No. 08-1438

In the Supreme Court of the United States

HARVEY LEROY SOSSAMON, III, PETITIONER

v.

STATE OF TEXAS, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ELENA KAGAN
Solicitor General
Counsel of Record
THOMAS E. PEREZ
Assistant Attorney General
NEAL KUMAR KATYAL
Deputy Solicitor General
SAMUEL R. BAGENSTOS
Deputy Assistant Attorney General
SARAH E. HARRINGTON
Assistant to the Solicitor General
JESSICA DUNSAY SILVER
ANGELA M. MILLER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether an individual may sue a State or a state official in his official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*

2. Whether state officials are subject to suit in their individual capacities for damages for violations of RLUIPA.

TABLE OF CONTENTS

Page

Statement 2
Discussion 7
I. The question whether individuals may sue States and state officials in their official capacities for money damages for violations of RLUIPA warrants this Court's review, but is better presented in *Cardinal* . . . 8
II. The question whether individuals may sue state officials in their individual capacities for violations of RLUIPA does not warrant this Court's review 9
A. There is no division among the courts of appeals on this issue 9
B. The court of appeals' conclusion that RLUIPA does not authorize damages suits against state officials in their individual capacities is incorrect . . . 11
C. Review by this Court of this issue is not warranted at this time 14
Conclusion 15

TABLE OF AUTHORITIES

Cases:

Ahmad v. *Furlong*, 435 F.3d 1196 (10th Cir. 2006) 10
Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985) 12
College Sav. Bank v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666 (1999) 12
Campbell v. *Alameida*, 295 Fed. Appx. 130 (9th Cir. 2008) 10
Cutter v. *Wilkinson*, 423 F.3d 579 (6th Cir. 2005) 11
Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 3
Figel v. *Overton*, 263 Fed. Appx. 456 (6th Cir. 2008) 10

Case—Continued: Page

M'Culloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) . . 12
Madison v. *Virginia*, 474 F.3d 118 (4th Cir. 2006) 11
Mayweathers v. *Newland*, 314 F.3d 1062 (9th Cir. 2002), cert. denied, 540 U.S. 815 (2003) 11
Nelson v. *Miller*, 570 F.3d 868 (7th Cir. 2009) 10
Procunier v. *Navarette*, 434 U.S. 555 (1978) 13
Rendelman v. *Rouse*, 569 F.3d 182 (4th Cir. 2009) 10
Sabri v. *United States*, 541 U.S. 600 (2004) 11, 13
Salahuddin v. *Goord*, 467 F.3d 263 (2d Cir. 2006) 10
Smith v. *Allen*, 502 F.3d 1255 (11th Cir. 2007) 6, 10
South Dakota v. *Dole*, 483 U.S. 203 (1987) 11, 12
United States v. *Butler*, 297 U.S. 1 (1936) 11
Walker v. *Iowa Dep't of Corrs.*, 298 Fed. Appx. 535 (8th Cir. 2008) 10

Constitution and statutes:

U.S. Const.:
Art. I:
§ 8:
Cl. 1 (Spending Clause) 3, 6, 11, 13
Cl. 3 (Commerce Clause) 3
Cl. 18 (Necessary and Proper Clause) 12, 13
Amend. I 5
Amend. VIII 5
Amend. XI 5
Amend. XIV 5

Statutes—Continued: Page

Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(e) 8, 9
Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.* 2, 5
42 U.S.C. 2000cc-1 (§ 3) 2
42 U.S.C. 2000cc-1(a)(1) 2
42 U.S.C. 2000cc-1(a)(2) 2
42 U.S.C. 2000cc-1(b) 4
42 U.S.C. 2000cc-1(b)(1) 3
42 U.S.C. 2000cc-2(a) 4, 11
42 U.S.C. 2000cc-2(e) 9
42 U.S.C. 2000cc-2(f) 4
42 U.S.C. 2000cc-5(4)(A) 2, 11
42 U.S.C. 2000cc-5(6) 4
42 U.S.C. 2000cc-5(7)(A) 2
42 U.S.C. 2000d-4a 4
18 U.S.C. 666 13
42 U.S.C. 1983 . . . . . 5, 10, 13

Miscellaneous:

H.R. Rep. No. 219, 106th Cong., 2d Sess. (1999) 2, 3
Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000, 146 Cong. Rec. 16,698 (2000):
pp. 16,698-16,699 3
p. 16,699 3
p. 16,701 3

Miscellaneous—Continued: Page

Protecting Religious Freedom After Boerne *v.* Flores: *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 2d Sess. Pt. 3 (1998) 3

In the Supreme Court of the United States

No. 08-1438

HARVEY LEROY SOSSAMON, III, PETITIONER

v.

STATE OF TEXAS, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to this Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, with respect to the first question presented in respondents' brief, the petition for a writ of certiorari should be held pending this Court's disposition of *Cardinal* v. *Metrish*, No. 09-109 (filed July 22, 2009), and then be disposed of accordingly. With respect to the second question presented in respondents' brief, the petition for a writ of certiorari should be denied.[1]

[1] The United States, in response to this Court's invitation, has filed a brief recommending that the Court grant the petition for a writ of certiorari in *Cardinal*, *supra*.

STATEMENT

1. Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*, to provide statutory protection against religious discrimination, unequal treatment of religions in the provision of accommodations, and unjustified infringement of the free exercise of religion. The statute applies to two specific contexts, land use regulation and institutionalization. The provision at issue in this case is Section 3 of RLUIPA, 42 U.S.C. 2000cc-1, which provides 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 in furtherance of a compelling governmental interest," and "is the least restrictive means" of furthering that interest. 42 U.S.C. 2000cc-1(a)(1) and (2). Congress further defined the terms used in this provision. It defined "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(A). And Congress defined "government" as "a State, county, municipality, or other governmental entity created under the authority of a State"; "any branch, department, agency, instrumentality, or official of [such] an entity"; and "any other person acting under color of State law." 42 U.S.C. 2000cc-5(4)(A).

Before enacting RLUIPA, Congress held nine hearings over three years, during which it gathered substantial evidence that, in the absence of federal legislation, persons institutionalized in state mental hospitals, nursing homes, group homes, prisons, and detention facilities had faced substantial, unwarranted, and discriminatory burdens on their religious exercise. See, *e.g.*, H.R. Rep. No. 219, 106th Cong., 1st Sess. 5, 9 (1999) (*House Re-*

port); *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. 16,698-16,699 (2000). Such "frivolous or arbitrary barriers" to religious exercise, *Cutter* v. *Wilkinson*, 544 U.S. 709, 716 (2005) (citation and internal quotation marks omitted), affected persons confined to correctional facilities in particular. See *House Report* 9-10; 146 Cong. Rec. at 16,701. Congress heard testimony about sectarian discrimination in the accommodations afforded to prisoners, see *Protecting Religious Freedom After* Boerne *v.* Flores: *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 2d Sess. Pt. 3, at 41 (1998) (statement of Isaac Jaroslawicz), as well as instances of prison officials' interfering with religious rituals without apparent justification, 146 Cong. Rec. at 16,699, 16,701.

Based on the evidence it collected, Congress concluded that prison inmates faced "frivolous or arbitrary" rules that resulted from "indifference, ignorance, bigotry, or lack of resources" and that had the effect of restricting their religious exercise "in egregious and unnecessary ways." 146 Cong. Rec. at 16,699. To prevent federal funds from contributing to such unreasoned or discriminatory burdens on the religious exercise of institutionalized persons, Congress invoked its Spending Clause authority, U.S. Const. Art. I, § 8, Cl. 18, to apply RLUIPA's statutory protections whenever a substantial burden on religious exercise "is imposed in a program or activity that receives Federal financial assistance." 42 U.S.C. 2000cc-1(b)(1).[2] A covered "program or activ

[2] In a provision not at issue in this case, Congress also invoked its authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, in

ity" includes "all of the operations of * * * a department, agency, special purpose district, or other instrumentality of a State or of a local government." 42 U.S.C. 2000cc-5(6), 2000d-4a.

To ensure that persons entitled to RLUIPA's protection may vindicate their rights, Congress created a private right of action, permitting any individual whose religious exercise has been substantially burdened in a manner prohibited by the statute to "assert a violation of this chapter as a claim or defense in a judicial proceeding" and to obtain "appropriate relief against a government." 42 U.S.C. 2000cc-2(a). In addition, the United States may seek injunctive or declaratory relief to enforce the statute. 42 U.S.C. 2000cc-2(f).

2. At the time he filed his complaint, petitioner was a state inmate housed in the Robertson Unit of the Texas Department of Criminal Justice-Correctional Institutions Division facility (Robertson). Pet. App. 2a. Petitioner, a Christian, alleges that he was denied the use of the prison chapel for purposes of worship (which has been referred to as his "chapel use" claim) and was denied access to all worship services while he was on cell restriction (his "cell restriction" claim). *Id.* at 2a-4a. He further alleges that inmates who practiced other faiths were provided special accommodations that were not provided to Christians, *id.* at 3a, and that inmates who were on cell restriction were permitted to attend secular activities such as work and the law library, but were not permitted to attend religious services, *ibid.*

---

providing that RLUIPA's protections apply to institutionalized persons when "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States or with Indian tribes." 42 U.S.C. 2000cc-1(b).

Petitioner filed suit pro se against the State of Texas and various prison officials alleging violations of: RLUIPA, 42 U.S.C. 2000cc *et seq.*; 42 U.S.C. 1983 for violations of his rights under the First, Eighth, and Fourteenth Amendments; and state law provisions protecting religious liberties. Pet. App. 4a-5a. He sought declaratory and injunctive relief against the respondents in their official capacities, and compensatory and punitive damages from them in their official and individual capacities. *Id.* at 5a. On the chapel-use claim, respondents conceded that petitioner and other prisoners were denied access to the chapel at the Robertson facility for the entirety of his period of incarceration. *Id.* at 6a. Respondents further noted that, after petitioner filed a grievance on this issue, no religious worship at all is permitted at the chapel. *Ibid.* On the cell-restriction claim, respondents noted that the Robertson facility changed its policy to permit certain prisoners (including petitioner) to attend religious services while on cell restriction, and the State later adopted that policy for all of its correctional facilities. *Id.* at 5a.

The district court granted summary judgment to respondents. Pet. App. 8a. The court held that: (1) the Eleventh Amendment barred petitioner's claims for monetary relief against the State and state officials in their official capacities; (2) respondents were entitled to qualified immunity from suit for damages in their individual capacities; and (3) injunctive relief was not appropriate under the circumstances. *Ibid.*

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-35a. The court first dismissed as moot petitioner's claims seeking declaratory and injunctive relief based on respondents' former cell-restriction policy. *Id.* at 9a-13a.

Turning to petitioner's RLUIPA claims against respondents in their individual capacities, the court of appeals found no basis in the statute for such relief. Pet. App. 14a-20a. The court recognized that "[a] number of circuits appear to have assumed that an individual-capacity cause of action for damages exists because the courts have conducted, or on remand have required that the district court conduct, a qualified immunity analysis." *Id.* at 15a. The court also noted, however, that the only court of appeals to have expressly addressed the issue had held that RLUIPA does not provide for damages against individuals. *Id.* at 16a-17a (citing *Smith* v. *Allen*, 502 F.3d 1255, 1272 (11th Cir. 2007)). The court of appeals agreed with that court, holding that, because RLUIPA was passed pursuant to Congress's authority under the Spending Clause, only entities that were "parties to the contract" (*i.e.*, the grant of federal funds in exchange for agreement to certain conditions) could be held liable for violation of the statute. *Id.* at 17a-19a. Individual RLUIPA defendants, the court explained, were not parties to the contract, and thus are not subject to suit in their individual capacities. *Ibid.*

The court of appeals then assumed that RLUIPA creates a damages cause of action against officials in their official capacities, but held that Texas's sovereign immunity bars such an action. Pet. App. 20a-24a. Acknowledging a division among the courts of appeals on that issue, *id.* at 21a, the court concluded that RLUIPA's language is "clear enough to create a right for damages on the cause-of-action analysis, but not clear enough to do so in a manner that abrogates state sovereign immunity from suits for monetary relief," *id.* at 23a. Accordingly, the court held that the Eleventh Amendment bars claims for monetary relief against

Texas and its officers in their official capacities. *Id.* at 23a-24a.

Finally, the court of appeals allowed petitioner's chapel-use claims for declaratory and injunctive relief against respondents in their official capacities to proceed, Pet. App. 24a-32a, finding that "RLUIPA unambiguously creates a private right of action for injunctive and declaratory relief," *id.* at 14a.

DISCUSSION

As noted in respondents' brief in opposition (at i), the question presented in this case encompasses two separate issues: (1) whether individuals may sue States or state officials in their official capacity for money damages under RLUIPA; and (2) whether individuals may sue state officials in their individual capacities for money damages under RLUIPA. The first of those issues is the subject of disagreement among the courts of appeals and warrants this Court's review. That question is the sole question presented in the petition for a writ of certiorari filed in *Cardinal* v. *Metrish*, No. 09-109 (filed July 22, 2009). For the reasons stated in the United States' amicus brief in *Cardinal*, the Court should grant the petition for a writ of certiorari in that case, which is a better vehicle for resolution of the question. Assuming it does so, the Court should hold the petition for a writ of certiorari in this case pending resolution of *Cardinal*.

The second issue embedded in the question presented in this case—whether RLUIPA authorizes suits against officials in their personal capacities—does not warrant this Court's review. Although the court of appeals' resolution of that issue is not correct, its decision does not warrant further review because there is no division among the courts of appeals about the issue at this

time. Thus, the petition for a writ of certiorari should be denied with respect to the second question presented in respondents' brief regardless of the Court's resolution of *Cardinal*.

I. THE QUESTION WHETHER INDIVIDUALS MAY SUE STATES AND STATE OFFICIALS IN THEIR OFFICIAL CAPACITIES FOR MONEY DAMAGES FOR VIOLATIONS OF RLUIPA WARRANTS THIS COURT'S REVIEW, BUT IS BETTER PRESENTED IN *CARDINAL*

For the reasons stated in the United States' amicus brief in *Cardinal*, the question whether individuals may sue States or state officials for money damages under RLUIPA warrants review by this Court. The United States has therefore recommended that the Court grant the petition for a writ of certiorari in *Cardinal*. The instant case presents an additional question; for the reasons discussed below, that question does not warrant review by this Court at this time. Thus, this Court should hold the petition for a writ of certiorari in the instant case pending resolution of the petition in *Cardinal*, and then dispose of this case accordingly as to the first question presented in respondents' brief.

In the alternative, the Court may wish to grant the petition for a writ of certiorari in this case, limited to the first question presented in respondents' brief. *Cardinal*, however, is a more appropriate vehicle for resolution of that question. As noted in the United States' amicus brief in *Cardinal* (at 21-22), the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. 1997e(e), often poses an independent bar to recovery of money damages by state inmates under RLUIPA because the PLRA prevents an inmate from recovering more than nominal damages for a mental or emotional injury unless he

can demonstrate a physical injury as well. 42 U.S.C. 1997e(e), 2000cc-2(e). Petitioner here does not allege any physical injury resulting from the RLUIPA violations he asserts. He therefore would not be entitled to compensatory damages in any event unless imposing a substantial burden on an individual's religious exercise in violation of RLUIPA constitutes something other than a mental or emotional injury. In *Cardinal*, by contrast, the petitioner alleges that he suffered a physical injury as a result of the alleged RLUIPA violation. For this reason, the Court may find that he is entitled to sue for compensatory damages under RLUIPA without resolving the ancillary and difficult question about whether imposing a burden on religious exercise counts as a mental or emotional injury under the PLRA.

II. THE QUESTION WHETHER INDIVIDUALS MAY SUE STATE OFFICIALS IN THEIR INDIVIDUAL CAPACITIES FOR VIOLATIONS OF RLUIPA DOES NOT WARRANT THIS COURT'S REVIEW

Although the court of appeals' conclusion that RLUIPA does not authorize suits against state officials in their individual capacities is incorrect, it does not warrant further review at this time because there is no division among the courts of appeals on that issue. Thus, the Court should deny the petition for a writ of certiorari with respect to the second question presented in respondents' brief in opposition.

A. There Is No Division Among The Courts Of Appeals On This Issue

To date, four courts of appeals have considered whether RLUIPA permits individuals to pursue damages actions against state officials in their individual capacities. All four courts have held that it does not.

Nelson v. *Miller*, 570 F.3d 868, 889 (7th Cir. 2009); *Rendelman* v. *Rouse*, 569 F.3d 182, 189 (4th Cir. 2009); *Smith* v. *Allen*, 502 F.3d 1255, 1275 (11th Cir. 2007); Pet. App. 15a-20a.

As petitioner notes (Pet. 17-18), several other courts of appeals appear to have assumed that individual capacity suits are available under RLUIPA when those courts were asked to decide whether a defense of qualified immunity was available to defendants sued under RLUIPA in their individual capacity. *E.g.*, *Campbell* v. *Alameida*, 295 Fed. Appx. 130, 131 (9th Cir. 2008); *Walker* v. *Iowa Dep't of Corrs.*, 298 Fed. Appx. 535, 536 (8th Cir. 2008); *Figel* v. *Overton*, 263 Fed. Appx. 456, 458-460 (6th Cir. 2008); *Ahmad* v. *Furlong*, 435 F.3d 1196, 1201-1204 (10th Cir. 2006); cf. *Salahuddin* v. *Goord*, 467 F.3d 263, 269, 273 (2d Cir. 2006) (addressing qualified immunity defense to suit under 42 U.S.C. 1983 alleging violations of statutory rights under RLUIPA). But none of those decisions actually conflicts with the holdings of the Fourth, Fifth, Seventh, and Eleventh Circuits because none specifically addressed the question of the availability of individual capacity suits. The question therefore remains open and ripe for further development in those circuits. Given these circumstances, this Court should allow the issue—and the arguments on both sides—to percolate more fully among the courts of appeals.

B. The Court Of Appeals' Conclusion That RLUIPA Does Not Authorize Damages Suits Against State Officials In Their Individual Capacities Is Incorrect

Congress has the power under the Spending Clause to spend federal revenues to "provide for the * * * general Welfare of the United States." U.S. Const. Art. I, § 8, Cl. 1; *Sabri* v. *United States*, 541 U.S. 600, 605 (2004). Congress's authority "to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." *United States* v. *Butler*, 297 U.S. 1, 66 (1936); accord *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987). Pursuant to the grant of authority in the Spending Clause, Congress may place clear conditions on a State's receipt of federal funds. Congress did exactly that when it enacted RLUIPA, imposing conditions intended to ensure that no federal funds are used to subsidize discriminatory or unreasonable restrictions on institutionalized persons' religious exercise. See, *e.g.*, *Madison* v. *Virginia*, 474 F.3d 118, 126 (4th Cir. 2006); *Cutter* v. *Wilkinson*, 423 F.3d 579, 585-587 (6th Cir. 2005); *Mayweathers* v. *Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002), cert. denied, 540 U.S. 815 (2003).

In RLUIPA, Congress expressly authorized individuals whose rights are violated under the statute to sue "any * * * official" of a State or state agency or "any other person acting under color of State law." 42 U.S.C. 2000cc-5(4)(A); see 42 U.S.C. 2000cc-2(a). That language plainly authorizes suits against state officials in their individual capacities (if the State has accepted federal funds for the relevant agency), and the court of appeals did not hold otherwise. See Pet. App. 17a (noting that RLUIPA's language "mirrors the 'under color of' language in [Section] 1983, which we know creates an

individual-capacity cause of action for damages"). The clarity of the statutory language provides the necessary notice to potential fund recipients that acceptance of federal funds will constitute agreement to the availability of individual-capacity suits to enforce the protections of RLUIPA. See, *e.g.*, *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 686-687 (1999); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 247 (1985); *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987).

The court of appeals held, however, that Congress lacks constitutional authority to impose liability on an entity other than the fund recipient for violations of conditions on federal funds. Pet. App. 17a-20a. The court reasoned that, because this Court has sometimes analogized legislation enacted pursuant to the Spending Clause to a contract, Congress may not impose conditions or consequences on parties—such as individual defendants—who are not parties to the contract. *Id.* at 17a-19a. That reasoning is incorrect.

The Necessary and Proper Clause authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution" its powers, including the spending power. U.S. Const. Art. I, § 8, Cl. 18. Since *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), it has been settled that Congress has the constitutional authority to enact not only legislation that is "indispensable" to the exercise of its enumerated powers, but also legislation that Congress believes "convenient, or useful" and "plainly adapted" to the execution of federal power, so long as the means chosen are not prohibited by the Constitution. *Id.* at 413-414, 421; see *Sabri*, 541 U.S. at 605 (Congress may protect its Spending Clause programs "by rational means").

Just as Congress may attach conditions to its disbursement of federal funds, so it is empowered to prevent third parties from interfering with a fund recipient's compliance with those conditions. Indeed, Congress's power to prevent such interference is "bound up with congressional authority to spend in the first place." *Sabri*, 541 U.S. at 608. Attaching civil liability to an individual official's interference with a state agency's compliance with RLUIPA is a straightforward and "plainly adapted" means of ensuring that federal funds are not spent contrary to the purposes of the statute. This Court's decision in *Sabri* demonstrates the point. There, the Court held that Congress acted within its authority under the Spending Clause and the Necessary and Proper Clause in enacting 18 U.S.C. 666, which makes it a crime to bribe a state or local official of an entity receiving at least $10,000 in federal funds. *Sabri*, 541 U.S. at 602-608. Persons subject to criminal prosecution under Section 666 are no more "parties to the contract" than the individual respondents in this case. Indeed, the civil liability that respondents would suffer is significantly less onerous, especially given qualified immunity principles, than the criminal punishment that Section 666 imposes. See *Procunier* v. *Navarette*, 434 U.S. 555, 561 (1978) (state prison officials entitled to qualified immunity defense to Section 1983 suit). Congress's authorization of suits against individual officials who violate the commands of RLUIPA is therefore permissible under the Spending and Necessary and Proper Clauses.

C. Review By This Court Of This Issue Is Not Warranted At This Time

As noted at pp. 8-9, *supra*, there is a substantial question whether petitioner in this case is entitled to any compensatory damages in light of the PLRA's restriction on inmates' recovery of such damages. That fact would make this case an unattractive vehicle for consideration of this issue even if the courts of appeals were divided over its proper resolution. In addition, this Court's resolution in *Cardinal* of the first question presented in respondents' brief may influence how courts of appeals determine going forward whether damages are available under RLUIPA against state officials sued in their individual capacities. Thus, the Court should deny petitioner's request to consider the individual capacity issue at this time.

CONCLUSION

With respect to the first question presented in respondents' brief, the petition for a writ of certiorari should be held pending this Court's disposition of *Cardinal* v. *Metrish*, No. 09-109 (filed July 22, 2009), and then be disposed of accordingly. With respect to the second question presented in respondents' brief, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
THOMAS E. PEREZ
Assistant Attorney General
NEAL KUMAR KATYAL
Deputy Solicitor General
SAMUEL R. BAGENSTOS
Deputy Assistant Attorney General
SARAH E. HARRINGTON
Assistant to the Solicitor General
JESSICA DUNSAY SILVER
ANGELA M. MILLER
Attorneys

MARCH 2010