No. _____

IN THE

Supreme Court of the United States

SHAWN C. SHARP,

Petitioner,

v.

SUPERINTENDENT JOHNSON ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Spending Clause permits Congress to regulate the conduct of private individuals, including those who do not directly receive federal funds. *See Sabri v. United States*, 541 U.S. 600 (2004). The Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc *et seq.*, which Congress enacted in part under its Spending Clause powers, creates a private cause of action against the States, state officials, and "any other person acting under color of state law." *Id.* § 2000cc-5(4)(A)(i)-(iii). The first question presented is whether the Third Circuit erred when it held that Section 2000cc-5(4)(A)(iii) does not provide a cause of action against state officials in their individual capacities because such defendants are not the direct recipients of federal funding.

2. Qualified immunity protects government officials from both liability and the burdens of discovery and trial. The defense is customarily asserted at the earliest possible moment, and its benefits are lost if a case erroneously proceeds to trial. The second question presented is whether officials waive qualified immunity by failing to develop the defense pretrial, not asserting the issue in a dispositive motion or pretrial memorandum, and thus concealing the basis for their claim until after the close of evidence.

PARTIES TO THE PROCEEDINGS

Petitioner Shawn C. Sharp is an inmate in the custody of the Pennsylvania Department of Corrections and is presently housed at the State Correctional Institution in Dallas, Pennsylvania.

Respondents—all current or former officials within Pennsylvania's Department of Corrections—are Superintendent Philip L. Johnson; Deputy Superintendent Mark A. Krysevig; Deputy Superintendent Joel S. Dickson; Program Manager Rhoda Winstead; Chaplain Father William Tursa; Deputy Superintendent William S. Stickman; Chaplain Imam Tanko Ibrahiym; Superintendent Conner Blain; Deputy Superintendent John Miller; Deputy Superintendent Paul Stowitzky; Captain Brian Coleman; Lieutenant Dennis Fisher; Major Melvin Lockett; Lieutenant John Matzus; Lieutenant Clarence Blakey; Jean A. Mears; Chaplain George J. Moneck; and Chaplain Imam Abu Bakr Muhammed.

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Petitioner Shawn C. Sharp respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 669 F.3d 144 (3d Cir. 2012). The district court's opinion (Pet. App. 37a-92a) is not reported in the Federal Supplement, but is available at 2008 WL 941686.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 2012. *See* Pet. App. 2a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

I. Constitutional Provisions

The Spending Clause of the United States Constitution, U.S. CONST. art I, § 8, cl. 1, provides, in relevant part:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States….

II. Statutory Provisions

The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5 (2000), provides, in relevant part:

> **Section 2000cc-1. Protection of religious exercise of institutionalized persons**
>
> (a) General rule
>
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling interest.
>
> (b) Scope of application
>
> This section applies in any case in which—
>
> (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
>
> (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the

several States, or with Indian tribes.

Section 2000cc-2. Judicial relief

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

* * * * *

Section 2000cc-5. Definitions

In this chapter:

* * * * *

(4) Government

The term "government"—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law….

* * * * *

STATEMENT OF THE CASE

Petitioner, a prison inmate, brought this suit against Pennsylvania Department of Corrections officials in their individual and official capacities, seeking monetary damages and various forms of injunctive relief for infringing his First Amendment right to the free exercise of religion and for violating his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc to 2000cc-5 (2000). In affirming the judgment for Respondents, the Third Circuit held that the RLUIPA claims failed because Congress was without the authority to regulate "third-party" conduct under the Spending Clause, and because the terms of Section 2000cc-5 did not sufficiently notify States that accepting federal money could subject officials to individual liability for money damages. It further held that qualified immunity barred Petitioner's constitutional claims.

1. RLUIPA applies to any state prison that "receives Federal financial assistance." 42 U.S.C. § 2000cc-1(b)(1). Years of congressional hearings exposed the discriminatory burdens that can unduly limit the free exercise of institutionalized persons' religious rights. *See Cutter v. Wilkinson*, 544 U.S. 709, 716 (2005) (discussing RLUIPA's legislative history); *see also* H.R. Rep. No. 106-219, at 9-10 (1999); *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) (summarizing findings). Congress, which provides federal funding to state prison systems throughout the country, thus invoked its authority under the Spending Clause,

U.S. CONST. art. I, § 8, cl. 1, to direct 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 "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering" that interest. 42 U.S.C. § 2000cc-1(a).

According to one of the statute's cosponsors, RLUIPA did not "abrogate the Eleventh Amendment immunity of states," but did "creat[e] a private cause of action *for damages*, injunction, and declaratory judgment…. against state officials or employees." 146 Cong. Rec. E1563, E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady) (emphasis added). The statute thus permits any person to sue for "appropriate relief," 42 U.S.C. § 2000cc-2(a), against "(i) a State, county, municipality, or other governmental entity …; (ii) any … official of an entity listed in clause (i); and (iii) any other person acting under color of State law." *Id.* § 2000cc-5(4)(A).

2. Qualified immunity is an affirmative defense to claims under 42 U.S.C. § 1983, for which defendants bear the burden of pleading. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). It balances "two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The defense is "'conceptually distinct'" and "significantly different from the questions underlying plaintiff's claim on the merits." *Johnson v. Jones*, 515 U.S. 304, 314 (1995) (citation omitted). In its modern formulation, the doctrine

protects government officials when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is more than a defense to liability, however; it insulates officials more generally from the costs and intrusiveness of pretrial and trial proceedings. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

3. Petitioner was a prisoner at the Pennsylvania State Correctional Institution in Pittsburgh from September 18, 1998, to May 23, 2001. Pet. App. 4a. He belongs to a sect of Sunni Muslim known as Ash'ariy Madhaab, which is commonly referred to as Habashi. *Id.* 5a-6a. The Habashi follow certain practices and beliefs distinct from those of other Sunni Muslims. At trial, members of the Muslim population at SCI-Pittsburgh testified about the "tremendous difference[s]" between the Habashi and other Muslim communities, which led the Islamic leadership at SCI-Pittsburgh to describe the Habashi as members of a strange, deviant sect that is inconsistent with the teachings of Muhammad.[1]

After unsuccessfully seeking separate Habashi services at SCI-Pittsburgh, Petitioner was transferred to the State Correctional Institution in Greene, Pennsylvania. *Id.* 11a. The situation there

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[1] The opinions from both the trial court and the Third Circuit omit reference to much of the testimony on this point. The trial transcript was included in the Joint Appendix filed electronically in the court of appeals on September 22, 2012. Some of the testimony regarding the differences between the Habashi and other Muslim communities at SCI-Pittsburgh can be found at pages JA276-80 of the Joint Appendix.

was no different. The Imam at SCI-Greene testified that "as a Muslim leader and an authentic Imam … I cannot fail in my responsibility to teach and inform [the Sunni prison population] about deviant groups" like the Habashi, and that separate services for the different groups could not occur simultaneously: "[Y]ou can't have two different Jumahs in the same place."[2]

Having been denied the ability to worship in the manner that his Habashi beliefs dictated, Petitioner submitted a religious accommodation request asking SCI-Greene—which already provided separate services for multiple Islamic communities—for, among other things, Habashi-specific services and designated prayer time. *Id.* 13a-14a. Officials denied the request and rejected Petitioner's administrative appeal on the grounds that "[s]hould an individual be so [devout] in his beliefs, he would realize that his inner faith is his strength in believing and performing his prayers." *Id.* 55a. Thereafter, the Department of Corrections transferred Petitioner to a third facility, the State Correctional Institution in Dallas, Pennsylvania. *Id.* 16a.

4. Acting *pro se*, Petitioner filed this lawsuit in the United States District Court for the Western District of Pennsylvania on November 2, 2000, pursuant to 28 U.S.C. § 1331. He claimed, *inter alia*, that prison administrators at SCI-Pittsburgh failed to accommodate his free exercise rights. Pet. App. 17a. The case then "underwent years of motions practice and several of Sharp's claims were dismissed

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[2] *See* Joint Appendix to the Court of Appeals at JA845, JA853-55.

prior to trial." *Id.* Respondents initially filed a motion to dismiss the case under Fed. R. Civ. P. 12(b)(6) or, in the alternative, for summary judgment under Fed. R. Civ. P. 56, which raised certain procedural defenses and challenged the merits of Petitioner's underlying claims, but did not assert qualified immunity. The District Court ultimately permitted Petitioner to replead his claims, appointed *pro bono* counsel, and denied Respondent's motion without prejudice.

The counseled Amended Complaint alleged violations of the First, Eighth, and Fourteenth Amendments, added a cause of action under the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, *et seq.*, and also stated claims based on the intervening events at SCI-Greene. Respondents filed a second motion to dismiss or for summary judgment, and again did not raise the issue of qualified immunity. The Magistrate Judge dismissed certain claims but permitted Petitioner to amend his pleadings a second time.

The Second Amended Complaint sought damages and injunctive relief for the infringement of Petitioner's First Amendment free exercise rights, as well as for violations of RLUIPA. Petitioner also restated his Eighth and Fourteenth Amendment claims. Respondents filed an answer, which included a single line stating that "Defendants are entitled to qualified immunity." Simultaneously, Respondents filed a motion for partial summary judgment, but the motion did not assert any immunity claim. Nor did Respondents seek early disposition of Petitioner's First Amendment and RLUIPA claims. Thus, when the District Court granted the motion on December

28, 2005—more than five years after the lawsuit began—those claims were left for trial. At Petitioner's request, the court allowed appointed counsel to withdraw, and Petitioner prepared to try the remaining claims *pro se*. Pet. App. 17a.

5. In advance of trial, the District Court ordered Respondents to submit a pretrial statement in compliance with the local rules of court, which required "a brief narrative statement of the material facts that will be offered at trial," including "defenses to the damages claims." W.D. Pa. R. 16.1.4.B (2006). Respondents' pretrial statement did not reference qualified immunity. A bench trial on the First Amendment and RLUIPA claims commenced on October 16, 2007, and at the close of evidence two days later, Respondents made an oral motion for judgment as a matter of law, arguing that certain defendants were not personally involved in the claims, that RLUIPA could not apply retroactively to the events at SCI-Pittsburgh, and that Petitioner's transfer to SCI-Dallas mooted all claims for injunctive relief.[3] Again, Respondents did not reference qualified immunity. The District Court took the motion under advisement and requested post-trial proposed findings of fact and conclusions of law from both sides.

On February 15, 2008, more than seven years after Petitioner filed his lawsuit and four months after the close of all evidence, Respondents submitted a proposed conclusion of law that they were entitled

[3] Respondents cited Fed. R. Civ. P. 50 in support of their motion. Because the case was tried without a jury, however, Rule 52 presumably would have been the more appropriate procedural vehicle.

to qualified immunity. Respondents also argued that Petitioner could not prevail on the merits of his First Amendment claims and that individual-capacity claims were unavailable under RLUIPA. The court agreed in each respect. It first held that Petitioner's First Amendment claims failed because he did not "negative every conceivable legitimate penological interest" that might support the denial of an accommodation. Additionally, RLUIPA did not permit personal-capacity claims, and, in the alternative, qualified immunity applied. *See* Pet. App. 64a-65a, 75a, 77a-78a. The District Court rejected Petitioner's argument that Respondents had waived their immunity defense. *Id.* 75a n.4.

6. The Third Circuit affirmed.

a. This Court's intervening decision in *Sossamon v. Texas*, 131 S. Ct. 1651, 1658-59 (2011), disposed of Petitioner's official-capacity claims for damages as precluded under the Eleventh Amendment. The Court of Appeals held that RLUIPA also did not permit claims against Respondents in their individual capacities because Congress cannot regulate the conduct of non-recipients of federal funds under the Spending Clause of Article I. Pet. App. 21a-22a. Echoing the holding of *Sossamon* with respect to Petitioner's individual-capacity claims, the Third Circuit found that Congress' use of the phrase "appropriate relief" in 42 U.S.C. § 2000cc-2(a) did not give sufficient notice to state officials that accepting federal funds could make them personally susceptible to claims for monetary damages. *Id.* 23a.

b. With respect to the First Amendment claims, the Third Circuit agreed with Petitioner that the District Court had erred by applying an improper

burden of proof. *Id.* 24a-29a. Nevertheless, the court affirmed the judgment on the basis of qualified immunity. The court noted that according to its own precedent, "communal worship by a substantial number of prisoners may be a fundamental aspect of the exercise of religion" and thus clearly established for qualified immunity purposes. *Id.* 33a-34a n.20. However, it was not clearly established that an insubstantial number of prisoners had such a right, *id.* 34a, and Petitioner had not produced evidence of a sufficient number of prisoners who joined in his request. *Id.* 88a-89a. The Third Circuit agreed that Respondents had not waived the qualified immunity defense, because qualified immunity "may be raised at any time, even after trial, so long as the plaintiff suffers no prejudice." *Id.* 30a. If anything, the court held, any delay in this case "may have benefited" Petitioner "because he was afforded the opportunity to introduce evidence at trial demonstrating that qualified immunity was improper under the circumstances." *Id.* 31a.

REASONS FOR GRANTING THE WRIT

This Court's review of the decision of the Third Circuit is warranted. The judgment of the Court of Appeals with respect to Petitioner's RLUIPA claims adds to a consensus among the circuits that a key provision of 42 U.S.C. § 2000cc-5 is unconstitutional as written, and that the limits of Congress' legislative authority under the Spending Clause are more narrow than what this Court has recognized. Moreover, the courts of appeals have struggled to ascertain what circumstances constitute waiver of the qualified immunity defense, and confusion in this

area is creating inconsistency on a point of critical importance to civil rights litigants.

I. The Court Should Decide Whether RLUIPA Permits Suits For Damages Against State Officials in Their Individual Capacities.

The Third Circuit's rejection of Petitioner's individual-capacity RLUIPA claims nullified a provision of that statute on grounds that directly contradict precedent from this Court. In both respects, certiorari jurisdiction should be exercised to correct the error.

A. The Courts of Appeals Have Partially Invalidated an Act of Congress.

In RLUIPA, Congress provided for a private cause of action by which prisoners like Petitioner can obtain "appropriate relief against a government" for unwarranted burdens on the exercise of their religion. 42 U.S.C. § 2000cc-2(a). RLUIPA further defines the term "government" to encompass three separately enumerated groups: "(i) a State, county, municipality, or other governmental entity created under the authority of a State; (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and (iii) *any other person acting under color of State law*...." *Id.* § 2000cc-5(4)(A) (emphasis added). It has long been understood that the term "under color of State law" encompasses state officials acting in their personal capacities. *See Monroe v. Pape*, 365 U.S. 167, 181-87 (1961) (construing 42 U.S.C. § 1983).

But the Third Circuit—mirroring the Fourth, Fifth, Seventh and Eleventh Circuits—held that "RLUIPA does not permit an action against Defendants in their individual capacities." Pet. App. 22a. *See also Nelson v. Miller*, 570 F.3d 868, 886-89 (7th Cir. 2009); *Rendelman v. Rouse*, 569 F.3d 182, 186-89 (4th Cir. 2009); *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 327-29 (5th Cir. 2009); *Smith v. Allen*, 502 F.3d 1255, 1271-75 (11th Cir. 2007), *abrogated on other grounds*, *Sossamon*, 131 S. Ct. 1651. Petitioner was limited to bringing RLUIPA claims against Respondents in their official capacity, as provided for in Section 2000cc-5(4)(A)(ii), and enjoyed no additional rights under subpart (iii) of that provision. The Third Circuit thus ignored "one of the most basic interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (quotation marks, alterations, and citations omitted). The Court of Appeals held that giving Section 2000cc-5(4)(A)(iii) any independent meaning would violate the Spending Clause. Pet. App. 21a.

The Third Circuit's reasoning cannot be reconciled with this Court's interpretation of Congress' Article I powers. *See infra* Part I.B. Regardless, the declaration that a personal-capacity claim against state officials under Section 2000cc-5(4)(A)(iii) would exceed the legislative authority granted in the Constitution independently warrants this Court's review. *See, e.g.*, *United States v. Edge Broad. Co.*, 509 U.S. 418, 425 (1993) (noting the exercise of certiorari where "the court below declared

a federal statute unconstitutional and applied reasoning that was questionable under our cases").[4]

B. The Third Circuit Misapplied This Court's Precedent.

The Third Circuit rejected Petitioner's personal-capacity RLUIPA claims for two reasons: (1) Congress purportedly cannot use its Spending Clause powers to impose individual liability on state officials who do not directly receive federal funds and are "not parties to the contract created between Pennsylvania and the federal government," Pet. App. 21a-22a; and (2) the term "appropriate relief" as used in Section 2000cc-2(a) did not clearly signal that Congress included monetary damages as one of the remedies available under RLUIPA. *Id.* 23a. On both points, this Court has held differently, and the Third Circuit's oversights warrant correction. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (noting the grant of certiorari "to resolve an apparent conflict with this Court's precedents"); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 926 (1982).

1. The Spending Clause grants Congress the power to "provide for the … general Welfare of the United States," U.S. CONST. art. I, § 8, cl. 1, and to advance social policies by attaching conditions on the

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[4] Because the Third Circuit's decision draws into question the constitutionality of an Act of Congress, and the United States has thus far not participated as a party in this case, a copy of this petition has been served upon the Solicitor General of the United States, as required by Rule 29.4(b) of the Rules of this Court.

receipt of federal funding. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). These spending arrangements are frequently analogized to contracts running between the federal government and the State-recipient. *See, e.g.*, *Barnes v. Gorman*, 536 U.S. 181, 186 (2002). With respect to Section 2000cc-5, the courts of appeals have reasoned that because "individual RLUIPA defendants are not parties to the contract in their individual capacities," they cannot be responsible for violations of the conditions that Congress imposed. *Sossamon*, 560 F.3d at 328; *see also* Pet. App. 21a.

Congress' Article I powers are not so constrained. The contract analogy does not "imply … that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise." *Barnes*, 536 U.S. at 188 n.2. Thus, in *Sabri v. United States*, 541 U.S. 600 (2004), the Court upheld Spending Clause legislation that imposed *criminal* liability on a private individual merely for offering bribes to the state official who administered a federally funded community development program. *Id.* at 608 (affirming the constitutional validity of 18 U.S.C. § 666). It was immaterial that "proof of any connection between a bribe or kickback and some federal money" was not required, and that "not every bribe or kickback offered … will be traceably skimmed from specific federal payments." *Id.* at 604, 605. The proper analysis was not whether the defendant had received federal funds, but whether Congress' "corresponding authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18," justified placing the condition at issue on the use of federal monies. *Id.* at 605. Where that condition meets the "means-ends rationality"

review under the Necessary and Proper Clause, it is a valid exercise of Spending Clause authority. *Id.* (citing *McCulloch v. Maryland*, 17 U.S. 316 (1819)).[5]

As a matter of Spending Clause jurisprudence, the Court of Appeals incorrectly concluded that Congress' legislative powers go only as far as the federal dollars that it spends. But the Third Circuit's judgment also demonstrates why this Court should answer the question presented now. The United States agrees with Petitioner that the courts of appeals have misapprehended the scope of Article I, but it previously counseled against this Court's review in order to allow the question to more fully percolate throughout the judiciary. *See* Br. for the United States as Amicus Curiae on Petition for Writ of Certiorari at 14, *Sossamon v. Texas*, 131 S. Ct. 1651 (2010) (No. 08-1438). As the Third Circuit's opinion demonstrates, however, this unreasoned limitation on Congress' Spending Clause powers is only metastasizing. This Court should intervene.

2. Relying on this Court's decision in *Sossamon*, 131 S. Ct. 1651, the Third Circuit also rejected Petitioner's statutory damages claim because "it cannot be said that RLUIPA's 'appropriate relief' language unambiguously signaled Congress's intent

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[5] In *dicta*, the Third Circuit labeled *Sabri* inapposite to the question presented because Congress "enacted RLUIPA to protect the religious rights of institutionalized persons." Pet. App. 22a-23a n.15. The Court of Appeals did not conduct a Necessary and Proper Clause analysis, however, and did not consider whether a condition on federal expenditures was a rational way of protecting against the use of federal funds to subsidize conduct that violates federal rights, particularly where equitable relief is unavailable, as in this case. *Id.* 19a.

to impose a condition of individual liability." Pet. App. 23a. In so doing, the Court of Appeals wrongly applied Eleventh Amendment jurisprudence to individual-capacity claims and ignored the presumptions on which both this Court and Congress rely.

In order to bind State-recipients to the conditions that it places on federal disbursements under the Spending Clause, Congress must provide clear notice so that a reasonable official would understand the obligation. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). In this respect, Congress unambiguously provided for liability against prison officials in their personal capacities. *See Nelson*, 570 F.3d at 886 (noting that the language of Section 2000cc-5(4)(A) "appears to authorize suit against [defendants in their] individual capacity"). And, where Congress has created a private cause of action under the Spending Clause, the "general rule … is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief," including compensatory damages. *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 70-71 (1992).

The term "appropriate relief" has thus accrued a settled meaning that encompasses monetary relief. *See Barnes*, 536 U.S. at 186-87; *see also Sossamon*, 131 S. Ct. at 1660 (discussing "[t]he presumption in *Franklin* and *Barnes* that" private litigants under the Spending Clause may recover compensatory damages). Congress formally adopted that presumption when it incorporated the phrase "appropriate relief" into 42 U.S.C. § 2000cc-2(a), providing ample notice to States and state officials of

the potential for individual-capacity monetary liability under RLUIPA. *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989) ("[W]here Congress uses terms that have accumulated settled meaning under … the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." (quotation marks, alterations, and citation omitted)).

The Third Circuit, however, ignored this precedent and instead relied on this Court's opinion in *Sossamon*. Pet. App. 23a. But that case concerned only RLUIPA claims against "prison officials in their *official* capacities." *Sossamon*, 131 S. Ct. at 1656 (emphasis added). Such claims implicate Eleventh Amendment sovereign immunity, which is "strictly construed … in favor of the sovereign," and which requires an "unequivocal expression of state consent" to liability for damages. *Sossamon*, 131 S. Ct. at 1658 (quotation marks and citation omitted). Congress must therefore provide more than reasonable notice before it can condition the receipt of federal funds on the voluntary abrogation of sovereign immunity; it must be explicit. *Id.* at 1663. In other words, whereas *Franklin* and *Barnes* require a presumption that monetary damages are available, the Eleventh Amendment requires a presumption that they are not. *Id.* at 1660.

Sossamon has no bearing on individual-capacity claims, to which the Eleventh Amendment does not apply. *See Hafer v. Melo*, 502 U.S. 21, 30-31 (1991). Only because the claims at issue were against defendants in their official capacities could this Court hold in *Sossamon* that the presumption of *Franklin*

and *Barnes* was "irrelevant." *Sossamon*, 131 S. Ct. at 1660. But whether or not the term "appropriate relief" is sufficiently clear to abrogate sovereign immunity is immaterial to this case. *See id.* at 1659 (noting that "the word 'appropriate' is inherently context-dependent"). In importing Eleventh Amendment jurisprudence to its analysis of Petitioner's individual-capacity claims, the Third Circuit not only reversed the presumption that Petitioner could recover monetary damages, it effectively required that Congress act with Eleventh Amendment specificity when placing *any* condition on the receipt of federal funding under Article I.

The Third Circuit did more than misapply this Court's precedent. The court also significantly undermined the private enforcement mechanism that Congress devised for RLUIPA. As noted, the statute did not abrogate sovereign immunity. Moreover, claims for injunctive relief will frequently become moot through the circumstances of prison administration, as happened in this case when Pennsylvania transferred Petitioner to different facilities. *See* Pet. App. 19a, 80a. Absent an individual-capacity claim for monetary damages, there will often be no means to redress non-compliance with the conditions that Congress placed on the receipt of federal funds, and RLUIPA will become a right without a remedy.

II. The Court Should Resolve The Uncertainty Regarding Waiver Of Qualified Immunity.

This Court also exercises certiorari jurisdiction to resolve disagreements among the courts of appeals and ensure the consistent application of federal law.

See Sup. Ct. Rule 10(a); *see also*, *e.g.*, *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59-60 (2006); *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 669 n.6 (1977). The need for this Court's review is particularly acute where the lower courts are confused on an issue of importance, and the frequency with which this Court has visited issues surrounding qualified immunity attests to both the gravity of the defense and the need for clarity in defining its parameters. *See*, *e.g.*, *Filarsky v. Delia*, 132 S. Ct. 1657 (2012); *Messerschmidt v. Millender*, 132 S. Ct. 1235 (2012); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011); *Camreta v. Greene*, 131 S. Ct. 2020 (2011); *Ortiz v. Jordan*, 131 S. Ct. 884 (2011); *Pearson*, 555 U.S. 223.

While qualified immunity protects officials from adverse judgments when they act reasonably, it goes beyond being "a mere defense to liability"; the doctrine "is an *immunity from suit*." *Mitchell*, 472 U.S. at 526. Unlike other affirmative defenses, qualified immunity is meant "to avoid '[subjecting] government officials either to the costs of trial or to the burdens of broad-reaching discovery.'" *Id.* (quoting *Harlow*, 457 U.S. at 817-18). The underlying policies that qualified immunity is meant to fulfill are therefore lost "if a case is erroneously permitted to go to trial," *Mitchell*, 472 U.S. at 526, and this Court has "repeatedly … stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

Tension between these policies—protecting officials from judgment and shielding them from the burdens of discovery and trial—has led to

inconsistency and contradiction among the courts of appeals regarding how and when government defendants waive qualified immunity.

1. For instance, in *Maul v. Constan*, 928 F.2d 784 (7th Cir. 1991), the Seventh Circuit assumed that defendants had properly pled qualified immunity, but nevertheless found the defense waived because the officials failed to "press a qualified immunity defense in any pretrial motions, at the pretrial conference," or at the bench trial on plaintiff's claims. *Id.* at 785. "There [was] no reason the defendants could not have raised their qualified immunity defense earlier in the proceedings," and they were therefore precluded from doing so after evidence closed. *Id.* at 787. The court declined to speculate how plaintiff might have tried the case had the officials timely asserted the defense. In rejecting the argument that permitting qualified immunity claims after trial would not waste time and resources, the court found it "sufficient to note that [plaintiff] might have approached the case differently had the defendants included the defense of qualified immunity in the pretrial order." *Id.* at 786.

In contrast, Respondents in this case were permitted to assert qualified immunity despite having made only a passing reference to the defense in their pleading, having chosen not to seek early disposition of the claims on that basis, and having willingly incurred the burdens and expenses of pretrial and trial proceedings—proceedings that occurred over nearly seven years and at considerable cost to judicial resources and the public fisc. Respondents also first argued for qualified immunity four months *after* trial, at which time Petitioner could not introduce evidence on the factual issues

that ultimately precluded his First Amendment claims. *See* Pet. App. 33a-34a (deciding qualified immunity based on the number of like-minded prisoners). But unlike the Seventh Circuit, the Court of Appeals in this case construed any uncertainty against Petitioner, finding that he "may have benefited from the delay because he was afforded the opportunity to introduce evidence at trial demonstrating that qualified immunity was improper under the circumstances." Pet. App. 31a. Whereas in *Maul* it was the officials who "should have contemplated the possibility that … it would be necessary to rely on qualified immunity," *Maul*, 928 F.2d at 786, the Third Circuit in this case held that Petitioner, acting *pro se*, should have looked beyond Respondents' dispositive motions and pretrial statement, anticipated each nuance of the arguments they might make to support the cursory qualified immunity defense in their pleadings, and then planned his presentation of evidence accordingly.

2. The failure to develop a qualified immunity defense pretrial has led to divergence in other respects. In *Blissett v. Coughlin*, 66 F.3d 531 (2d Cir. 1995), the trial court raised *sua sponte* the potential for a qualified immunity defense at the opening of the jury trial on plaintiff's Section 1983 claims. *Id.* at 538-39. Although the defendants only pled a defense of "general immunity," the Second Circuit affirmed a finding of waiver because the officials also

> did not raise the issue of qualified immunity during the subsequent five years of pre-trial proceedings. None of [them] sought summary judgment at any time prior to trial on the issue of

> qualified immunity … [or mentioned] a qualified immunity defense in their … pretrial memorandum of law outlining the disputed issues of law and fact….

Id. at 538. The waiver of qualified immunity as a defense to pretrial proceedings thus constituted a waiver of the defense to liability as well.

On the other hand, some circuits have taken a phased approach to waiver. Thus, in *Guzman-Rivera v. Rivera-Cruz*, 98 F.3d 664 (1st Cir. 1996), the defendants did not assert their qualified immunity defense until "very late in the pre-trial, post-discovery phase, despite the fact that they had ample opportunity to have the issue resolved expeditiously earlier in the proceedings." *Id.* at 668. But while the result was a waiver of the defense, the waiver was limited to "the pre-trial stage" only, *id.*, and did *not* imply "that the defense has been waived for other stages of the litigation." *Id.* at 669. The decision left "defendants free to present the qualified immunity defense at trial, despite the fact that the defense is waived for pre-trial purposes." *Id.*; *see also Skrtich v. Thornton*, 280 F.3d 1295, 1306 (11th Cir. 2002).

3. Cases from the Fourth and Fifth Circuits also crystallize the unresolved tension between the twin policies that underlie qualified immunity. The Fifth Circuit excused years of potentially unnecessary delay and intervening trial proceedings in *Spann v. Rainey*, 987 F.2d 1110 (5th Cir. 1993). The defendant in that case pled qualified immunity in his answer, but never filed a dispositive motion. *Id.* at 1112. Following a defense verdict after trial on the merits, the district court awarded plaintiff a new trial, and the defendant then sought dismissal on

grounds of qualified immunity for the first time. *Id.* at 1112-13. Although the district court found the late motion "'not well taken,'" the Fifth Circuit held that permitting the defense would still advance the purposes of qualified immunity, notwithstanding the prior proceedings. *Id.* at 1113-14.

But similar delay was dispositive in *Sales v. Grant*, 224 F.3d 293 (4th Cir. 2000). In that case, the defendants pled qualified immunity but filed no pertinent dispositive motion either before or during trial, and ultimately obtained a judgment under Fed. R. Civ. P. 50. *Id.* at 295. After the Fourth Circuit reversed that order and remanded the case, the defendants asserted their immunity defense in motions for summary judgment. *Id.* A divided panel of the Court of Appeals ultimately found the motion improper:

> [W]here, as here, a defendant only cursorily references qualified immunity in his answer to a section 1983 complaint, and thereafter fails to mention, let alone seriously press, his assertion of that affirmative defense, despite filing several dispositive motions in the district court and despite participating in a trial on the merits of the section 1983 claim, that defendant may not actively pursue his claim of qualified immunity for the first time on remand after appeal.

Id. at 296-97.

The Third Circuit's decision in this case thus fits within a broader pattern of confusion and inconsistency about waiving qualified immunity.

Although every case has unique facts and circumstances, the critical point is that the lower courts lack clear guidance concerning the effect of intervening trial proceedings when defendants voluntarily assume the burdens of discovery and trial. As a result, the scope of the qualified immunity defense shifts according to jurisdiction.

Moreover, the judgment in this case encourages a gamesmanship contrary to the social interests behind qualified immunity. Permitting the post-trial assertion of qualified immunity allows state officials to weigh the potential costs of discovery and trial against the potential costs of liability and—if they deem the latter to be greater—to wait until after the close of evidence to assert their immunity defense. Unsuspecting civil rights litigants like Petitioner then suffer adverse judgments due to the absence of evidence on points that were never previously contested. The purpose of qualified immunity is not to reward trial strategy and opportunism; it is to differentiate between state officials who do not act reasonably and those who do, and to spare the public the burdens of unnecessary litigation. This Court interprets the doctrine to promote these policies and to allow for the proper resolution of legitimate factual disputes. *See, e.g.*, *Mitchell*, 472 U.S. at 528 (permitting appeal from the denial of immunity at the summary judgment stage); *Johnson*, 515 U.S. at 317 (prohibiting such appeals when there are genuine issues for trial). It should not permit state officials, including Respondents, to circumvent those goals.

CONCLUSION

For all of the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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May 9, 2012