No. 21-674

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULE

OTHER AUTHORITIES

Respondents defend the decision below, minimize its importance, and argue that review would be premature. However, their contentions lack merit. The Court should grant certiorari now.

"The question whether sovereign immunity has been waived is one of critical importance to any functioning government, but particularly to a democratic republic." *Robinson v. Dep't of Educ.*, 140 S. Ct. 1440, 1441 (2020) (Thomas, J., dissenting from denial of certiorari). Petitioner cannot evade or otherwise ameliorate the injury created by the Fourth Circuit's decision.

The question this Court deferred in *Sossamon*—whether the residual clause in a 1987 statute can provide an "unequivocal textual waiver" of sovereign immunity for a subsequent statute—is now critical. *Sossamon v. Texas*, 563 U.S. 277, 292 (2011). The United States has spent $3.46 trillion in response to COVID-19, with much of this assistance passing through the States. *See* USASPENDING, *available at* http://usaspending.gov (last accessed Jan 3, 2022). The States estimate that their spending for the 2021 fiscal year will reach $2.65 trillion. NAT'L ASS'N OF STATE BUDGET OFF., STATE EXPENDITURE REPORT at 1 (2021) *available at* https://bit.ly/3pQTPSe (last accessed Jan. 3, 2022). This includes a 35.7 percent increase in the federal funding allocated to the States "directly related to the COVID-19 pandemic response and recovery efforts." *Id.*

This federal spending highlights the need for the Court to "proceed expeditiously to correct the constitutional error here." Pet. App. at 94. Maryland,

North Carolina, South Carolina, Virginia, and West Virginia deserve assurance that their partnership with the federal government at this difficult time does not include hidden litigation consequences that are absent for other states.

I. The Court of Appeals' Decision Is Wrong.

1. While the Spending Clause provides a path to relax this "important constitutional limitation on the power of the federal courts," the Supreme Court's test for Congressional legislation is "stringent": the "text of the relevant statute" must "unequivocally express[ ]" Congress's demand and elicit a "clear declaration" from the State that it "consents to suit." *Sossamon*, 563 U.S. at 284.

Respondents concede that the Fourth Circuit panel members did not agree how Congress 'unequivocally expressed' its demand for waiver of sovereign immunity in the 'text of the relevant statute.' Opp. at 9-11; Pet. Br. at 26-28. Chief Judge Gregory would hold that Congress has demanded a waiver of sovereign immunity under the residual clause of 42 U.S.C. § 2000d-7(a) whenever a law is federal and the law includes as one of its provisions, a prohibition against discrimination by recipients of Federal financial assistance. Opp. at 9. Judge Diaz would hold that Congress has only demanded a waiver of sovereign immunity to enforce a provision that, itself, prohibits discrimination by recipients of federal funds. He would not find a waiver to enforce every provision in an omnibus statute. Opp. at 10-11.

That said, "nothing in either opinion" by Chief Judge Gregory or Judge Diaz "persuasively demonstrates how either [interpretation] is the *only* plausible reading" of the residual clause at issue here. Pet. App. at 77 (Agee, J., dissenting). This ambiguity alone is sufficient to resolve the dispositive question. Pet. App. at 78. Statutory language is "construed strictly in favor of the sovereign" and against a waiver of sovereign immunity, allowing only "what the language **requires**." *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 34 (1992) (emphasis added). When there is a "plausible" reading that preserves sovereign immunity, then "a reading imposing monetary liability . . . is not 'unambiguous' and therefore should not be adopted." *Id.* at 37. To find an unequivocally expressed demand for a clear waiver of sovereign immunity, the federal courts must have more than a plausible interpretation or even a 'better' interpretation that permits waiver of immunity. *Compare* Opp. at 17.

To defend the opinion below, Respondents expand the meaning of the "last antecedent" rule (a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows) in a manner that no judge considered. Respondents argue that a refined application of this canon of construction leads to Judge Diaz's interpretation because the phrase at issue—"provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance," 42 U.S.C. § 2000d-7(a)—is a "precise and integrated clause." Opp. at 13-14. Respondents also urge that § 1557, a "Miscellaneous provision" enacted as part of the Affordable Care Act, Patient Protection and Affordable Care Act,

124 Stat. 119, 121 (2010), is in fact "itself a federal statute" independent of its inclusion in "an omnibus piece of legislation," Opp. at 14-15. In support of this theory, Respondents minimize the scope of Chief Judge Gregory's interpretation by citing *United States v. Marks* for the proposition that Judge Diaz's "narrower" opinion should control. Opp. at 14 n.1 (citing *U.S. v. Marks*, 430 U.S. 188, 193 (1977)).

Respondents' citation to *Marks* is itself a concession that the Fourth Circuit has erred. *Marks* provides that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent [of the majority], the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. at 193. Chief Judge Gregory did not agree with Judge Diaz's interpretation of the last antecedent rule, Pet. App. at 27 n.5, and Judge Diaz found it "unnecessary to decide" whether § 1557 is a standalone demand for a waiver of sovereign immunity, so he concurred only in "those [unspecified] portions of Chief Judge Gregory's opinion that affirm the district court's reasoning," Pet. App. at 49-50.

There can be no "clear declaration" by a State that it has waived its immunity, *Sossamon*, 563 at 284, by a "fragmented Court" that has "no single rationale explaining the result," *Marks*, 430 U.S. at 193. This is especially true given that neither the Respondents nor the Petitioner can discern which "part" of Chief Judge Gregory's opinion was joined by Judge Diaz. Chief Judge Gregory decided that he did not need to fully interpret the residual clause, because the sovereign

immunity waiver "clearly applies" "regardless" of the interpretation. Pet. App. at 27 n.5. Judge Diaz "join[ed] Chief Judge Gregory in affirming the district court's judgment." Pet. App. at 33. While other portions of Judge Diaz's opinion refer to concurrence with a "part" of the Chief Judge's opinion, neither opinion specifically identifies agreement other than on the outcome. Sovereign immunity requires more.

2. Respondents also defend Chief Judge Gregory's alternative conclusion that § 1557 of the Affordable Care Act, 18 U.S.C. § 18116, itself unequivocally expresses a Congressional demand for a waiver of state sovereign immunity. Opp. at 16 17. While § 1557 never refers to States or sovereign immunity, Respondents cite Justice Scalia's concurring opinion that Congress can demand a waiver of sovereign immunity "without explicit reference to state sovereign immunity or the Eleventh Amendment." *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring). But Respondents critically fail to acknowledge that Justice Scalia never implied that a waiver of sovereign could be accomplished without any reference in the statutory text to **States at all**, as is the case in § 1557. 42 U.S.C. § 18116(a).

3. With few arguments in support of the "fragmented" opinion below, *Marks*, 430 U.S. at 193, Respondents seek to minimize the effect of the Fourth Circuit's opinion. Opp. at 1-2. Respondents claim that § 1557 of the Affordable Care Act is "the only law Congress has enacted pursuant to the Spending Clause to prohibit discrimination by a recipient of Federal financial

assistance since enacting CRREA." *Id.* at 2. This is incorrect.

As Petitioner previously noted, Judge Moss has already confronted a claim that CRREA extends a waiver of sovereign immunity to claims of discrimination by whistleblowers under 6 U.S.C. § 1142(a), a statute enacted in 2007. Pet. Br. at 33 (citing *Buck v. Wash. Metro. Area Transit Auth.*, 427 F.Supp.3d 60 (D.D.C. 2019)). Respondents also carefully limit their assertion—§ 1557 is the "only" law "since enact[ment of] CRREA" in 1987—in order to direct this Court away from the multiple significant statutory schemes impacted by CRREA. *Compare* Opp. at 2 *with* Pet. Br. at 20 (citing district court case involving a claim of sovereign waiver under CRREA to enforce the Fair Housing Act of 1968).

Respondents' argument that § 1557 is unique because no other provision has its precise "linguistic formulation," Opp. at 4, is beside the point. Respondents cannot simultaneously cite Justice Scalia's *Dellmuth* concurrence for the proposition that no magic words are required to waive sovereign immunity, 491 U.S. at 233, and seek to limit the Fourth Circuit's interpretation of CRREA with an argument that § 1557's magic words dispositively differ from other statutory provisions.

One need not look beyond the past year to find provisions that forbid discrimination in federally funded programs. Just as it did in § 1557, Congress has repeatedly folded these provisions into an omnibus bill, which Respondents concede is a "common modern occurrence." Opp. at 15. Like § 1557, most of these

provisions do not refer to States at all. Those that do lack any indication that "Congress has specifically considered state sovereign immunity and has intentionally legislated on the matter." *Sossamon*, 563 U.S. at 290.

On November 15, 2021, President Biden signed the Infrastructure Investment and Jobs Act int0 law. 2021 Daily Comp. Pres. Docs. 3 (Nov. 15, 2021), https://bit.ly/3sVFGoy (last accessed Jan. 3, 2022). This statute reforms and re-enacts the Railroad Rehabilitation and Improvement Financing program as chapter 224 of Title 49 of the U.S. Code. H.R. 3684, 117th Cong., Div. B, Title II, Subtitle C, §§ 21301-03 (2021). The railroad improvement program provides "loans and loan guarantees for railroad capital improvements" from the United States to, among others, "State and local governments" and "government sponsored authorities." U.S. DEP'T OF TRANS., FACT SHEET, RAILROAD REHABILITATION AND IMPROVEMENT FINANCING, *available at* https://bit.ly/3EKhdot (last accessed Jan. 3, 2022). The law extends the application of 49 U.S.C. § 306(b), which forbids anyone from being "subject to discrimination . . . because of race, color, national origin, or sex" in any program funded by the various transportation programs. 49 U.S.C. § 306(b). *See* H.R. 3684, 117th Cong., Div. B, Title II, Subtitle C, §§ 21301(j)(4)(B).

The infrastructure bill also includes the "Digital Equity Act of 2021," H.R. 3684, 117th Cong., Div. F, Title III, §§ 60301-07, creating grant programs to increase access to the Internet, NAT'L DIGITAL INCLUSION ALL., THE INFRASTRUCTURE ACT AND

DIGITAL EQUITY ACT PASSED… NOW WHAT?, *available at* https://bit.ly/3eOQ7lq (accessed Jan. 3, 2022). For this federal grant program, "[n]o individual in the United States may, on the basis of actual or perceived race, color, religion, national origin, sex, gender identity, sexual orientation, age, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity that is funded in whole or in part with funds made available to carry out this title." H.R. 3684, 117th Cong., Div. F, Title III, § 60307(a)(1).

Finally, the Appropriations Act in effect for the 2021 Federal Fiscal Year provides that "[n]one of the funds made available to the Department of Justice . . . may be used to discriminate against or denigrate the religious or moral beliefs of students who participate in programs for which financial assistance is provided from those funds, or of the parents or legal guardians of such students." Consolidated Appropriations Act, 2021, Div. B. § 511, 134 Stat. 1182, 1277 (Dec. 27, 2020). *See also id.*, 134 Stat. 1615 (Appropriation for the Corporation for Public Broadcasting); *id.*, 134 Stat. 1622 (prohibition on availability of funds from the Department Health and Human Services "to a State or local government" that engages in "discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."); *id.*, Title X § 1001(c), 134 Stat. 3217 (protection against discriminatory treatment in mortgage relief available under the 2019 CARES Act).

Petitioner does not seek this Court's interpretation of the parameters of each program, the extent of State

enmeshment, or whether the Fourth Circuit's opinion also waives sovereign immunity for suits against States that participate in these programs. Rather, the critical point is that these provisions forbid discrimination in programs which receive federal funds; they are recent enactments; and these provisions lack evidence that "Congress has specifically considered state sovereign immunity and has intentionally legislated on the matter." *Sossamon*, 563 U.S. at 290. Without this Court's grant of certiorari, states within the Fourth Circuit will experience the lack of clarity that this Court's cases reject: ambiguity about whether State participation in federal spending programs will engender federal lawsuits by private parties.

II. This Court's Review Is Warranted Now

A. The Court of Appeals' Decision Creates a Circuit Conflict.

1. Respondents assert that no circuit conflict exists because the Fifth and Tenth Circuit have not specifically considered the effect of CRREA in the context of § 1557 of the Affordable Care Act. Opp. at 17-25. In this view, Respondents disagree with the Fourth Circuit itself, which expressly acknowledged that its decision creates a split in authority. Judge Agee criticized the majority's lack of consideration for the longstanding interpretations in the Fifth and Tenth Circuits. "To create a circuit split on this consequential issue, one would expect the majority opinion to provide a good reason—or at least some reason—why the Fifth and Tenth Circuits' reading of the Residual Clause is implausible." Pet. App. at 52.

Unlike Respondents, Chief Judge Gregory and Judge Diaz agreed with the dissent that the decision creates a circuit split. "The dissent correctly notes that, by rejecting this brand of statutory interpretation, we take a different view of the residual clause than two of our sister circuits." Pet. App. at 25 n.4 (Gregory, C.J.). "To the extent that [*Levy v. Kansas Dep't of Soc. & Rehab. Servs.*, 789 F.3d 1164 (10th Cir. 2015)] purports to reject wholesale the residual clause's applicability to provisions enacted after 1986, I decline to follow it." Pet. App. at 46 n.10 (Diaz, J.).

This Court looks to whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." R. Sup. Ct. 10(a). This has unambiguously occurred. The States are subject to different interpretations of CRREA. It is irrelevant that the plaintiffs in these lawsuits brought different causes of action. In each case, it is CRREA's demand for a waiver of sovereign immunity that must be satisfied for the lawsuit to proceed. As noted in the Petition for certiorari, the Fifth and Tenth Circuit have clearly and definitively rejected the reading put forward by the Fourth Circuit below. Pet. Br. at 15-26.

For the circuits in agreement, Opp. at 17-18, Petitioner challenges only the provision invoked by Respondents and the Fourth Circuit: the residual clause of CRREA. The Court need not address whether a waiver of sovereign immunity exists for each specifically identified statute. The question presented is the one reserved by *Sossamon*: whether "a residual clause like the one in [CRREA] could constitute an

unequivocal textual waiver" of state sovereign immunity." 563 U.S. at 292.

B. This Case Represents an Appropriate Vehicle.

1. Respondents note that litigation proceeds in the trial court below. This is unsurprising and presents no reason to defer or deny review. Respondents have sought injunctive relief against state officials under *Ex parte Young*, 209 U.S. 123 (1908). The availability of such relief has never been seen as a reason to defer review of claims for money damages against the State itself. The State's claim to sovereign immunity involves "a fundamental constitutional protection whose resolution generally will have no bearing on the merits of the underlying action." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993) (internal citation omitted). The value of immunity "is for the most part lost as litigation proceeds past motion practice." *Id.* This is true even when prospective relief is available against officers; as here, it "does not permit judgments against state officers declaring that they violated federal law in the past." *Id.*

Moreover, this Court's review, whether granted for review this term or next, will not become moot. Respondent's claims under the Equal Protection Clause are more straightforward than those under § 1557 of the ACA, as this Court acknowledged with a grant of certiorari in a separate case this term. *Compare Washington v. Davis*, 426 U.S. 229, 239 (1976) (Fourteenth amendment does not prohibit all policies with disparate impact) *with CVS Pharmacy, Inc. v.*

Doe, 141 S. Ct. 2882 (granting writ of certiorari to decide whether section 504 of the Rehabilitation Act of 1973 provides a disparate-impact cause of action in § 1557 suit against private insurer); 142 S. Ct. 480 (2021) (dismissing writ at request of parties).

Nor does Respondents' parol evidence provide a basis to deny review. Respondents refer to documents in the record below in a manner that muddles the question presented with a separate issue: Petitioner's prior obligation under a regulation by the U.S. Department of Health and Human Services which explicitly addressed federal grantees. Respondents cite records that were generated in 2016, at a time when a specific federal regulation applied to Respondent as a federal grantee, and prior to the issuance of an injunction staying this regulation as inconsistent with law. *See generally Franciscan All., Inc. v. Burwell*, 227 F.Supp.3d 660 (N.D. Tex. Dec. 31, 2016) (discussing the 2016 HHS regulation and enjoining its enforcement). These documents, generated in the shadow of an enjoined, and later rescinded, federal regulation do not reflect a "clear declaration by the State" under which a court can "be certain that the State in fact consents to suit" under a federal statute. *Sossamon*, 563 U.S. at 284.

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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