No. 03-9877

In The Supreme Court of the United States

JON B. CUTTER, et al.,

Petitioners,

vs.

REGINALD WILKINSON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether Congress violated the Establishment Clause by enacting the Religious Land Use and Institutionalized Persons Act of 2000 which requires state officials to lift unnecessary governmental burdens imposed on the religious exercise of institutionalized persons under their control.

LIST OF PARTIES

Petitioners in this consolidated case are:

Jon Cutter

Darryl Blankenship

David Dattilo

John Gerhardt

Rick Hall

Lee Hampton

Jeffrey Holland

Roy Howington

William LeMasters

John Miller

Fred Schocke

Matthew Stump

Respondents are officials of the Ohio Department of Correction and Rehabilitation:

Reginald Wilkinson [Director]

George Alexander

K. L. Brown

Ron Carnein

June Coleman

Terry Collins

LIST OF PARTIES – Continued

L. C. Coval

Jim Erwin

Rev. Charles Griffin

Cheryl Hart

Allan Lazaroff

William Lowery

Nicholas Menedes

Rita Panzone

Rudy Pringle

Rev. David Schwartz

Rick Stallins

Jack Taylor

Chad Van Sickle

Diane Walker

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (Pet. App. A1-A8) is reported at 349 F.3d 257. The opinion of the District Court (Pet. App. B1-B18) which adopted and included the Report and Recommendation of the Magistrate Judge (Pet. App. B5-B18) is reported at 221 F. Supp. 2d 827.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 2003, and a timely petition for rehearing and rehearing *en banc* was denied on March 3, 2004. Pet. App. A1. The petition for a writ of certiorari was filed on April 19, 2004, and was granted on October 12, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Establishment Clause of the First Amendment to the Constitution provides in relevant part, "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

The Spending Clause of the Constitution provides in relevant part, "The Congress shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ." U.S. CONST. art. I, § 8, cl. 1.

The Commerce Clause of the Constitution provides in relevant part, "The Congress shall have Power To regulate Commerce . . . among the several states . . . ." U.S. CONST. art. I, § 8, cl. 3.

The relevant provisions of the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc *et seq*.), are reproduced in the appendix to this brief at App. 1a-15a.

STATEMENT OF THE CASE

Petitioners, present and former inmates of the Ohio Department of Rehabilitation and Correction (ODRC), are plaintiffs in three consolidated cases brought to challenge burdens that ODRC Respondent prison officials imposed on Petitioner inmates' religious activities. Petitioners are, or have been, incarcerated at ODRC[1] and are adherents of unrelated, nonmainstream religions. They sued Respondents, individually and in their official capacities, for injunctive and other relief under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803, 42 U.S.C. 2000cc *et seq*. Section 3 of the Act provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution" unless the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a)(1), (2).[2] Petitioner inmates also sued under the First and Fourteenth Amendments pursuant to 42 U.S.C. § 1983. In the proceedings below, the Court of Appeals for the Sixth Circuit

[1] Petitioners Cutter and Gerhardt were released from custody after their suits were filed and are no longer Ohio Department of Correction and Rehabilitation inmates. Each sought injunctive and other relief. Petitioners Hampton, Miller, and Blankenship are still at the ODRC.

[2] RLUIPA was enacted following this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), which invalidated the provisions of the Religious Freedom Restoration Act as applied to the States.

held that RLUIPA is unconstitutional on its face because it violates the Establishment Clause.

A. The Proceedings Below

Petitioners filed separate, *pro se* complaints in 1995, 1997, and 1998 to challenge the withholding of religious publications and ceremonial items ordered from publishers or vendors outside of Ohio, denial of access to religious services, and other burdens placed on their religious activities. *Hampton v. Wilkinson*, No. C2-97-382; *Miller v. Wilkinson*, No. C2-98-275; *Gerhardt v. Lazaroff*, No. C2-95-517. Initially, their complaints alleged violations of the First and Fourteenth Amendments. However, following September 22, 2000, RLUIPA's effective date, Petitioners amended their respective complaints to include RLUIPA claims. J.A. 42, 113, 125. Respondents moved to dismiss on the ground that RLUIPA is unconstitutional.

Petitioners' cases were consolidated before District Judge Edmund A. Sargus for the limited purpose of ruling on RLUIPA's constitutionality. Respondents filed their Consolidated Partial Motions to Dismiss pursuant to FED.R.CIV.P. 12(b)(6) on the ground that RLUIPA is unconstitutional on its face and in every application because it violates the Establishment Clause and exceeds Congress' powers under the Spending and Commerce Clauses. Judge Sargus referred the Respondents' consolidated motion to Magistrate Judge Terence P. Kemp for a Report and Recommendation. The United States intervened to defend RLUIPA's constitutionality pursuant to 28 U.S.C. § 2403(a).

On August 27, 2001, Magistrate Judge Kemp filed a Report and Recommendation finding the Act to be constitutional on its face. Pet. App. B5. He ruled that RLUIPA did not violate the Establishment Clause because, among other things, the government is permitted "to alleviate

significant governmental interference" with religion. Pet. App. B14 (internal citation omitted). Magistrate Judge Kemp also found that Congress had the authority to enact RLUIPA pursuant to the Spending Clause. He did not rule on Respondents' claim that Congress lacked authority to enact RLUIPA under the Commerce Clause.

Respondents filed objections to the Report and Recommendation, but on February 25, 2002, District Judge Sargus filed an opinion and order overruling the objections and adopting the Report and Recommendation. He held that RLUIPA did not violate the Establishment Clause because the government's decision to lift burdens on the free exercise of religion "is not tantamount, by itself, to an unconstitutional endorsement of religion." Pet. App. B4. He also held that RLUIPA is a valid condition on the expenditure of funds under the Spending Clause. He declined to rule on Respondents' Commerce Clause challenge because "any opinion on the Commerce Clause issue would be an advisory opinion." Pet. App. B4. He certified his order for appeal on August 4, 2003. J.A. 363. A joint petition for leave to appeal under 28 U.S.C. § 1292(b) was granted by the Court of Appeals on September 23, 2003. J.A. 368.

On November 7, 2003, the Sixth Circuit Court of Appeals reversed, holding that RLUIPA violates the Establishment Clause because it "has the effect of impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights." Pet. App. A5. The Sixth Circuit found it unnecessary to decide other issues concerning RLUIPA's facial validity. A petition for rehearing and rehearing *en banc* was denied on March 3, 2004.

Petitioners filed their petition for writ of certiorari on April 19, 2004, and the petition was granted on October 12, 2004.

B. The Facts

Petitioner inmates are members of four distinct religions. ODRC Respondents have stipulated for purposes of the Petitioners' lawsuits that Petitioners are members of *bona fide* religions and that they are sincere in their beliefs. Pet. App. 5; J.A. 185.[3] Petitioners Cutter and Hampton are plaintiffs in *Hampton v. Wilkinson*. Hampton is a member of the Wicca religion. According to the ENCYCLOPEDIA OF AMERICAN RELIGIONS, the Wicca religion "is polytheistic, finding its pantheon in various European pre-Christian nature religions. Many of its adherents believe that the world can be manipulated by magic."[4] Cutter is a member of the Satanist religion. J.A. 47. According to MERRIAM-WEBSTER'S ENCYCLOPEDIA OF WORLD RELIGIONS, the Satanist religion emerged as a protest against Judeo-Christian spiritual hegemony.[5]

Petitioners Hampton and Cutter allege, among other things, that ODRC officials refused to allow them to purchase and possess certain religious books and ceremonial items obtainable only in interstate commerce. J.A. 50-57. These books include: WICCA – THE ANCIENT WAY, published by Illuminet Press, Lilburn, Georgia; THE

[3] Although only the facial validity of RLUIPA is before this Court, ODRC Respondents' memoranda and briefs in the Courts below made factual assertions that Petitioner inmates will contest on remand, in addition to asserting their First and Fourteenth Amendment claims.

[4] J. GORDON MELTON, ENCYCLOPEDIA OF AMERICAN RELIGIONS 167 (6th ed. 1999).

[5] MERRIAM-WEBSTER'S ENCYCLOPEDIA OF WORLD RELIGIONS 971 (1999).

RITUAL BOOK OF MAGIC, published by Samuel Weiser, Inc., New York; and OF WITCHES published by Samuel Weiser, Inc., York Beach, Maine. J.A. 50, 281-83.

Petitioners John Miller and Darryl Blankenship, plaintiffs in *Miller v. Wilkinson*, are adherents of the Asatru religion. They sue individually and on behalf of others similarly situated. Their complaint alleges that they are believers in the ancient Teutonic/Norse religion of Asatru. J.A. 13-14. Asatru is a polytheistic religion that originated in Northern Europe.[6] In the courts below, Respondents claimed that the Asatru religion has connections with a myriad of white supremacist movements engaged in unlawful activities outside of prison. This claim is not relevant to RLUIPA's validity, and will be challenged on remand.

Respondents have refused to allow Asatru inmates to purchase religious books including RUNELORE by Edred Thorson, published by Samuel Weiser, Inc., York Beach, Maine. J.A. 281. Asatru Petitioners also allege that Respondents have refused to permit members of the Asatru religion to purchase or possess religious medallions, altar cloths, and other ceremonial items. J.A. 29-30. All of these items must be obtained from vendors outside of Ohio. J.A. 265.

Petitioner John Gerhardt, plaintiff in *Gerhardt v. Lazaroff*, is a member of the Church of Jesus Christ Christian. J.A. 117. He is an ordained minister of the Christian Identity Church whose beliefs are based on the Bible. He believes that the Bible requires separation of the races. J.A. 117-18. Respondents refused to allow Petitioner

[6] Asatru Folk Assembly, Frequently Asked Questions about Asatru, *at* http://www.runestone.org/flash/faq/index.html (last visited Dec. 11, 2004)).

Gerhardt to receive issues of a religious periodical entitled THE WAY, published in Idaho, and denied him group religious worship with others of the same religion. J.A. 118.

C. ODRC's Federal Funding

The amount of money received by the Ohio Department of Rehabilitation and Correction from the federal government, as of RLUIPA's effective date, represented less than one percent of the ODRC's total budget. ODRC Cir. Br. 18. During 2001, ODRC received $25,545,892 in federal grants,[7] had a total budget of $1,587,724,137,[8] and, according to public records, the total budget of the State of Ohio for the same year was $40,864,100,000.[9] Accordingly, federal funding for corrections that year was approximately 1.61% of the total ODRC budget and .063% of the total state budget. The federal grant to the ODRC from the "Violent Offender and Truth in Sentencing Program" for the twelve-month period starting after September 16, 1999, was $12,143,169. J.A. 246. Respondents received these and other grants during 2000 and 2001, including a $1.7 million Intensive Confinement Construction, J.A. 244, as well as Federal School Breakfast and Lunch Programs grants for meals given to young offenders under 21 years of age. J.A. 248. The parties have stipulated that the ODRC expects to receive money from these programs as long as Congress continues to appropriate funds for them. J.A. 320-323. According to the ODRC budget, funding from its Truth-in-Sentencing grant is estimated to be $24,604,000

[7] J.A. 243.

[8] *Id*.

[9] State of Ohio Executive Budget for FY 2004-05, Actual and Estimated Revenues, *available at* http://www.obm.ohio.gov/information/budget/Bluebook0405/pdf/c_revtbl.pdf (last visited Dec. 11, 2004).

for FY 2004.[10] The combined funding expected to be received by the ODRC from all federal sources is estimated to be $35,363,000 for FY 2004.[11] The total ODRC budget for FY 2004 is $1,631,242,000,[12] and the total state budget for FY 2004 is $47,988,400,000.[13]

SUMMARY OF THE ARGUMENT

I. THE ESTABLISHMENT CLAUSE. This Court's decisions have approved statutory accommodations of religious exercise, lifting burdens the government imposes on religious exercise, even when those burdens do not violate the Establishment Clause or the Free Exercise Clause. Moreover, this Court has invited legislatures to accommodate religious exercise, if they choose, by exempting religious exercise from burdens that are incidental to otherwise valid laws or regulations.

RLUIPA does just that and no more: it lifts substantial government burdens placed on religious exercise of prison inmates. It does not have the purpose or effect of favoring religious exercise over secular activities or providing gratuitous benefits to religion. Because RLUIPA is

[10] State of Ohio Department of Rehabilitation and Correction Budget for FY 2004–05, *available at* http://obm.ohio.gov/information/budget/Bluebook0405/pdf/e_drc.pdf (last visited Dec. 11, 2004). It was stipulated by the parties in the district court that the Respondents were receiving grants under the Truth in Sentencing Grants program at the time their consolidated motion to dismiss was filed. J.A. 320-22. It was also stipulated that Respondents believed the grants would continue to be renewed until the program expired. *Id*.

[11] State of Ohio Department of Rehabilitation and Correction Budget for FY 2004-05, *available at* http://obm.ohio.gov/information/budget/Bluebook0405/pdf/e_drc.pdf (last visited Dec. 11, 2004).

[12] *Id*.

[13] *See supra* note 9.

confined to lifting burdens on religious exercise, it does not involve the government in religious exercise, give benefits to religion, or prefer one religion over another. It merely permits individuals to engage in religious activities that government burdens would otherwise prevent. Therefore, RLUIPA does not have an impermissible purpose or effect that violates the Establishment Clause.

The fact that RLUIPA accommodates religious exercise without simultaneously accommodating all other constitutional rights does not change the analysis. This Court has never held that for the government to accommodate religious exercise, it must simultaneously accommodate all other constitutional rights. It has squarely rejected such a position – which indeed would require invalidation of widely approved and routine accommodations of religious exercise.

RLUIPA does not impose impermissible burdens on third parties. The Act is flexible because it does not require religious exercise to be automatically accommodated. RLUIPA only requires accommodation on a case-by-case basis when a burden on religion is substantial, is not justified by a compelling governmental interest, and is not the least restrictive means to protect that interest. The fact that prison officials must spend time and resources accommodating religious exercise of nonmainstream religions is not the type of burden on third parties that the Establishment Clause recognizes.

A federalist reading of the Establishment Clause giving the states power to define religious accommodations in a way that invalidates RLUIPA would permit the states to selectively accommodate religion in violation of Establishment Clause principles. It would also be completely incompatible with this Court's decisions incorporating and

applying the Free Exercise and Establishment Clauses to the states through the Fourteenth Amendment.

II. THE SPENDING CLAUSE. This Court should not address ODRC Respondents' constitutional challenges to RLUIPA under the Spending or Commerce Clauses. The Court of Appeals decided neither of these questions and the District Court did not decide the Commerce Clause question. As a general rule, this Court generally avoids deciding important questions not decided in the courts below. Moreover, the Court does not have the benefit of a complete factual record addressing Petitioner inmates' claims.

In any event, RLUIPA is valid under the Spending Clause because it imposes a constitutionally permissible condition on ODRC Respondents' receipt of federal funds. First, RLUIPA serves the general welfare by lifting government burdens on religious exercise and enhancing prospects for inmate rehabilitation. Second, the Act clearly notifies recipients of the conditions imposed on their receipt of federal funds. Third, RLUIPA is reasonably related to the purposes of the ODRC's federal funding grants, which include improving the quality of corrections and enhancing inmate prospects for rehabilitation. And, fourth, there is no independent constitutional bar to RLUIPA because the Act does not violate the Establishment Clause.

III. THE COMMERCE CLAUSE. It is also premature for this Court to decide whether RLUIPA violates the Commerce Clause because the Act contains a jurisdictional element. The jurisdictional element requires case-by-case determinations as to whether particular burdens on religious exercise substantially affect interstate commerce. There has been no district court determination as to whether the jurisdictional element has been satisfied.

Moreover, Congress has power under the Commerce Clause to enact RLUIPA to lift burdens on religious exercise that actually or substantially affect interstate commerce. Petitioner inmates have alleged, among other things, that Respondents have interfered with and substantially affected interstate commerce by denying Petitioners access to religious books and ceremonial items only available through interstate commerce. Therefore, RLUIPA is constitutional on its face because it can be constitutionally applied.

ARGUMENT

This Court granted the petition for writ of certiorari to presenting the following question: "Whether Congress violated the Establishment Clause by enacting [RLUIPA]. . . . " Petitioners seek review of the Sixth Circuit's holding that § 3 of the Religious Land Use and Institutionalized Persons Act of 2000 is unconstitutional on its face because it violates the Establishment Clause. The holding was based on a novel view of the Establishment Clause neither briefed nor argued by ODRC Respondents. This brief will first address the reasons the Sixth Circuit gave to support its holding. It will then address Respondents' Establishment Clause arguments in the courts below. Finally, it will address the ODRC Respondents' alternative grounds for affirmance.

I. RLUIPA IS VALID ON ITS FACE BECAUSE IT DOES NOT ESTABLISH RELIGION

A. Legislative Accommodation Of Religion Has Long Been Approved By This Court

Legislative accommodation of religious exercise has long been approved by this Court. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*

v. Amos, 483 U.S. 327, 338 (1987) (government may enact legislation that lifts governmental burdens on religion); *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 705 (1994) (opinion of Souter, J.) ("Religion clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice"); *id*. at 716 (O'Connor, J., concurring) ("The Constitution permits '*non-discriminatory* religious-practice exemptions' . . . ."); *id*. at 723 (Kennedy, J., concurring) (quoting *County of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 657 (1989)) ("Government policies of accommodation . . . are an accepted part of our political and cultural heritage"); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 21 (1989) (permissible accommodation is not limited to what is required by Free Exercise Clause); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 144-45 (1987) (". . . the government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause"); *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 669 (1970) (". . . there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference"); *Locke v. Davey*, 124 S. Ct. 1307, 1315, n.8 (2004) (noting favorably that a state constitution provides greater scope for accommodation than that required by federal Constitution). Both Congress and state legislatures often act on these holdings, including RLUIPA and some 12 states that have adopted legislation similar to RLUIPA.[14]

[14] ARIZ. REV. STAT. ANN. §§ 41-1493 to 41-1493.02; CONN. GEN. STAT. ANN. § 52-571b; FLA. STAT. ANN. §§ 761.01 to 761.05; IDAHO CODE §§ 73-401 to 73-404; 775 ILL. COMP. STAT. ANN. 35/1 to 35/99; MO. ANN. STAT. §§

(Continued on following page)

B. RLUIPA Does No More Than Lift Government Burdens Imposed On Religious Exercise

The Court of Appeals concluded that RLUIPA violates the Establishment Clause because it assumed that an accommodation that singles out religion for distinctive treatment inherently provides a gratuitous special benefit to religion. This assumption is mistaken. RLUIPA provides no gratuitous benefit to religion. It is carefully confined to lifting substantial governmental burdens imposed on private religious activity. This Court specifically approved such accommodations in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338 (1987). And, it affirmatively invited such accommodations in *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990):

> Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

Id. at 890.

1.302 to 1.307; N.M. STAT. ANN. §§ 28-22-1 to 28-22-5; OKLA. STAT. ANN. tit. 51, §§ 251 to 258; 71 PA. CONS. STAT. ANN. §§ 2401 to 2407; R.I. GEN. LAWS §§ 42-80.1-1 to 42-80.1-4; S.C. CODE ANN. §§ 1-32-10 to 1-32-60; TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001 to 110.012; *see also* ALA. CONST. amend. 622, § 5.

1. RLUIPA's Accommodations Of Religious Exercise Lift Government Burdens And Do Not Provide Gratuitous Benefits To Believers

The Sixth Circuit treated RLUIPA as if it granted gratuitous benefits to believers. It does not. By RLUIPA's very language, § 3 only applies when prison officials impose a "substantial burden on the religious exercise" of a prison inmate. And, this Court's decisions in *Amos* and *Smith* explicitly approve legislation like RLUIPA, which accommodates religious exercise by lifting substantial burdens on religious practice.

In *Amos*, a building engineer employed at a gymnasium operated by a church was discharged because he was not a member in good standing. He sued on grounds that his discharge violated Title VII's prohibition against religious discrimination in employment. 42 U.S.C. § 2000e-1. He contended that the blanket statutory exemption from Title VII for religious institutions engaged in religious discrimination violated the Establishment Clause because it singled out religion for special treatment and went well beyond a constitutionally mandated free exercise accommodation.

The *Amos* Court upheld the exemption, reasoning it was a legitimate accommodation of religion because it lifted the burden imposed on religious exercise by Title VII's anti-discrimination provisions. By lifting the burden, the exemption did not sponsor or favor religion because "[t]here is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'" *Amos*, 483 U.S. at 334 (quoting *Walz*, 397 U.S. at 669). *Amos* also explicitly rejected a claim, similar to that advanced below by Respondents, that the exemption

established religion because it facilitated religious practice by making observance less onerous. "A law is not unconstitutional simply because it *allows* churches to advance religion . . . ." *Id*. at 337.

Although *Amos* warned against falling into the trap of treating an accommodation as *per se* having the purpose or effect of advancing religion, the Sixth Circuit did just that when it found RLUIPA to have an arguably impermissible purpose and a plainly impermissible effect. Pet. App. A5-7. *Amos* explicitly rejected the argument that any statute lifting burdens on religion would automatically have an unconstitutional purpose, even assuming the statute goes beyond constitutional requirements. *Amos* explained that, for an accommodation to be constitutional, it must first "serve a 'secular legislative purpose.' [*Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).] This does not mean that the law's purpose must be unrelated to religion – that would amount to a requirement 'that the government show a callous indifference to religious groups,' *Zorach v. Clauson*, 343 U.S. 306, 314 (1952), and the Establishment Clause has never been so interpreted." *Amos*, 483 U.S. at 335. *Amos* further explained that "[u]nder the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id*. at 335.

Congress enacted RLUIPA to lift official burdens on the religious activities of inmates and "alleviate significant governmental interference." *Amos*, 483 U.S. at 335 (construing *Lemon*, 403 U.S. 612-13); *see also* RLUIPA § 5(a), (b), (e). It made no pronouncement that religion is more important than all other rights. Rather, it was attempting to address the distinctive problems of religious exercise in prisons and similar institutions. Congress was well aware that prison officials often impose "frivolous or arbitrary

rules" on the religious exercise of prison inmates and other institutionalized persons. 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy).

Amos also rejected the claim that a statute, like RLUIPA, which lifts burdens on religion automatically has the effect of establishing religion. Specifically with regard to effect, *Amos* said, "The second requirement under *Lemon* is that the law in question have 'a principal or primary effect . . . that neither advances nor inhibits religion.'" *Amos*, 483 U.S. at 336 (quoting *Lemon*, 403 U.S. at 612). The legislative record here indicates an effect indistinguishable from those found permissible under *Amos*. RLUIPA lifts burdens that the government routinely imposes on inmates' religious exercise. This was specifically acknowledged by RLUIPA's sponsors, who supported passage of RLUIPA because it had the effect of redressing excessive government interference with religion. They observed that, as a result of official "indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy). Correcting such official actions "'neither advances nor inhibits religion.'" *Amos*, 483 U.S. at 336 (quoting *Lemon*, 403 U.S. at 612).

Amos was not the first decision by this Court to approve religious accommodations lifting government burdens on religion. In *Walz*, 397 U.S. at 673, this Court upheld a property tax exemption granted to church property because ". . . it is simply sparing the exercise of religion from the burden of property taxation. . . . " *Id*. The Court reached the same conclusion in *Zorach*, 343 U.S. at 311, which upheld a program authorizing the release of public school students from class to attend religious

instruction because the released-time program did no more than remove a state-generated obstacle to religious instruction.

2. Treatment Of RLUIPA's Accommodations As Gratuitous Benefits To Religion Would Invalidate Widely-Accepted Accommodations Of Religion

If RLUIPA were to be invalidated because it is a gratuitous benefit to religion, the impact on other widely-accepted accommodations of religion would be immediate and sweeping. Virtually all legislative and administrative religious accommodations singling out religion would be rendered unconstitutional. It would no longer be constitutional for Congress to provide a statutory exemption from military service for religious conscientious objectors without providing an exemption for secular, political objectors. *See* Universal Military Training and Service Act, 50 U.S.C. app. § 456(j); *United States v. Seeger*, 380 U.S. 163 (1965); *Welch v. United States*, 398 U.S. 333 (1970). Likewise, it would no longer be constitutional for Congress to exempt ordained ministers and divinity students from compulsory military service. 50 U.S.C. app. § 456(g). Further, Congress would be prohibited from authorizing the Department of Defense to allow the wearing of religious apparel by military personnel while in uniform because the accommodation is not required by the Free Exercise Clause and no such accommodation is granted to nonreligious apparel. 10 U.S.C. § 774; *but see Goldman v. Weinberger*, 475 U.S. 503 (1986) (holding that the Free Exercise Clause does not bar disciplining of uniformed, Jewish Air Force officer for wearing a yarmulke). It would also be impermissible for the Department of Defense to pay military chaplains, while only accommodating members of the press by permitting them to be present in war

zones like Iraq without paying their salaries and living expenses.

The impact on accommodations provided at the state level would be equally significant. State prisons would be required to remove religious chaplains from their payrolls because there are no equivalent nonreligious, full-time personnel employed to address the constitutionally permissible secular ideological and political activities of inmates. Other common but less widely known statutory and regulatory accommodations would also be invalidated. For example, it would be impermissible for the State of Ohio to exempt ordained ministers from the statutory requirement that no one shall render services or engage in the practice of psychology without a license. OHIO REV. CODE ANN. § 4732.22(F). Connecticut could not exempt religious rituals from the state approved methods of animal slaughter. CONN. GEN. STAT. § 22-272a(e). And, Delaware could not exempt persons who treat the ill by means of prayer alone from rules governing provision of medical treatment. DEL. CODE ANN. tit. 16, § 530.

C. The Sixth Circuit's Efforts to Distinguish *Amos* Were Unsuccessful

1. The Sixth Circuit's View That *Amos* Only Allows Legislative Accommodations Where There Are "Arguable Violations" Of The Establishment Clause Is Mistaken

The Sixth Circuit said that *Amos* was distinguishable because "the exemption in *Amos* was arguably necessary to avoid a violation of the Establishment Clause." Pet. App. A5. It reasoned that RLUIPA is different because it ". . . was not even arguably necessary to avoid a violation of the Establishment Clause." *Id*. It read *Amos* as if the

religious exemption to Title VII was only valid because, without the exemption, Title VII would unconstitutionally entangle the government in the affairs of the church. *Id*.

Amos, however, does not stand for that proposition. *Amos* explicitly assumed, for the Establishment Clause analysis, ". . . that the pre-1972 exemption was adequate in the sense that the Free Exercise Clause required no more." *Amos*, 483 U.S. at 336. Thus, it approved an accommodation motivated by a legislative desire to unburden religious exercise, whether or not it was constitutionally protected. It did not rule that the only permissible legislative accommodations were those to prevent an unconstitutional entanglement.

> "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." There is ample room under the Establishment Clause for "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." (citations omitted).

Id. at 334. This Court has not subsequently read *Amos* in the limited fashion suggested by the Court of Appeals. *Mitchell v. Helms*, 530 U.S. 793, 809 (2000); *Grumet*, 512 U.S. at 705-06; *County of Allegheny*, 492 U.S. at 601, n.51.

2. Statutes That Alleviate Restrictions On Prisoners' Religious Activities Permitted By The Free Exercise Clause Do Not Automatically Violate The Establishment Clause

The Sixth Circuit also sought to distinguish *Amos* on the ground the only government burdens on religious exercise of prisoners that could be accommodated were

those that violated their free exercise rights. Pet. App. A5. In its view, RLUIPA could not be constitutional because it lifted burdens on religion that corrections officials could lawfully impose. *Id*.

The Court of Appeals based its reasoning on the relaxed standard of constitutional review applied to prisoner cases by *Turner v. Safley*, 482 U.S. 78, 87 (1987) and *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349-50 (1987). Under *Turner*, prison regulations restricting inmate-to-inmate correspondence and the right of inmates to marry were constitutionally permissible because they were reasonably related to legitimate penological interests. *Turner*, 482 U.S. at 87. *O'Lone* applied this standard of justification to official burdens on the free exercise of religious inmates. *O'Lone*, 482 U.S. at 349-50. In the Court of Appeals' view, RLUIPA establishes religion because the religious burdens it lifts are reasonably related to legitimate penological interests and therefore are constitutionally permissible under the *Turner* and *O'Lone* standard. Pet. App. A5.[15]

This reasoning is categorically mistaken. It confuses burdens on religion imposed by prison restrictions that are constitutionally permissible under *Turner* and *O'Lone* with the fact that the state is actively burdening religious practice whenever it enforces those restrictions. It is the burden on religion, not the constitutionality of that burden under the *Turner* and *O'Lone* standard, that is relevant in assessing the constitutionality of an accommodation. The burden exists because prison is a total institution where

[15] Petitioners First Amendment claims in their cases are pending and no court has ruled that Respondents have discharged their duties under *Turner* and *O'Lone*.

all behavior of all inmates is categorically restricted, even if the restriction is constitutionally tolerable under *O'Lone*.

A religious inmate denied a kosher diet suffers a substantial and palpable burden on his religious exercise whether or not the denial is permissible under *Turner* and *O'Lone*. The propriety of such burden-lifting is clear where, as here, the burden is lifted by RLUIPA for the secular purpose of preventing arbitrary official conduct burdening religion. "The nonsectarian aims of government and the interests of religious groups often overlap, and this Court has never required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs that they would otherwise incur." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 10 (1989) (plurality opinion of Brennan, J.).

3. No Rule of Law Requires Equal Treatment of All Constitutional Rights

The Sixth Circuit also distinguished *Amos* on a novel ground not argued by Respondents. It said that *Amos* did not apply to RLUIPA because RLUIPA "giv[es] greater protection to religious rights than to other constitutionally protected rights." Pet. App. A5. Understandably, the Sixth Circuit cited no cases from this Court in support of its proposition, because there are none to cite.

The guarantees of liberty embodied in the Constitution are minimums below which no state may go. This is true outside of prison as well as inside of it, where all rights exist in attenuated form. These constitutional minimums, however, do not prevent the government from offering greater protections for one right without simultaneously offering enhanced protection for other constitutional rights. For example, legislatures may grant the

press greater protection against *ex parte* search warrants than they provide to private citizens. *Compare Zurcher v. Stanford Daily*, 436 U.S. 547 (1998), *with* Privacy Protection Act, 42 U.S.C. § 2000aa. Similarly, this Court has held that the government can subsidize constitutionally protected preventive family planning services without obligating itself to subsidize constitutionally protected abortion-related services. *Rust v. Sullivan*, 500 U.S. 173, 192-93 (1991). Petitioners know of no rule of law that would prohibit a legislature from enhancing the rights of inmates to receive visitors, or to have mail privileges, medical care, or any other right without simultaneously protecting all other rights. There is no guarantee of "equal protection of all constitutional rights," requiring that they be enhanced in tandem or not at all.

To support this theory, the Sixth Circuit turned to two district court opinions for support, one that had been previously overruled by the Seventh Circuit and another that was subsequently reversed by the Fourth Circuit. Pet. App. A4 (citing *Al Ghashiyah (Khan) v. Dep't. of Corr. of the State of Wisconsin*, 250 F. Supp. 2d 1016 (E.D. Wis. 2003), *overruled by Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003); *Madison v. Riter*, 240 F. Supp. 2d 566 (W.D. Va. 2003), *rev'd*, 355 F.3d 310 (4th Cir. 2003) (*cert. pending sub nom. Bass v. Madison*, No. 03-1404 (filed Apr. 6, 2004)). Indeed, the Sixth Circuit all but ignored the Seventh Circuit's ruling in *Charles*, which previously had rejected the Sixth Circuit's approach. Pet. App. A4.

Subsequently, in *Madison v. Riter*, the Fourth Circuit explicitly rejected the Sixth Circuit's "equal protection of all constitutional rights" theory:

> We cannot accept the theory advanced by the district court that Congress impermissibly advances religion when it acts to lift burdens on religious exercise yet fails to consider whether other rights

> are similarly threatened. There is no requirement that legislative protections for fundamental rights march in lockstep. (citations omitted).

Madison, 355 F.3d at 318. The Fourth Circuit's opinion rested on *Amos*' rejection of the argument that religious accommodations not simultaneously accommodating secular activities thereby violate the Establishment Clause. "'[W]here as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to other secular entities.'" *Id*. (quoting *Amos*, 483 U.S. at 338); *accord Benning v. State of Georgia*, Nos. 04-10979 & 04-11044, 2004 U.S. App. LEXIS 24842, at *24 (11th Cir. Dec. 2, 2004) (quoting *Madison*, 355 F.3d at 319) ("In fact, it is 'reasonable for Congress to seek to reduce the burdens on religious exercise for prisoners without simultaneously enhancing, say, an inmate's First Amendment rights to access pornography.'").

The permissibility of accommodating religious activities without accommodating all other rights is buttressed by this Court's approval in *Smith* of the widespread existence of state anti-drug statutes only exempting religious use of peyote. *Smith*, 494 U.S. at 890 (citing ARIZ. REV. STAT. ANN. §§ 13-3402(B)(1)-(3); COLO. REV. STAT. § 12-22-317(3); N.M. STAT. ANN. § 30-32-6(D)). None of the statutes cited exempt secular political or associational uses protected by the First Amendment. Hence, a Native American can use peyote as part of a religious rite, but a political protestor advocating decriminalization of peyote cannot use peyote as part of his political protest. *Cf. Africa v. Pennsylvania*, 662 F.2d 1025, 1036-37 (3d Cir. 1981).

4. RLUIPA's General Accommodation Of Prisoners' Religious Exercise Does Not Violate The Establishment Clause

That RLUIPA accommodates prisoners' religious exercise generally, rather than by accommodating specific religious activities on a case-by-case basis, does not render it invalid. Indeed, it underscores RLUIPA's compatibility with the Establishment Clause. What makes accommodation permissible, even praiseworthy, is that the government is accommodating deeply held religious beliefs, rather than making it easier for favored religious groups to practice their religion. Petitioners recognize that accommodations may justify treating those who practice their religious beliefs differently from those who do not, but they also recognize that accommodations cannot be based on sect. In *Grumet*, 512 U.S. at 705-07, Justice Souter's plurality opinion explained that sect-based accommodations are never constitutional. *Id*. at 706. Justice O'Connor's concurring opinion agreed that the Establishment Clause generally requires equal treatment of believers and nonbelievers, but it went on to explain that accommodation of religion alone does not violate that principle, because the Constitution permits "'*nondiscriminatory* religious-practice exemption[s]' not sectarian ones." *Id*. at 714-16 (quoting *Smith*, 494 U.S. at 890).

RLUIPA's breadth avoids the problem of sectarian preference. Its protections are available to inmates of any faith whose practices are subjected to "governmental burdens." RLUIPA has, in fact, been invoked by inmates who are part of America's remarkable religious diversity. *See, e.g.*, *Charles*, 348 F.3d at 604 (suit by Muslim inmate asking to use prayer oil); *Madison*, 355 F.3d at 313 (suit by Hebrew Israelite to get kosher meal); *Marria v. Broaddus*, 2003 U.S. Dist. LEXIS 13329, at *66, *73 (S.D.N.Y. July 31, 2003) (flat ban on inmate access to Five Percent

religion's literature substantially burdens religious exercise). While some academic writers condemn the general command of accommodation, apparently preferring faith-specific accommodations forbidden in *Grumet*, *see, e.g.*, Marci A. Hamilton, *The Religious Freedoms Restoration Act Is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1 (1998), Congress wisely followed this Court's mandate when it enacted RLUIPA's sect-neutral accommodation.

The limited record here suggests the dangers of faith-specific accommodations. The Respondents' briefs in the courts below suggest their strong preference for accommodating mainstream religions. For example, Respondents complained that accommodating religious exercise of inmates like Petitioners was a "patently offensive use of public resources." ODRC Cir. Br. 60. One corrections official complained about the need to verify the authenticity of requests for religious accommodation: "Time spent on such tasks is time that cannot otherwise be spent upon the delivery of religious services to inmates adhering to unquestionably established religions." J.A. 202, ¶12. And, ODRC Chaplain Charles Griffin stated, "I truly regret that the House of Yahweh is not a mainstream religion because that would help us come to a more agreeable resolution of some of your requests," even though a policy of accommodation based on state favoritism of majority faiths is unsustainable. J.A. 279; *Cruz v. Beto*, 405 U.S. 319, 322 (1972).

RLUIPA's even-handed protection of all religions will help neutralize any official temptation to favor popular mainstream religions over less popular religions. It is precisely the breadth of RLUIPA that makes it constitutional.

5. The Sixth Circuit's Hypothetical Comparing RLUIPA's Treatment of Religious And Political Literature Does Not Support Its Holding

In support of its holding that RLUIPA impermissibly favors religion, the Sixth Circuit posited a hypothetical case which, it said, demonstrates that RLUIPA's accommodation of religion impermissibly prefers religious speech over political speech. Pet. App. A7-8. The hypothetical compared the authority of prison officials under RLUIPA to confiscate an inmate's white supremacist religious literature with the authority of prison officials to confiscate an inmate's white supremacist political literature. The Sixth Circuit said that because RLUIPA provides more *procedural* protection to white supremacist religious literature than the First Amendment provides to white supremacist political literature, it violates the Establishment Clause. *Id*.

The Court of Appeals' reasoning is seriously flawed. The Establishment Clause is not violated by a statute that lifts burdens on religious publications without simultaneously lifting burdens on secular publications. A statute that lifts government burdens on religious exercise does not have to "come packaged with benefits" for secular activities. *Amos*, 483 U.S. at 338. Thus the fact that RLUIPA might lift a government burden on access to religious literature without lifting burdens on political activities does not render it unconstitutional. It merely reflects a legislative judgment that government burdens on religious activities are inconsistent with the general welfare.

Moreover, the Circuit's hypothetical is based on the mistaken assumption that, because of RLUIPA, inflammatory white supremacist religious literature will be admitted

to a prison, where inflammatory white supremacist political literature will not. RLUIPA itself provides prison officials with ample authority to exclude inflammatory white supremacist religious publications when they have a compelling interest in doing so. As a consequence, both inflammatory white supremacist religious and political literature are likely to be excluded, even if the burdens of justification are different. There is no reported case under any constitutional or statutory standard, including the Religious Freedom Restoration Act of 1993, RLUIPA, state statutes akin to RLUIPA, or the First Amendment, holding that either religious or secular inmates have a right of access to inflammatory white supremacist literature of any kind.[16] Any actual difference in treatment of inflammatory religious and political literature is more imagined than real.[17]

D. ODRC Respondents' Alternative Establishment Clause Arguments Are Not Persuasive

In their briefs below, ODRC Respondents took a different tack than that taken by the Court of Appeals.

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[16] Petitioners can find no cases admitting inflammatory religious literature into prisons. *See, e.g.*, *Lawson v. Singletary*, 85 F.3d 502 (11th Cir. 1996) (there is a compelling state interest in prison exclusion of religious white supremacist literature under RFRA except where literature could be appropriately redacted); *Reimann v. Murphy*, 897 F. Supp. 398 (E.D. Wis. 1995) (there is a compelling state interest under RFRA justifying exclusion of religious white supremacist literature from prison); *George v. Sullivan*, 896 F. Supp. 895 (W.D. Wis. 1995) (same); *Haff v. Cooke*, 932 F. Supp. 1104 (E.D. Wis. 1996) (same); *Metheny v. Anderson*, 953 F. Supp. 854 (N.D. Ohio 1996) (exclusion of religious white supremacist literature from prison permissible under RFRA because there was no substantial burden on religious exercise).

[17] Petitioners do not concede they seek inflammatory literature, and that question is not before this Court.

They argued that RLUIPA is unconstitutional because it imposes burdens on third parties – corrections staff and inmates who do not assert RLUIPA's protections. They also informed this Court that they intend to argue that RLUIPA is unconstitutional because it violates their proposed federalist reading of the Establishment Clause. ODRC Cert. Reply 2. This latter argument was not made below.

1. RLUIPA Does Not Impermissibly Impose Burdens On Third Parties

ODRC Respondents argued below that RLUIPA impermissibly burdens third parties by imposing costs on ODRC staff and inmates that should be held unconstitutional under *Estate of Thornton v. Caldor, Inc.*, 422 U.S. 703 (1985) and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). ODRC Cir. Br. 29-31.[18] They argued that RLUIPA purportedly imposes unconstitutional burdens on prison religious staff by compelling them to respond to the religious needs of Petitioner inmates, diverting some of the prison staff's attention and resources from servicing the religious needs of the other inmates. ODRC Respondents also claimed that RLUIPA creates an unconstitutional burden on third parties because it burdens prison security and therefore endangers others. *Id*.

While Petitioners have not yet had the benefit of an adversary proceeding to test the factual bases for these claims, Respondents' argument boils down to a contention that RLUIPA impermissibly imposes burdens on third parties because it marginally increases the costs of prison

[18] ODRC Respondents did submit affidavits describing these burdens; however, neither the affidavits nor the claims they make have received judicial consideration in adversary proceedings.

administration. This is not really an argument that RLUIPA is unconstitutional on its face. It is a claim that the Act does not apply because compliance is so burdensome that there is a compelling governmental interest justifying noncompliance. Since this appeal is from a decision invalidating RLUIPA on its face, the application of RLUIPA to a particular request for religious accommodation in light of specific burdens on Respondents is not before the Court.

The "burdens" Respondents point to are not burdens relevant to the Establishment Clause. Respondents are public employees who have no personal, judicially enforceable interest in performing their tasks in any particular way. They have no enforceable right to execute their duties under pre-RLUIPA standards, any more than a Christian chaplain at the ODRC could object to prison policies requiring the provision of services to Muslims or Buddhists, as well as Christians, because they divert him or her from "attending to the religious needs of a vast majority of inmates . . . ." J.A. 187.

Indeed, the asserted burdens imposed by RLUIPA are indistinguishable from ordinary burdens that are imposed by any law constraining or otherwise affecting government activity. Government officials faced with any new law are always "burdened" by the duty to adjust existing procedures and comply with its new requirements, which may in turn require additional expenditures or reallocations of funds. Petitioner inmates can find no case suggesting that the increased cost of government activities resulting from such compliance with a statutory accommodation of religion is the kind of burden the Establishment Clause forbids.

Burdens on private third parties do not invalidate an accommodation unless they run afoul of the bedrock

principle of the religion clauses – that religious observance must be voluntary. If, by the government accommodating X, a private party, it necessarily requires Y, another private party, to unwillingly participate in a religious exercise or to pay for it, then the government is unconstitutionally compelling Y to engage in a religious exercise. Here, however, no ODRC official is required by RLUIPA to actively participate in any of Petitioner inmates' religious exercises. Moreover, no individual official is required to take money from his or her own pocket and pay for them. At most, RLUIPA obligates Respondents to accommodate religious exercise in the same way that prison (and military) chaplains of all faiths routinely accommodate religious practices of those under their care.

2. *Estate of Thornton v. Caldor* Does Not Support ODRC Respondents' Establishment Clause Claim

Respondents' heavy reliance on *Caldor* is wholly misplaced. *Caldor* invalidated a Connecticut statute that created an *absolute* right for Sabbath observers to not work on their Sabbath no matter how much their absence burdened their employer and co-workers. The Connecticut statute required everything to give way to Sabbath observance. "In effect, Connecticut had given the force of law to the employee's designation of a Sabbath day and required accommodation by the employer regardless of the burden which that constituted for the employer or other employees." *Amos*, 483 U.S. at 337, n.15.

RLUIPA, by contrast, only lifts substantial burdens on religious exercise if there is no countervailing, narrowly tailored governmental interest. It does not command accommodation without regard to impact on third parties. If a religious practice endangers third parties at a prison by, for example, creating a bona fide health or security

risk, RLUIPA provides that the practice need not be accommodated. There is no statutory requirement of compliance in the face of "undue hardship." *Caldor*, 472 U.S. at 711-12 (O'Connor, J., concurring). Thus, the government may substantially burden inmate religious exercise when it has a compelling governmental interest and selects the least restrictive means to address that interest. And, RLUIPA § 5(e) explicitly reserves to prison officials the choice of means to avoid an undue burden, even if it is not the means preferred by the inmate. 42 U.S.C. § 2000cc-3(e).

RLUIPA's sponsors stated on the Senate floor that courts are to give ". . . due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy). Experience with the Religious Freedom Restoration Act, which had language similar to RLUIPA, indicates that, indeed, there has been extensive judicial deference to the judgment and expertise of prison officials. According to the Fourth Circuit, "[t]he experience of federal correctional officials in complying with RLUIPA's predecessor statute, RFRA, suggests that the similar provisions of RLUIPA would not impose an unreasonable burden on state or local prisons. In the cases litigated under RFRA, federal correctional officials have continued to prevail the overwhelming majority of the time." *Madison*, 355 F.3d at 321 (citation omitted); *cf.* Derek L. Gaubatz, *Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y (forthcoming 2005).

3. *Texas Monthly v. Bullock* Does Not Support ODRC Respondents' Establishment Clause Claim

The ODRC Respondents' reliance on *Texas Monthly* in the courts below is equally flawed. In the context of this case, *Texas Monthly* stands only for the proposition that a subsidy in the form of a sales or use tax exemption for religious periodicals violates the Establishment Clause when it is not equally available for secular periodicals.[19] "[W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly *or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion* . . . it 'provide[s] unjustifiable awards of assistance to religious organizations' and cannot but 'conve[y] a message of endorsement' to slighted members of the community." *Texas Monthly*, 489 U.S. at 15 (quoting *Amos*, 483 U.S. at 348) (emphasis added). It should be noted that this quote is from the *Texas Monthly* plurality opinion and is the narrowest possible reading of *Amos*. However, a majority of the Justices in *Texas Monthly* thought the opinion too narrowly cabined the permissible scope of accommodation. *See id*. at 25 (White, J., concurring); *id*. at 26-29 (Blackmun, O'Connor, JJ., concurring); *id*. at 29-45 (Scalia, Rehnquist, Kennedy, JJ., dissenting).

ODRC Respondents relied on the *Texas Monthly* plurality opinion in the courts below because it holds that

[19] Nondiscriminatory taxes imposed upon First Amendment activities on the same basis as they are imposed upon activities not protected by the First Amendment do not violate the Constitution. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591-93 (1983).

a tax exemption given only to religious periodicals unconstitutionally shifts tax burdens to nonreligious periodicals. However, in contrast to a tax exemption, RLUIPA provides no subsidy. Rather, it removes governmental barriers to religious practice.

4. No Federalism Policies Inherent In The Establishment Clause Invalidate RLUIPA

According to their reply to the petition for writ of certiorari, ODRC Respondents will contend that RLUIPA fails under a federalist reading of the Establishment Clause. ODRC Cert. Reply 10-11. This argument was made by Virginia in *Madison*, 355 F.3d at 322, and in its pending petition for writ of certiorari in *Bass v. Madison*, No. 03-1404 (filed Apr. 6, 2004). However, ODRC Respondents did not advance this contention in the courts below. It appears they will claim that RLUIPA violates the Establishment Clause because RLUIPA's accommodation violates the states' supposed authority to determine which religions should enjoy the benefits of accommodation and which should not. *Id*.

The federalist reading is based on the understanding that the Establishment Clause was originally intended to prevent Congress from establishing a national religion, while simultaneously protecting religions established by the states against Congressional action. *See, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2330-31 (2004) (Thomas, J., concurring); *Zelman v. Simmons-Harris*, 536 U.S. 639, 679-80 (2002) (Thomas, J. concurring); *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting). Accordingly, it is said to follow that the states should have a wider, broader "margin of appreciation" to aid religion – even on a selective basis – than Supreme Court cases currently permit. Richard C. Schragger, *The Role of the*

Local in the Doctrine and Discourse of Religious Liberty, 117 HARV. L. REV. 1810, 1813-14 (2004). Such a reading of the Establishment Clause would require the overruling of all this Court's Establishment Clause decisions addressing state practices affecting religion. *Grumet*, 512 U.S. at 705-07; *Larsen v. Valente*, 456 U.S. 228, 246 (1982). It would also conflict with Congress' long-standing practice of implementing the Establishment Clause by conditioning federal grants on the agreement of recipients not to use them for religious purposes.[20]

No federalist reading of the Establishment Clause has ever been adopted by a majority of this Court. Moreover, a reading of the Establishment Clause that invalidates RLUIPA is wholly incompatible with the well-settled principle that the Establishment Clause of the First Amendment as incorporated under the Fourteenth Amendment applies to the states. *Everson v. Bd. of Educ. of the Township of Ewing*, 330 U.S. 1, 8 (1947) (citing *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)). It forgets ". . . how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States." *Wallace v. Jaffree*, 472 U.S. 38, 48-49 (1985).

Even if it were to be held, as suggested by AKHIL REED AMAR, THE BILL OF RIGHTS' CREATION AND RECONSTRUCTION 254 (1998), that the Establishment Clause was originally a federalist provision, the Clause, as incorporated, must certainly include the basic principle of no

[20] Such conditions are common in aid to parochial schools. *See* 20 U.S.C. § 7301 to 7373; *Mitchell v. Helms*, 530 U.S. 793, 801-02 (2000); *Agostini v. Felton*, 521 U.S. 203, 209-10 (1997).

denominational preference. This is a principle that RLUIPA accomplishes far better than the ad hoc approach to accommodation that Respondents apparently will urge. Indeed, the Fourth Circuit found the federalism challenge to be such an unpersuasive Establishment Clause claim in *Madison* that it remanded the challenge to the district court for treatment as a Spending Clause argument. *Madison*, 355 F.3d at 322.

II. THIS COURT SHOULD NOT DECIDE ISSUES NOT DECIDED BY THE COURT BELOW

Because the Sixth Circuit found that RLUIPA, on its face, violated the Establishment Clause, it did not discuss or decide ODRC Respondents' Spending Clause or Commerce Clause claims. The District Court and the Magistrate Judge held that the Act did not violate the Establishment Clause and was well within Congress' spending power. Neither court below addressed the Commerce Clause challenge, and the District Court stated that a ruling on the issue would be an improper advisory opinion. Pet. App. B4. The record contains *no* factual or legal findings relevant to the Commerce Clause and only skeletal legislative facts with respect to RLUIPA's facial validity under the Spending Clause. *Id*.

Although it has power to decide questions neither addressed nor resolved by the Courts of Appeals, *United States v. Locke*, 471 U.S. 84, 92-93 (1985), this Court generally refrains from exercising that power, even when the questions have been properly raised and preserved, and even when a judgment would otherwise be reversed. *See, e.g.*, *Hoffmann-LaRoche, Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2372 (2004); *Glover v. United States*, 531 U.S. 198, 205 (2001). Thus, virtually without exception, this Court declines to decide ". . . issue[s] on which the trial

and appellate courts did not focus, . . . [and when] the trial court offered little in the way of concrete detail for its conclusions . . . ." *United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998).

The sole question presented by the petition for writ of certiorari was "[w]hether Congress violated the Establishment Clause by enacting [RLUIPA] . . . ." To consider Respondents' Spending and Commerce Clause arguments would undermine the settled process by which "[t]he Court decides which questions to consider through well-established procedures . . . ." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992). Should this Court reverse the judgment below, Respondents remain free to raise whatever other arguments they have on remand.

In all events, Respondents' arguments fail on their merits. As explained below, RLUIPA is well within Congress' delegated powers under both the Spending and Commerce Clauses.

III. RLUIPA IS A LEGITIMATE EXERCISE OF CONGRESS' SPENDING POWER

A. Respondents' Challenge To Congress' Spending Authority To Enact RLUIPA Misapplies Applicable Constitutional Standards

The ODRC Respondents argued below that the condition RLUIPA imposes on receipt of federal corrections funds violates Congress' broad constitutional authority under the Spending Clause, U.S. CONST. art. I, § 8, cl. 1, because the Act is not congruent and proportional to the purposes for which the funds are granted. ODRC Cir. Br. 35-45. This argument fails for two reasons. First, it imports the restrictive standards articulated by this Court in *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), which is not a Spending Clause case. Second, it is premised on a misreading of *South Dakota v. Dole*, 483 U.S. 203, 207-08

(1987), which defines the limits of Congress' power to impose conditions on states' receipt of federal funds. As Respondents concede, there are conditions under which RLUIPA can be constitutionally imposed. ODRC Cir. Br. 38-39. As a consequence, Respondents cannot demonstrate that RLUIPA is facially invalid because there are circumstances in which it can be constitutionally applied. *Sabri v. United States*, 124 S. Ct. 1941, 1948 (2004).

Congress' broad spending authority is substantive and allows for programs of cooperative federalism in which state participation is voluntary; however, Congress' legislative power under the Fourteenth Amendment is remedial and, therefore, more limited. Nothing in this Court's cases, or in the history of Congressional practice, suggests that *Boerne*'s "congruence and proportionality" requirement, applicable to Fourteenth Amendment remedial legislation, is appropriately applied to Congress' authority to spend for the general welfare. Moreover, *Sabri*, 124 S. Ct. at 1946, which recently upheld a Spending Clause condition, applied a necessary and proper analysis rather than *Boerne*'s "congruence and proportionality" requirement. *Accord Benning*, 2004 U.S. App. LEXIS 24842 at *9-*14; *Mayweathers v. Newland*, 314 F.3d 1062, 1066-68 (9th Cir. 2002); *Charles*, 348 F.3d at 606-10.

Should Respondents' "congruent and proportional" approach be applied to RLUIPA, other long-established statutory conditions would be invalidated. For example, it would require invalidation of the Equal Access Act, requiring schools that receive federal funds to grant religious student clubs the same access to school facilities as secular student clubs. *Bd. of Educ. of the Westside Cmty Schs. v. Mergens*, 496 U.S. 226, 235-36 (1990). It would also invalidate the condition in the Education of the Handicapped Act, mandating federally subsidized schools to provide individualized medical service to handicapped students

attending those schools. *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 886-87 (1984); *Cedar Rapids Cmty. Sch. Dist. v. Garret F. by Charlene F.*, 526 U.S. 66, 68-69 (1999).

B. RLUIPA Is Well Within The Limits of *South Dakota v. Dole*

RLUIPA is well within the broad spending authority accorded to Congress by *South Dakota v. Dole*, *supra*, 483 U.S. at 206-7. In *Dole*, this Court explicitly held that Congress has the authority to choose how it will spend federal funds for the general welfare, U.S. CONST. art. I, § 8, cl. 1, and "may attach conditions on the receipt of federal funds, and . . . [employ] the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" *Dole*, 483 U.S. at 206-07 (citations omitted). In addition, Congress may use its spending authority to impose conditions which implement objectives that cannot be accomplished through direct legislation. *Dole*, 483 U.S. at 207.

Dole's respectful treatment of Congress' spending power was reaffirmed in *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 214 (2003), where this Court upheld the Children's Internet Protection Act, which conditions public libraries' receipt of federal funds subsidizing Internet access on the use of Internet filters. Citing his opinion in *Dole*, Chief Justice Rehnquist wrote, "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives." *Am. Library Ass'n, Inc.*, 539 U.S. at 203 (citing *Dole*, 483 U.S. at 206). While he acknowledged that Congress' discretion to impose conditions on use of its funds is not unlimited, he reiterated the Court's reluctance to impose limits on Congress' policy choices. *Id*. at 203, 211.

When Congress drafted RLUIPA, it took into account the four requirements spelled out in *Dole*, 483 U.S. at 207-208, and carefully drafted RLUIPA to comply with them. Congress knew that conditions on grants and subsidies (1) must be in pursuit of the general welfare; (2) must be unambiguous so that recipients are on notice of their existence; (3) "might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" (citations omitted); and, (4) the conditions cannot be barred by other constitutional provisions. RLUIPA complies with each of *Dole*'s requirements.

1. RLUIPA Is In Pursuit Of The General Welfare

The courts must defer to Congress unless there is ". . . a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress." *Helvering v. Davis*, 301 U.S. 619, 640 (1937) (quoting *United States v. Butler*, 297 U.S. 1, 67 (1936)). Only a "display of arbitrary power, not an exercise of judgment" exceeds Congress' discretion to choose the subjects and goals of its spending power. *Id*. at 640.

RLUIPA advances the general welfare because it is a condition on the receipt of federal funds that has the "permissible legislative purpose to alleviate significant governmental interference" with religious practice. *Amos*, 483 U.S. at 335. It serves the general welfare by preventing government interference with religious exercise, an area of human activity given distinctive protection under the First Amendment. *See Norwood v. Harrison*, 413 U.S. 455 (1971); *see also* 146 CONG. REC. H1790 (daily ed. July 27, 2000) (statement of Rep. Canady). "[B]y fostering nondiscrimination, RLUIPA follows a long tradition of federal

legislation designed to guard against unfair bias and infringement on fundamental freedoms." *Mayweathers*, 314 F.3d at 1067; *see also Lau v. Nichols*, 414 U.S. 563 (1974) (Congress has the authority to impose conditions on federal funds to protect individual liberties).

RLUIPA also serves the general welfare by increasing options for rehabilitation of some inmates who voluntarily seek to engage in religious exercise, but are unable to do so because of needless prison restrictions. According to Senator Kennedy, one of RLUIPA's sponsors, permitting "[s]incere faith and worship can be an indispensable part of rehabilitation . . . ." 146 CONG. REC. S6689 (daily ed. July 13, 2000). Current corrections grants reflect Congress' view, and its judgment that permitting voluntary religious exercise can sometimes enhance prospects for rehabilitation is supported by social science studies and expert opinion. *See* Byron R. Johnson & David B. Larson, *Linking Religion to the Mental and Physical Health of Inmates: A Literature and Research Note*, 1997 AM. JAILS 29.

Though Ohio may disagree with Congress' judgment, the judgment is a reasonable one, well within Congress' policy-making authority.

2. RLUIPA's Conditions Are Unambiguous

RLUIPA § 3 (a)(1) and (2) unambiguously notify corrections officials receiving federal funding that they must cease imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution," unless it furthers "a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a)(1), (2). In addition, RLUIPA § 4(a) provides

notice of a private right of action triggered by violation of § 3 of the Act. 42 U.S.C. § 2000cc-2(a).

RLUIPA's legal standards are familiar and have been long used. The "compelling governmental interest" has long been used by this Court. *Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378, 384-85 (1990). Similarly, the "least restrictive means" test is a well-established and frequently applied rubric. *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest"); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 539 (1993). Indeed, Ohio uses the least restrictive means test in interpreting the Ohio Constitution religion clause. *Humphrey v. Lane*, 728 N.E.2d 1039, 1043 (Ohio 2000).

In the District Court, Respondents argued that RLUIPA's least restrictive means test is too vague "because it does not tell States what is expected of them." ODRC Motion to Dismiss Mem. 27. The objection, which apparently was abandoned in the Court of Appeals, contends, in effect, that RLUIPA should specify every application to which it applies. However, neither *Dole* nor *Pennhurst State Sch. v. Halderman*, 451 U.S. 1 (1981), the cases from which the notice requirement is derived, impose such a requirement. For the Court to find that RLUIPA provides insufficient notice to Respondents would require every situation covered to be "specifically identified and proscribed in advance." *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 666 (1985). This impossible requirement would demand such detail that federal grants would read like a catalogue of all possible situations.

3. The Conditions Imposed By RLUIPA Are Clearly Related To The Federal Interest In Particular Projects And Programs.

RLUIPA's funding condition is clearly related to the federal interest served by the grant of funds to state prisons. By requiring that a condition be related, *Dole* means only that there should be a rational connection between the funds expended and the condition imposed. The connection in *Dole* was between the federal goal of funding highway construction and the condition of raising the drinking age in order to make highways safer. Here, the connection is far more direct. The government is funding incarceration of inmates, but only under suitable conditions. It is the same as congressional funding of state prisons under the condition that inmates are provided with health care and diet that meet federal standards. RLUIPA addresses Congress' interest in not subsidizing activities that are unacceptable or are inconsistent with its policy choices. This is not a case where the Spending Clause is being used to accomplish a goal unrelated to the purposes of the grant, like if Congress conditioned Medicare funding on a state's agreement to provide physical education programs in its public schools.

In the Court of Appeals, ODRC Respondents asserted that RLUIPA's conditions "can only be constitutionally applied if there is a direct connection between federal funding and religious burdens." ODRC Cir. Br. 38. *Dole*, however, does not require a "direct connection" or a "particular nexus" between the funding and the condition, only that the condition remove an "impediment to a purpose for which the funds are expended." *Dole*, 483 U.S. at 209. *See, e.g.*, *id*. at 211-12 (upholding federal highway funding condition that required enactment of state laws prohibiting the purchase or possession of alcohol by persons under the age of 21); *Sabri v. United States*, 124 S. Ct. at 1946-47

(upholding federal anti-bribery statute even though the statute applies to bribes unrelated to federal funds); *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 143-46 (1947) (upholding the constitutionality of a condition prohibiting active participation in political campaigns by any state official employed in federally funded programs).

RLIUPA also satisfies the alternative standard articulated by Justice O'Connor's dissent in *Dole*. Justice O'Connor said that "Congress may only condition grants in ways that can fairly be said to be related to the expenditure of federal funds." *Dole*, 483 U.S. at 217 (O'Connor, J., dissenting). According to her opinion, the measure of the proper relationship turns on whether the condition to be served indicates how the federal funds should be spent. *Id*. at 216.

No matter which test is applied, RLUIPA is valid because it conditions the receipt of federal corrections funds on the recipients' adherence to Congress' standards regarding the proper treatment and rehabilitation of inmates. The District Court recognized that the ODRC receives identifiable federal funds that share RLUIPA's goal of enhancing prospects for rehabilitation. Pet. App. B13. These funds include the ODRC's $28 million grant from the "Violent Offender and Truth in Sentencing Program," which "seek[s] to instill in offenders an improved sense of responsibility and the ability to become productive citizens," J.A. 294, and the $1.3 million Intensive Confinement Construction grant which places an emphasis on the transition of inmates back into the community, J.A. 244.

Certainly, Congress can require, as a condition of funding correctional systems, that funding recipients operate those systems in compliance with minimum

standards of decency in health care and security for inmates and guards. Likewise, it can insist under RLUIPA that funding recipients operate correctional facilities without imposing needless burdens on religious exercise. Congress may make such conditions system-wide, just as it requires that any federally funded institution, program, or activity not engage in prohibited discrimination based on handicap, race, or sex under Title VI, 42 U.S.C. § 2000d-4(a). In *Grove City College v. Bell*, 465 U.S. 555, 573-74 (1984), this Court held that a statutory anti-discrimination condition on federal fund recipients did not apply generally to a college whose students received federal financial assistance and assigned it to the college. It held the statutory language required the statutory condition to apply only to the portion of the college that actually received the funds. *Id*. As a result, Congress amended the statutory condition, making clear that the right to receive federal money is sacrificed even if the discrimination is not directly connected to the federal funding. 20 U.S.C. § 1687. Accordingly, if RLUIPA is unconstitutional, so is the amendment to Title VI.

4. No Provisions Of The Constitution Create An Independent Bar

In order for RLUIPA to fail to meet *Dole*'s fourth prong, it would have to require ODRC Respondents to themselves engage in conduct forbidden by the Constitution. *Am. Library Ass'n Inc.*, 539 U.S. at 203, n.2. The only way for Respondents' compliance with RLUIPA to cause a constitutional violation would be for the accommodation of religious exercise pursuant to RLUIPA to violate the Establishment Clause. Petitioners have already explained why RLUIPA does not violate the Establishment Clause. *See supra* Part I.

Furthermore, it cannot be argued that RLUIPA is barred by the Establishment Clause because it creates a financial incentive compelling state and local officials to lift burdens on religious exercise. If Ohio does not wish to be bound by RLUIPA's incentive, she may "adopt the 'simple expedient' of not yielding to what she urges is federal coercion" by not applying for and accepting the applicable federal grants to state prison programs. *Dole*, 483 U.S. at 210 (quoting *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. at 143-44). No coercion was found in an Establishment Clause challenge to the Spending Clause program in *Mergens*, 496 U.S. at 241, even though the Court conceded that the cost to schools of foregoing the federal funding was so great as to be possibly unbearable. *Id*.

In reality, Respondents are not coerced in any way since they are genuinely free to choose whether to comply with RLUIPA or to forego federal funding. This is not an illusory choice. As Respondents conceded below, the federal grants received by the ODRC during FY 2001 "comprise[d] less than one percent of the recipient's total budget." ODRC Cir. Br. 42. Those same funds comprised approximately .063% of the entire state budget for that year.[21] For FY 2004, federal grants comprised a similarly small percentage of the estimated state budget.[22] Thus, RLUIPA hardly can be said to create a financial inducement passing "the point at which pressure turns into compulsion."[23]

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[21] *See supra* notes 7, 9, and accompanying text.

[22] *See supra* notes 10-13 and accompanying text.

[23] *See Jim C. v. United States*, 235 F.3d 1079, 1081-82 (8th Cir. 2000) (loss of 12% of annual state education budget would not be coercive); *Nevada v. Skinner*, 884 F.2d 445, 447-49 (9th Cir. 1989) (condition causing loss of 95% of state highway budget is not coercive);

(Continued on following page)

In brief, should this Court reach ODRC Respondents' Spending Clause challenge to RLUIPA on its face, the challenge should be rejected because RLUIPA complies with all of *Dole*'s standards. In addition, Respondents cannot "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Respondents accept federal subsidies for meals given to young offenders to which they concede "RLUIPA's conditions could quite properly be applied." ODRC Cir. Br. 38. Thus, Respondents' Spending Clause challenge must fail.

IV. ODRC RESPONDENTS' COMMERCE CLAUSE CHALLENGE IS PREMATURE AND UNFOUNDED

A. Respondents' Commerce Clause Challenge Is Premature

The ODRC Respondents' response to the petition for writ of certiorari served notice that they would invite affirmance on the alternative ground that RLUIPA exceeded Congress' commerce power. ODRC Cert. Reply 16, 18-20. However, as already pointed out, this issue was not addressed by the District Court or the Court of Appeals, and it is this Court's regular practice to forgo resolving issues that were not decided below. *See supra* Part II.

Moreover, consideration of Respondents' Commerce Clause challenge is premature because there has never been a determination as to whether the Petitioners' claims satisfy RLUIPA's jurisdictional element. Congress included § 3(b)(2), RLUIPA's jurisdictional element, to limit the

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Kansas v. United States, 214 F.3d 1196, 1201-02 (10th Cir. 2000) (condition which causes loss of 66% of funds for one state program and 80% of funds for a second program is not coercive).

Act's application to circumstances where "the substantial burden [on religious exercise] affects, or removal of that substantial burden would affect" interstate commerce. 42 U.S.C. § 2000cc-1(b)(2). This assures that RLUIPA will not be applied indiscriminately in situations unrelated to interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

As a consequence, before Respondents' Commerce Clause challenge to RLUIPA was pressed, there should have been a District Court determination as to whether the prerequisite effect on interstate commerce had been shown. That is not to say, however, that Respondents concede such an effect exists. Indeed, their reply to the petition for writ of certiorari argues that "the religious burdens did not have a sufficient impact on interstate commerce to justify application of the Act." ODRC Cert. Reply 5. Yet, rather than permitting the District Court to consider whether the burdens at issue here actually affect interstate commerce, Respondents have single-mindedly pursued their facial challenge as though RLUIPA had no jurisdictional element.

For this Court to address Respondents' Commerce Clause challenge to RLUIPA's validity under these circumstances would violate the teaching of *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). According to *Ashwander*, "[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' " *Id*. (citations omitted). ODRC Respondents' Commerce Clause challenge ignores this *Ashwander* principle. If there had been case-specific determinations that the burdens on Petitioners' religious exercise did not affect or interfere with interstate commerce, RLUIPA's Commerce Clause provision would not apply to Respondents' conduct. Petitioners' Commerce Clause allegations would therefore have been dismissed,

negating any need to address Respondents' Commerce Clause challenge.

B. Respondents' Commerce Clause Challenge Is Unfounded Because RLUIPA Is Confined To Burdens That Are Within Congress' Authority

In any event, this Court should reject Respondents' Commerce Clause challenge as unfounded. Congress carefully confined RLUIPA to government burdens that directly interfere with or substantially affect interstate commerce. This unquestionably places RLUIPA within Congress' commerce authority. *Lopez*, 514 U.S. at 558-60. And, as explained above, the Act contains a jurisdictional element that denies jurisdiction over claims when no substantial effect on commerce is involved. *Id*. at 559-61; *United States v. Morrison*, 529 U.S. 598, 613 (2000).

In the courts below, Respondents argued that RLUIPA is unconstitutional, notwithstanding the presence of its jurisdictional element, because the Act covers noncommercial activities. ODRC Cir. Br. 45-47. However, whether RLUIPA addresses noncommercial activities has nothing to do with Congress' constitutional power to regulate those activities. Congress has routinely exercised authority under the Commerce Clause to regulate any activities that actually interfere with or affect interstate commerce. *See*, *e.g.*, Church Arson Prevention Act, 18 U.S.C. § 247(b) (creating a federal crime when religious property is damaged or destroyed and the criminal undertaking is in or affects interstate commerce); Hobbs Act, 18 U.S.C. § 1951 (making robbery, extortion, or physical violence interfering or affecting interstate commerce a federal crime).

It is well settled that Congress has the authority to regulate activities that directly interfere with the movement

of goods in interstate commerce or substantially affect commerce. *Lopez*, 514 U.S. at 558-60; *see also Stirone v. United States*, 361 U.S. 212, 215 (1960). Petitioners have specifically alleged that ODRC officials have interfered with interstate transactions by preventing them from purchasing or receiving religious items from out-of-state sources. J.A. 50-57, 118, 265. Because Respondents are Petitioner inmates' custodians, it is clear that Petitioners cannot engage in such transactions without ODRC Respondents' permission. Indeed, even beyond this direct interference with commerce, the ODRC has extensive involvement in interstate transactions where the inmates themselves, as well as the goods and services they produce or consume in prison, move in interstate commerce or substantially affect interstate commerce. J.A. 318. This, too, subjects Respondents to Congress' commerce authority.

CONCLUSION

For the reasons explained above, RLUIPA is constitutional on its face and the decision of the Court of Appeals to the contrary in this consolidated appeal should be reversed. In addition, this appeal should be remanded for further proceedings.

Respectfully submitted,

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APPENDIX A

42 U.S.C. §§ 2000cc-1 to 5

§ 2000cc-1. Protection of religious exercise of institutionalized persons

(a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application

This section applies in any case in which –

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

(Pub.L. 106-274, § 3, Sept. 22, 2000, 114 Stat. 804.)

§ 2000cc-2. Judicial relief

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

(b) Burden of persuasion

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) Full faith and credit

Adjudication of a claim of a violation of section 2000cc of this title in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) Omitted

(e) Prisoners

Nothing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) Authority of United States to enforce this chapter

The United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) Limitation

If the only jurisdictional basis for applying a provision of this chapter is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

(Pub.L. 106-274, § 4, Sept. 22, 2000, 114 Stat. 804.)

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§ 2000cc-3. Rules of construction

(a) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(b) Religious exercise not regulated

Nothing in this chapter shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) Claims to funding unaffected

Nothing in this chapter shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) Other authority to impose conditions on funding unaffected

Nothing in this chapter shall –

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this chapter.

(e) Governmental discretion in alleviating burdens on religious exercise

A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing

exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) Effect on other law

With respect to a claim brought under this chapter, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this chapter.

(g) Broad construction

This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

(h) No preemption or repeal

Nothing in this chapter shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this chapter.

(i) Severability

If any provision of this chapter or of an amendment made by this chapter, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this chapter, the amendments made by this chapter, and the application of the provision to any other person or circumstance shall not be affected.

(Pub.L. 106-274, § 5, Sept. 22, 2000, 114 Stat. 805.)

§ 2000cc-4. Establishment Clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. In this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions. (Pub.L. 106-274, § 6, Sept. 22, 2000, 114 Stat. 806.)

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§ 2000cc-5. Definitions

In this chapter:

(1) Claimant

The term "claimant" means a person raising a claim or defense under this chapter.

(2) Demonstrates

The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause

The term "Free Exercise Clause" means that portion of the First Amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government

The term "government" –

(A) means –

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

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

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation

The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity

The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title.

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

(Pub.L. 106-274, § 8, Sept. 22, 2000, 114 Stat. 806.)

APPENDIX B

PL 106-274 (S 2869) §§ 3 to 6, 8

September 22, 2000
RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000

SEC. 3. PROTECTION OF RELIGIOUS EXERCISE OF INSTITUTIONALIZED PERSONS.

(a) GENERAL RULE. – No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –]

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) SCOPE OF APPLICATION. – This section applies in any case in which –

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

SEC. 4. JUDICIAL RELIEF.

(a) CAUSE OF ACTION. – A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) BURDEN OF PERSUASION. – If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) FULL FAITH AND CREDIT. – Adjudication of a claim of a violation of section 2 in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

* * *

(e) PRISONERS. – Nothing in this Act shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) AUTHORITY OF UNITED STATES TO ENFORCE THIS ACT. – The United States may bring an action for injunctive or declaratory relief to enforce compliance with this Act. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or

any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) LIMITATION. – If the only jurisdictional basis for applying a provision of this Act is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

SEC. 5. RULES OF CONSTRUCTION.

(a) RELIGIOUS BELIEF UNAFFECTED. – Nothing in this Act shall be construed to authorize any government to burden any religious belief.

(b) RELIGIOUS EXERCISE NOT REGULATED. – Nothing in this Act shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) CLAIMS TO FUNDING UNAFFECTED. – Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this Act may require a government to incur expenses in its own

operations to avoid imposing a substantial burden on religious exercise.

(d) OTHER AUTHORITY TO IMPOSE CONDITIONS ON FUNDING UNAFFECTED. – Nothing in this Act shall –

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act.

(e) GOVERNMENTAL DISCRETION IN ALLEVIATING BURDENS ON RELIGIOUS EXERCISE. – A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) EFFECT ON OTHER LAW. – With respect to a claim brought under this Act, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this Act.

(g) BROAD CONSTRUCTION. – This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.

(h) NO PREEMPTION OR REPEAL. – Nothing in this Act shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this Act.

(i) SEVERABILITY. – If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.

SEC. 6. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. In this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

SEC. 8. DEFINITIONS.

In this Act:

(1) CLAIMANT. – The term "claimant" means a person raising a claim or defense under this Act.

(2) DEMONSTRATES. – The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) FREE EXERCISE CLAUSE. – The term "Free Exercise Clause" means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) GOVERNMENT. – The term "government" –

(A) means –

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

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

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 4(b) and 5, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) LAND USE REGULATION. – The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) PROGRAM OR ACTIVITY. – The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-4a).

(7) RELIGIOUS EXERCISE. –

(A) IN GENERAL. – The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) RULE. – The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.