
21 clear notice.

22 JUSTICE BREYER: I was looking at the cases
23 the best I can at the moment. I think you might say
24 that there are a lot of cases which interpret the word
25 "appropriate relief" to include monetary relief. And

1 then there is some that don't. And to get a rule out of
2 them, you would have to say, well, they are looking to
3 context. And in context it sometimes is clear,
4 sometimes occasionally not. But here, isn't this and
5 maybe this was asked, but I want your answer. The
6 context here, the words appropriate relief, govern both
7 the prison situation and the land use situation, don't
8 they? You are given an action when the government
9 through a general land use regulation infringes
10 somebody's right to build, for example. Now, wouldn't
11 that kind of interference with the use of property quite
12 often and normally require some kind of monetary
13 compensation? This isn't just the odd thing in a
14 prison, where it's talking about it might be called
15 building a religious building or building some kind of
16 parking, all kinds of things that have monetary
17 compensation. Do you see my question?

18 MR. HO: I think I do, Your Honor. First of
19 all, we certainly agree that your premise, which is that
20 context matters, the Court has said specifically
21 appropriate relief can enlarge or contract, it could be
22 mean monetary or it could mean not monetary, so it does
23 depend on context. I confess that your question is
24 interesting, we are obviously focused on section 3.

25 JUSTICE BREYER: I know, but isn't it the

1 same word that governs both?

2 MR. HO: It is the same word.

3 JUSTICE BREYER: If it's the same word that
4 governs both and if land cases very often involve claims
5 for money, I would think that would cut against you.
6 But that's why I ask. I want to get your response.

7 MR. HO: Well, we are still looking for
8 express language in the text.

9 JUSTICE BREYER: But there are loads of
10 cases that have nothing more than appropriate relief and
11 in those cases context makes it clear. The only one
12 really I thought strongly -- your strongest case seems
13 to me to be RFRA.

14 MR. HO: RFRA certainly is the direct
15 context from which the words appropriate relief in this
16 statute are drawn. And RFRA, of course, is land use,
17 it's prisons, it's anything, RFRA applies to the federal
18 government or any activity under the sun.

19 JUSTICE BREYER: Uh-huh.

20 MR. HO: So for that reason alone, I think
21 we might resist the notion that the specific uses of
22 appropriate relief in RLUIPA would somehow provide any
23 sort of change or certainly any expectation that we
24 would have or that Congress would have, for that matter,
25 that the words appropriate relief would take on a new

1 meaning just because it's land use.

2 JUSTICE BREYER: I mean, so often, what I'm
3 thinking of, a church wants to build, and they can't
4 because of a land restriction. And it turns out that
5 that land restriction violates this statute. And in the
6 meantime they have had to rent buildings, they have had
7 to maybe build somewhere else and they have had to do
8 all kinds of things that cost money. And that's why I
9 would think in that context money would be a natural
10 thing.

11 MR. HO: I'm not sure though --

12 JUSTICE BREYER: To fulfill appropriateness.

13 MR. HO: I'm actually not sure that that
14 would be true even in that context. Certainly anybody
15 might want money, but when it comes to what Congress has
16 indicated and what states would expect, I would imagine
17 that the federal government's biggest interest is in
18 making sure that states and other recipients use the
19 money for what it's supposed to be for, comply with the
20 substantial burden mandate. And a local government is
21 not doing so with regard to a church, then they should
22 be enjoined so that they would be required to comply
23 with it. If anything, damages might exacerbate the
24 problem just in the sense that we are now taking federal
25 money and applying damages to it.

1 JUSTICE GINSBURG: I thought a local
2 government would be subject to damages. We are talking
3 about the state.

4 MR. HO: We are talking about the state,
5 Your Honor. To be clear, we do not actually concede
6 that damages would even be available against a local
7 government. Our point here is that simply it doesn't
8 matter for us, because we obviously are treated very
9 differently from local governments. I think they have,
10 both the Petitioner and U.S. have indicated that the
11 statute should treat state and locals the same way. The
12 problem with that is the Constitution obviously treats
13 states and locals very differently. The Constitution
14 treats the state and federal government in the same way,
15 in that both enjoy sovereign immunity and included in
16 that are the principles of sovereign immunity, the need
17 for specific waiver, not just a clear waiver, but
18 specific as to the scope of the waiver, and specific as
19 to the remedies.

20 JUSTICE SOTOMAYOR: So now we have three
21 distinctions. With respect to land use discrimination,
22 the Rehab Act would presumably apply. So the Rehab Act
23 says compensatory damages are permissible for that kind
24 of discriminatory claim, so now we have compensatory
25 damages for that. We have, potentially, compensatory

1 damages for local governments, but not for State or
2 Federal level.

3 We are chopping up the statute at each
4 stage, correct? We are treating different defendants
5 differently and different claims differently with
6 respect to the relief that's permissible?

7 MR. HO: That would not be our submission,
8 Your Honor. If we are talking about the 2000d(7)
9 language, all that 2000(d)(7) says if you are a
10 provision prohibiting discrimination, then you get the
11 same remedies against a State that you would get against
12 any other nonsovereign defendant. And if we were
13 representing the City of Austin, we actually would
14 argue -- we think we have a good argument -- that
15 damages would not be available even against the City of
16 Austin. Our point here is simply that --

17 JUSTICE SOTOMAYOR: Could you explain why?

18 MR. HO: Sure. I think if I were the City
19 of Austin, I would make three arguments. One, the words
20 "appropriate relief" are in the statute. I think
21 they -- the other one wants to read this as surplusage.
22 We would think that the words "appropriate relief"
23 should do something, and we note that there were several
24 justices who dissented in West v. Gibson, noting that
25 the words "appropriate relief" seemed to indicate

1 equitable discretion, or discretion, and therefore
2 equitable relief.

3 In addition, we will note that the words
4 "appropriate relief" in (4)(A) --

5 JUSTICE SOTOMAYOR: But equity permits money
6 as well. Equity permits money as well.

7 MR. HO: In some limited formats, but it
8 wouldn't be compensatory damages in the sense that we
9 are talking about in this case.

10 An additional indication would be the fact
11 that the words "appropriate relief" aren't just attached
12 to the claim. It's attached to both claim or defense.
13 And of course it makes no sense to say that you can get
14 money damages by asserting RLUIPA as a defense.

15 So for all those reasons, the City of Austin
16 might actually have a good case that damages aren't
17 available even against them. Of course, it doesn't
18 matter for our case, because the whole point is if the
19 City of Austin were to lose due to Barnes and Franklin,
20 what we know for sure here is that Barnes and Franklin
21 have nothing, nothing whatsoever, to do with the States.

22 If I may, I would like to spend a little bit
23 of time on that issue.

24 JUSTICE ALITO: Before you do that, Barnes
25 and Franklin were cases involving implied rights of

1 action; isn't that right?

2 MR. HO: Yes. With the 2000d(7) backdrop,
3 but yes, Your Honor.

4 JUSTICE ALITO: Okay.

5 JUSTICE KENNEDY: And I'm -- this one
6 question may be covered, but can you give me any
7 examples where States have turned down money under the
8 Spending Clause, say we don't want it, the restrictions
9 are too great? Does this happen all the time, or ever?

10 MR. HO: Where States turn down money?

11 JUSTICE KENNEDY: Where States tell the
12 Federal Government: No, thank you, we don't want the
13 money.

14 MR. HO: It's starting to happen in Texas.

15 JUSTICE KENNEDY: Under programs like this?

16 MR. HO: I don't -- I can't think of a
17 situation where Texas has turned down RLUIPA Federal
18 prison money. But there --

19 JUSTICE KENNEDY: I mean other States --
20 they say, oh, the liabilities are just too great, we
21 don't want it?

22 MR. HO: I'm not aware of any State in the
23 country that has turned down Federal prison funds. Of
24 course, if damages were somehow inflicted, if Congress
25 changed the law, perhaps States would start to

1 recalibrate that decision.

2 Their core argument is that we should just
3 extend Franklin and Barnes to States. The fatal flaw
4 with that argument is that the very principle on which
5 Franklin and Barnes apply -- are premised, that
6 principle does not apply to sovereigns. When Congress
7 passes a cause of action and is silent or ambiguous with
8 respect to the remedies, there is a traditional
9 presumption that we apply. Non-sovereigns now expect to
10 be subject to any possible remedy under the sun.

11 Precisely the opposite rule applies to
12 sovereigns. We know that for sure as a matter of
13 precedent in Lane, which rejected Franklin as applied to
14 a sovereign. We also know this as a more fundamental
15 basic principle of sovereign immunity, because when it
16 comes to sovereigns, we have to have not only a clear
17 waiver, but also a waiver that is specific to the remedy
18 that is being sought.

19 These two rules can't be reconciled. You
20 either can apply the traditional presumption of all
21 remedies, or you apply the other rule that sovereigns
22 benefit from.

23 Petitioner claims that maybe a special rule
24 should apply that is unique to the Spending Clause, that
25 maybe that's a way to get around the sovereign immunity

1 problem, but we submit that fundamentally misreads
2 Franklin and Barnes, because what's doing the work in
3 Franklin and Barnes isn't the Spending Clause. It's
4 actually quite the opposite. The Spending Clause is
5 cutting back against the traditional presumption.

6 In Franklin -- I will take each case in
7 turn. In Franklin, you see pages and pages of analysis
8 in section 2 of the opinion, where there is exhaustive
9 research about Bell v. Hood and the traditional
10 presumptions that the Court has applied for decades
11 under any thought of Federal power.

12 The Spending Clause makes an appearance in
13 Franklin only at the very end in section 4, invoked by
14 the defense as a potential reason not to apply the
15 traditional presumption. The court, you know, gets past
16 that on the grounds that the traditional presumption is
17 so strong that it does provide the clarity for
18 non-sovereigns. It doesn't indisputably apply to
19 non-sovereigns; why not apply it under the Spending
20 Clause as well?

21 The point, though, is it's not the Spending
22 Clause that does the work. It is -- it is the
23 traditional presumption. That has even more dramatic
24 force in Barnes v. Gorman. Mr. Gorman would have had a
25 \$1.2 million punitive damage award that he would have

1 been entitled to, except for the fact that this was a
2 Spending Clause case, and that's precisely why he lost
3 that punitive damage award.

4 So put simply, yes, it could be that under
5 Barnes and Franklin, remedies would be clear enough in
6 that one context. The problem is it's not clear enough
7 in this context, because sovereigns present a completely
8 different constitutional context.

9 I want to address very quickly Justice
10 Sotomayor's question about Ex parte Young. I think you
11 were exactly right that Ex parte -- that our reading
12 isn't in any way redundant with Ex parte Young, but I
13 want to note an additional reason why we are not
14 redundant.

15 We need to confirm, Congress needed to
16 confirm, that there was in fact a privately enforceable
17 right, and that's why our reading in no way renders the
18 Ex parte Young concept redundant.

19 JUSTICE GINSBURG: What do you do with the
20 practical problem that's been brought up that if a State
21 is sued, it can release the prisoner, it can transfer
22 the prisoner, and then no relief is appropriate? That
23 the only way that the State is going to take its
24 obligation seriously is if it's exposed to compensatory
25 damages?

1 MR. HO: If a prisoner is transferred,
2 released, or the State simply changes its mind and gives
3 up and provides the accommodation, in all those
4 situations, the prisoner is no longer suffering from the
5 complaint of condition. That's why this Court's
6 mootness doctrines would apply.

7 Put another way, mootness is really just
8 another word for settlement, and we would think that
9 settlement, the State essentially capitulating and
10 saying: Our bad, we should have complied, we should
11 have provided the accommodation, that actually
12 vindicates the purpose of RLUIPA, and indeed, it avoids
13 the need for costly litigation to do so.

14 I want to mention briefly the U.S. --

15 JUSTICE SOTOMAYOR: What's the inducement to
16 do it more quickly rather than to delay, to remedy the
17 wrong faster rather than to delay?

18 MR. HO: The reason to do it?

19 JUSTICE SOTOMAYOR: Uh-huh.

20 MR. HO: Simply to avoid litigation. I
21 mean, the way this works practically on the ground,
22 prisons obviously have a lot to deal with, a lot of
23 security concerns. They set general policies. They may
24 not be aware that their policy might have an application
25 for a certain individual of a particular faith. If

1 that's brought to their attention and --

2 JUSTICE SOTOMAYOR: That's an ideal world,
3 that they'll respond, but there is an allegation that
4 some prisons wait until the eve of the trial after
5 onerous discovery on the plaintiff and after enormous
6 harm to plaintiffs, physical and otherwise, before they
7 capitulate. So what's the inducement?

8 MR. HO: Well, the inducement is to --

9 JUSTICE SOTOMAYOR: To move faster.

10 MR. HO: States are -- States are suffering
11 the litigation costs as well. We are not in the
12 business to litigate just because we want to. We have
13 plenty of other suits to deal with.

14 This very case, I think, is a good example.
15 Once the prisoner -- once Mr. Sossamon agreed with
16 respect to the salt restriction policy, we immediately
17 abandoned that policy, before litigation was even filed.

18 With respect to the U.S. cause of action
19 provision, there was an argument that appropriate relief
20 has to mean damages, because otherwise just take that
21 declaratory or injunctive relief language and put it
22 into the private cause of action. The reason that
23 argument doesn't work is because these are two
24 fundamentally different provisions.

25 There is (4)(F) of RFRA, which is the U.S.

1 cause of action, and there was (4)(A) of -- I'm sorry,
2 of RLUIPA -- and there is (4)(A) of RLUIPA, which is not
3 just a private cause of action, but also a defense. So
4 again, if you can imagine sticking in the words
5 "declaratory and injunctive relief" and putting it right
6 into (4)(A), it doesn't work. It doesn't make any
7 sense, because what person asserting a defense would
8 seek an injunctive relief? If you take what's --

9 JUSTICE BREYER: Let me ask -- get this
10 information from you. As I understand it, there are
11 some cases that find the words "appropriate relief" in a
12 statute to include damages and there's some that don't.
13 Let's look at the ones that don't.

14 There is some where it's pretty hard to do
15 it because it's in a heading called "injunction," and
16 that's obvious. But there are only two statutes,
17 really, where the courts have ever held in significant
18 numbers that the word "appropriate relief" does not
19 include money damages. One is the IDEA, the
20 Disabilities Act, and the other is RFRA.

21 Is there anything else that you've come
22 across?

23 MR. HO: Those are two great examples.

24 JUSTICE BREYER: Yes, but are there any
25 others? I mean, I just want to get down on a piece of

1 paper what I have to look at.

2 MR. HO: Sure. I think there are two -- two
3 great examples. I would note --

4 JUSTICE BREYER: All right. So you don't
5 have any others, I'm judging from your hesitation.

6 MR. HO: No, no -- I would actually -- I
7 would note there are two other cases --

8 JUSTICE BREYER: What?

9 MR. HO: -- that I would refer you to, and
10 of course discussed in the briefs. West v. Gibson which
11 talks about how the words appropriate relief, remedies
12 in that context, by definition have no fixed meaning;
13 they can't possibly have fixed meaning. So it has to
14 enlarge or contract. And prior to 1991 -- prior to 1991
15 amendment at issue in that case -- the Court would
16 unanimously agreed that appropriate relief would not
17 have included money damages.

18 Ruckelshaus provides similar guidance, in
19 that I think the phrase was, there was no possible -- no
20 comprehensible or principled meaning to the phrase
21 "appropriate" as attached to a remedy.

22 I will briefly touch on the 2000d-7 issue
23 unless there are questions about that. Assuming the
24 issue is even preserved for this Court's consideration,
25 2000d-7 doesn't allow relief, either. I think there are

1 a lot of reasons why that would be so, but I think the
2 simplest is simply to acknowledge the difference between
3 section 2 of RLUIPA and section 3.

4 Section 2 of RLUIPA is much like the four
5 provisions expressly enumerated in 2000d-7, in that all
6 of them have the word discrimination and more
7 importantly turn on the concept of discrimination. A
8 discrimination is an element of a cause of action under
9 section 2, or under any of the four provisions
10 enumerated.

11 By contrast section 3 is not. You can have
12 discrimination as -- as part of your fact background if
13 you want but it will have nothing whatsoever to do with
14 whether have you a valid section 3 claim or not.

15 JUSTICE KENNEDY: You -- you have already
16 addressed this but I think it's their -- the position of
17 your friend on the other side of the case is that with
18 the Spending Clause you have a contract. The State has
19 some extra protection, and therefore we need not be
20 quite so strict in -- in construing waivers -- waivers
21 of immunity, because you have the contract.

22 Can you comment on that argument? And --
23 and you might want to say that the Spending Clause is
24 potentially so sweeping that the State should have
25 special protection and we should be particularly careful

1 about the clear statement rule.

2 Or do you think the clear statement rule
3 applies with equal force whether it's a Spending Clause
4 or a direct regulation under say, the Fourteenth
5 Amendment?

6 MR. HO: I'll try to take each of those
7 points in turn.

8 We don't see anything in the law that
9 suggests that sometimes there is a clear statement rule
10 and sometimes there is a super-duper clear statement
11 rule. I think there has been some suggestion -- or
12 maybe there has not been any more; I'm not sure; I read
13 the briefs the same way, I think the same way that the
14 Justices did. But they seem not to be arguing that any
15 more.

16 So it should be the same standard. I -- I
17 certainly acknowledge that when it comes to the Spending
18 Clause as you wrote in your dissent in Davis v. Monroe,
19 that the Spending Clause if anything does raise special
20 constitutional considerations as a general matter,
21 inasmuch as the Spending Clause could be used to impose
22 Federal restrictions on States that they could never
23 dream of under Article I otherwise. RLUIPA of course is
24 a prime example of that.

25 But at the end of the day, the Spending

1 Clause is not doing any work with regard to providing an
2 assumption or presumption of remedies. Again, it's
3 exactly precisely the opposite. Franklin and Barnes
4 both articulate that it's the traditional presumption
5 that applies to any exercise of Federal power. That
6 traditional presumption is what's doing the work. The
7 Spending Clause if anything is a cut back. So the
8 notion that just invoking the Spending Clause suddenly
9 puts States on this fabulously clear notice, I think
10 just does not work.

11 If there are no further questions, Your
12 Honor?

13 CHIEF JUSTICE ROBERTS: Thank you, Mr. Ho.

14 MR. HO: Thank you.

15 CHIEF JUSTICE ROBERTS: Mr. Russell, you
16 have four minutes remaining.

17 REBUTTAL ARGUMENT OF KEVIN K. RUSSELL

18 ON BEHALF OF THE PETITIONER

19 MR. RUSSELL: Thank you.

20 Nearly every argument the state made here
21 today could have been made by the local governments in
22 Barnes. Ranging from the complaint that the language
23 like appropriate relief is too unclear, to the assertion
24 that they were not on notice, that by accepting federal
25 funds they were subjecting themselves to suits. And

1 that's because the local government, like any other
2 state, had the same right to the same clear statement
3 rule. Unless this Court is, in fact, going to create a
4 proliferation or hierarchy of clear statement rules, the
5 Pennhurst rule that applies in the Spending Clause
6 context of local governments applies in exactly the same
7 way to a state government under the Eleventh Amendment
8 and Barnes' Court construed the express private right of
9 action under section 504, which incorporated by
10 reference the remedies available under Title XI, which
11 this Court construed to authorize appropriate relief.
12 Exactly the same remedy that RLUIPA authorizes. And so
13 the state for the first time today has suggested that
14 the city of Austin is not bound by Barnes. I don't see
15 how they can reach that conclusion. Barnes quite
16 clearly says that the local government is subject to --
17 and is on notice that it has clear, there is a clear
18 statement in every Spending Clause statute that they are
19 subject to a damages remedy so long as they accept the
20 funds because of the contractual nature of the
21 obligation. That applies.

22 JUSTICE SCALIA: Was that contested in
23 Barnes?

24 MR. RUSSELL: Which part, I'm sorry.

25 JUSTICE SCALIA: Was the liability for

1 compensatory damages contested in Barnes?

2 MR. RUSSELL: No. The question in Barnes is
3 punitive.

4 JUSTICE SCALIA: Just punitive. And there
5 is a lot of discussion, the assumption that they were
6 liable for compensatory, but it really wasn't litigated,
7 was it?

8 MR. RUSSELL: Well, the legal principle this
9 Court adopted to resolve that issue was one that, I take
10 it, was not just a principle for that case, but that in
11 general, funding recipients are on notice that they are
12 subject to contract remedies and unless this Court is
13 going to back away from that as a general matter, unless
14 the Court is going to say that Pennhurst applies
15 differently in the Spending Clause context than it does
16 in the sovereign immunity context, I don't see how you
17 can come to a different result in this case.

18 Justice Breyer, with respect to RFRA, as far
19 as I know, there is only one court of appeals case that
20 says the United States is not subject to suits and that
21 was decided six years after RLUIPA was enacted. With
22 respect to the IDEA, there are a handful of lower courts
23 decisions that say damages are unavailable. Those --
24 they give reasons that are specific to the IDEA and the
25 fact that that remedial provision is part of the due

1 process hearing process there. In general, damages are
2 the quintessential appropriate relief for violations of
3 civil rights, and there is no reason to think that
4 Congress was creating in RLUIPA a second class civil
5 right that wasn't deserving of a remedy that Congress
6 has provided even against states in every other context.
7 With respect to the state's belief that the Eleventh
8 Amendment somehow prefers injunctions over damages
9 remedies, as counsel for the United States pointed out,
10 the Eleventh Amendment is no basis for that. It treats
11 injunctions and damages as equally offensive to state
12 sovereignty, and in fact, particularly in RLUIPA, where
13 damages are often capped significantly by the PLRA, the
14 concern really ought to be on the states by injunctive
15 relief, which will frequently have a much more
16 significant effect on the public FISC than a small
17 damages award.

18 And finally with the state's argument that
19 the words appropriate relief are too inherently
20 ambiguous to meet any clear statement. Well, this Court
21 rejected that kind of argument in West where it
22 construed appropriate remedy to encompass a damages
23 remedy by engaging an ordinary statutory interpretation,
24 which is entirely appropriate in this context. This
25 Court has repeatedly in cases like Ruckelshaus, for

1 example, like Richlin, relied on how statutes apply with
2 respect to private parties to give meaning to the
3 otherwise ambiguous word "appropriate" in the federal
4 statute waiving the federal government's sovereign
5 immunity. Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
7 The case is submitted.

8 (Whereupon, at 11:58 a.m., the case in the
9 above-entitled matter was submitted.)

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