No. 18-_____

In The
Supreme Court of the United States

DAVID ALTSTATT, SR.,

Petitioner,

v.

NOEL TYLER, AS INTERIM DIRECTOR OF THE OKLAHOMA DEPARTMENT OF REHABILITATION SERVICES, AND THE UNITED STATES DEPARTMENT OF EDUCATION, REHABILITATION SERVICES ADMINISTRATION,

Respondents.

On Petition For A Writ Of Certiorari To The Unites States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

When States voluntarily choose to participate under the Randolph Sheppard Act, and consent to arbitration of blind vendors' grievances, do the states waive their Eleventh Amendment Sovereign Immunity as to compensatory damages?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the court below are:

Noel Tyler, as interim director of the Oklahoma Department of Rehabilitation Services, Defendant-Appellant.

United States Department of Education Rehabilitation Services Administration, Defendant – Appellee.

David Altstatt, Sr., Intervenor Defendant Counterclaimant – Appellee.

Although the United States Department of Education ("DOE") was named as a defendant in the district court it only participated in the litigation to the extent of filing the administrative record of the panel proceedings. Similarly, while named as an appellee in the appellate proceedings, the DOE was a nominal party and only participated as to: (1) briefing the question of intervention by blind vendor Robert Brown, who had not participated in the arbitration or district court proceedings, and (2) upon request by the appellate court, briefed the issues regarding the availability of prospective relief and the application of the Eleventh Amendment to RSA arbitration panels under the decision in *FMC v. S.C. State Ports Authority*, 535 U.S. 743 (2002). However, because the Tenth Circuit's decision expressly determines whether the DOE's arbitration panels have authority to award compensatory damages, the DOE has a direct interest in this Court's granting certiorari review and determining the extent of the DOE's authority on this issue.

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PETITION FOR WRIT OF CERTIORARI

David Altstatt, Sr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS AND ORDERS ENTERED IN THIS CASE

The Opinion of the United States Court of Appeals for the Tenth Circuit is reported at 904 F.2d 1167 (10th Cir. 2018) (Appendix "App." 1). The opinion of the United States District Court for the Western District of Oklahoma, CIV-16-137 is unreported. App. 76, 105. The decision of the United States Department of Education Arbitration Order, Case No. R.-S/13-01, is unreported. App. 62.

JURISDICTION

The Tenth Circuit Court of Appeals entered judgment on September 26, 2018. App. 1. No petition for rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Eleventh Amendment

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

The relevant provisions of the Randolph Sheppard Act, 20 U.S.C. § 107 *et seq.* are reprinted in the appendix at App. 107.

The relevant provisions of the Federal Regulations governing the implementation of the Randolph Sheppard Act, 34 C.F.R. § 395.1 *et seq.* are reprinted at App. 128.

The relevant Oklahoma statutory provisions 7 Okla. Stat § 71 *et seq.*, governing Blind Persons, Activities to Promote Employment – Vending Facilities – Gambling, are reprinted at App. 151.

INTRODUCTION AND STATEMENT OF THE CASE

1. Summary of the Randolph Sheppard Act

The Randolph Sheppard Act (RSA) was enacted in 1936 "[f]or the purposes of providing blind persons with remunerative employment, enlarging the

economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting." 20 U.S.C. § 107(a), App. 107. The RSA accomplishes these goals through a program giving priority to state-licensed blind vendors to operate vending facilities on federal property. 20 U.S.C. § 107(b), App. 115.

However, the federal agencies do not deal directly with blind vendors. Instead, the United States Secretary of Education designates an agency in each participating state as the State Licensing Agency (SLA) to contract and interact with the blind vendors in that state. 20 U.S.C. §§ 107a(a)(5), 107(b), App. 109, 115; 34 C.F.R. § 395.5, App. 139. Federal agencies issue a permit for a vending facility with the SLA, which in turn issues licenses to blind vendors. *Id.*

States' participation in the RSA is voluntary. 20 U.S.C. § 107b, App. 115; 34 C.F.R. § 395.2-395.4, App. 134-139. The RSA prescribes the terms and conditions on which the participating states may contract with blind vendors. These terms and conditions include, *inter alia*, cooperation in carrying out the purpose of the Act, recruitment, licensing and training of blind vendors, provision of equipment and vending stock, ownership obligations, distribution of income, compliance reports, and creation of state regulations consistent with the RSA that are necessary for the operation of the program. 20 U.S.C. § 107-107d-4, App. 107-127; 34 C.F.R. § 395.6-395.13, App. 140-147.

The RSA also requires that states agree that "[a]ny blind licensee who is dissatisfied with any action

arising from the operation or administration of the vending facility program may submit to a State licensing agency a request for a full evidentiary hearing, which shall be provided by such agency in accordance with section 107b(6) of this Act." 20 U.S.C. § 107d-1(a), App. 119; 34 C.F.R. § 395.13, App. 147.

Participating states must also agree to binding arbitration with any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program, which was not satisfactorily resolved by the evidentiary hearing. 20 U.S.C. § 107b(6), App. 117; 20 U.S.C. § 107d-1, App. 119; 20 U.S.C. § 107d-2, App. 120; 34 C.F.R. § 395.13, App. 147. The aggrieved vendor may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute. *Id.*

Following notice and hearing, the arbitration panel's decision is final and binding on the parties and is subject to judicial review as a final agency action under the Administrative Procedure Act (APA). 20 U.S.C. § 107d-1(a), App. 119; 20 U.S.C. § 107d-2(a), App. 120; 34 C.F.R. § 395.13(c), App. 148.[1]

In fiscal year 2014, there were 2,108 blind vendors operating 2,389 vending facilities located on federal and other property. U.S. Dept. of Educ., Randolph Sheppard Vending Facility Program, Program Office:

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[1] Review of a final agency action under the APA is judicial review before a United States District Court and appeal to a United States Court of Appeals. 5 U.S.C. § 701 *et seq.*; *see e.g. Premo v. Martin*, 119 F.3d 764, 770 (9th Cir. 1997).

Rehabilitation Services Administration (RSA), June 20, 2017, https://www2.ed.gov/programs/rsarsp/index.html, App. 152. In 2014, the program generated $693.6 million, and the average vendor earnings amounted to $59,012. *Id.* at 153. In 2015, the total gross income for the program was $697,000,000 and the total earnings of all vendors was $118.2 million in 2015. *Id.*

In the Presidential Memorandum of January 20, 2012, the President recognized the 75th anniversary of the Randolph Sheppard Vending Facility Program.

> Memorandum for the Heads of Executive Departments and Agencies
>
> Thousands of Americans who are blind have embraced the entrepreneurial spirit that helps define our Nation as a land of opportunity. Through the Federal Randolph Sheppard Vending Facility Program administered by the Department of Education, talented and creative individuals who are blind have acquired the management training and business skills necessary to realize the American dream – a lifetime of economic opportunity, independence, and self-sufficiency for themselves and their families.
>
> For 75 years, blind business managers have successfully operated food services and commercial ventures at Federal, State, and private buildings and locations nationwide. We honor and celebrate this program's historic achievements. We also trust that the Randolph Sheppard Program will continue to be a leading model for providing high-quality

> entrepreneurial opportunities for blind individuals. From a simple snack shop, to tourist services at the Hoover Dam, to full food-services operations at military installations, blind entrepreneurs have provided exceptional customer service to Federal and State employees, the Armed Forces, and the general public. With proven ability, they have challenged preconceived notions about disability.
>
> The Randolph Sheppard Act (20 U.S.C. § 107 *et seq.*) created the Vending Facility Program requiring qualified blind individuals be given a priority to operate vending facilities on Federal properties. This program is responsible today for providing entrepreneurial opportunities for over 2,500 individuals who are blind. In turn, these business managers have hired thousands of workers, many of whom are individuals with disabilities. Every American, including persons with disabilities, deserves the opportunity to succeed without limits, earn equal pay for equal jobs, and aspire to full-time, career-oriented employment. Pres. Mem. of January 20, 2012, 77 Fed. Reg. 3917, App. 113; 20 U.S.C. § 107a, App. 108.

2. Factual and Procedural Background

Petitioner, David Altstatt, Sr. is a blind vendor licensed by the Oklahoma Department of Rehabilitative Services (ODRS). App. 62-63, 81. In 2012, Altstatt submitted an application and detailed management plan to the ODRS Selection Committee in response to a published notice that ODRS was accepting applications for

a contract to manage the Fort Sill, Oklahoma (Ft. Sill) dining facilities. App. 62-63, 81.

ODRS ultimately selected another vendor, Brown, for the contract. App. 5, 81. However, Altstatt objected to the contract award because Brown had been improperly selected. App. 5, 81. Accordingly, Altstatt notified ODRS of his objections to Brown's selection based on violations of ODRS's regulations implemented pursuant to the RSA. App. 5, 6, 85. Pursuant to Altstatt's request, ODRS held two evidentiary hearings to determine Altstatt's complaints. App. 5, 6, 64, 81, 84.

After the second hearing, ODRS issued a Final Written Decision affirming Brown's appointment concluding that the selection committee "complied with the applicable regulations and due process." App. 6, 85.

In response to ODRS's decision, Altstatt filed a Complaint and Request for Arbitration with the United States Secretary of Education against ODRS pursuant to the Randolph Sheppard Act. App. 7, 70, 85. The Secretary convened a three-member arbitration panel to hear Altstatt's complaint. After notice and hearing, the arbitration panel held that ODRS failed to follow the law with regard to the selection of the Licensed Blind Vendor at Ft. Sill. App. 7, 8, 70-73, 88-89. This violation was evidenced by ODRS's admitted failure to utilize the mandatory factors for selection including the use of a selection committee member who was biased against Altstatt and selection of a blind vendor (Brown) who had a tax delinquency. App. 71-73, 87.

The arbitration panel granted Altstatt prospective relief by removing Brown as the Licensed Blind Vendor at Ft. Sill and replacing him with Altstatt. App. 7, 8, 74, 88. The panel also awarded Altstatt compensatory damages against ODRS in an amount equal to Brown's net revenue share during the time that he served as the Interim and Permanent Licensed Blind Vendor at Ft. Sill along with interest at the legal rate. App. 8, 74, 88.

ODRS sued the Department of Education ("DOE") in the United States District Court for the Western District of Oklahoma seeking review of the Panel's decision. App. 9. Altstatt intervened as a defendant and counterclaimant seeking affirmation of the arbitration decision. App. 9, 77. ODRS contended, *inter alia*, that the RSA did not permit the arbitration panel to remove Brown and replace him with Altstatt. App. 9, 10, 93. ODRS also contended that the Eleventh Amendment barred the award of compensatory damages against the state. App. 10, 89. The district court rejected ODRS's argument and upheld the arbitration panel's award of prospective relief and compensatory damages. App. 10, 13-15, 102, 103.

ODRS appealed the district court's decision to the Tenth Circuit Court of Appeals alleging that the district court had erred in affirming the arbitration panel's decision. App. 10. Jurisdiction was proper under 28 U.S.C. § 1291. App. 3.

On appeal, ODRS argued, *inter alia*, that sovereign immunity barred the award of compensatory

damages under the RSA. App. 10, 35. Altstatt argued that when the state elected to participate in the RSA and agreed to arbitration of blind vendor grievances, it consented to waive its sovereign immunity as to compensatory damages.[2] App. 56.

The Tenth Circuit determined that under the RSA, the arbitration panel had the power to hear Altstatt's complaint and grant his request for prospective relief. App. 31, 32. The court then concluded that based on the holding in *FMC* that the "interest in protecting States' dignity and the strong similarities between [RSA] proceedings and civil litigation" compel us to conclude that state sovereign immunity bars RSA arbitration panels from adjudicating complaints filed by a private party against a nonconsenting State. App. 55.

After finding that sovereign immunity applied to RSA arbitration proceedings, the Tenth Circuit then applied the decision in *Sossamon v. Texas*, 563 U.S. 277 (2011) to hold that the state did not waive sovereign immunity as to compensatory damages. App. 39, 40, 56, 57. The Tenth Circuit found that the RSA's failure to expressly state what damages can be awarded by arbitration panels makes it too "open-ended and ambiguous about what types of relief it includes" to waive sovereign immunity as to compensatory

[2] The DOE submitted a Supplemental Brief in the Tenth Circuit arguing that sovereign immunity did not apply to arbitration under the RSA and even if it did, the state waived sovereign immunity as to arbitration under the RSA with regard to equitable remedies. The DOE did not address the availability of compensatory damages.

damages. App. 57. The court thus vacated the award of compensatory damages to Altstatt. App. 57.

REASONS FOR GRANTING CERTIORARI REVIEW

A. Certiorari Review Should Be Granted to Remedy the Division Among the Seven Different Courts of Appeals Regarding the Availability of Compensatory Damages Under the RSA and to Settle this Important Issue of Federal Law Which Has Not Yet Been Decided by This Court.

Certiorari review is appropriate in this case because the decision of the Tenth Circuit in this case directly conflicts with the decisions of the Third and Ninth Circuit Courts of Appeals which have expressly held that the states have waived their Eleventh Amendment immunity to compensatory damages. *Premo v. Martin*, 119 F.3d 764 (9th Cir. 1997); *Delaware Dept. of Health & Soc. Servs., Div. for Visually Impaired v. United States Dept. of Educ.*, 772 F.2d 1123 (3d Cir. 1985).[3]

Moreover, the conflict is not limited to directly opposing decisions. The decision in this case also conflicts with the findings of two circuits that found, without deciding, that compensatory damages are available

[3] Both Circuits questioned whether the Eleventh Amendment even applied to RSA arbitration, but determined that if it did, the states had waived their immunity.

under the RSA. *New Hampshire v. Ramsey*, 366 F.3d 1, 21 (1st Cir. 2004); *Georgia Dept. of Human Servs. v. Nash*, 915 F.2d 1482 (11th Cir. 1990). The Sixth Circuit also held that sovereign immunity does not apply to arbitration and, therefore, does not bar the award of compensatory damages by such panels, however, the court found that the Eleventh Amendment does bar enforcement of compensatory damages in federal courts. *Tennessee Dept. of Human Servs. v. United States Dept. of Educ.*, 979 F.2d 1162 (6th Cir. 1992).[4]

Only one other circuit besides the Tenth has determined that compensatory damages are not available to blind vendors under the RSA and did so in a *per curiam* decision with each of the judges concurring and dissenting and writing separately. *McNabb v. United States Dept. of Educ.*, 862 F.2d 681 (8th Cir. 1988) *cert. denied*, 493 U.S. 811 (1989).

Out of the seven circuits weighing in, the Tenth Circuit is only the second circuit to hold that

[4] The decision in *Tennessee Dept. of Human Servs. v. United States Dept. of Educ.*, 979 F.2d 1162, 1167 (6th Cir. 1992) stands alone in holding that states have not waived their sovereign immunity as to federal court enforcement of arbitration awards. In contrast, the Ninth Circuit expressly held that the states waived sovereign immunity as to federal court enforcement of the arbitration panels' decisions. By providing that the arbitration panel's decisions are subject to appeal and review in federal courts, the "overwhelming implication of the statute is that by agreeing to participate in the Randolph Sheppard program, states have waived their sovereign immunity to enforcement of such awards in federal court." *Premo v. Martin*, 119 F.3d at 771. The issue of waiver of the Eleventh Amendment with regard to federal court enforcement was not raised in *Tyler*, and will not be addressed herein.

compensatory damages are not available under the RSA. Furthermore, the decision in *Tyler* is the first to expressly hold that under the decision in *FMC v. S.C. State Ports Auth.*, 535 U.S. 743 (2002) the Eleventh Amendment applies to arbitration.[5] It is also the first to hold that under the decision in *Sossamon v. Texas*, 563 U.S. 277 (2011), sovereign immunity has not been waived under the RSA as to compensatory damages.

The split among the circuits, and the lack of clear precedent on the availability of compensatory damages to blind vendors under the RSA, makes it critical for

[5] Altstatt does not seek certiorari review of the Tenth Circuit's holding that under the decision in *FMC v. S.C. State Ports Auth.*, 535 U.S. 743 (2002), sovereign immunity applies to RSA arbitration panels. Altstatt will assume that the Tenth Circuit correctly determined that sovereign immunity applies to RSA arbitration proceedings. This assumption is warranted due to the fact that under the RSA, sovereign immunity has been waived when the states consented to arbitration. Moreover, even if the arbitration panels were not governed by the Eleventh Amendment, the appeal and enforcement of their decisions occurs in federal court under the APA. Certainly the Eleventh Amendment and sovereign immunity applies to the federal court proceedings, although the states waived sovereign immunity as to the federal court proceedings under the RSA by agreeing to appeal and enforcement in federal courts. *See e.g.*, *Premo v. Martin*, 119 F.3d at 770-71. But, the application of sovereign immunity does make a difference when addressing waiver of sovereign immunity as to damages. Having an arbitration panel unconstrained by the Eleventh Amendment's limit on compensatory damages makes little difference if the Eleventh Amendment prevents the appeal and enforcement of that award in federal court. Therefore, the necessary analysis is to determine the scope of the waiver of sovereign immunity as to damages, regardless of the venue. Thus, the issue in this Petition for Writ of Certiorari is the scope of the states' waiver of sovereign immunity under the RSA with regard to damages.

this Court to grant certiorari review to remedy the disharmony among the circuits and determine this question of first impression on an important issue of federal law. Clear and definite resolution of this issue is required to guide the federal government, the participating states and more than 2,500 blind vendors, in their pursuit of the goals under a federal program generating hundreds of millions of dollars in yearly income.

i. The Decision in *Sossamon* – Applying Rules Governing Waiver of Sovereign Immunity as to Money Damages Under the Religious Land Use and Institutionalized Persons Act of 2000.

In finding that sovereign immunity barred compensatory damages under the RSA, *Tyler* relied exclusively on the decision in *Sossamon v. Texas*, 563 U.S. 277 (2011). Thus, to fully understand *Tyler*'s error in holding that sovereign immunity bars the recovery of compensatory damages under the RSA, a review of *Sossamon* is required.

Sossamon is a 5-4 decision wherein the majority held that the Eleventh Amendment prevented individuals suing the state under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq*. from recovering compensatory damages. RLUIPA contains an express waiver of state sovereign immunity, authorizing a prisoner whose religious liberties had been violated, to sue and "obtain appropriate relief against a government." *Sossamon v.*

Texas, 563 U.S. at 282. The question in *Sossamon* was whether RLUIPA's waiver of sovereign immunity and authorization of "appropriate relief" allowed prisoners to sue state's for monetary damages. *Sossamon*, at 285-86.

In reaching its decision, the majority recognized that a state may choose to waive its sovereign immunity at its pleasure. *Sossamon*, 563 U.S. at 284. However, the test for waiver is a stringent one and a state's consent to suit must be unequivocally expressed. *Id.* at 284. The majority acknowledged that RLUIPA unequivocally authorized suit for "appropriate relief against a government" and therefore waived sovereign immunity as to the inmates bringing the suit. However, the term "appropriate relief" did not "clearly and unambiguously waive sovereign immunity to private suit for damages." *Id.* at 285. To waive sovereign immunity as to compensatory damages a statute must contain clear language expressly establishing such waiver. *Id.* at 287.

The majority found that even though the term "appropriate relief" could be read to encompass monetary damages, as had been found in previous cases, the term "appropriate" was inherently context dependent. *Sossamon*, at 286. Thus, the term's use in RLUIPA was "not so free from ambiguity that we may conclude that the States, by receiving federal funds, have unequivocally expressed intent to waive their sovereign immunity to suits for damages." *Id.* at 288. Moreover, based on the fact that compensatory damages are not ordinarily recoverable from the government, the majority

held that in the context of a waiver of sovereign immunity for damages where states are merely receiving federal funds, the phrase "appropriate relief" necessarily fails to extend the waiver of sovereign immunity to compensatory damages. *Id.* at 286.

ii. The *Tyler* Court's Misplaced Reliance on *Sossamon*.

In *Tyler*, the Tenth Circuit relied exclusively on *Sossamon v. Texas*, 563 U.S. 277 to support its conclusion that the text of the RSA was insufficient to constitute a waiver of sovereign immunity as to compensatory damages. App. 56, 57.

> Guided by *Sossamon*, we conclude that the RSA is insufficiently explicit to render state participation in the RSA Program a waiver of sovereign immunity from an RSA arbitration panel award for damages. Like RLUIPA, which authorizes private parties to sue states for "appropriate relief," the RSA does not expressly enumerate the types of remedies available to private parties aggrieved by a state. Compare 42 U.S.C. § 2000cc-2(a) with 20 U.S.C. §§ 107d-1(a), 107d-2(a)-(b)(1). In *Sossamon*, the Supreme Court held that states, by accepting federal funding under RLUIPA, do not waive sovereign immunity as to damages because the term "appropriate relief" is too "open-ended and ambiguous about what types of relief it includes." 563 U.S. at 286. Here, the RSA does not even use the words "appropriate relief." It is silent as to

> what remedies aggrieved vendors may obtain against SLAs and is therefore just as 'open-ended and ambiguous' as RLUIPA, if not more. App. 56, 57.

The Tenth Circuit then cited as conflicting authority, the decision in *Delaware Dept. of Health v. United States Dept. of Educ.*, 772 F.2d 1138 noting that it was a pre-*Sossamon* decision, and gave it no analysis or application to the present case. App. 57.

The *Tyler* court erred in its simplistic application of *Sossamon* as binding authority to remove compensatory damages from the ambit of the RSA. As shown herein, the *Tyler* decision failed to consider the applicable rules of statutory interpretation necessary to properly interpret the RSA. It failed to take into account the context of the waivers under each Act. It failed to consider the difference between a statute like RLUIPA that expressly mentions relief and uses limiting language, and a statute like RSA that does not mention relief at all.

Moreover, this is not merely a case where the states receive federal funds. The RSA is a cooperative program governing the conduct and contracts of the federal and state governments and through which blind vendors are able to earn a living, become self-supporting, and provide employment for thousands of employees and produce upwards of $698 million per year.

iii. The Analysis and Outcome in *Sossamon* Under RLUIPA is Not Applicable to the Randolph Sheppard Act – The Proper Analysis of the Randolph Sheppard Act is Found in *Delaware Dept. of Health v. United States Dept. of Educ.*, 772 F.2d 1123 (3d Cir. 1985).

The *Tyler* court's error in applying the context specific waiver in *Sossamon* to the context specific waiver under the RSA is revealed when the appropriate canons of interpretation are used to determine Congressional intent, and the purpose of the RSA and the context of the states' waiver of sovereign immunity under the RSA, are taken into account. *See Tanvir v. Tanzin*, 894 F.3d 449 (2d Cir. 2018) (holding that the context specific statutory analysis and outcome in *Sossamon* is inapplicable and unpersuasive in the context of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*).

The Third Circuit undertook a proper analysis of the RSA in the seminal case of *Delaware Dept. of Health v. United States Dept. of Educ.*, 772 F.2d 1123 (3d Cir. 1985). In determining whether the state had waived sovereign immunity as to arbitration and compensatory damages, the Third Circuit extensively analyzed the RSA, its history, its terms and the context of the states' agreement to waive sovereign immunity as to arbitration and compensatory damages in order to participate in the RSA. *Delaware Dept. of Health v. United States Dept. of Educ.*, 772 F.2d at 1123.

The Third Circuit found that states wishing to participate in the RSA must agree:

> to provide to any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair hearing, and to agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration as provided in section 5 of this Act [20 U.S.C. § 107d-1].

Delaware, 772 F.2d at 1127.

Furthermore, the court found that the Randolph Sheppard Act essentially creates a contractual relationship between the federal government and the state and the blind vendors. *Id.* at 1136. The RSA specifies the terms upon which participating states may contract with blind vendors. *Id.* at 1136. One of these terms is that states desiring to gain access to blind vendor locations in federal facilities must agree to submit to arbitration of their disputes with blind vendors. *Id.* at 1138.

Recognizing that the RSA did not enumerate what remedies would be available to aggrieved blind vendors, the Third Circuit applied the interpretive canon requiring that a court look to the state of the law when the statute was enacted. *Id.* at 1136. The court found that in 1974, when the RSA was amended to include the arbitration requirement, the term arbitration had a well-recognized meaning.

> Congress was surely aware that arbitrators proceeding under the authority of the Federal Arbitration Act or under the authority of the Uniform Arbitration Act, as a matter of course awarded retrospective compensatory relief in appropriate cases. *See generally*, G. Wilner, Domke on Commercial Arbitration, § 30.02 (rev. ed. 1984).

Delaware, at 1136.

The court also observed that at the time Congress amended the RSA to include arbitration, contract arbitration was a legal concept with well-settled meaning and content, therefore there was no ambiguity in Congress' choice of the term for use in the RSA. *Id.* at 1135. Furthermore, "there is not one iota of legislative history suggesting that, insofar as it dealt with the relief which arbitrators could award, the term was understood by any member of Congress to have any meaning other than the conventional one." *Id.* at 1163. Moreover, because the RSA prescribes the terms and conditions on which the participating states may contract with blind vendor, "a federal rule of contract damages is appropriate, if not mandated." *Id.* at 1139 (citations omitted).

Based on its thorough analysis of the RSA, applicable interpretive law, and the context of the waiver, the Third Circuit affirmed the award of compensatory damages to the blind vendor under the RSA. The Court found that "our rejection of the eleventh amendment's application in this case does not require that we review the nuances, complexities, historical inaccuracies, and

errors which have bedeviled that amendment since its ratification." Rather, the Third Circuit held that assuming that the Eleventh Amendment applied to arbitration proceedings, sovereign immunity under the Amendment "plainly has been waived by Delaware when, after full notice of the Act's requirements, one of which was an agreement to arbitration, it voluntarily made application with the Secretary to participate in the Randolph Sheppard program." *Delaware*, at 1138. In confirming that the Eleventh Amendment did not bar compensatory damages under the RSA, the court held "[t]he waiver of sovereign immunity with respect to arbitration could hardly have been made more clearly." *Id.* at 1138.

The Third Circuit's exhaustive review of the RSA and its analysis of the Act's purpose, its operation, and its context together with application of the appropriate canons of statutory interpretation, provides the proper framework to determine that states waive their sovereign immunity as to compensatory damages when they agree to arbitration under the RSA.

iv. This Court's Decisions Regarding Available Damages When a Statute Fails to Enumerate Damages are Consistent with *Delaware* and Support the Conclusion that Congress Expressly Intended for Compensatory Damages to be Recoverable Under the RSA.

Long standing canons of statutory interpretation support the *Delaware* court's decision regarding the RSA's clearly expressed waiver of sovereign immunity with regard to compensatory damages. These canons are necessary to determine the remedies intended by Congress where the statute provides a right of action but does not mention remedies. Additional canons of interpretation also establish what damages are available when the context of the waiver involves contractual rights and relations. This analysis is particularly relevant in establishing, as emphasized in *Sossamon*, that the context of the waiver is critical in determining a waiver as to compensatory damages.

When a statutory right to recover is implicit, a court cannot resort to interpretation of the language used, and must instead evaluate the state of the law when the statute was passed by Congress. *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 71 (1992).[6] In

[6] In *Sossamon*, the majority rejected application of *Franklin*'s presumption regarding damages because in RLUIPA Congress had expressly stated its intent, albeit ambiguously, as to available remedies. However, the rule in *Franklin* is applied when "there is no express congressional intent to limit remedies available against municipal entities under an implied right of action, the Court presumed that compensatory damages were

interpreting a statute, courts generally presume that Congress acts "against the background of our traditional legal concepts." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978). It is a well-settled maxim of statutory construction that "where 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." *NLRB v. Amax Coal Co., a Div. of Amax, Inc.*, 453 U.S. 322, 329 (1981).

Furthermore, when a federal statute provides for a general right to sue for invasion of legal rights, the courts may use any available remedy to make good the wrong done. *Barnes v. Gorman*, 536 U.S. 181, 189 (2002). When the wrong is a failure to provide what a contractual obligation requires, that wrong can be remedied by the award of compensatory damages. *Id.* at 189. When the statute is of a contractual nature, participants under that program are generally on notice that they are exposed to contractual liability, including the award of compensatory damages. *Id.* at

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available." *Sossamon v. Texas*, 563 U.S. at 278. Under the RSA, as in *Franklin*, there is only an implied right to remedies. On the other hand, RLUIPA, the right to remedies is expressly stated as "appropriate remedies." It is the express statement of remedies under RLUIPA that distinguishes it from *Franklin.* No such distinction exists in the present case under RSA. Instead, the RSA is like Title IX of the Education Amendments of 1972 in *Franklin*, which does not specify damages, but clearly intends for them to be available. Thus, under the decision in *Franklin*, all available remedies, including compensatory damages, are also available under the RSA.

187. Even where the statute fails to reference any remedies, the contractual nature of the statute and attendant obligations, makes the award of compensatory damages appropriate. *Barnes*, at 187-88. The courts should construe the details of an act in conformity with its dominating general purpose. *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350 (1943).

Moreover, as emphasized in *Sossamon*, this Court has consistently stressed that "the words of a statute must be read in their context." *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 320 (2014). "Context is a primary determinant of meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 167 (2012).

Finally, while waivers of sovereign immunity must be "unequivocally expressed" in the statutory text, the court should not "assume the authority to narrow the waiver that Congress intended." *United States v. Idaho*, 508 U.S. 1, 7 (1993) (*quoting Smith v. United States*, 507 U.S. 197, 206 (1993) (*quoting United States v. Kubrick*, 444 U.S. 111, 117-118 (1979)).

Congress unequivocally expressed its intent that by participating in the RSA states agreed to waive their sovereign immunity to arbitration. The RSA does not enumerate the remedies available through arbitration. The right to recover any relief under the RSA is implicit in the granting of arbitration. While the requirement of an express waiver of sovereign immunity as to compensatory damages is strict, it is also subject to the rule that the waiver is dependent on the law in

existence at the time the RSA was passed. When the RSA was amended in 1974 to include the requirement that states agree to arbitrate blind vendor grievances, the law clearly recognized that arbitrators would and could award legal and equitable relief, as required to make the aggrieved party whole. In the context of contracts, this included the award of compensatory damages.

Furthermore, considering the concept of arbitration in 1974, together with the fact that in 1974 the law did not require Congress to expressly declare that states waive their sovereign immunity as to damages, it is judicial legislation to go back and hold that what Congress clearly stated in 1974 will not be recognized today. *See* John Copeland Nagle, *Article, Waiving Sovereign Immunity in An Age of Clear Statement*, 1995 Wis. L. Rev. 771, 780 (beginning in 1991, the United States Supreme Court began to alter the rules regarding interpretation of Congress' clear statement to waive of sovereign immunity). The express intent of the amended RSA was to allow compensatory damages – it is error for courts to alter that intent based on court created changes in the law of statutory interpretation and waiver of sovereign immunity that occurred after the amendment was enacted.

Moreover, unlike RLUIPA which protects a prisoner's religious freedoms, the RSA governs contractual relationships with regards to a multi-million dollar system of enterprise between the federal government, the states, and blind vendors. In this context, when

Congress required that the states submit to arbitration without any language placing limitations on damages, Congress clearly intended for compensatory damages to be available to the blind vendors. The courts should not assume the authority to narrow Congress' express intent to waive sovereign immunity as to compensatory damages.

v. The Tenth Circuit's Decision in *Tyler* Creates a Two-Five Split Among the Circuit Courts on the Availability of Compensatory Damages Under the RSA.

The decision in *Tyler*, conflicts with precedent in five (5) other Circuits which all held that the RSA allows awards of compensatory damages to blind vendors. In addition to the Third Circuit's decision in *Delaware Dept. of Health v. United States Dept. of Educ.*, 772 F.2d 1123 discussed *supra*, these cases are as follows:

Like the Third Circuit in *Delaware*, the Ninth Circuit in *Premo v. Martin*, upheld an award of compensatory damages holding that as a matter of statutory construction the RSA gives arbitration panels the authority to award compensatory relief and that the states waived their sovereign immunity as to enforcement of those awards in federal court. *Premo v. Martin*, 119 F.3d 764 (9th Cir. 1997). The Ninth Circuit found that the state had waived its sovereign immunity claim by agreeing to participate in arbitration

proceedings which do "not limit the authority of arbitration panels convened under the Act to award compensatory relief." *Premo*, at 769. Moreover, "the evidence that Congress conditioned state participation in the Randolph Sheppard program on consent to federal jurisdiction enforcement of compensatory awards is overwhelming." *Id*. at 770.

The remaining decisions that conflict with *Tyler*, all held that compensatory damages were available under the RSA, but without directly finding a waiver of sovereign immunity as to compensatory damages. In *Georgia v. Nash*, 915 F.2d 1482 (11th Cir. 1990) the Eleventh Circuit held that the states agreeing to participate in the RSA did so on the condition that they would submit to arbitration with regard to blind vendors' grievances. *Id.* at 1484. The court then assumed without deciding that the RSA arbitration panels could award damages against the state in favor of blind vendors. *Id.* at 1488.[7] Similarly, in *New Hampshire v. Ramsey*, the First Circuit noted that under the RSA the states had agreed to arbitration, that the RSA was silent as to damages, and that there was a split in the courts' conclusions of whether compensatory damages were available under the RSA. *New Hampshire v. Ramsey*, 366 F.3d 1, 21-22 (1st Cir. 2004). However,

[7] The *Georgia* court also discussed the limitation on remedies against the federal government contained in 20 U.S.C. § 107d-2(b) and noted that if Congress had intended to limit the remedies blind vendors could obtain against the states under 20 U.S.C. § 107d-2(a), that limitation would have been stated therein. *Georgia*, 915 F.2d at 1491-1492.

based on its review of the RSA and extant cases, the First Circuit assumed without deciding that the RSA allowed damages to be awarded against states based on complaints by blind vendors. *New Hampshire*, at 21-22. Finally, the Sixth Circuit also held that compensatory damages are available under the RSA, after finding that sovereign immunity did not apply to the RSA. *Tennessee Dept. of Human Servs. v. United States Dept. of Educ.*, 979 F.2d 1162 (6th Cir. 1992).

A sharply divided panel of the Eighth Circuit is the only other circuit besides the Tenth Circuit to hold that compensatory damages are not available under the RSA. In *McNabb v. United States Dept. of Educ.*, 862 F.2d 681 (8th Cir. 1988) *cert. denied*, 493 U.S. 811 (1989) the majority held that compensatory damages are not available under the RSA, with the two (2) member majority divided as to the reason for the conclusion. The court found that states choosing to participate in the program did so on the condition that they would submit to arbitration involving grievances of a blind vendor. However, Judge Fagg found that the states had not consented, and Congress had not required, liability for compensatory damages. *Id.* at 685-86. Judge Doty found that Congress did not intend to abrogate sovereign immunity as to compensatory damages under the RSA. *Id.* at 687-88. Disagreeing with his colleagues, Chief Judge Lay found that the recovery of compensatory damages was permissible because Congress had abrogated sovereign immunity for the states under the RSA. *Id.* at 684-85.

These various and opposing views taken by the circuit courts with regard to the waiver of sovereign immunity under the RSA and the states' waiver of immunity as to compensatory damages are irreconcilable. Moreover, the *Tyler* Court's misplaced reliance on *Sossamon*, and its failure to adequately and correctly interpret the RSA, will only further the disarray of decisions regarding sovereign immunity, compensatory damages, and the RSA.

Moreover, it is unlikely that this Court's ruling in *Sossamon* will resolve the split in the courts' rulings on whether compensatory damages are available under the RSA. The decisions in *Delaware* and *Premo* both hold that Eleventh Amendment sovereign immunity as to compensatory damages has been waived under the RSA. These cases provide direct precedent on the precise issue: sovereign immunity and compensatory damages under the RSA. On the other hand, *Sossamon* is interpreting completely different statutory language in a completely different statute, in a completely different context, making it inapplicable to the RSA.

Sossamon's finding that under RLUIPA states have not waived sovereign immunity as to compensatory damages has little precedential or persuasive value in altering the opinions of these courts, especially in light of *Delaware*'s detailed analysis of the context specific waiver of sovereign immunity as to compensatory damages under the RSA. Nor does *Sossamon* expressly or implicitly overrule the earlier RSA cases. *Sossamon* merely stands alongside the RSA

cases analyzing the scope of the waiver of sovereign immunity as to compensatory damages under the relevant act of Congress. As held in *Sossamon*, a finding of waiver of sovereign immunity is text and context specific. The text and context in RLUIPA is worlds away from the text and context in the RSA and its interpretation has no sway over the RSA.

The Tenth Circuit's failure to undertake the necessary analysis to determine the actual context and scope of waiver under the RSA has resulted in its erroneous decision and placed it at odds with five (5) other circuits. This erroneous decision and the resulting conflict with the other circuits, requires this Court's review and issuance of a decision to guide and bind the lower courts to the proper result.

vi. *Sossamon* Has Been Directly Rejected as Authority to Determine Whether States Waive Their Sovereign Immunity as to Compensatory Damages Under the RSA.

Since the decision in *Sossamon*, recent decisions of other Federal Courts and RSA arbitration panels show that the courts and arbitration panels have rejected *Sossamon* as binding or persuasive authority in the context of the RSA. Instead, they have continued to find that compensatory damages are available to blind vendors.

In May 2017, the difference in the statutory language and the expressly limited scope of the waiver in RLUIPA as compared to the RSA, led the Oregon

District Court to reject the reasoning in *Sossamon* and hold that states waive their sovereign immunity under the RSA and that compensatory relief is available to the blind vendors. *Bird v. U.S. Dept. of Educ.*, Case No. 3:14-cv-00843-YY, 2017 U.S. Dist. LEXIS 83951, 2017 WL 2365110 (D. Or. Feb. 24, 2017). The district court first noted that this Court's decision in *Sossamon* centered on the limited waiver of sovereign immunity as to damages indicated by the phrase "appropriate relief against a government." *Id.* at LEXIS 16. The court then contrasted this language in RLUIPA with the language in the RSA to find that "the clear language of the RSA that the state agrees to 'submit grievances of any blind licensee . . . to arbitration'" is explicit consent to such a process that will be final and binding on the parties. *Id.* LEXIS at 15-16. Relying on the Ninth Circuit's decision in *Premo*, the district court held that "it was 'widely recognized that this language permits arbitration panels to award compensatory relief.'" *Id.* at LEXIS 16-17.

Then, in 2017, in *Homan v. State of Maryland, Dept. of Educ.*, Case No. R.-S/15-05, 82 Fed. Reg. 41,941-42 (2017) the panel of arbitrators found that the Ninth Circuit's decision in *Premo v. Martin*, 119 F.3d 764 (9th Cir. 1997) provided ample authority for them to award the licensed blind vendor the disputed contract, lost wages for damages, and reasonable attorney fees.

Similarly, in February 2018, in *Taylor v. State of Wisconsin*, R-S/12-01 (January 10, 2018), in a well-considered opinion, the arbitration panel expressly

rejected the holding and reasoning of the USDC in *Wisconsin Dept. of Workforce Dev. v. United States Dept. of Ed.*, 667 F. Supp. 2d 1007 (USDC Wis. 2009) which relied on the Fifth Circuit's decision in *Sossamon*, prior to certiorari review in this Court, to hold that compensatory damages were not available.[8] The *Taylor* panel acknowledged that "there is conflicting legal authority and no settled law over whether monetary relief and legal fees can be awarded under the RSA." *Id.* at 28. It then rejected *Sossamon* and *Wisconsin*, and instead adopted the reasoning and ruling in *Delaware*, and *Premo* to hold that compensatory damages could be awarded to blind vendors under the RSA.

The confusion engendered among the lower courts and United States Department of Education arbitration panels, arising out of the conflicting rulings of the Circuit Courts of Appeals, makes apparent the extreme need for this Court to grant certiorari and rule on the waiver of sovereign immunity as to compensatory damages under the RSA.

[8] *Tyler* cited *Wisconsin Dept. of Workforce Dev. v. United States Dept. of Ed.*, 667 F. Supp. 2d 1007 (USDC Wis. 2009) to determine the scope of available prospective relief under the RSA. App. 31. However, *Tyler* did not cite the *Wisconsin* case to determine that sovereign immunity barred compensatory damages under the RSA.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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