No. _____

In the
Supreme Court of the United States

NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES,
Petitioner,

v.

MAXWELL KADEL; JASON FLECK; CONNOR THONEN-FLECK, BY HIS NEXT FRIENDS AND PARENTS; JULIA MCKEOWN; MICHAEL D. BUNTING, JR.; C.B., BY HIS NEXT FRIENDS AND PARENTS; SAM SILVAINE,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

MARK A. JONES
BELL, DAVIS & PITT, PA
P.O. Box 21029
Winston-Salem, NC
27120-1029
(336) 714-4122
mjones@belldavispitt.com

JOHN GUYTON KNEPPER
Counsel of Record
LAW OFFICE OF JOHN G. KNEPPER, LLC
1720 Carey Avenue, Suite 590
Cheyenne, WY 82001
(307) 632-2842
John@KnepperLLC.com

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Section 1003 of the Rehabilitation Act Amendments of 1986 provides that a State "shall not be immune under the Eleventh Amendment . . . from suit in Federal court" for violations of Title VI, Title IX, Section 504 of the Rehabilitation Act, the Age Discrimination Act of 1975, or—in what this Court has referred to as the section's residual clause—"the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a).

The question presented is:

Whether the residual clause of Section 1003 provides an "unequivocal textual waiver" of sovereign immunity, permitting suits against States under subsequently enacted statutory provisions that refer to neither States nor sovereign immunity?

PARTIES TO THE PROCEEDING

Petitioner, the North Carolina State Health Plan for Teachers and State Employees ("State Health Plan" or "Plan"), is an agency of the State of North Carolina. N.C. Gen. Stat. § 35.48.2(a). The State Health Plan is a Defendant in the district court below and was the appellant in the Fourth Circuit. The Plan seeks interlocutory review of the lower courts' decisions that the State has waived its sovereign immunity.

Respondents Maxwell Kadel, Jason Fleck, Connor Thonen-Fleck, Julia McKeown, Michael D. Bunting, Jr., C.B., by his next friends and parents, and Sam Silvaine are Plaintiffs below. They are current and former state employees, and their dependents, who allege that the State Health Plan impermissibly discriminates in the diagnoses and medical procedures it covers. The Plaintiffs seek injunctive, declaratory and monetary relief against the Plan. They also seek injunctive and declaratory relief pursuant to *Ex Parte Young* against two Defendants not before this Court: Dale Folwell, Treasurer of the State of North Carolina, and Dee Jones, the Executive Administrator of the State Health Plan.

While the State Health Plan's interlocutory appeal was pending, the magistrate judge allowed Plaintiffs to amend their Complaint and add an additional Plaintiff: Dana Caraway. In addition to joining the above claims against the State Health Plan and its officials, Caraway also asserts a claim under Title VII against the State Health Plan and against her

employer, the North Carolina Department of Public Safety. The case is scheduled for trial in July 2022.

STATEMENT OF RELATED PROCEEDINGS

This Petition is an interlocutory appeal from the following decisions by the courts below:

- Maxwell Kadel, et al. v. North Carolina State Health Plan for Teachers and State Employees, et al., No. 20-1409 (4th Cir. Sept. 1, 2021) (opinion affirming district court);

- Maxwell Kadel, et al. v. Dale Folwell, et al., No. 1:19-cv-272 (M.D.N.C. Mar. 10, 2020) (order denying motion to dismiss).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of Rule 14.1(b)(iii).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statutes and Regulations

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the North Carolina State Health Plan for Teachers and State Employees, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The court of appeals' opinion is available at 12 F.4th 422 (4th Cir. 2021). Pet. App.1–94. The district court's opinion is available at 446 F.Supp.3d 1 (M.D.N.C. 2020). Pet. App. 95–125.

JURISDICTION

The court of appeals' judgment was entered on September 1, 2021. Pet. App. 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment provides:

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.

Section 1003 of the Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7, provides:

(a) General provision

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. § 794], title IX of the Education Amendments of 1972 [20 U.S.C. § 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

(b) Effective date. The provisions of subsection (a) shall take effect with respect to violations that occur in whole or in part after October 21, 1986.

Section 1557(a) of the Patient Protection and Affordable Care Act (42 U.S.C. § 18116(a)) provides:

> (a) Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the

ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. § 6101 et seq.), or section 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement–mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

STATEMENT OF THE CASE

This case presents a circuit split involving the interpretation of the residual clause of Section 1003 of the Rehabilitation Act Amendments of 1986. Section 1003 provides that a "State shall not be immune" from suit for violations of four listed civil rights statutes or "the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a).

The States within the Fourth Circuit now face deep uncertainty because that circuit has concluded that this residual catch-all clause waives state sovereign immunity even when the anti-discrimination provision itself does not refer to states or suits against states at all. Moreover, the panel has added further ambiguity to the provision, holding that the waiver either applies to all provisions prohibiting discrimination in federally funded programs (the concurrence's conclusion) or to all provisions of any sort that appear in a statute that also contains a provision forbidding such discrimination (the panel author's conclusion).

The Fifth and Tenth Circuit have rejected these broad interpretations of the residual clause as inconsistent with this Court's command to "find waiver only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction." *Levy v. Kansas Dep't of*

Soc. & Rehab. Servs., 789 F.3d 1164, 1170 (10th Cir. 2015) (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)) (internal punctuation omitted). Both circuits have concluded that the residual clause reaches, at most, instances where the entire Federal statute—not just a single provision tucked within an omnibus statute—is concerned exclusively with discrimination by recipients of Federal financial assistance. This alternative interpretation, and the two interpretations offered by the majority below, mean that the residual clause does not "unequivocally express" a demand for a waiver of sovereign immunity. The suit against the State Health Plan should have been dismissed.

The States received approximately $732 billion in federal funds during their 2020 fiscal years, for such services as education, roads, and Medicaid. Nat'l Ass'n of State Budget Offices, 2020 STATE EXPENDITURE REPORT 14 (2020) *located at* https://bit.ly/2ZA4LJt. Anti-discrimination–provisions in statutes are common, and as with the provision pressed by the Plaintiffs below, these provisions rarely, if ever, refer to States. While a plaintiff must still identify a cause of action, the Eleventh Amendment's protection has been shuffled aside for the states of the Fourth Circuit.

As the dissent noted below, the Fourth Circuit has created a "consequential circuit split" that should have been "squarely foreclosed" by this Court's decisions. Pet. App. 93 (Agee, J., dissenting).

"The Supreme Court should proceed expeditiously to correct the constitutional error here." Pet. App. 94.

A. Statutory Background

1. States can waive sovereign immunity as a condition of receiving federal funds, but Congress must "manifest[ ] a clear intent to condition" federal funding on a waiver in the text of the relevant statute. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985). A year after *Atascadero* held that the Rehabilitation Act of 1973 did not abrogate or waive state sovereign immunity, Congress responded with a provision some lower courts call the "Civil Rights Remedies Equalization Act" or "CRREA":

> A State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or *the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.*

Rehabilitation Act Amendments of 1986, § 1003(a)(1), 100 Stat. 1807, 1845 (October 21, 1986)

(located, but not codified by Act of Congress, at 42 U.S.C. § 2000d-7) (emphasis added).[1]

2. CRREA's text naturally reads as though Congress intended to abrogate sovereign immunity (a State "shall not be immune") rather than entice a waiver with the offer of federal funds. Nevertheless, in dicta, this Court referred to CRREA as providing "the sort of unequivocal waiver" required to waive sovereign immunity. *Lane v. Pena*, 518 U.S. 187, 198 (1996). After *Lane*, lower courts have found "an unambiguous waiver of the state's Eleventh Amendment immunity" to enforce the four specifically listed statutes. *E.g.*, *Litman v. George Mason Univ.*, 186 F.3d 544, 554 (4th Cir. 1999) (Title IX). *See generally Gruver v. Louisiana Bd. of Supervisors for Louisiana State Univ. Agric. & Mech. Coll.*, 959 F.3d 178, 181 n.2 (5th Cir. 2020) (collecting cases).

Until recently, however, lower courts have rejected attempts to find additional waivers of sovereign immunity through the residual clause's reference to any "other Federal statute prohibiting discrimination." *See*, *e.g.*, *Cronen v. Texas Dep't of Hum. Servs.*, 977 F.2d 934, 937 (5th Cir. 1992) (holding no waiver of sovereign immunity for claim of violation of the Supplemental Nutrition Assistance Program because that Act does not "deal

[1] The Court has considered this provision before, but it has never used this title or acronym. Because the acronym CRREA is used throughout the opinion below, the Petitioner has adopted this term for clarity.

solely with discrimination by recipients of federal financial assistance").

This Court last reviewed the residual clause ten years ago, in *Sossamon v. Texas*, 563 U.S. 277, 292 (2011). *Sossamon* reserved judgment on whether the residual clause constitutes an "unequivocal textual waiver" of sovereign immunity at all, holding only that to even be considered a "statute prohibiting discrimination" under the residual clause, the statute must, at a minimum, use the term "discrimination." *Id.* Because § 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1, prohibits "substantial burden on the religious exercise" of institutionalized persons, not "discrimination," the residual clause does not "clearly extend[ ]" to it. *Id.*

3. In 2010, Congress enacted the Patient Protection and Affordable Care Act, a historic remaking of the health care industry. *See*, *e.g.*, President Barack Obama, Remarks on Signing the Patient Protection and Affordable Care Act, 2010 DAILY COMP. PRES. DOC. 197 (March 23, 2010) ("Today, after almost a century of trying . . . health insurance reform becomes law in the United States of America."). Within the ACA, Congress included a provision that applies the non-discrimination grounds in title VI, title IX, the Age Discrimination Act of 1975, and § 504 of the Rehabilitation Act to "any health program or activity, any part of which is receiving Federal financial assistance." 42 U.S.C. § 18116(a). This provision, § 1557, provides that individuals

"shall not . . . be excluded from participation in, be denied the benefits of, or *be subjected to discrimination*" on these grounds under any federally funded program administered by an Executive Agency or created by the ACA. *Id.* (emphasis added). Section 1557 adopts the "enforcement mechanisms provided for and available under such title VI, title IX, § [504], or such Age Discrimination Act" for alleged violations. *Id.*

B. Factual and Procedural Background

1. Petitioner, the North Carolina State Health Plan for Teachers and State Employees (the "State Health Plan" or "Plan") is an agency of the State of North Carolina. N.C. Gen. Stat. § 135-48.2. The State Health Plan is self-funded, using employee premiums and appropriations from the North Carolina General Assembly to pay over $3.2 billion annually for health care. *See generally* N.C. Gen. Stat. § 135-48.

The Plaintiffs are transgender individuals and the parents of transgender individuals who enrolled in the Plan. They allege that because the Plan does not cover gender transition treatments, the Plan discriminates against them in violation of § 1557 of the ACA. For example, the Plaintiffs argue, in part, that because the Plan covers mastectomies and breast reconstruction for the treatment of breast cancer, the Plan must also cover mastectomies or breast augmentations when a mental health

professional concludes these procedures are needed to treat gender dysphoria.[2]

In 2016, the U.S. Department of Health and Human Services issued a final rule interpreting § 1557 that required health plans to cover gender reassignment surgery and hormone treatment beginning in 2017. *Nondiscrimination in Health Programs and Activities*, 81 Fed. Reg. 31376, 81472–73 (May 18, 2016). The State Health Plan complied and authorized this coverage for the 2017 Plan year. *Maxwell Kadel, et al. v. Dale Folwell, et al.*, No. 1:19-CV-272 (M.D.N.C. Mar. 10, 2020) (Complaint, ECF No. 75 at ¶¶ 56–58). A federal court subsequently enjoined this regulatory requirement, *Franciscan All., Inc. v. Burwell*, 227 F.Supp.3d 660 (N.D. Tex. 2016), and the Plan allowed the coverage expansion to lapse at the end of 2017. (Complaint at ¶¶ 61–62). HHS subsequently revised its regulation and removed this mandate, Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37160, 37161-62 (June 19, 2020), but this rule has also been

[2] Gender dysphoria is "a mental health condition from which only a subset of transgender people suffer." *Doe 2 v. Shanahan*, 917 F.3d 694, 708 (D.C. Cir. 2019) (Williams, J., concurring). Transgender "identity per se" is not a mental illness. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013). Gender dysphoria requires more than discomfort from living as a member of one's biological sex; the patient's "cognitive discontent" must be so disabling that it causes "clinically significant distress or impairment in social, occupational, or other important areas of functioning." *Id.* at 451, 453.

enjoined, *Walker v. Azar*, 480 F.Supp.3d 417 (E.D.N.Y. 2020).

The Plaintiffs sued the State Health Plan in the U.S. District Court for the Middle District of North Carolina on March 11, 2019, alleging that the refusal to pay for treatment of gender dysphoria is discrimination "on the basis of sex" in a "health program or activity." (Complaint at ¶¶ 149–50). Plaintiffs allege that § 1557 of the ACA guarantees the "right . . . to receive health insurance through [the Plan] free from discrimination on the basis of sex, sex characteristics, gender, nonconformity with sex stereotypes, transgender status, or gender transition." (Complaint at ¶ 153). The Plaintiffs seek compensatory damages, consequential damages, and injunctive relief against Petitioner. (Complaint at ¶¶ 156–57).

The State Health Plan asserted sovereign immunity and moved to dismiss the § 1557 claim. Pet. App. 96–97, 99–100. The district court acknowledged that neither § 1557 nor any other provision in the ACA refers to suits against states or to sovereign immunity. Pet. App. 115. The court denied the motion, however, concluding that § 1557 is "sufficiently similar" to the statutes specifically listed in CRREA that a state official "would clearly understand that the acceptance of federal funds would subject it to suit" pursuant to the residual clause. Pet. App. 116. According to the district court, Section 1557 of the ACA prohibits the same "kinds of discrimination" and incorporates the same "enforcement mechanisms" as the statutes listed in CRREA. Pet. App. 116–17. "In short, it is hard to see

how Section 1557 could be any more like the statutes expressly listed." Pet. App. 117. Section 1557 "when read in conjunction with the CRREA, effectuates a valid waiver of sovereign immunity," the district court concluded. Pet. App. 119.

2. The State Health Plan sought interlocutory review by the Fourth Circuit, which affirmed the denial of immunity in a divided opinion. Pet. App. 1–94. The majority rejected the Plan's argument that CRREA could not waive sovereign immunity to enforce § 1557 of the ACA because the ACA and CRREA were enacted separately and neither statute references the other. The residual clause "reflects a specific objective to render states liable for money damages when they engage in unlawful discrimination." Pet. App. 29. "[B]road general language is not necessarily ambiguous when congressional objectives require broad terms," and the origins of CRREA indicate that broad terms were needed. Pet. App. 24. CRREA provides "clear notice" to state officials that sovereign immunity is waived for "the provisions of '*any*' federal statute that prohibits discrimination by recipients of federal funds." Pet. App. 24. (emphasis in original). The panel concluded that the residual clause waives sovereign immunity in all cases when a "law [is] federal" and a *provision within that law* "prohibits discrimination by recipients of federal financial assistance." Pet. App. 26.[3]

[3] The author of the panel opinion, Chief Judge Gregory, also concluded that § 1557's reference to the "enforcement mechanisms" of Title IX and § 504 of the Rehabilitation Act incorporated the waiver of sovereign immunity that exists to

The concurring judge offered a different analysis with a more limited effect. Congress intended to include "at least some claims" under CRREA in addition to the listed statutes. Pet. App. 34. The concurrence then offered two different interpretations of the residual clause. Congress could have either intended a waiver for "*provisions* that target discrimination by recipients of federal financial assistance" or intended a waiver for "a claim brought under any provision of a *statute* that, somewhere, contains a provision prohibiting" discrimination. Pet. App. 34. Recognizing that sovereign immunity waivers must be strictly construed in favor of the sovereign, *Sossamon*, 563 U.S. at 285, the concurrence adopted a narrower interpretation than the panel opinion: the residual clause applies to all provisions prohibiting discrimination by recipients of federal funds rather than—as the panel opinion concluded—the entirety of a statute that contains such a provision. Pet. App. 38–43. Even under the narrow interpretation, however, the concurrence concluded that the State waived its immunity. Pet. App. 49–50.

The panel acknowledged that this decision splits from the interpretation of the residual clause by the Fifth and Tenth Circuit. Pet. App. 25 n.4. The court below also acknowledged that the panel opinion and the concurrence disagreed about which interpretation of the residual clause is correct. Pet. App. 27 n.5. Because a majority held that the State had waived its immunity to the Plaintiffs' suit,

---

enforce those statutes. Pet. App. 18. No other judge joined this portion of the panel opinion.

"regardless" of the specific reasoning, the lower court's decision was affirmed. *Id.*

3. The dissent rejected the majority and concurring opinions as a departure from this Court's "meticulously curated" sovereign immunity jurisprudence, which directs courts "to follow the same well-trodden analytical path: 'A State's consent to suit must be 'unequivocally expressed' in the text of the relevant statute.'" Pet. App. 50. The residual clause does not unequivocally express its demand for a waiver as there is "at least one other plausible interpretation": the interpretation adopted by the Fifth and Tenth Circuits. Pet. App. 62. These circuits require "that the relevant legislative enactment *as a whole*—not just one of its individual provisions—be solely aimed at prohibiting discrimination by recipients of federal financial assistance." Pet. App. 71. As an "omnibus health care reform package," the ACA fails this test. Pet. App. 70. When other plausible interpretations exist, this Court has been "crystal clear" that there is no waiver of sovereign immunity. Pet. App. 72.

Beyond this error, the dissent pointed to this Court's longstanding requirement that a demand for waiver be found in the "text of the relevant statute." The "broad catchall language" of CRREA's residual clause cannot provide such a waiver for *another* unidentified statute. Pet. App. 78. There can be no knowing waiver of immunity in the "text of the relevant statute" when the waiver itself is "hidden in another statute and only applied to section 1557 through implication." Pet. App. 79 (quoting *Levy v.*

Kansas Dep't of Soc. & Rehab. Servs., 789 F.3d 1164, 1170 (10th Cir. 2015)).

The dissent concluded that "[t]he Supreme Court should correct the majority's errors without delay to ensure the preservation of the integrity of the Eleventh Amendment and the dignity of state sovereign immunity." Pet. App. 53.

REASONS FOR GRANTING THE WRIT

I. The Circuits are Split Regarding the Proper Interpretation of the Waiver of Sovereign Immunity Demanded from States by the Residual Clause.

A. The lower courts are divided about the meaning of the residual clause's reference to the "provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance"

1. This Court has considered the meaning of the residual clause twice, but only to find that the clause did not waive sovereign immunity for another unlisted statute. In *Sossamon*, the Court held that "a State might reasonably conclude that the clause covers only provisions using the term 'discrimination.'" 563 U.S. at 292. Therefore, a prohibition against a "substantial burden" on religious exercise by recipients of federal funds did not fall within the clause's terms. In *Dellmuth v. Muth*, the Court held that residual clause was

merely "nontextual" evidence of what Congress intended when it passed the Education of the Handicapped Act (now called the Individuals with Disabilities Education Act) ten years earlier, not a waiver of sovereign immunity to enforce that earlier Act. 491 U.S. 223, 228–32 (1989).

The Fourth Circuit has acknowledged that its decision creates a circuit split about the reach of CRREA's residual clause. Pet. App. 25 n.4. While it identified an earlier decision, *Madison v. Virginia*, 474 F.3d 118 (4th Cir. 2006), as the basis for this disagreement, *id.*, this overstates the prior decision. *Madison*, like this Court's opinion in *Sossamon*, considered § 3 of the Religious Land Use and Institutionalized Persons Act, and *Madison*, like *Sossamon*, held only that, "[a]t a minimum," a statute must prohibit discrimination to fall within the residual clause. 474 F.3d at 133. *Madison* did not endorse the conclusion that the word "discrimination" is all that is necessary, as the panel did below. The Fourth Circuit's decision that the residual clause applies whenever a "law [is] federal" and a *provision within that law* "prohibits discrimination by recipients of federal financial assistance," Pet. App. 26, is a departure from *Madison* and not an evolution.

The panel opinion holds that Congress and the States need not agree on the details of the waiver of sovereign immunity at the time Congress demands it. Courts do not "view sovereign immunity waivers through the lens of what Congress intended at the

time of enactment." Pet. App. 24. Rather, a court looks "from the perspective of a state official who is engaged in the process of deciding whether the State should accept federal funds and the obligations that go with those funds." *Id.* State officials should understand that CRREA's "sovereign immunity waiver encompasses the provisions of 'any' federal statute that prohibits discrimination by recipients of federal funds." *Id.*

The State Health Plan argued that Congress cannot "unequivocally express" a demand for a waiver of sovereign immunity "in the text of the relevant statute" when the federal law that prohibits discrimination, the federal law that creates the federally funded program, and the waiver of sovereign immunity are located in three separate legislative acts enacted over almost twenty-five years.[4] The Fourth Circuit rejected this concern as an argument that "CRREA is ambiguous simply by virtue of its breadth." Pet. App. 24. The residual clause's "language is plain," so "the sole function of the courts—at least where the disposition required

[4] The State Health Plan does not receive payments under the ACA, which was enacted in 2010. The Plan does receive federal payments under the Retiree Drug Subsidy program enacted in 2003. 42 U.S.C. § 1395w-132. As part of the creation of Medicare Part D, Congress subsidized private health plans to discourage them from eliminating prescription drug coverage for Medicare-eligible retirees and shifting all such coverage to Medicare. *See* "Overview of the Retiree Drug Subsidy Option," U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, *available at* https://go.cms.gov/39s9xJt (Nov. 2, 2005).

by the text is not absurd—is to enforce it according to its terms." Pet. App. 23.[5]

2. In direct contrast, the Fifth Circuit and the Tenth Circuit have held the residual clause reaches only "statutes that deal *solely* with discrimination by recipients of federal financial assistance." *Sullivan v. Texas A&M Univ. Sys.*, 986 F.3d 593, 598 (5th Cir. 2021). A State's consent to suit cannot be "unequivocally expressed in the text of the relevant statute," *Sossamon*, 563 U.S. at 284, when the State "is unaware of the conditions or is unable to ascertain what is expected of it," *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Indeed, the very existence of ambiguity defeats a claim of waiver of sovereign immunity.

The Fifth Circuit's caselaw is well-established. Beginning in 1992, the Fifth Circuit held that another interpretation of the residual clause is that the "listed statutes [in CRREA] define a set—'statutes that deal *solely* with discrimination by recipients of federal financial assistance.'" *Sullivan*, 986 F.3d at 597 (quoting *Cronen v. Texas Dep't of*

[5] The Fourth Circuit noted that four district courts have reached the same conclusion about the application of CRREA to § 1557, and the Fifth and Tenth Circuit have not specifically considered this precise question. Pet. App. 22. But the Fourth Circuit cannot remain faithful to this Court's requirement that a waiver of sovereign immunity exist in the "text of the relevant statute" if it looks beyond the residual clause. The relevant statute for each of these decisions must be CRREA—where the circuits have split in their interpretation—not § 1557.

Hum. Servs., 977 F.2d 934, 937 (5th Cir. 1992)). They are "antidiscrimination statutes." *Cronen*, 977 F.2d at 938. A "comprehensive federal entitlement program that happens to include a provision prohibiting discrimination in these entitlements" cannot, therefore, be easily inferred to fall under the residual clause. *Id.* More importantly, *Cronen* concluded that it did not need to decide which interpretation was more appropriate. When there are two alternative interpretations, Congress has not been "unmistakably clear in the language of the statute" and there is no waiver of sovereign immunity. *Id.* (quoting *Atascadero*, 473 U.S. at 242).

Following *Cronen*, courts in the Fifth Circuit have turned away suits under Title I of the Americans with Disabilities Act, *Sullivan*, 986 F.3d at 598, the Family and Medical Leave Act, *id.*, and the Age Discrimination in Employment Act, *Fields v. Dep't of Pub. Safety*, 911 F.Supp.2d 373, 379 (M.D. La. 2012). *Accord McCardell v. U.S. Dep't of Hous. & Urb. Dev.*, 794 F.3d 510, 521–22 (5th Cir. 2015) (finding State immune from claims of discrimination under the Fair Housing Act because that statute, unlike Title VI of the Civil Rights Act of 1964, has no express abrogation of sovereign immunity under CRREA (42 U.S.C. § 2000d-7a)).

The Tenth Circuit has also rejected the theory adopted by the Fourth Circuit as "novel." *Levy v. Kansas Dep't of Soc. & Rehab. Servs.*, 789 F.3d 1164, 1170 (10th Cir. 2015) (claim under Title V of the ADA). "For a waiver of sovereign immunity to be 'knowing and voluntary,' it cannot be hidden in

another statute and only applied to the ADA through implication." *Id.* "[A]s other courts have noted, the ADA has a much broader focus than discrimination by recipients of federal financial assistance." *Id.* at 1171; *Garcia v. Dep't of Health & Soc. Servs.*, No. 19-CV-159-SWS, 2020 WL 5629784, at *9 (D. Wyo. Aug. 25, 2020) (same). The ADA "was passed *after* the Rehabilitation Act's waiver provisions," so Congress could have—but did not—either write "a similar waiver provision" or amend CRREA to add a reference to the ADA. *Levy*, 789 F.3d at 1171. The failure to do so, points to the "absence of clear evidence that Congress intended for states to waive their immunity." *Id. See also Melton v. Oklahoma ex rel. Univ. of Oklahoma*, No. CIV-20-608-G, ___ F.3d ____, 2021 WL 1220934, at *3 (W.D. Okla. Mar. 31, 2021) (holding the residual clause does not waive immunity to enforce the Fair Housing Act of 1968 because "[t]he considerations articulated in *Levy* apply equally to Plaintiff's FHA claim").

3. This circuit split, as the dissent noted below, is rooted in different interpretations of the residual clause's text, which refers to "the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a)(1).

The dissent—and the analysis of the Fifth and Tenth Circuit—reflects a judgment that the residual clause can be plausibly interpreted as reaching only a "Federal statute prohibiting discrimination by recipients of Federal financial assistance." "The

distinction between the terms 'provision' and 'statute' is as meaningful now as it was in 1986." Pet. App. 66. A "statute" is "an act of the legislature" while a "provision" is "only a *clause* within a statute." *Id.* The last antecedent rule makes clear that "a limiting clause or phrase . . . modifies only the noun or phrase that it immediately follows." *Id.* Because the phrase "prohibiting discrimination by recipients of Federal financial assistance" follows the word "statute," the residual clause should be read to reach only Congressional enactments ("statutes") that concern the issue of discrimination by recipients of federal financial assistance, not to discrete provisions or clauses within larger legislative acts. "[I]t is not the *clause* that must prohibit discrimination by these recipients; it is the *legislative act* as a whole that must do so." *Id.*

The Fourth Circuit analyzed the phrase differently, and the panel's majority opinion reads it to cover the "provisions of any other Federal statute prohibiting discrimination." Pet. App. 23. Interestingly, the panel majority opinion and concurring opinion disagree about the correct interpretation. The panel opinion concludes the residual clause as written "imposes but two conditions: that the law be federal and that it prohibit discrimination by recipients of Federal financial assistance." Pet. App. 26. "That the Affordable Care Act does more than prohibit discrimination does not lessen the prohibition's force or effect." Pet. App. 27. "CRREA's residual clause reflects a specific objective to render states liable for money damages when they engage in unlawful discrimination. Reading this clause to encompass

§ 1557 is wholly consistent with the task to which the judiciary is assigned: enforcing statutes 'according to [their] terms.'" Pet. App. 29.

The concurring opinion engages with the Fifth (and to a lesser extent the Tenth) Circuit's conclusion. The concurring opinion admits that the residual clause "allows for two interpretations." *Id.* at 439. While this ambiguity should be conclusive that the States do not have clarity as to what falls "within the terms of the waiver," *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003), the concurrence proceeds to resolve this ambiguity—and reaches a different conclusion than the panel majority opinion.

The first possible "reading is that Congress sought to waive sovereign immunity for claims brought under statutory *provisions* that target discrimination by recipients of federal financial assistance." The alternative interpretation would be that the phrase "prohibiting discrimination by recipients of Federal financial assistance" modifies the term "statute." The concurrence argues that this second interpretation would require waiver for *any* claim under *any* provision of such an Act, not just the anti-discrimination provisions. Pet. App. 34–35. Such a broad waiver of state sovereign immunity would extend to claims that "have nothing to do with discrimination." Pet. App. 35.[6] This is precisely the

[6] The concurring opinion concludes that the plaintiff in *Cronen* offered this second, broader interpretation, which formed the basis for the Fifth Circuit's decision. Pet. App. 35. *Cronen*, however, specifically considered the ambiguity that the

interpretation offered by the panel majority. Pet. App. 27, 32.

Both the dissent *and the other judge in the majority* disagree with the concurrence's statutory analysis, which disregards the last-antecedent rule. Pet. App. 27 ("But where this reading avoids surplusage, it runs up against the last-antecedent rule.") (panel opinion); Pet. App. 76 ("But this, too, is far from the *only* plausible reading, as it would have us improperly assume that Congress violated both the last antecedent rule and basic grammatical rules by intentionally misplacing that modifying phrase far away from its object ('provision')") (dissent).

Properly understood, the Fourth Circuit's opinion is not that the residual clause is an unambiguous waiver of sovereign immunity. Rather, the Fourth Circuit has concluded that any ambiguity in the residual clause does not matter, because under either interpretation—the panel's broad interpretation or the concurrence's more limited statutory analysis—the State has waived sovereign immunity.

One consequence of this splintered reasoning is that state officials are even less able to discern

---

concurrence noted: whether the residual clause applies to all provisions in an Act prohibiting discrimination in federally funded programs or just to those claims that assert discrimination. *Cronen*, 977 F.2d at 937 n.4. The Fifth Circuit noted that this ambiguity "lends additional support" to its holding that the residual clause is not a clearly expressed demand for a waiver of sovereign immunity. *Id.*

whether the acceptance of federal funds will waive state sovereign immunity.

B. The disagreement between the circuits reflects an underlying tension within this Court's jurisprudence on waivers of sovereign immunity.

To demand that the States waive their immunity from suit, Congress must make its demand "expressly and unequivocally in the text of the relevant statute." *Sossamon*, 563 U.S. at 290–91. The Court has emphasized two separate reasons for this requirement. Clarity ensures that the State understands that a waiver of sovereign immunity has occurred. Second, the clear statement in the text of the relevant statute "ensures that Congress has specifically considered state sovereign immunity and has intentionally legislated on the matter." *Sossamon*, 563 U.S. at 291. The sweeping, imprecise language of CRREA's residual clause places these two constitutional purposes in conflict.

The Fourth Circuit's interpretation relies only upon the requirement that a federal statute provide a "clear statement" of the demand for a waiver. "[W]e do not view sovereign immunity waivers through the lens of what Congress intended at the time of enactment," but "from the perspective of a state official who is engaged in the process of deciding whether the State should accept [federal] funds and the obligations that go with those funds." Pet. App. 24. The broad catch-all language of the residual

clause is not, therefore a concern. Its breadth "'furnishes clear notice' to state officials that its sovereign immunity waiver encompasses the provisions of 'any' federal statute that prohibits discrimination by recipients of federal funds." *Id.*

But, as the dissent below (and the Fifth and Tenth Circuit) have noted, the residual clause conspicuously lacks the solicitude that the Constitution demands for statutes that affect the balance between the states and federal government. Immunity from suit is "central to sovereign dignity" and enforces "an important constitutional limitation on the power of the federal courts." *Sossamon*, 563 U.S. at 283–84. *Atascadero* noted that "in determining whether Congress has abrogated the States' Eleventh Amendment immunity, the courts themselves must decide whether their own jurisdiction has been expanded." 473 U.S. at 243. This requires that the courts "rely only on the clearest indications in holding that Congress has enhanced our power." *Id.*

Moreover, a waiver of sovereign immunity requires both a "clear statement" waiving sovereign immunity and clarity about "the terms of the waiver." *U.S. v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (The "terms of consent to be sued" must be "unequivocally expressed."). It is not just that a waiver demand is viewed from the perspective of a state official. The waiver is viewed *as if it is a contract* with "a state official who is engaged in the process of deciding whether the State

should accept [the] funds and the obligations that go with those funds." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). The State "voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst*, 451 U.S. at 17. There can "be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it," unless Congress speaks clearly. *Id.* Congress must therefore do more than demand a waiver; it must also, in the same statute, identify the relevant non-discrimination requirement and the affected federal funding.

II. The Decision Below is Wrong.

Beyond creating a division of authority, allowing private suits against some States and not others, the decision below is wrong. The majority commits three distinct errors.

1. The first and most telling error is that the two Fourth Circuit panel members in the majority disagree about *how* the residual clause waives sovereign immunity. The concurring judge concludes that the residual clause applies to the "provisions of any other Federal statute" that "target discrimination by recipients of Federal financial assistance." Pet. App. 43. The concurring judge acknowledges, however, that both the other judge in the majority and the dissenting judge "say that my reading of the residual clause conflicts with the last-antecedent rule, which counsels that 'a limiting clause or phrase . . . should ordinarily be read as

modifying only the noun or phrase that it immediately follows.'" Pet. App. 42.

The judge who authored the panel opinion applies the residual clause to waive sovereign immunity for *all* provisions, whether connected to antidiscrimination or not, that are contained within a statute that also contains a provision prohibiting discrimination in federally funded programs. "[T]he residual clause imposes but two conditions: that the law be federal and that it prohibit discrimination by recipients of Federal financial assistance." Pet. App. 26.

The author of the majority panel opinion further concludes it is not "necessary" to agree with the concurrence's statutory interpretation. Pet. App. 27–28. "As a majority of the Court today holds, the sovereign immunity waiver contained in CRREA's residual clause clearly applies to NCSHP regardless of whether 'prohibiting discrimination by recipients of Federal financial assistance' modifies 'provision' or 'statute.'" *Id.*

The Eleventh Amendment requires more than that the members of the majority agree upon an outcome. "The requirement of a clear statement in the text of the statute ensures that Congress has specifically considered state sovereign immunity and has intentionally legislated on the matter." *Sossamon*, 563 U.S. at 290. At a minimum, if the majority is to conclude that "Congress says in a statute what it means and means in a statute what

it says there," Pet. App. 23, the majority should agree upon the proper reading of the text.

Sossamon makes clear that ambiguity alone means that Congress has not clearly demanded a waiver of state sovereign immunity. 563 U.S. at 287 ("[W]here a statute is susceptible of multiple plausible interpretations, including one preserving immunity, we will not consider a State to have waived its sovereign immunity.").

The Fourth Circuit dissent shows such a plausible interpretation. "[T]he Residual Clause can plausibly be read to require that the relevant legislative enactment *as a whole*—not just one of its individual provisions—be solely aimed at prohibiting discrimination by recipients of federal financial assistance." Pet. App. 71. This means, under the Court's sovereign immunity caselaw, that the State has *not* waived immunity. "The Court has been crystal clear that when a statute like the Residual Clause 'is susceptible of multiple plausible interpretations, including one preserving immunity,' we are required to conclude that states have not waived immunity." Pet. App. 72. *See also Federal Aviation Admin. v. Cooper*, 566 U.S. 284, 290 (2012) ("Any ambiguities in the statutory language are to be construed in favor of immunity, so that the [state's] consent to be sued is never enlarged beyond what a fair reading of the text requires.").

2. Second, the Fourth Circuit brushes aside this Court's jurisprudence by creating a conceptual

distinction between the clear statement "required to abrogate a state's sovereign immunity" and the statement needed "to condition spending upon a state's waiver of sovereign immunity." Pet. App. 30. "Abrogation is conceptually similar but analytically distinct from sovereign immunity waivers." *Id*. "The fact that both doctrines require a 'clear statement' from Congress does not mean that they require (or permit) the same statement." *Id.*

This conclusion is directly contrary to *Atascadero*. The dissent points out that *Atascadero* "reaffirm[ed] the rule of prior decisions requiring the same degree of clarity in a spending power statute, which triggers inquiry into whether the state waived its eleventh amendment protection, as would be required by an abrogation statute. The two inquiries are now the same." Pet. App. 86–87 (Agee, J. dissenting) (quoting George D. Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 GEO. L.J. 363, 388 (1985)).

By creating a distinction between abrogration and waiver, the decision below is able to disregard this Court's guidance in *Dellmuth v. Muth*, 491 U.S. 223 (1989), one of the two cases wherein this Court specifically considered CRREA's residual clause. In *Dellmuth*, the Plaintiff challenged his son's individualized education plan under the EHA. 491 U.S. at 225–26. The Plaintiff argued that the residual clause "expressly abrogates state immunity

from suits for tuition reimbursement." *Id.* at 223. While the claims arose before the effective date of CRREA, which arguably makes this Court's guidance *dicta*, *Dellmuth* directly addressed the residual clause argument as a "nontextual" claim. 491 U.S. at 228. The Court compared "the language in the [CRREA] with the language of the EHA" and concluded it "serve[d] only to underscore the difference in the two statutes, and the absence of any clear statement of abrogation in the EHA." *Id.* at 229 (emphasis added). "When measured against such explicit consideration of abrogation of the Eleventh Amendment [in CRREA], the EHA's treatment of the question appears ambiguous at best." *Id.* at 230. "Our opinion in *Atascadero* should have left no doubt that we will conclude Congress intended to abrogate sovereign immunity only if its intention is 'unmistakably clear in the language of the statute.'" *Id.* "[W]e reaffirm today that in this area of the law, evidence of congressional intent must be both unequivocal and textual" and the CRREA provision "is neither." *Id.* The EHA did not abrogate sovereign immunity because *that statute* "made no reference whatsoever to either the Eleventh Amendment or the States' sovereign immunity." *Id.* at 231.

Dellmuth stands for the principle that, setting aside the four specific statutes listed in CRREA, the residual clause does not provide the required *textual* evidence that Congress intended to abrogate or waive states' sovereign immunity from suit.

3. Finally, even beyond its disregard of *Dellmuth*, the Fourth Circuit gives little respect, or even consideration to the requirement that "[a] State's

consent to suit must be 'unequivocally expressed' in *the text of the relevant statute*." *Sossamon*, 563 U.S. at 284. The decision below blends the ACA and CRREA together throughout its opinion. The Fourth Circuit analyzed the question presented as whether state officials were "on clear notice that acceptance of federal funds amounted to a waiver of sovereign immunity against claims of discrimination arising out of [the Affordable Care Act's] provision." Pet. App. 13. "We affirm the district court and hold that, when read alongside CRREA, § 1557 clearly conditions the receipt of federal funds upon NCSHP's waiver of sovereign immunity against suits for money damages." Pet. App. 13. But "the Residual Clause provides no basis to conclude that states knowingly waived their sovereign immunity from section 1557 suits, or that Congress specifically considered the issue of state sovereign immunity when enacting section 1557." Pet. App. 62 (Agee, J., dissenting).

The Fourth Circuit "fails to respect the 'stringent' requirement that a state's waiver of sovereign immunity be 'unequivocally expressed in the text of the relevant statute.'" Pet .App. 94 (quoting *Sossamon*, 563 U.S. at 284). Just as in *Dellmuth*, the statute in this case, § 1557 of the ACA, has no textual hook to the residual clause. Neither CRREA nor the ACA references or incorporates the other statute. As the dissent below noted, "it is 'difficult to believe that Congress, taking careful stock of the state of Eleventh Amendment law, decided it would drop coy hints but stop short of

making its intention manifest' that section 1557 would be encompassed by the Residual Clause." Pet. App. 90 (quoting *Dellmuth*, 491 U.S. at 230–31).

III. This Petition presents an Ideal Vehicle to Resolve the Conflict between the Circuits, which is Exceptionally Important and Squarely Presented.

1. The Fourth Circuit's decision creates a square conflict among the circuits about the proper interpretation of the residual clause and state waivers of sovereign immunity. The differing interpretations are squarely and cleanly presented and were outcome-determinative below. No further percolation is needed.

Moreover, erroneous decisions on sovereign immunity should be addressed immediately. This Court allows interlocutory review of such matters because of the "concern that States not be unduly burdened by litigation" as well as the "ultimate justification" of "ensuring that the States' dignitary interests can be fully vindicated." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

2. This case is an ideal vehicle for addressing the question presented. The case comes for review from the denial of a motion to dismiss and does not require the Court to navigate a lengthy factual record. "[A] motion by a State or its agents to dismiss on Eleventh Amendment grounds involves a claim to a fundamental constitutional protection, whose

resolution generally will have no bearing on the merits of the underlying actions." *Puerto Rico Aqueduct*, 506 U.S. at 145. This is not a case where the State voluntarily invoked the federal court's jurisdiction. Rather, as noted above, the lower court held that, by accepting federal financial assistance, Petitioner waived its sovereign immunity to the Plaintiffs' suit. Pet. App. 13. What is more, the resolution of sovereign immunity is outcome-determinative. Had respondents brought their claims in the Fifth or Tenth Circuit, there is no question their claims under § 1557 would have been rejected.

3. Because the Fourth Circuit's decision below rests on the residual clause, it sweeps far beyond the health care context. The Fourth Circuit has opened the federal courts to lawsuits for a myriad of claims against the States. *Compare*, *e.g.*, *Buck v. Washington Metro. Area Transit Auth.*, 427 F. Supp. 3d 60 (D.D.C. 2019) (rejecting claim that residual clause waives sovereign immunity to suit by whistleblower under the National Transit Systems Security Act, 6 U.S.C. § 1142(a), even though that provision prohibits "discrimination").

In doing so, the Fourth Circuit has eliminated the constitutional safeguard that Congress must consider the "sovereign dignity" of the States before expanding the power of the federal courts. *Sossamon*, 563 U.S. at 283. Even when a lawsuit fails, it imposes litigation costs on the States. The federal government retains numerous other tools to

ensure that its funds are spent correctly, including its own authority to bring suit against a State. Sovereign immunity prevents the federal government from delegating this enforcement to private parties, whose incentives may differ. Weighing the costs of enforcement is a political decision, best left to the political actors, not to private litigants in Article III courts.

The panel majority reaches the result below by disregarding alternative readings of the statute at issue, this Court's jurisprudence, and the reasoning of one another. "The majority only acknowledges one possible interpretation of the Residual Clause despite the existence of at least one other plausible interpretation that has been endorsed by the only circuits to consider the issue and would preserve states' sovereign immunity." Pet. App. 93. "The Supreme Court should proceed expeditiously to correct the constitutional error here." Pet. App. 94.

IV. Conclusion

The Petition for a writ of certiorari should be granted.

Mark A. Jones
BELL, DAVIS & PITT, PA
P.O. Box 21029
Winston-Salem, NC
27120-1029
(336) 714-4122
mjones@belldavispitt.com

John Guyton Knepper
Counsel of Record
LAW OFFICE OF JOHN G. KNEPPER, LLC
1720 Carey Avenue, Suite 590
Cheyenne, WY 82001
(307) 632-2842
John@KnepperLLC.com