NO. _____

In the Supreme Court of the United States

JERRY BIRD,

Petitioner,

v.

OREGON COMMISSION FOR THE BLIND, an agency of the State of Oregon; and the U.S. DEPARTMENT OF EDUCATION, Rehabilitation Services Administration,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has never addressed the Randolph-Sheppard Act (RSA), 20 U.S.C. §§ 107-107f, in its decisional law. The RSA provides economic opportunities to blind Americans to operate vending concessions on government property, with the properties and vendors managed by States that voluntarily agree to participate. The RSA and its concomitant federal and state regulations require arbitration of any disputes between States and vendors, subject to limited appeal exclusively in the federal district courts under the Administrative Procedures Act. In this case, the RSA and it related federal and state statutes and rules—including the exclusive federal arbitration process—were incorporated by reference into private, annual contracts between the state agency and Petitioner. Petitioner asserted a contract dispute with the agency, the dispute was arbitrated, Bird was awarded compensatory money damages as well as attorney fees, and the entire award was upheld by the district court. On appeal in this case, the Ninth Circuit voided Bird's monetary award under a theory of Eleventh Amendment immunity to damages pursuant to this Court's holding in *Sossamon v. Texas*, 563 U.S. 277 (2011). The questions presented are:

1. Does a State by necessity waive its sovereign immunity from money damages in federal court when it voluntarily enters into a commercial vending services contract with a private individual, and the contract incorporates by reference a "final and binding" arbitration process created by federal statute to resolve contract disputes?

2. Does an arbitration panel convened by a federal agency to decide any grievance between a State and a blind individual under a commercial vending services contract have authority to award attorney fees as part of a make-whole remedy where such fees were previously authorized by prior Ninth Circuit precedent and authorized by the incorporated statutes?

PARTIES TO THE PROCEEDINGS

Petitioner

- Petitioner is Jerry Bird ("Bird"), a blind individual and contracting vendor in the State of Oregon's blind vendor program. Petitioner was the petitioner in the review of an arbitration panel proceeding before the District Court of Oregon and appellee before the Ninth Circuit.

Respondents

- Respondent is the Oregon Commission for the Blind ("OCB"), an agency of the State of Oregon. Respondent OCB was the respondent and cross-petitioner in the review of the arbitration panel proceeding, and the appellant before the Ninth Circuit.
- The other Respondent is the United States Department of Education, Rehabilitation Services Administration ("DOE"). The Department of Education convened the arbitration panel from which the parties sought review in the district court, and DOE was denominated as a respondent to that review. The DOE was also an appellee before the Ninth Circuit, but did not brief or argue the matter.

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit (Designated for Publication)

No. 20-36066

Jerry Bird, *Petitioner-Appellee,* v. Oregon Commission for the Blind, an Agency of the State of Oregon, *Respondent-Appellant;* U.S. Department of Education, Rehabilitation Services Administration, *Respondent-Appellee*

Date of Final Opinion: January 7, 2022

Date of Rehearing Denial: March 21, 2022

United States District Court for the District of Oregon

No. 3:18-cv-01856-YY

Jerry Bird, *Petitioner,* v. Oregon Commission for the Blind, an Agency of the State of Oregon, and The United States Department of Education, Rehabilitation Services Administration, *Respondents.*

Date of Final Judgment: January 26, 2021

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OPINIONS BELOW

The RSA arbitration panel's initial decision is set out at (App.168a-193a). The District Court's findings of fact, conclusions of law, and opinion related to the initial arbitration panel decision are set out at (App. 96a-116a). The arbitration panel's decision on remand from the District Court is set out at (App.74a-95a). The District Court's findings of fact, conclusions of law, and opinion on the arbitration panel award after remand are set out at (App.12a-19a). The Ninth Circuit Court of Appeals opinion is set out at (App.1a-11a).

JURISDICTION

Petitioner's initial RSA arbitration panel decision denying relief was issued on March 24, 2014. (App. 168a-193a). The district court vacated the arbitration panel's denial of relief, and remanded and the matter to the panel only for a determination of the amount damages and the availability of fees on May 31, 2017. (App.96a-97a) (judgment of remand); (App.98a-116a) (opinion and order). The arbitration panel's award on remand of monetary damages and attorney fees to Petitioner was issued on June 26, 2018. (App.76a-95a). The district court affirmed the award of compensatory money damages and attorney fees to Bird on June 1, 2019. (App.48a-50a). OCB's notice of appeal to the Ninth Circuit was filed on December 4, 2020. (ER-266-68). The Ninth Circuit's opinion was issued on Janu-

ary 7, 2022. (App.1a-11a). Petitioner sought panel rehearing and en banc review on February 22, 2022, and that petition was denied on March 21, 2022. (App.194a-195a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The following provisions are reproduced in the appendix:

CONSTITUTIONAL PROVISIONS

- U.S. Const. amend. XI (App.196a)

FEDERAL STATUTORY PROVISIONS

- 20 U.S.C.A. § 107 (App.196a)
  Operation of vending facilities
- 20 U.S.C. § 107a (App.196a)
  Federal and State responsibilities
- 20 U.S.C. § 107b (App.198a)
  Application for designation as State licensing agency; cooperation with Secretary; furnishing initial stock
- 20 U.S.C. § 107d-1 (App.200a)
  Grievances of blind licensees
- 20 U.S.C. § 107d-2 (App.202a)
  Arbitration
- 20 U.S.C. § 107d-3 (App.204a)
  Vending machine income

- 20 U.S.C. § 107e (App.206a)
  Definitions

REGULATORY PROVISIONS

- 34 C.F.R. § 395.1 (App.208a)
  Terms.
- 34 C.F.R. § 395.2 (App.212a)
  Application for designation as a State licensing agency; general.
- 34 C.F.R. § 395.3 (App.213a)
  Application for designation as State licensing agency; content.
- 34 C.F.R. § 395.4 (App.214a)
  State rules and regulations.
- 34 C.F.R. § 395.7 (App.215a)
  The issuance and conditions of licenses.
- 34 C.F.R. § 395.8 (App.216a)
  Distribution and use of income from vending machines on Federal property.
- 34 C.F.R. § 395.9 (App.217a)
  The setting aside of funds by the State licensing agency.
- 34 C.F.R. § 395.13 (App.219a)
  Evidentiary hearings and arbitration of vendor complaints.
- 34 C.F.R. § 395.32 (App.221a)
  Collection and distribution of vending machine income from vending machines on Federal property.

- 34 C.F.R. § 395.37 (App.223a)
  Arbitration of State licensing agency complaints.

OREGON ADMINISTRATIVE RULES

- ORS 346.510 (App.226a)
  Definitions
- ORS 346.520 (App.228a)
  Operation of vending facilities in public buildings or on public property
- ORS 346.525 (App.229a)
  Preference given to the blind in establishing and operating vending facilities in public buildings; compliance
- ORS 346.530 (App.232a)
  Notice of vending facilities locations; reason for refusal of commission offer to operate a vending facility
- ORS 346.540 (App.233a)
  Operation of vending facilities; duties of commission

OREGON STATE REGULATIONS

- OAR 585-015-0000 (App.235a)
- OAR 585-015-0005 (App.235a)
- OAR 585-015-0010 (App.237a)
- OAR 585-015-0020 (App.238a)
- OAR 585-015-0035 (App.243a)
- OAR 585-015-0040 (App.247a)

INTRODUCTION

Beginning in 1936, vending concessions on federal properties have been granted with a preference to blind individuals under forward-thinking federal legislation known as the Randolph-Sheppard Act (RSA). Following amendment in 1974, the preference for blind vendors became a legal priority for blind vendors to service government vending concessions, 20 U.S.C. § 107(b), and Congress added a host of procedures to address grievances by blind vendors against States that administer the program and manage the vendors and equipment locally. *See* 88 Stat 1617 (1974), *amending* 20 U.S.C. §§ 107-107f.

Participating States voluntarily agree to the RSA's requirements by contract with the U.S. Secretary of Education, 20 U.S.C. § 107a(a)(5), (b), and frequently pass their own laws to allow blind vendor access and legal priority to service the vending operations on state-owned properties, as well. *E.g.*, ORS 346.510-346.570. The States in turn contract individually with blind individuals who wish to participate in the program on an annual basis to service the facilities that the States assign to the vendors through their respective specially-created state agencies. *E.g.*, ORS 346.540(1)(c). Respondent OCB is one such "state licensing agency" under the RSA. (App.84a). *See* 20 U.S.C. § 107a(b) (setting out duties). Petitioner Jerry Bird is a blind individual who has participated in Oregon's RSA blind vendor program for decades. (App.103a).

As part of each State's contract with the federal government to participate in the RSA, States voluntarily consent to resolve disputes with blind vendors through the process outlined in the Act. 20 U.S.C. § 107d-1 (a); 20 U.S.C. § 107d-2(a); (*See* App.268a-277a (Oregon's 1978 RSA contract)). That process involves a blind vendor first raising with the state licensing agency "dissatisf[action] with any action arising from the operation or administration of the vending facility program[,]" progressing to an evidentiary hearing before the state agency. *See* 20 U.S.C. § 107d-1(a). If not resolved, the blind vendor can file a letter complaint with the Secretary of Education ("the Secretary") requesting a panel be convened to arbitrate the grievance, "and the decision of such panel shall be final and binding on the parties[.]" *Id*. *See also* 20 U.S.C. § 107d-2(b) (structure of panel arbitrating vendor "grievances").

Only licensed blind vendors can compel arbitration with a State. 20 U.S.C. § 107d-1(a); 20 U.S.C. § 107d-2 (a); 34 C.F.R. §§ 395.7(a), 395.13, 395.37. *See*, *e.g.*, *Colorado Dep't of Hum. Servs. v. United States*, 74 Fed. Cl. 339, 345 (2006) ("Another category of Randolph-Sheppard Act cases in which arbitration is unnecessary —and indeed unavailable—consists of cases in which a disappointed bidder who is not a blind vendor challenges the application of the Randolph-Sheppard priority to an awarded contract. In these cases, the plaintiffs have no rights under the Randolph-Sheppard Act, and thus have no available administrative remedies to pursue.") (citations omitted). Any appeal of the arbitration decision is conducted under the Administrative Procedures Act, pursuant to 5 U.S.C. §§ 701-706. *See* 20 U.S.C. § 107d-2(a).

In Petitioner's case, the statutes and administrative regulations concerning dispute resolution were all incorporated by reference into each of the private, annual, commercial vending service contracts that OCB signed with Bird. (*E.g.*, App.249a, App.254a.) Specifically, the contract incorporated "all applicable provisions of the Business Enterprises Rules and Regulations . . . and the Randolph-Sheppard Act, 20 U.S.C. § 107 ff." (App. 249a, App.254a). OCB's contracts with Bird are practical, commercial, business agreements, not merely aspirational policy statements, and they set out concrete economic rights and obligations between the parties as part of the physical servicing of commercial, for-profit vending concessions at specific, assigned locations. (*E.g.*, App.249a-258a).

Petitioner Bird brought a grievance against OCB for violations of his contractual rights, and he was eventually awarded lost profit damages, declaratory relief, and attorney fees for OCB's failure to secure vending rights and refusal to enforce blind vendor priority at a local community college. (App.74a-88a). The District Court for Oregon affirmed that award, including attorney fees, pursuant to the Ninth Circuit's prior precedent of *Premo v. Martin*, 119 F.3d 768 (9th Cir. 1997), *cert. denied* 522 U.S. 1147 (1998). (App.12a-19a). *Premo* held that States waived both immunity from suit and immunity from damages by participating in the RSA because the arbitration of commercial disputes necessarily involves the payment of money damages. 119 F.3d at 768-770.

On appeal, the Ninth Circuit reversed, holding that the Eleventh Amendment to the United States Constitution and this Court's precedent in *Sossamon v. Texas*, 563 U.S. 277 (2011), do not allow a State to waive

sovereign immunity to damages in federal court unless that waiver is "unequivocally expressed" in the statutory text. *Bird v. Oregon Commission for the Blind*, 22 F.4th 809, 815 (2022). (App.1a-11a).

This Court holds that the Eleventh Amendment does not create state sovereign immunity, nor does it impose additional or heightened protections, but instead simply recognizes that States may invoke their common law sovereign immunity in federal courts where appropriate. *Alden v. Maine*, 527 U.S. 706, 713-27 (1999). State sovereign immunity is recognized in two forms: immunity from suit and immunity from money damages, and one may be waived without waiving the other. *Sossamon*, 563 U.S. 285-286.

In *Sossamon*, this Court held that Congress must expressly abrogate a State's sovereign immunity to money damages in the text of a statute where Congress establishes a private right of action under the Spending Clause power against States for statutory violations in exchange for receiving funds. 563 U.S. at 289-290. The Ninth Circuit manifestly erred in applying *Sossamon* here because unlike the assertion of a religious free exercise "claim or defense" under RLUIPA, the private right of action under the RSA is an incorporated provision of Bird's contracts with OCB.

Pointedly, this Court has held that a sovereign may voluntarily waive common law sovereign immunity by necessary construction when the sovereign enters into a contract that necessarily requires such waiver in order to meaningfully effectuate an arbitration provision, even where the enforcement term is only incorporated by reference. *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indians of Okla.*, 532 U.S. 411, 422 (2001).

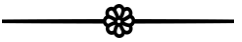
The State of Oregon by its own admission here affirmatively waived sovereign immunity to suit in RSA arbitration proceedings by agreeing to participate in the program. (Appellants Opening Brief at the Ninth Circuit at 17-18 (OCB admitting to voluntary participation in the RSA's federal arbitration process)). *See* 20 U.S.C. §§ 170d-1-107d-2.

Critically, as *C&L* illustrates, OCB also waived its common law sovereign immunity to money damages by participating in the RSA because it incorporated the statute as a contract term, and imposing money damages is entirely necessary to effectuate the RSA's arbitration provision. Thus, the contract, not the statute, is the source of law for the arbitration process in this case.

As with any contract, "an interpretation that gives a reasonable meaning to all parts of the contract will be preferred to one that leaves portions of the contract meaningless[.]" *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1555 (Fed. Cir. 1983). Yet the Ninth Circuit opinion below deprives the contractual arbitration provision of any force and effect, rendering it "meaningless" indeed—an outcome this Court squarely and expressly rejected under *C&L's* common law sovereign immunity analysis.

This Court's review is warranted and indispensable here because the improper application of this Court's holding in *Sossamon* has rendered RSA arbitration relief hollow, depriving economically vulnerable blind vendors of their vested contract rights. This misinterpretation—now shared by three federal Circuit Courts—cannot be corrected without this Court's intervention.

Although the number of RSA blind vendors across the nation is not immense, the RSA program is essential to the livelihoods, self-respect, and dreams of independence of thousands of blind individuals such as Petitioner Bird. Respectfully, this Court should hold the State of Oregon to its bargain. Only this Court can rectify the manifest injustice suffered by blind vendors under the Ninth Circuit's decision.



STATEMENT OF THE CASE

This petition arises from a statutorily-established, contractually agreed-to, "final and binding" arbitration proceeding between an agency of the State of Oregon and a private individual over alleged breaches of a commercial vending services contract. The arbitration panel eventually awarded Petitioner money damages for lost revenue and attorney fees under existing Ninth Circuit precedent authorizing such fees. *See Premo*, 119 F.3d at 768. OCB appealed and the Ninth Circuit overruled its 25-year-old prior precedent to deny the availability of either monetary damages or attorney fees to blind vendors in RSA arbitrations. (App.10a).

By way of background, in 2006, after years of ongoing disagreement with OCB regarding vending service at an Oregon community college, Bird filed a complaint letter with the Secretary of Education ("the Secretary") requesting arbitration over his lost profits based on OCB's failure to secure vending rights. (App. 120a-131a (Findings and Recommendations describing dispute and grievance process)). In 2009, that RSA arbitration panel awarded Bird lost revenue, ordered

OCB to award Bird the vending contract for the college, required OCB to pursue additional rights to future vending at the college, and allowed Bird's attorney fees. (SER-50-74). OCB complied with that 2009 arbitration award and did not appeal.

In 2011, after learning that he was not the only concession vendor at the college, Bird and other "blind vendors" filed a letter complaint with OCB as contractors aggrieved in part by OCB's failure to secure vending rights at the college. (ER-262-265; *see also* App-126a-127a). Thereafter, OCB lost all vending at the college, and Bird and other vendors requested an arbitration panel be appointed by the Secretary. (App.128a). The arbitration panel rejected Bird's complaint on March 17, 2014. (App.168a). Bird appealed and obtained reversal, including a ruling from the district court that state entities were not allowed to use the "better offer" methodology in rejecting offers from OCB, and secured a judgment of remand with instructions to the panel to consider only the amount of damages owed to Bird and the availability of attorney fees under applicable law. (App.96a-116a).

On remand, the arbitration panel awarded Bird over $70,000 in lost income as the result of OCB's failure to secure Bird's vending rights as required under the RSA and Bird's ongoing contract, attorney fees to that point of $246,057, and costs in the amount of $16,682. (App.74a-87a). This arbitration award and its appeal are the subject of the case number giving rise to this appeal. Bird appealed the amount of compensation, application of interest to that award, and other issues, while OCB appealed the award of any monetary damages, but did not further contest the court's earlier rejection of the "better offer" methodology. (*See* App.

147a-158a). The court dismissed OCB's two assignments of error and two affirmative defenses, granted two of Petitioner's assignments of error, and denied the remainder. (App.12a-16a). The district court ultimately increased lost income damages to $83,040, allowed prejudgment interest of over $10,000, and raised the combined attorney fee and cost award to over $297,000. (App.16a). The appeal to the Ninth Circuit followed.

OCB appealed two basic issues: Bird's right to any monetary compensation and the availability of attorney fees under the RSA. (Ap.Op.Br. at 17-21, 22-23). OCB did not challenge the amount of damages or fees found by the district court. As described more fully *infra*, the Ninth Circuit reversed its prior precedent, *Premo v. Martin*, 119 F.3d 768, which had approved both compensatory damages and fees in RSA arbitration proceedings. (App.10a). The Ninth Circuit denied panel rehearing and the request for rehearing *en banc*. (App.194a-195a). This Petition follows.

REASONS FOR GRANTING THE PETITION

I. A State Waives Its Eleventh Amendment Immunity from Money Damages When It Contracts for "Final and Binding" Arbitration of Commercial Contract Disputes with Private Individuals.

It is true that this Court has upheld state sovereign immunity to damages where Congress establishes a statutory remedy providing for vague "appropriate relief" against a State upon receipt of federal funds. However, that holding cannot apply where a State contractually agrees to arbitrate commercial disputes with private citizens. A commercial contract remedy involving lost income can in fact only, for instance, can only be effectuated "meaningfully" through an award of money damages. The clear import of OCB agreeing to "final and binding arbitration" with Bird is that OCB was agreeing to pay for Bird's commercial, economic losses if awarded in arbitration.

A. The Eleventh Amendment Is a Recognition of Sovereign Immunity and Does Not Impose Additional Constraints on a State's Waiver of That Immunity.

The Eleventh Amendment to the United States Constitution provides in pertinent part: "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[.]" U.S. Const. Amend. XI. The Eleventh Amendment was a reaction to this Court's decision in

Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), which held that citizens of one State were permitted to sue other States in federal court without the State's consent pursuant to Article III, Section 2 of the Constitution—which in turn grants diversity jurisdiction to federal courts in suits "between a State and Citizens of another State[.]" *See* U.S. Const. Art III, § 2.

A State's involuntary exposure to suit ran afoul of the centuries-old principle of sovereign immunity arising from English common law, wherein a private individual could not sue the monarch or the monarch's government. *See Nevada v. Hall*, 440 U.S. 410, 414 (1979) ("The immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify (*i.e.*, curtail] the absolute character of that immunity"). States, as sovereigns, maintained this sovereign immunity upon gaining independence.

So "intense" was the States' reaction to *Chisolm* that Congress approved the Eleventh Amendment for ratification in three weeks, and it was quickly ratified. *See U.S. ex rel. Stevens v. State of Vt. Agency of Nat. Res.*, 162 F.3d 195, 210 (2d Cir. 1998) (describing amendment's history), *rev'd sub nom.*, *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 76 (2000). The accepted understanding is that the fledgling States feared bankruptcy from Revolutionary War debts. *See Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 151 (1984) (Stevens, J., dissenting) (so stating).

This Court has described the Eleventh Amendment as serving two purposes. First, the Eleventh Amendment serves to prevent "the indignity of subjecting a

State to the coercive process of judicial tribunals at the instance of private parties[.]" *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 58 (1996), quoting *Puerto Rico Aqueduct and Sewer Authority,* 506 U.S. 139, 146 (1993) (internal quotation marks omitted). Second, the amendment is intended to prevent "federal-court judgments that must be paid out of a State's treasury." *Seminole Tribe*, 517 U.S. at 58, quoting *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994).

Waiver of immunity from suit does not necessarily trigger corresponding waiver of the State's immunity to paying money damages in federal court actions. *Sossamon*, 563 U.S. at 284-285, citing *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 238-239 (1985), *Lane v. Peña*, 518 U.S. 187, 192 (1996). Ultimately, the Eleventh Amendment does not create either form of immunity, it simply recognizes a State's inherent sovereign immunity under common law. *Alden v. Maine*, 527 U.S. at 713-27; *Fed. Mar. Com'n. v. S.C. State Ports Auth. (FMC)*, 535 U.S. 743, 753 (2002) (so stating).

Ordinarily, waivers of state sovereign immunity are strictly construed. *E.g.*, *Sossamon*, 563 U.S. 285-286 (Congress authorizing "appropriate relief" against states accepting federal correctional funds subjected them to suit but did not abrogate their immunity from money damages).[1] Even so, "waiver of sovereign immunity is accomplished not by 'a ritualistic formula'; rather

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[1] Despite this narrow view of waiver, this Court has "on occasion narrowly construed exceptions to [express] waivers of sovereign immunity where that was consistent with Congress' clear intent[.]" *United States v. Nordic Village Inc.*, 503 U.S. 30, 34 (1992) (and authorities cited therein). Those occasions included where the intent of Congress was clear through the use of "sweeping language" of relief under the Federal Tort Claims Act, *see United*

intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy. *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 389 (1939)." *Franchise Tax Bd. of California v. U.S. Postal Serv.*, 467 U.S. 512, 521 (1984).

The question here is whether Oregon waived its immunity from money damages by entering into a commercial contract with an individual citizen, and the contract remedy—incorporated by reference from a federal statute—by its terms and context, necessarily requires a wavier to be effective. In other words, can the Eleventh Amendment, by recognizing the States' common law immunity, be invoked to nullify the terms of a private contract governing commercial activity?

B. Oregon by Its Own Admission Waived Its Sovereign Immunity to Suit by Entering into the RSA Agreement with the United States, and by OCB Entering into RSA Contracts with Bird.

The RSA requires States to consent to "final and binding" arbitration as a condition of participation in the program, and those arbitration awards are expressly subject to exclusive federal district court

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States v. Yellow Cab Co., 340 U.S. 543, 547 fn.4 (1951), or "in the context of equally broad 'sue and be sued' clauses, *see, e.g.*, *Franchise Tax Bd. of California v. United States Postal Service*, 467 U.S. 512, 517-519 (1984)." *Nordic Village*, 503 U.S. at 34. The RSA's guarantee of arbitration relief for any blind vendor "dissatisfied with any action arising from the operation or administration of the vending facility program," 20 U.S.C. § 107-d1(a), is similarly "sweeping language" of relief.

review as a final agency action under the APA. 20 U.S.C. § 107d-2; 20 U.S.C. § 107b(6) (participating state licensing agencies must agree to the RSA arbitration process). The State of Oregon directly agreed to the arbitration of disputes with blind vendors, reviewed in federal court, as far back as 1978 in its RSA contract with the Department of Education. SER-116 (Oregon agreed to have OCB "[s]ubmit to an arbitration panel (upon its being convened by the Secretary) those grievances of any vendor which the vendor believes to be unresolved after a full evidentiary hearing").

OCB similarly contracted with Bird to engage in the arbitration process under the RSA by incorporating by reference the RSA and the concomitant state statutes and regulations. Specifically, under the annual contracts OCB drafted and presented to Bird, the parties agreed that their conduct would be governed by "all applicable provisions of the [OCB] Business Enterprises Rules and Regulations (adopted February 2, 2001), ORS 346.510 to 346.570 and the Randolph-Sheppard Act, 20 USC § 107 ff." (App.249a, App.254a).

The OCB Business Enterprises Rules (BER) set out an escalating process for a "fair hearing" starting at the state agency level, "conducted as a contested case . . . under the procedures set forth in ORS 183.413 to 183.497[,]" and, thereafter, "an arbitration panel may be requested by filing a complaint with the Secretary of Education as authorized by [the RSA.]" (*See* App. 266a-267a (BER dispute resolution procedure)). *see also* OAR 585-015-0035 (dispute resolution rule). Moreover, OCB's governing administrative regulations include OAR 585-015-0035, which separately provides for arbitration under the RSA, and in turn incorporates 34 C.F.R. § 395.13.

Section 395.13 requires, where demanded by a vendor, "an *ad hoc* arbitration panel which shall, in accordance with the provisions of [APA judicial review statues], give notice, conduct a hearing, and render its decision which shall be final and binding on the parties[.]" 34 C.F.R. § 395.13(c). This Court has recognized that "binding" arbitrations are those in which "a 'court having jurisdiction' [can] enforce the award in question." *C&L*, 532 U.S. at 419. Of course, the process all flows from the RSA, 20 U.S.C. § 107d-1(a), which as noted mandates "final and binding" arbitration for all State-vendor disputes. All of these laws and regulations are directly incorporated in the annual Bird-OCB contracts as the contract term governing the parties' course of conduct. (*E.g.*, App.249a, App.254a).

Axiomatically, "where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613, 619 (2002) (emphasis in original) (citations omitted). There is no argument—and OCB has made none in this litigation—that OCB is sovereignly immune from either the RSA arbitration proceedings or federal court review of panel decisions.

C. Oregon Waived Its Immunity from Money Damages by Agreeing to Final and Binding Arbitration of All Disputes Under a Separate Commercial Contract with a Private Individual.

The fundamental truth here is that the scope of Bird's remedial rights against the OCB are grounded

in his contract with the State, not simply the RSA statute standing alone. The contract here makes all the difference. Unlike the "contract-law analogy" for Spending Clause cases discussed in *Sossamon*, 563 U.S. at 290 (emphasis added), Petitioner is not invoking the federal funding contract between the State and the federal government as the source of Oregon's waiver of immunity from damages. Rather, *Bird* is in fact a contract case. As such, the RSA, the federal regulations, and the attendant state statutes and regulations must be viewed as contract terms, not simply in isolation as legal text.

Under the precedent of this Court, a sovereign's waiver of immunity for breaches of contract may be inferred from incorporated contract provisions that necessarily require such waiver to be effectuated. Under *C&L*, 532 U.S. 411, a contract may incorporate outside arbitration procedures and enforcement mechanisms—such as entering a judgment in federal court—that in turn necessarily require a waiver of sovereign immunity. *C&L* dealt with the sovereign immunity of a Native American tribe and whether the tribe's contractual agreement to arbitrate according to American Arbitration Association (AAA) rules amounted to a waiver of that sovereign immunity in a federal court action to enforce an arbitration award.

Like the States, Native tribes "remain separate sovereigns pre-existing the Constitution" and, unless Congress abrogates that sovereignty or it is waived, tribes "retain their historic sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quotations omitted). Although there are recognized distinctions, the sovereign immunity of Native tribes and that of the States are evaluated under largely

the same logic and precedent. *E.g.*, *Lewis v. Clarke*, ___ U.S. ___, 137 S. Ct. 1285, 1290-1291 (2017) (discussing Eleventh Amendment cases to determine tribal immunity in individual capacity suits). Specifically, this Court's test for voluntary waiver of immunity is identical for both sovereigns. Compare *Pennhurst*, 465 U.S. at 99 (State's waiver of sovereign immunity must be "unequivocally expressed"), and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("a waiver of [Tribal] sovereign immunity cannot be implied but must be unequivocally expressed.") (citation and internal quotation marks omitted).

The central issue in *C&L* was whether the Potawatomi Tribe waived sovereign immunity in its construction contract with a private company where the contract's arbitration provision incorporated by reference the AAA Rules, which in turn summarily state that the parties consent to a judgment being entered in an appropriate federal or state court with jurisdiction. *See C&L*, 532 U.S. at 415 (discussing rule). Oklahoma law provided jurisdiction over arbitration awards rendered in that state in either the state or federal courts, so the federal court in *C&L* unquestionably possessed such jurisdiction. *Id.* at 415-416.

This Court pointed out that under its past precedent, a Tribe can retain immunity in commercial contracts by expressly reserving it as a contract term, thereby rendering the Tribe immune from enforcement. *Id.* at 418, discussing *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 753-754 (1998). Because the Potawatomi Tribe did not assert its sovereign immunity in the contract that it drafted, and further incorporated by reference provisions that allowed enforcement of arbitral awards in courts of

competent jurisdiction,[2] this Court held that the AAA enforcement rules acted as a direct, albeit not directly stated, waiver of sovereign immunity. *See C&L*, 532 U.S. at 420-421 (finding it a "cogent observation" where a Circuit opinion held a waiver of sovereign immunity that necessarily follows from contract terms is not "implicit" and the words "sovereign immunity" do not need to be stated for there to be an unambiguous waiver). The same "necessary," unambiguous waiver is seen in the terms of Bird's contract with OCB.

The regulatory and statutory provisions of the RSA are incorporated into the contract that OCB presented to Bird. Thus, they logically cannot be viewed or construed solely as regulations and statutes in isolation, as *Sossamon* would do. Rather, as this Court noted with the inclusion of AAA rules in *C&L*, incorporated contract terms must be given practical effect, and an arbitration clause that was unenforceable due to sovereign immunity would render that contract term "meaningless":

> The [contract's arbitration] clause no doubt memorializes the Tribe's commitment to adhere to the contract's dispute resolution

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[2] In *C&L*, this Court expressly declined to hold that Tribal and State sovereign immunity were governed by "parallel principles" when dealing with provisions that would avoid federal court jurisdiction. *C&L*, 532 U.S. at 421 fn.4, citing *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946) (a State does not waive immunity from suit in federal court by agreeing to suit in a "court of competent jurisdiction," because a narrower interpretation is that the state's own courts can fulfill that role). No narrower holding of the arbitration remedy here can provide relief for lost profits.

> regime. That regime has a real world objective; it is not designed for regulation of a game lacking practical consequences. And to the real world end, the contract specifically authorizes judicial enforcement of the resolution arrived at through arbitration. *See* [*Native Village of Eyak v. GC Contractors*, 658 P.2d 756, 760 (Alaska 1983)] ("[W]e believe it is clear that any dispute arising from a contract cannot be resolved by arbitration, as specified in the contract, if one of the parties intends to assert the defense of sovereign immunity. . . . The arbitration clause . . . would be meaningless if it did not constitute a waiver of whatever immunity [the Tribe] possessed.")

C&L, 532 U.S. at 422. The arbitration and review process outlined in the RSA and its concomitant state statutes and regulations cannot be viewed under the narrow statutory-language-only analysis set out in *Sossamon*, because they are in fact incorporated contract provisions.

As a contract term, *C&L* counsels the Court to interpret the RSA's "final and binding" arbitration process in a manner that gives such arbitrations the "practical consequences" necessary to effectuate a commercial contract—commercial arbitrations necessarily include the ability to award money damages. Indeed, this court has held that compensatory money damages are one of the "forms of relief traditionally available in suits for breach of contract[.]" *Barnes v. Gorman*, 536 U.S. 181, 187 (2002), citing *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 76 (1992). *See also Cummings v. Premier Rehab Keller, P.L.L.C.*,

__ U.S. __, 142 S.Ct. 1562, 1571 (Apr. 28, 2022) (describing "compensatory damages" as "a remedy . . . traditionally available, generally . . . available, or normally available for contract actions.") (internal quotation marks omitted).[3]

Compensation is a foundational part of commercial arbitration relief. By way of example, Rule 47 of the AAA Commercial Arbitration Rules provides: "The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties . . . . [T]he arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate." American Arbitration Association, Commercial Arbitration Rules, Rule 47(a), (b) at 28 (2013) (emphasis added).

Indeed, the judiciary's recognition of the authority to award compensatory money damages in arbitration simply cannot be gainsaid. *E.g., United Steelworkers*,

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[3] Under the prior Ninth Circuit precedent of *Premo* and the immediate past practice of OCB with respect to Petitioner himself (*see* SER-50-78 (2009 arbitration panel awarding Bird compensatory lost income and attorney fees)), the State of Oregon was on notice that it was liable to blind vendors for monetary damages and attorney fees for violations of the RSA. *See Cummings*, 142 S. Ct. at 1570, quoting with approval *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 286 (1998) (discussing notice of liability to funding recipients for compensatory damages in Title IX cases). *Cf., Sauer v. U.S. Dep't of Educ.*, 668 F.3d 644, 652-653 (9th Cir. 2012) (state licensing agency was not on notice that it was required, and therefore had no obligation, to sue federal agency to enforce a vendor's RSA arbitration award). Even assuming *arguendo* that sovereign immunity was not at issue, *Cummings* would not pose any barrier to the award of money damages and fees in Bird's case under Spending Clause doctrine.

363 U.S. at 598 (under Federal Arbitration Act, compensation authorized in arbitration even after expiration of collective bargaining agreement); *SBC Advanced Solutions, Inc. v. Communications Workers of America*, 794 F.3d 1020 (8th Cir. 2015) (arbitration award of compensation for past work upheld); *Stellar-eMarketing, Inc. v. Kolat*, No. 3:17-CV-01130, 2020 WL 978635 at *5 (M.D. Tenn. Feb. 28, 2020) (citing Rule 47); *Ebbe v. Concorde Inv. Servs., LLC*, 392 F. Supp. 3d 228, 232 (D. Mass. 2019) ("FINRA arbitration panel issued an award for $286,096 in compensatory damages"); *Morgan Stanley Smith Barney LLC v. Johnson*, No. CV 17-1101 (PAM/TNL), 2018 WL 4654711 at *1 (D. Minn. Sept. 27, 2018) (FINRA arbitration panel awarded $1,502,000 in compensatory damages); *Dobbs Tire & Auto v. Illinois Workers' Comp. Comm'n*, 99 N.E.3d 68, 70 (Ill. App. 2018) (enforcement of arbitration award granting compensatory damages in workers compensation matter). *See* 9 U.S.C. §§ 2, 9 (arbitration awards are binding and enforceable in federal court with jurisdiction over the parties). The district court unquestionably had jurisdiction over OCB in this case, by OCB's own admission, and binding arbitration awards may be judicially enforced where jurisdiction exists. *C&L*, 532 U.S. at 419.

Further, although "arbitrators may not award remedies expressly forbidden by the arbitration agreement or submission[,]" an arbitration award "will be upheld so long as it was even arguably based on the contract; it may be vacated only if the reviewing court is compelled to infer the award was based on an extrinsic source." *Advanced Micro Devices, Inc. v. Intel Corp.* 9 Cal.4th 362, 381 (Cal. App. 1994); *Gainesville Mech., Inc. v. Air Data, Inc.*, 829 S.E.2d 838, 840-41 (Ga. App. 2019) (no error in arbitrator rejecting use

of "total cost" approach where not supported by all elements, but allowing award of $185,000 in compensatory damages).

The scope of the OCB/Bird annual contracts explicitly include Bird being monetarily compensated for his managing and stocking of OCB's vending machines, and Bird sending a percentage of his earnings to OCB. (App.249a, App.254a). Disputes, or "grievances" arising under such contracts necessarily include disputes over the right to payments from either party, and resolving such disputes therefore necessarily encompasses one party or the other paying money damages.

In other words, irrespective of whether the language of the RSA standing alone would be viewed under *Sossamon* as sufficiently definite to abrogate state sovereign immunity for damages,[4] *C&L* instructs that the terms of the RSA, including arbitration, be given practical effect because they have been separately incorporated as contract provisions in a commercial agreement. The RSA cannot be read in isolation of the contract(s) that gives it force and effect with respect to these specific parties. The State of Oregon, by agreeing to arbitration through OCB in its contracts with Bird, necessarily and therefore unambiguously waived its immunity from damages.

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[4] Because of the central importance of money awards to resolving commercial disputes with blind vendors under the RSA, Petitioner does not concede that the RSA is inadequate on its face to abrogate state sovereign immunity to damages, even given *Sossamon*. See Footnote 1, *supra*. Yet because of the incorporation of the RSA and its attendant regulations into Bird's contracts with OCB, this Court need not reach that issue.

This Court has given a practical reading to contracts entered into by sovereigns in a manner which avoids the hidden risk of a sovereign suddenly invoking immunity to avoid commercial obligations. Practically speaking, Congress would not create a program "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), where States have no obligation to pay money damages for violating the commercial contracts that provide blind individuals with those benefits. "[I]t would be abhorrent to permit the State to enter into contracts with no corresponding obligation to perform its promises under the contract. . . . When the State enters into a contract or otherwise voluntarily assumes legal consequences, courts may find the government constructively waived its immunity from suit." *Myers v. Iowa Bd. of Regents*, 30 F.4th 705, 709 (8th Cir. 2022) (citation and internal quotation marks omitted).

Sovereign immunity is not a trap for the unwary where a State has agreed by contract to resolve commercial disputes in federal arbitration, reviewed in federal court. The Eleventh Amendment cannot serve as ace up the sleeve to renege on the States' contracts with blind vendors where both common sense and the common law analysis of the contracts OCB signed with Bird demonstrate an unambiguous, necessary waiver by OCB of Oregon's immunity to money damages.

D. This Court's Prior Decisions Do Not Prohibit Money Damages in RSA Arbitration Awards.

Aside from *C&L's* instruction to give practical, meaningful weight to incorporated contract provisions, there are significant logical and analytical barriers preventing the application of *Sossamon* in Bird's case. The structure of the RSA, read comprehensively, shows that the unambiguous language of the RSA requires money damages be available to individuals with vested contractual rights against participating States, and the States contractually waive that immunity through their contracting with individuals. Thus, the Ninth Circuit's use of *Sossamon* in Petitioner's case was erroneous, and Petitioner urges this Court to hold that *Sossamon's* holding has no bearing in RSA cases.

Sossamon v. Texas involved the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc-2000cc-5. In *Sossamon*, this Court addressed whether the term "appropriate relief" to recipients of federal funding in RLUIPA intended to create an award of monetary damages absent any further explanation of the term or a state's voluntary participation in a specific program. *Sossamon*, 563 U.S. at 282 (*citing* 42 U.S.C. § 2000cc-2(a)); *see also* 563 U.S. at 289-90 (discussing states' general waiver of immunity to suit under Spending Clause power). The differences between the RLUIPA and the RSA are fundamental.

First, the core reason for retaining state sovereign immunity to damages in *Sossamon* was the ambiguity of the term "appropriate relief" in RLUIPA's express cause of action. The Ninth Circuit in *Bird* below adopted the reasoning of the Sixth Circuit in *Ohio v. U.S. Dep't*

of Educ., 986 F.3d 618 (6th Cir. 2021), wherein the court held that "[t]he RSA includes language even more ambiguous than RLUIPA[,]" and "[t]he RSA does not mention any type of available remedy." (App.9a). Also following *Sossamon*, but without any analysis of the RSA beyond a facial reading of Sections 107d-1 and 107d-2, the Tenth Circuit likewise held that the RSA was "silent as to what remedies aggrieved vendors may obtain." *Tyler v. United States Dep't of Educ. Rehab. Servs. Admin.*, 904 F.3d 1167, 1193 (10th Cir. 2018).

Neither *Ohio* nor *Tyler* factually examined the contracts between the respective blind vendors and the state licensing agencies for evidence of waiver of the State's immunity to damages.[5] They only looked to the RSA statutory arbitration provisions in isolation. Yet even looking at only the text of the RSA, *Ohio* and *Tyler* remain incorrect.

"Final and binding arbitration" of any blind licensee's grievance over "any action arising from the operation or administration of the vending facility program[,]" 20 U.S.C. § 107d-1, is on its face substantially more specific than a provision allowing "[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." 42 U.S.C. § 2000cc-2(a). To begin, the RSA contains a limitation on who may bring a claim—only a "blind licensee" may do so,

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[5] The *Tyler* analysis occurred in a factual vacuum: "This case presents no opportunity to address the extent to which we may look beyond the relevant statute to determine whether a state has waived sovereign immunity . . . . [T]he parties have not provided us with any other material that sheds light on the terms of ODRS's participation in the RSA Program." *Tyler*, 904 F.3d at 1193 n25 (emphasis added).

not any blind person, let alone any "person" with Article III standing. Compare 20 U.S.C. § 107d-1(a) with 42 U.S.C. § 2000cc-2(a).

Finally, RSA relief is not ambiguous because it is limited to violations of commercial contract arrangements. The RSA defines the scope of relief as addressing disputes "arising from the operation . . . of the . . . program", in contrast to RLUIPA's "a violation of this chapter" securing innumerable iterations of religious practice. *Id.*[6] The RSA further limits the form of relief, beginning with a state agency "full evidentiary hearing" that proceeds to a request for a specially convened federal agency arbitration process, appealable exclusively in federal district court. Contrast that regimented structure to a litigant raising RLUIPA as some indeterminant "claim or defense in a judicial proceeding"—not even necessarily against a State. *Id.*

The unambiguous relief for breach of RSA contracts—at their core disputes over money—is money damages. The RSA is a commercial, for profit program. Real relief in RSA disputes must include monetary awards, contrasted with RLUIPA's "appropriate relief" being contingent on the nature of a religious free exercise violation—something that rarely if ever has a

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6 To put a finer point on the limits of the RSA arbitration process, after requesting arbitration, the blind licensee obtains a letter from the Secretary of Education convening the arbitration panel. 20 U.S.C. § 107d-1(a). Bird received one of these letters authorizing the arbitration of this matter. (ECF-Doc.1-1:5-6). The letter from the Secretary authorizing the arbitration panel contains substantive guidelines on the scope of the panel's authority and the limits of Bird's claim before the panel. *Id.* The panel's decision arising from this mandate is all that can be appealed to the district court. (*See* generally ECF-Doc.1).

directly ascertainable economic value, (particularly if asserted as a "defense" as RLUIPA envisions). The *Ohio* and *Tyler* courts' rejection of RSA waiver of state sovereign immunity to damages on the grounds of the ambiguity of the relief granted frankly does not hold up to any careful scrutiny.

The second major distinction between the RSA and RLUIPA is that the RSA viewed as a whole is structured around financial transactions that the State itself conducts. Specifically, the RSA and its concomitant federal and state regulations contain provisions for the state licensing agencies to collect and disburse cash received from vending operations directly to individual licensed blind vendors. *See* 20 U.S.C. § 107d-3 (discussing specific allocations and distributions of "vending machine income"); 34 C.F.R. §§ 395.8, 395.32 (allocations and distributions); App.264a-265a (BER vending distribution procedures). *See also* OAR 585-015-0020 (discussing set-aside reductions to vendor income).

Naturally, because the RSA allows for arbitration of any dispute by a blind licensee over the "operation or administration of the vending facility program," 20 U.S.C. § 107d-1(a), potential arbitrated disputes invariably include those involving the distribution of "vending machine income," allocations, and set-asides. Admittedly, RLUIPA does not involve these types of economic activities or monetary distributions under individual private contracts, and so its remedy would not need to be interpreted in light of such provisions. However, that is precisely what makes *Sossamon* particularly inapplicable here.

The Fourth Circuit, pre-*Sossamon*, used this type of practical reasoning to hold that the State waived its liability for damages by agreeing to arbitration of

potential economic disputes. *Delaware Dep't of Health & Soc. Servs., Div. for Visually Impaired v. U.S. Dep't of Educ.*, 772 F.2d 1123, 1137-38 (3d Cir. 1985) ("Delaware, by applying to participate in the Randolph-Sheppard program, has agreed to the remedies which that program requires."). The Ninth Circuit, in *Premo v. Martin*—the case overruled by *Bird*—looked to the *Delaware* court's analysis in holding that the statutory designation of arbitration as a commercial contract remedy "permits arbitration panels to award compensatory relief." 119 F.3d at 769.

While the *Delaware* decision was founded primarily on the now-inapplicable pre-*FMC* notion that arbitrations did not fall under sovereign immunity protections,[7] the Third Circuit further held (and the Ninth Circuit concurred) that even apart from sovereign immunity, the concept of commercial arbitration necessarily incorporated money damage remedies. 772 F.2d at 1136, cited in *Premo*, 119 F.3d at 770.

RSA further demonstrates a clear textual intent to provide vendors with more than just injunctive relief. Section 107d-2, contains two subsections that set the composition and scope of authority of RSA arbitration panels. 20 U.S.C. § 107d-2(b)(1), (2). The first subsection concerns arbitration panels formed to address blind vendor complaints, and it concludes

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[7] The primary basis for the *Delaware* ruling, that the Eleventh Amendment is not applicable to arbitration proceedings, was squarely rejected in *FMC*. *See* 535 U.S. at 760 ("state sovereign immunity bars the FMC from adjudicating complaints filed by a private party against a nonconsenting State."). However, *FMC* was a state sovereign immunity from suit case, not a case where a State specifically agreed to federal jurisdiction.

solely with a provision whereby the Secretary is authorized to appoint panel members if a party fails to do so. 20 U.S.C. § 107d-2(b)(1).

The second subsection concerns panels formed to address arbitrations requested by state licensing agencies against a federal government entity for failure to allow vending services. 20 U.S.C. § 107d-2(b)(2). That subsection concludes with a very clear limitation on the relief that a state licensing agency is able to receive from the arbitration panel:

> If the panel appointed pursuant to paragraph (2) finds that the acts or practices of any such department, agency, or instrumentality are in violation of this chapter, or any regulation issued thereunder, the head of any such department, agency, or instrumentality shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel.

20 U.S.C. § 107d-2(b)(2) (emphasis added). In *Sauer*, 668 F.3d at 652-53, and *Georgia Department of Human Resources v. Nash*, 915 F.2d 1482, 1484-1485 (11th Cir. 1990), the Ninth and Eleventh Circuits, respectively, hold that this language prohibits a state licensing agency from suing the federal government on behalf of blind vendors for a vendor's economic loss. Yet tellingly, no such limitation exists as to blind vendor claims against the state licensing agencies.

Finally, the notion that the citizens contract with the government at their peril finds no purchase in this Court's jurisprudence. *Sossamon* qualified the use of direct contract principles in Spending Clause cases on

the grounds that contracts with the government are not enforceable: "contracts between a Nation and an individual are only binding on the conscience of the sovereign and have no pretensions to compulsive force. They confer no right of action independent of the sovereign will." *Lynch v. United States,* 292 U.S. 571, 580-581 (1934) (quoting Hamilton, Federalist Papers No. 81), quoted in *Sossamon*, 563 U.S. at 290 (internal quotation marks omitted). This quotation is misleading without context.

In the first instance, *Lynch* was referring to a sovereign's consent to suit generally, and in fact cited a lawsuit against a State over antebellum bonds that became void as a result of the Civil War. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 319 (1934) (bond obligations and the right to sue thereon were voided by post-Civil War statutes and state constitutional amendments). Losing a war might a reasonable basis for holding a sovereign's contractual obligations void. Such is not the situation here.

Instead, Bird's contract with OCB does include a specific cause of action and means of enforcement—arbitration. Pointedly, *Lynch* further held that contracts executed with the government confer vested rights that cannot be repudiated without the sovereign incurring liability for a taking. 292 U.S. at 579 ("As Congress had the power to authorize . . . [life insurance policies], the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the federal police power or some other paramount power."). Only if the contractual obligations were met could a contract remedy be eliminated. *Id.* at 582.

So too, here, the RSA arbitration remedy to which Oregon contractually agreed plainly and unequivocally confers a specific, tailored, express right to enforce compliance in a "final and binding" fashion regarding a monetary distribution and allocation system in for-profit economic ventures managed by OCB.

The RSA arbitration provision must be read in the entire context of the statute, in light of its purpose, not merely in isolation as *Sossamon* did with RLUIPA. Bird's contract with OCB represents vested property rights in OCB's performance of its terms. OCB cannot claim immunity from the money damages that explicitly and expressly flow from the agreed-to enforcement of blind vendors' contract rights under the text of the RSA. *Sossamon* is simply the wrong analytical tool to evaluate RSA arbitrations.

II. ATTORNEY FEES ARE AUTHORIZED IN THIS CASE.

Attorney fees were awarded below, not on some abstract notion or frivolous whim of the arbitration panel, but rather pursuant to the valid precedent of *Premo* and the reality that the RSA structure—incorporated as a contract term—is geared toward making blind vendors whole in their remedies.

> The evolution of the Randolph-Sheppard Act from 1936 through 1974 shows increasing concern that the contractual remedies available to those vendors be expeditious and completely effective. Although the statute does not deal specifically with pre-arbitration legal expenses, the overall scheme strongly suggests that the states must undertake to make blind vendors whole for breaches of the contractual obligations imposed on them by virtue of

> participation in the Federal Blind Vendors Program.

Delaware, 772 F.2d at 1139. *Cf*, *Advanced Micro Devices*, 9 Cal.4th at 381 (where arbitration remedy not prohibited by contract, arbitrators should be permitted to look to the contract to determine the scope of relief).

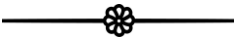
Admittedly, this Court has characterized the "American Rule" in litigation as follows: "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 253 (2010) (citations omitted). However, it is precisely the contract here, incorporating the RSA, and as interpreted under applicable Ninth Circuit precedent at the time, that formed a basis for fees.

Additionally, Oregon statutory and administrative law provide another basis for the recovery of attorney fees given the structure of the grievance process. The 2010-16 contracts that OCB entered into with Bird (*see* SER-20-47) each required the parties to "comply with all applicable provisions of the Business Enterprises Rules and Regulations (adopted February 2, 2001), ORS 346.510 to 346.570 and the Randolph-Sheppard Act, 20 USC § 107 ff." (*E.g.*, SER-43). The BERs acknowledge that the necessary early step of a full evidentiary "fair hearing" at OCB would be "conducted as a contested case hearing under the procedures set forth in ORS 183.413 to 183.497." *See* App.266a-267a (BER dispute resolution procedure)). Not only did OCB agree to be bound by these Rules, OCB affirmatively incorporated them into the operating agreements it voluntarily signed with Bird.

Crucially, ORS 183.497 expressly authorizes an award of costs and attorney fees to successful petitioners in the course of judicial review of agency action. ORS 183.497(1), (2). These fees "shall" be awarded "if the court finds in favor of the petitioner and determines that the state agency acted without a reasonable basis in fact or in law," subject to court oversight not applicable in this situation. ORS 183.497(1)(b). OCB never challenged the justification of fees under ORS 183.497, only that such fees had no basis in law. This is plainly incorrect.

Attorney fees have been authorized from the outset of Bird's full evidentiary "fair hearing" at the state licensing agency. The RSA arbitration panel authorized under the BE Rules functions as an appeal of the "full evidentiary hearing" under a "contested case" rubric, and the Oregon APA rules nowhere restrict ORS 183.497 attorney fees on appeal. The panel was therefore authorized to award attorney fees as part of Bird's ongoing challenge to the denial of his rights all the way along the path agreed upon by OCB in its contract with Bird. (*See* App.87a (fees awarded include past expenditures plus "all other reasonable fees and costs incurred in bringing about the implementation of the remedy ordered herein.")).

The arbitration panel acted within the terms the contract in formulating a remedy to addressed Bird's grievance and make him whole. ORS 183.497, incorporated into the contract by reference as part of the BERs, authorize attorney fees arising from a contested case proceeding, which includes the OCB "fair hearing" that started this action. Thus, Bird had both a contractual and statutory right to his reasonable attorney fees. OCB has never objected to those fees on the grounds that Bird failed to meet a certain legal threshold such as the "reasonableness of agency action" requirement under ORS 183.497(1)(b). Therefore, Petitioner Bird's fees should be reinstated.



CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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