No. _____

In The
Supreme Court of the United States

GARY L. BASS, in his official capacity as Chief of Operations of Offender Management Services for the Virginia Department of Corrections, LEWIS B. CEI, in his official capacity as Special Programs Manager for the Virginia Department of Corrections, and DUNCAN M. MILLS, in his official capacity as Central Classification Supervisor for the Virginia Department of Corrections,

Petitioners,

v.

IRA W. MADISON and UNITED STATES OF AMERICA,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc through 2000cc-5, contains provisions prescribing what religious accommodation policies must be implemented in state prisons ("Prison Provisions"). This petition presents the following questions:

1. Do the Prison Provisions of RLUIPA violate the Establishment Clause?

2. Does Congress have authority to enact the Prison Provisions of RLUIPA, using the Spending Clause, the Commerce Clause, or any other grant of authority?

3. If the Prison Provisions are constitutional, does the existence of a detailed remedial scheme and/or a special sovereignty interest preclude the application of *Ex Parte Young*, 209 U.S. 123 (1908), thereby leaving sovereign immunity as a bar to the federal court injunction sought by the respondent?

PARTIES TO THE PROCEEDINGS

The petitioners are three officials of the Virginia Department of Corrections, each of whom was sued in his official capacity for injunctive relief. They are: (1) Gary L. Bass, Chief of Operations of Offender Management Services, (2) Lewis B. Cei, Special Programs Manager, and (3) Duncan M. Mills, Central Classification Supervisor.[1]

There are two respondents: (1) Ira W. Madison, a prisoner incarcerated by the Virginia Department of Corrections, and (2) the United States of America, which intervened for the purpose of defending the constitutionality of a federal statute.

[1] Russell A. Riter (sometimes referred to as R. Riter or R. Ruter), Daniel J. Armstrong, and the Commonwealth of Virginia were parties to proceedings below but are not parties to this petition. Riter and Armstrong were sued in their official capacities for injunctive relief and in their personal capacities for damages. However, Riter and Armstrong are no longer employed by the Virginia Department of Corrections. Thus, the claims against them for injunctive relief are moot. Although the damages claims against them in their personal capacities remain live controversies in the district court, those claims are not a part of this petition. The Commonwealth of Virginia was sued for both damages and injunctive relief. However, the district court dismissed the Commonwealth on sovereign immunity grounds and that ruling was not part of the appeal below.

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PETITION FOR WRIT OF CERTIORARI

Three officials of the Virginia Department of Corrections – Gary L. Bass, Lewis B. Cei, and Duncan M. Mills (collectively, "the Commonwealth" or "Virginia") – respectfully petition the Court for a writ of certiorari to review the judgment of the court of appeals, which upheld the prison provisions of the Religious Land Use and Institutionalized Persons Act against constitutional challenge.

OPINIONS BELOW

The opinion of the court of appeals is reported as *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003). It is reprinted in the Appendix at App. 1. The opinion of the district court is reported at 240 F. Supp. 2d 566 (W.D. Va. 2003). It is reprinted at App. 23.

JURISDICTION

The court of appeals entered its judgment on December 8, 2003. On February 25, 2004, the Chief Justice, sitting as Circuit Justice for the Fourth Circuit, acted on the petitioners' application for an extension of time and set April 6, 2004, as the deadline for filing this petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

1. The Establishment Clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion. . . ."

2. The Spending Clause, U.S. Const. Art. I, § 8, cl. 1, states: "Congress shall have power . . . to pay the debts and provide for the common defense and general welfare of the United States. . . ."

3. The Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, states: "Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes."

4. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

5. The provisions of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") that are applicable to state prisons ("Prison Provisions") are found at 42 U.S.C. § 2000cc-1 through § 2000cc-5. They are reproduced in their entirety at App. 59.[2] Central to the Prison Provisions are the restrictions imposed by 42 U.S.C. § 2000cc-1, which provides as follows:

> 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, 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

[2] RLUIPA has two parts. The first part, which is not at issue in this case, requires that religious organizations be given preferential treatment with respect to local planning and zoning laws. *See* 42 U.S.C. § 2000cc, App. 59.

with foreign nations, among the several States, or with Indian tribes.

STATEMENT OF THE CASE

This case involves a dispute between two sovereigns – the Commonwealth of Virginia and the United States of America – over which sovereign has authority to set the religious accommodation policy for convicted criminals incarcerated in Virginia prisons. By adopting the Prison Provisions of RLUIPA, Congress has claimed such authority for itself. However, the Commonwealth contends that those provisions are unconstitutional and that Virginia retains sole authority in this area.

There are, of course, limits imposed on Virginia by the Fourteenth Amendment insofar as it incorporates the Religion Clauses of the First Amendment. However, this is not a case where the policy chosen by Virginia is alleged to violate those constitutional limits. Instead, this case arises within the sphere of state discretion that lies between what the Establishment Clause prohibits and what the Free Exercise Clause requires. *See Locke v. Davey,* 124 S. Ct. 1307, 1311 (2004) (explaining there is "room for play in the joints" between the two religion clauses). At issue is whether, by adopting the Prison Provisions, Congress has unconstitutionally invaded that sphere.

What brings this issue to a head is a lawsuit brought by an incarcerated felon, Ira W. Madison, challenging the prison dietary options made available to him by the Commonwealth. Madison brought suit while a prisoner at Buckingham Correctional Center. From 2000 to the present, Madison has claimed to be a member of the "Church of God and Saints of Christ," a congregation founded in 1896 and headquartered at "Temple Beth El" in Suffolk, Virginia. Commonly known as "Hebrew Israelites," members of this church describe themselves as "followers of the anointed God" who honor but do not worship Jesus Christ. App. at 4. Madison's church apparently requires its members to abide by the dietary laws laid out in the Hebrew Scriptures.

In July 2000, and again in March 2001, Madison informed correctional officials that his religious beliefs required him to receive a kosher diet, defined as a "common fare diet" by the Virginia Department of Corrections.[3] Both requests were denied. The Commonwealth rejected Madison's requests because it determined that Madison already had adequate alternatives from the regular, vegetarian, and "no pork" daily menus; because it doubted the sincerity of Madison's religious beliefs;[4] and because it considered Madison's history of disciplinary problems. In August 2001, Madison filed suit against the Commonwealth in the U.S. District Court for the Western District of Virginia, alleging that the failure to provide him with the kosher diet he requested violated the Prison Provisions of RLUIPA.[5]

Although the demands made by this particular inmate may seem relatively benign, the statute he invokes also has the malignant consequence of greatly complicating the task of combating prison gangs. Under RLUIPA's predecessor, the Religious Freedom Restoration Act ("RFRA"),[6] the pattern of inmates manipulating the "strict scrutiny" standard was well-established. *See*, *e.g.*, *Mickle v. Moore*, 174 F.3d 464 (4th

[3] The affidavits offered in support of the Commonwealth's motion for summary judgment demonstrated that the common fare diet was created to provide reasonable accommodation to inmates whose religious diet needs could not be met by the other menus offered at all Virginia Department of Corrections prisons. When an inmate requests a special religious accommodation, the Department of Corrections looks at the inmate's disciplinary history, his stated religious preference, the specifics of his request, and the specifics of what the prison currently offers to meet his religious needs. *See* J.A. 69 (Note: "J.A." refers to the Joint Appendix in the court of appeals.)

[4] Since his original incarceration in 1991, Mr. Madison "participated" in a variety of religious sects, including the Rastafarian, Nation of Islam, Al-Islam, Jehovah's Witnesses, and Moorish Science Temple faiths. J.A. 67.

[5] RLUIPA includes a private right of action. *See* 42 U.S.C. § 2000cc-2(a), App. 62.

[6] RFRA was declared unconstitutional as applied to the States in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

Cir. 1999) (inmates claimed that separating religious group known as "Five Percenters" violated Free Exercise Clause notwithstanding documented history of group members engaging in violent acts against other prisoners); *Stefanow v. McFadden*, 103 F.3d 1466 (9th Cir. 1996) (inmate claimed that his religion required him to read white supremacist literature); *Ochs v. Thalaker*, 90 F.3d 293 (8th Cir. 1996) (inmate claimed that his religion required that he be separated from prisoners of other races).

The same practice has reemerged under RLUIPA, with white supremacists and other gangs invoking the statute in attempts to thwart anti-gang practices. *See, e.g., Gerhardt v. Lazaroff*, 221 F. Supp. 2d 827, 833, 834 (S.D. Ohio 2002) (Aryan Nation, Astara, Wiccan and Satanist believers seeking, *inter alia*, access to white supremacist literature, group religious services, and right to group identity by conforming dress and appearance to supposed religious requirements); *Johnson v. Martin*, 223 F. Supp. 2d 820, 822-823 (W.D. Mich. 2002) (members of Melanic religion challenged group designation as Security Threat Group – with attendant restrictions on group gatherings and receipt of religious literature – where group members had engaged in violent conduct inside prison); *Marria v. Broaddus*, 200 F. Supp. 2d 280, 284 (S.D.N.Y. 2001) (Five Percenter challenged designation as Security Threat Group notwithstanding gang activities of group members, including extortion, theft and violence against other inmates).

Moreover, the Prison Provisions' "least restrictive means" test provides an uncertain standard, greatly complicating prison management. Before 1987, this Court's jurisprudence used a least restrictive means test to adjudicate prisoner religious claims. *Procunier v. Martinez*, 416 U.S. 396, 413-414 (1974). Using that test, the lower federal courts reached diametrically opposite legal conclusions about the propriety of actions that were factually indistinguishable. This Court ultimately abandoned the least restrictive means standard because "every administrative judgment [was] subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand." *Turner v. Safley*, 482

U.S. 78, 79 (1987). RLUIPA returns to the least restrictive means test with all its accompanying uncertainty. As this Court recognized in *Turner*, such uncertainty interferes with the States' ability to "anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id.*

Finally, the Prison Provisions force Virginia to choose between (i) forfeiting *all* federal funding for *all* Department of Corrections operations, and (ii) implementing the troublesome religious accommodation policy preferred by Congress.[7] The fact that federal funds are not made available to implement that policy is of no consequence.

Given the problems caused by the Prison Provisions, the Commonwealth responded to Madison's lawsuit with a motion for summary judgment arguing, *inter alia*, that the Prison Provisions are unconstitutional. Specifically, the Commonwealth maintained that (1) the Prison Provisions violate principles of federalism because they are not a valid exercise of any enumerated power of Congress; and (2) even if the Prison Provisions were otherwise valid, they violate the Establishment Clause. The United States intervened in order to defend the constitutionality of the Prison Provisions.

The district court found that the Prison Provisions violate the Establishment Clause. As the chief explanation for this result, the district court faulted the Prison

[7] To explain, the Prison Provisions apply to any "program or activity" that receives federal funds. 42 U.S.C. § 2000cc-1(b)(1). The term "program or activity" is defined broadly to include "all of the operations of any entity" described in 42 U.S.C. § 2000d-4(a)(1) or (2). 42 U.S.C. § 2000cc-5(6). Those provisions cover, in turn, a variety of entities including "a department, agency, special purpose district, or other instrumentality of a State or a local government." 42 U.S.C. § 2000d-4(a)(1). In other words, if "any part" of the Virginia Department of Corrections receives "federal financial assistance" for *any* purpose, then *all* operations of the Virginia Department of Corrections are covered by the Prison Provisions. *See* 42 U.S.C. § 2000cc-1; 42 U.S.C. § 2000d-4. Thus, if the Department of Corrections receives federal money, say, for new prison construction, the religious accommodation requirements apply to all of its prisons.

Provisions because it accommodates religion while failing to accommodate other First Amendment interests in a comparable manner. Explaining what might be termed the "symmetrical accommodation" theory, the district court said that, by lifting limitations on religious rights, without lifting comparable limitations on other First Amendment rights, the Prison Provisions violate the neutrality required by the Establishment Clause. App. 33-44, 53-54.

The district court also cited *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985), in support of its decision. *See* App. 47. In *Caldor*, this Court held that Connecticut violated the Establishment Clause when it required private employers to accommodate their employees' religious practices by giving them time off on their Sabbath regardless of any burdens such accommodation might create. The *Caldor* decision did not rely on any lack of comparable accommodation of non-religious interests and, thus, suggests an alternative ground for holding of the Prison Provisions unconstitutional.

With the district court having found the Prison Provisions unconstitutional, Madison and the United States asked that the matter be certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). After making the requisite findings, the district court so certified the case.[8] App. 55. The Fourth Circuit accepted the appeal. App. 57-58.

After reflecting on the implications of the district court's decision – and after reviewing the briefs of the United States and Madison – the Commonwealth became persuaded that the symmetrical accommodation theory was fundamentally flawed and had the potential for working great mischief. Thus, on appeal, the Commonwealth declined to argue – and expressly disavowed – that theory. Instead, the Commonwealth contended that the Prison

[8] Madison also made other claims, including a 42 U.S.C. § 1983 claim for alleged violations of the First Amendment. These other claims are still pending in the district court.

Provisions violate the Establishment Clause for two reasons: (1) the "federalism" aspect of the Establishment Clause, which denies to Congress the power to legislate with respect to state religious polices falling within the States' sphere of discretion, and (2) this Court's decision in *Caldor*. The Commonwealth also pressed its other federalism arguments, contending that the Prison Provisions are not a valid exercise of the Spending Clause power, or the Commerce Clause power; and that, even if the Prison Provisions were constitutional, the claim for injunctive relief would be barred by sovereign immunity.

The Fourth Circuit rejected the district court's symmetrical accommodation theory as well as the Commonwealth's argument based on *Caldor*. At the same time, the court declined to address the federalism aspect of the Establishment Clause or the Commonwealth's other federalism arguments, taking care to explain that these issues had been preserved but remanding them for further consideration by the district court. App. 21-22.

REASONS FOR GRANTING THE WRIT

The writ should be granted for three reasons. First, there is a split in the Circuits with respect to whether the Prison Provisions violate the Establishment Clause. Three circuits – the Fourth, Seventh and the Ninth – have ruled that the Prison Provisions do not violate the Establishment Clause. The Sixth Circuit has reached the opposite conclusion, ruling that they do. *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003), *rehearing denied*, 2004 U.S. LEXIS 4294 (Mar. 3, 2004). Granting certiorari in this case would provide the Court several alternative theories for resolving the split.

Second, this Court should grant review to resolve important federal questions concerning the scope of Congress' Powers. In recent years, this Court has reinvigorated federalism by placing limits on Congress' exercise of its powers under the Commerce Clause and under Section 5 of the Fourteenth Amendment. However, without limits on the Spending Clause, Congress may easily outflank those

federalism limits. This petition offers the Court a good vehicle to address the issue because the Prison Provisions display a variety of objectionable features, thus allowing the Court flexibility in crafting constitutional limits. This petition also offers the Court an opportunity to clarify and/or confirm limits on the Commerce Clause by deciding whether the power to regulate interstate commerce includes the power to define the religious accommodation policies implemented behind the walls of a state prison.

Third, this Court should grant review to clarify the scope of the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). Specifically, this petition may allow this Court to apply previous rulings that establish exceptions to the *Ex Parte Young* doctrine when a detailed remedial scheme is available or when a special sovereignty interest is at stake.

I. THE WRIT SHOULD BE GRANTED IN ORDER TO RESOLVE A SPLIT IN THE CIRCUITS OVER WHETHER THE PRISON PROVISIONS VIOLATE THE ESTABLISHMENT CLAUSE.

Four circuits have ruled on whether the Prison Provisions of RLUIPA violate the Establishment Clause. In addition to the Fourth Circuit, both the Seventh and Ninth Circuits have ruled that they do not. *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003); *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002), *cert. denied sub nom. Alameida v. Mayweathers*, 2003 U.S. LEXIS 5554 (Oct. 6, 2003). On the other hand, the Sixth Circuit has ruled that the Prison Provisions do violate the Establishment Clause. *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003), *rehearing denied*, 2004 U.S. App. LEXIS 4294 (Mar. 3, 2004).

As a federal law circumscribing the authority of the States to manage their own prisons, the Prison Provisions alter the delicate balance of power between the State and National governments. As a statute dealing with the exercise of religion, the Prison Provisions touch upon a subject of profound importance. As a congressional enactment struck

down by a federal circuit, the Prison Provisions are a measure from which some but not all States have been judicially exempted. In short, there is a split in the circuits on the constitutionality of a major federal statute. Certiorari should be granted.

This petition provides a timely and well-postured opportunity for this Court to resolve the circuit split because a variety of Establishment Clause theories were presented to the court below, and are thus available for the Court's consideration. These theories include: (a) the "symmetrical accommodation" theory, (b) the "federalism" aspect of the Establishment Clause, and (c) an analogy to this Court's decision in *Caldor*. Each will be briefly discussed.

A. The Symmetrical Accommodation Theory

According to the symmetrical accommodation theory, the Prison Provisions are unconstitutional because they accommodate *religion* without providing symmetrical accommodation for *other* First Amendment interests. As the theory was articulated by the district court,

> When Congress acts to lift the limitations on one right while ignoring all others, it abandons a position of neutrality towards these rights, placing its power behind one system of belief. . . . When the one system of belief protected is religious belief, Congress has violated the basic requirement of neutrality embodied in the Establishment Clause.

App. 44. In upholding the Prison Provisions, the Fourth Circuit rejected this theory with the following explanation:

> The mere fact that RLUIPA seeks to lift government burdens on a prisoner's religious exercise does not mean that the statute must provide commensurate protections for other fundamental rights.
>
> * * *
>
> Free exercise and other First Amendment rights may be equally burdened by prison regulations, but the Constitution itself provides religious exercise with special safeguards. . . . To attempt to read a requirement of symmetry of protection for

> fundamental liberties would not only conflict with all binding precedent, but it would also place prison administrators and other public officials in the untenable position of calibrating burdens and remedies with the specter of judicial second-guessing at every turn.

App. 14, 16. Thus, the symmetrical accommodation theory has been thoroughly addressed – and with different results – by the *Madison* district court and by the Fourth Circuit.[9] Thus, the theory is available for this Court's consideration in the event certiorari is granted.

Even so, the Commonwealth does not embrace the symmetrical accommodation theory. Indeed, the theory offers a Hobson's choice: (i) approving federal intrusion into an area of policy-making left to the States since the Founding, or (ii) invalidating the Prison Provisions with an analysis that jeopardizes religious accommodation in a broad array of settings that heretofore seemed constitutional. Thus, the Commonwealth contends that the Prison Provisions violate the Establishment Clause on other grounds. Either the "federalism" aspect of the Establishment Clause, or the principles at work in *Caldor*, or both, render the Prison Provisions invalid. The Commonwealth pressed each of these grounds below, and each presents an alternative theory for consideration by this Court.

B. The Federalism Aspect of the Establishment Clause

The federalism protections of the Establishment Clause are the logical consequence of two principles firmly

[9] The Sixth Circuit relied on the symmetrical accommodation theory and "streamlined" its opinion in *Cutter* by "repeated references" to the *Madison* district court decision. *Cutter*, 349 F.3d at 262. The Sixth Circuit concluded that "RLUIPA violates the Establishment Clause because it favors religious rights over other fundamental rights without any showing that religious rights are at any greater risk of deprivation." *Cutter*, 349 F.3d at 262.

embedded in this Court's jurisprudence. The first principle relates to the original scope of the Establishment Clause; the second relates to the alteration of its original scope by application of the Establishment Clause to the States through incorporation under the Fourteenth Amendment.

1. The Original Scope of the Establishment Clause: When the Religion Clauses were adopted in 1791, they were intended to serve two distinct purposes. The first purpose was "libertarian" in nature. The objective was to protect the *people* of the United States against any federal effort to interfere with their freedom of religion and/or to establish a national religion. The second purpose was "structural" or "federalist" in nature. It was to protect the *States* against any federal efforts to interfere with state religious policies, whatever those policies might be. As explained by Justice Story, the Religion Clauses were intended "to exclude from the national government *all power* to act upon the subject [of religion]." Joseph Story, *Commentaries on the Constitution of the United States*, § 1873 (1833) (available at www.constitution.org/js/js_000.htm) (emphasis added).[10] Indeed, "[t]he *whole power* over the subject of religion [was] left *exclusively* to the state governments, to be acted upon according to their own sense of justice, and the state constitutions." *Id.* (emphasis added).

Except as they might be limited by their own constitutions, State governments retained the authority to adopt any religious policy they wished, free from federal oversight or limitation. *See Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833) (holding that no provision of the Bill of Rights is applicable to the States). *See also Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., joined by Rehnquist, C.J. White, & Thomas J.J., dissenting) (noting that the Establishment Clause was adopted, in part, "to protect state establishments of religion from federal interference"). This protection of State religious

[10] Justice Story's work has long been regarded as a leading authority on original intent.

policy from interference by the National Government constitutes the federalism aspect of the Establishment Clause.

2. Alteration by Incorporation: By construing the Fourteenth Amendment to extend both the Establishment Clause and the Free Exercise Clause to the States, this Court's jurisprudence has substantially curtailed the States' authority to adopt policies regarding religion. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 17 (1947) (incorporating the Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause). However, that authority has not been completely eliminated.

The States retain the authority to make policy choices in the "play in the joints" between what the Establishment Clause prohibits and what the Free Exercise Clause requires. *Locke*, 124 S. Ct. at 1307. *See also Texas Monthly, Inc. v. Bullock,* 489 U.S. 1, 18 n.8 (1989) ("we in no way suggest that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause."); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause. It is well established, too, that the limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.").[11]

[11] For example, the federal Establishment Clause does not prohibit a State from indirectly funding training for the ministry as part of a larger program of neutral application, *Witters v. Washington Dept. of Servs. for the Blind,* 474 U.S. 481, 487 (1986), but the Free Exercise Clause is not violated if training for the ministry is excluded from such a program. *Locke*, 124 S. Ct. at 1315.

The Fourteenth Amendment has made applicable to the States the same "libertarian" aspect of the Religion Clauses that previously applied only to the federal government. However, the "federalism" aspect remains unaffected and continues to prevent the federal government from legislating with respect to State policy in the small but vital zone of discretion where the States are not constitutionally foreclosed from acting on matters of religion. Before the Fourteenth Amendment, States could go so far as to *establish* religion and, because Congress could enact no law "respecting" such an establishment, Congress could not interfere. *A fortiori*, before the Fourteenth Amendment, States could also take the lesser step of merely *accommodating* religion, and such accommodation was likewise free from Congressional interference. By incorporating the Religion Clauses, the Fourteenth Amendment made moot the original prohibition against Congressional interference with state policies on *establishments* of religion; however, the prohibition against Congressional interference with state policies on the *accommodation* of religion remains intact.[12] In other words, just as the National Government could not tell the States whether to establish a church or whether to respect the free exercise of religion in 1804, it cannot tell the States what policies regarding accommodation of religion should fill "the play in the joints" in 2004.

By enacting the Prison Provisions, Congress has exceeded its authority because those provisions interfere with States' discretion to fill "the play in the joints" as they deem best. Though the Prison Provisions *favor* the accommodation of religion, they interfere with State sovereignty no less than if Congress had *prohibited* such accommodation. If Congress

[12] Obviously, this means that the Establishment Clause applies against the National Government in ways for which there is no comparable application against the States. However, such a difference in application is mandated by the historical purposes of the Establishment Clause. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 678-79 (2002) (Thomas, J., concurring) ("[I]t may well be that state action should be evaluated on different terms than similar action by the Federal Government.").

may constitutionally enact the Prison Provisions, it is difficult to imagine how the Constitution could protect the States against a future Congress bent on using that same power for a contrary purpose.

In sum, the federalism aspect of the Establishment Clause offers this Court a plausible means of curbing congressional over-reaching while leaving each sovereign – the States and the National Government – full authority to implement "RLUIPA-like" religion accommodation policies in their own prisons, should they be so inclined. Certiorari should be granted to consider this option.[13]

C. *Estate of Thornton v. Caldor*

At issue in *Caldor* was a Connecticut statute requiring private employers to excuse their employees from work on whichever day of the week individual employees designated as their Sabbath.[14] The Court found that the statute had the primary effect of advancing religion. *Caldor*, 472 U.S. at 710. As such, it violated the second prong of the *Lemon* test. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). This decision seems best explained by two factors working in combination. First, Connecticut was not accommodating religion by lifting a burden of its own making. Instead, it was requiring *another* entity to accommodate religion by changing *its* conduct. Second, the burden imposed by the mandated accommodation was heavy.

The statute did not just lift burdens imposed by Connecticut's own policies and practices. Instead, it targeted

[13] In *Cutter,* the Sixth Circuit did not address the federalism aspect of the Establishment Clause, nor did the Ohio Defendants in *Cutter* make such an argument.

[14] The statute provided, "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal." *Caldor*, 472 U.S. at 706 (quoting Conn. Gen. Stat. § 53-303e(b) (1985)).

burdens imposed by others – private employers. In other words, Connecticut authorized its citizens to demand religious accommodation from third parties. As the Court aptly recognized:

> The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.

Caldor, 472 U.S. at 710 (quoting *Otten v. Baltimore & Ohio R. Co.,* 205 F.2d 58, 61 (2nd Cir. 1953) (Hand, J.)) As Justice O'Connor explained, the statute lifted "a burden on religious practice imposed by private employers, and hence is not the sort of accommodation specifically contemplated by the Free Exercise Clause." *Caldor*, 472 U.S. at 712 (O'Connor, J., concurring). Moreover, the statute was "unyielding." *Caldor*, 472 U.S. at 710. It made no exception, even when compliance imposed "substantial economic burdens" on employers or imposed "significant burdens" on other employees. *Caldor*, 472 U.S. at 710. Indeed, "the statute allow[ed] for no consideration as to whether the employer has made *reasonable* accommodation proposals." *Id.* (emphasis added).

The Prison Provisions suffer from analogous flaws. Congress does not seek to lift burdens of its own making. Instead, it is targeting burdens imposed by others – the States. Moreover, the burdens imposed by the Prison Provisions are heavy. Indeed, the federal law is nearly as unyielding as the Connecticut statute, a fact that did not escape the attention of the district court:

> The "convenience or interests" of the prison system, an important element of the inquiry into an inmate's claim under the *Turner* test, has been eliminated in favor of a right to exemption closely resembling the "absolute and unqualified right" held by the employee in [*Caldor*].

App. 47. Like the Connecticut statute, the Prison Provisions give every state prisoner "the right to insist that . . . others must conform their conduct to his own religious necessities." *Caldor*, 472 U.S. at 710. Moreover, like the Connecticut statutes, the Prison Provisions are not satisfied with *reasonable*

accommodation. In order to avoid liability, a State must prove that compliance would interfere with a "compelling interest" – the heaviest burden recognized by constitutional jurisprudence. Judged by the nature of the burden targeted – and the nature of the burdens imposed – the Prison Provisions should fare no better than the Connecticut statute.

Analyzing the Prison Provisions by using the *Caldor* analogy has the advantage of leaving intact other governmental accommodations of religion. When not required by the Free Exercise Clause, government accommodation of religion has typically meant action by government to relieve religion of burdens imposed by that *same* government. *See*, *e.g.*, *Amos*, *supra* (treating as a permissible accommodation a provision in Title VII of 1964 Civil Rights Act exempting religious organizations from the Act's generally applicable prohibition against religious discrimination); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 613 n.59 (1989) (citing as an example of plausible accommodation of religion a hypothetical "Air Force . . . regulation exempting yarmulkes (and similar religiously motivated headcoverings) from its no-headdress rule."); *Walz v. Tax Com.*, 397 U.S. 664 (1970) (upholding as a permissible accommodation a state law exempting real property used for religious purposes from generally applicable real estate taxes imposed by the state). In other words, governmental accommodation of religion typically does not involve requiring accommodation from a third party.[15]

[15] An exception can be found in Title VII of the 1964 Civil Rights Act, which does impose religious accommodation obligations on third parties; however, unlike the heavy burdens imposed by the Prison Provisions or by the statute in *Caldor*, the burden imposed by Title VII is relatively light. A *reasonable* accommodation is all that is required. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986) ("By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation . . . . [W]here the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end.").

Thus, unlike the symmetrical accommodation theory, the *Caldor* analogy would not preclude the federal or state governments from adopting "RLUIPA-like" religious accommodation policies in their own prisons. Granting certiorari on this petition will ensure that the *Caldor* argument is presented to the Court for consideration.[16]

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE IMPORTANT FEDERAL QUESTIONS CONCERNING THE SCOPE OF CONGRESS' POWERS.

A. This Court Should Grant Review to Resolve Important Federal Questions Concerning the Scope of Congress' Spending Clause Power.

This Court should also grant review to determine whether Congress may use the Spending Clause to circumvent other constitutional limitations and invade the sphere of sovereignty reserved to the States. This issue is an important federal question that has not been, but ought to be, decided by this Court.

The division of sovereignty between the States and the National Government "is a defining feature of our Nation's constitutional blueprint." *Federal Maritime Comm'n v. South Carolina State Ports Auth.,* 535 U.S. 743, 751 (2002). In order to preserve the sovereign authority of the States, this Court has limited Congress' Commerce Clause power, *United States v. Morrison*, 529 U.S. 598, 615-16 (2000); *United States v. Lopez*, 514 U.S. 549, 563-64 (1995), as well as its power under Section 5 of the Fourteenth Amendment, *Morrison*, 529 U.S. at 619-27; *Flores*, 521 U.S. at 519-24. However, this Court has not yet articulated meaningful limits on Congress' power under the Spending Clause.

Such limits are essential to maintaining our federal system. As this Court has recognized, the "mechanism for

[16] *Caldor* was not addressed by the Sixth Circuit decision in *Cutter*.

exercising power under the Spending Clause . . . must have limits. Otherwise, Congress 'could render academic the Constitution's other grants and limits of federal authority.'" *New York v. United States*, 505 U.S. 144, 167 (1992). "If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.'" *South Dakota v. Dole*, 483 U.S. 208, 217 (1987) (O'Connor, J., joined by Brennan, J., dissenting) (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)).[17] Moreover, if "government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government . . . ," *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994), then surely the National Government may not require the people at large – acting through their States – to surrender an aspect of their sovereignty in exchange for federal money. Indeed, if government "may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may be thus manipulated out of existence." *Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 594 (1926). If the preservation of the States' sovereignty dictates limits on all other congressional powers, then surely limits also must be placed on the Spending Clause

[17] As one commentator has noted, Congress now has "a seemingly easy end run around any restrictions the Constitution might be found to impose on its ability to regulate the states. Congress need merely attach its otherwise unconstitutional regulations to any one of the large sums of federal money that it regularly offers the states." Lynn A. Baker, *The Revival of States' Rights: A Progress Report and a Proposal*, 22 Harv. J.L. & Pub. Pol. 95, 100-01 (1998). Indeed, "the states will be at the mercy of Congress so long as Congress is free to make conditional offers of funds to the states that, if accepted, regulate the states in ways that Congress could not directly mandate." Lynn A. Baker, *Conditional Federal Spending and State's Rights,* 574 Annals 104, 105 (2002).

power. The articulation of such limits on Congress' authority involves important federal questions that have not been, but ought to be, decided by this Court.

In evaluating the current state of this Court's Spending Clause jurisprudence, it is helpful to note both the majority and dissenting opinions in *Dole*. In that case, a majority of this Court recognized several principles that might serve as limits on the Spending Clause power:

1. "[T]he exercise of the spending power must be in pursuit of the general welfare." *Dole,* 483 U.S. at 207 (internal quotation marks and citation omitted).
2. Any condition imposed by Congress must be unambiguous. *Id.*
3. "[C]onditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Id.* at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)).
4. "[O]ther constitutional provisions may provide an independent bar to the conditional grant of federal funds." *Id.* at 208.
5. "[T]he financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.* at 208 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

Relevant to this case are the third and final principles – relatedness and coercion. Yet, despite this suggestion of limiting principles, neither *Dole* nor any subsequent cases decided by this Court have applied those principles to invalidate any mandate imposed by Congress as a condition of receiving federal funds.[18]

[18] Several circuits have suggested that the coercion requirement is substantively meaningless. *See Kansas v. United States,* 214 F.3d 1196, 1202

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Dole is also important because of the dissent in which Justice O'Connor articulated a specific test for determining the validity of Spending Clause legislation:

> The appropriate inquiry, then, is whether the spending requirement or prohibition is a condition on a grant or whether it is regulation. The difference turns on whether the requirement specifies in some way how the money should be spent, so that Congress' intent in making the grant will be effectuated. Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress' delegated regulatory powers.

Dole, 483 U.S. at 215-216 (O'Connor, J., joined by Brennan, J., dissenting). *See also* Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 Colum. L. Rev. 1911, 1962-78 (1995) (further refining the distinction in Justice O'Connor's dissent).

This petition presents an ideal vehicle for this Court to provide clarity to the limiting principles suggested by the majority in *Dole* or, alternatively, to adopt the standard suggested by Justice O'Connor's dissent. This is so because the Prison Provisions embody *all* of the Spending Clause problems identified by each approach.[19]

(10th Cir. 2000); *California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997); *Nevada v. Skinner,* 884 F.2d 445, 448 (9th Cir. 1989); *Oklahoma v. Schweiker,* 655 F.2d 401, 414 (D.C. Cir. 1981). However, another circuit has suggested that the coercion requirement is a meaningful restriction. *West Virginia v. United States*, 289 F.3d 281, 291 (4th Cir. 2002).

[19] Neither the Fourth Circuit nor the Sixth Circuit reached the issue of whether Congress has power under the Spending Clause to enact the Prison Provisions. However, the question has been addressed by both the Seventh and Ninth Circuits. *Charles*, 348 F.3d at 606-10 (upholding the Prison Provisions against a Spending Clause challenge); *Mayweathers*, 314 F.3d at 1066-68 (same). With the issue having been thus vetted through the lower

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1. Coercion: The *Dole* majority found no coercion in that case because "all South Dakota would lose if she [declines to abide by the federal condition] is *5* [*percent*] of the funds otherwise obtainable under *specified* highway grant programs." 483 U.S. at 211 (internal quotation marks and citation omitted) (emphasis added). By contrast, under RLUIPA, there is no way to avoid the federal condition without sacrificing *100 percent* of funding otherwise available to the Department of Corrections for *all* federal grant programs. Thus, this case does not require the Court to find the precise point where "pressure turns into compulsion." The Court need only recognize that it is coercive to threaten a state agency with a *complete loss* of *all* federal funds. Such a decision by the Court would establish a useful "bookend" to *Dole's* conclusion that losing a relatively small percentage of specified programs was not coercive.

2. Relatedness: Conditions on the receipt of federal funds always must "bear some relationship to the purpose of the federal spending . . . otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority." *New York*, 505 U.S. at 167. In *Dole*, the Court was divided over whether the federal condition (raising the drinking age to 21) was sufficiently related to the federal funding program at issue (highway construction). The majority found "relatedness" on the theory that a nationwide drinking age of 21 would promote safety on the highways that the federal funds

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courts, there is little to be gained for this Court to postpone consideration to another day. Indeed, the decisions by the Seventh and Ninth Circuits underscore the need for this Court to take up the issue. Both conflate the *Dole* requirement that a funding condition serve the general welfare with the requirement that the condition be related to a federal interest, *see Charles*, 348 F.3d at 608; *Mayweathers*, 314 F.3d at 1067. Such a misguided approach precludes any possibility of imposing meaningful limits on the Spending Clause because notions of general welfare are rarely, if ever, subject to judicial review. *See*, *Dole*, 483 U.S. at 207 n.2 ("The level of deference to the congressional decision is such that the Court has more recently questioned whether "general welfare**"** is a judicially enforceable restriction at all.") (citing *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976) (*per curiam*)).

helped build. Here there is not even such an indirect connection. Indeed, there is no pretense of such relatedness. Instead of a condition related to a specific funding program, there is a *blanket* condition imposed whenever the relevant state agency receives federal funds for *any* purpose. If "relatedness" means anything, surely this blanket condition goes too far. For this Court to say so would, again, establish a useful bookend to *Dole*.

3. "Spending Specification": In *Dole*, Justice O'Connor said that the applicable test should be "whether the requirement specifies in some way how the money should be spent." *Dole*, 483 U.S. at 216 (O'Connor, J., joined by Brennan, J., dissenting). Such a test may best be viewed as a particularly stringent sort of relatedness. Since the RLUIPA-imposed condition is unrelated to the purposes for which prison-related federal funds are granted, then *a fortiori* that condition would not satisfy the "spending specification" approach favored by Justice O'Connor. Hypothetically, if there were a federal program to fund meals for inmates, then it might satisfy Justice O'Connor's approach for Congress to impose conditions related to the inmates' dietary needs – religious or otherwise. However, in such a meal-funding program, it would *not* be permissible for Congress to impose other conditions related, say, to inmate clothing, hair length, reading materials, sweat lodges or any of the other myriad demands that prisoners might make under RLUIPA. Adopting the "spending specification" approach advocated by the *Dole* dissent is another option made available to the Court by this petition.

4. Regulation: In *Dole*, Justice O'Connor also said that, if a requirement is not a spending specification, it is valid "*only* if it falls within one of Congress' delegated regulatory powers." *Dole*, 483 U.S. at 215-16 (O'Connor, J., joined by Brennan, J., dissenting) (emphasis added).[20] Under this approach, if the

[20] For example, to the extent that Congress may use its Commerce Clause powers to prohibit discrimination against the disabled, *see* Americans with Disabilities Act, 42 U.S.C. § 12101, Congress may also use its Spending Clause powers to prohibit such discrimination by recipients of

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requirement could be enacted by Congress directly, then concerns about the "coerciveness" or "relatedness" may or may not disappear. However, this case would not require the Court to address such a potentially troublesome question because it is clear that Congress may *not* enact legislation directly imposing the Prison Provisions on the States. By striking down the Religious Freedom Restoration Act – RLUIPA's predecessor – this Court's decision in *Flores* forecloses any argument that the Prison Provisions are a legitimate exercise of Congressional power under Section 5 of the Fourteenth Amendment. It should also be clear that Congress has no power to impose the Prison Provisions under the Commerce Clause. *See infra* at 25-26. Thus, this case presents little danger that the development of meaningful limits on the Spending Clause would involve a complicated debate over whether the Prison Provisions "fall[ ] within one of Congress' delegated regulatory powers," *Dole*, 483 U.S. at 215-16 (O'Connor, J., joined by Brennan, J., dissenting), or what the consequence of such delegation might be. For this reason, too, this petition neatly presents alternatives for formulating restrictions on the Spending Clause.

In sum, the Prison Provisions embody all the worst elements of conditions placed on federal spending. They greatly exceed any requirements Congress could impose

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federal funds. *See* Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. Moreover, in the Commonwealth's view, the test articulated by Justice O'Connor could be readily expanded so as to allow Congress to impose a condition on funding *if* the condition is one that the already Constitution imposes directly on the States. For example, because the Fourteenth Amendment prohibits the States from engaging in many forms of discrimination, Congress could impose compliance with that constitutional standard as a condition for receiving federal funds. Thus, it would be permissible for Congress to condition the receipt of federal funds on compliance with the non-discrimination provisions of Title VI (42 U.S.C. § 2000d, prohibiting discrimination based on race) or Title IX (20 U.S.C. § 1681, prohibiting discrimination based on sex). *See Grutter v. Bollinger,* 123 S. Ct. 2325, 2347 (2003); *Gratz v. Bollinger*, 123 S. Ct. 2411, 2431 n.23 (2003) (Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, is coextensive with the Equal Protection Clause).

directly. They are not intended to specify how the federal funds are spent, nor are they related to any federal spending program. By making the cost of non-compliance the loss of all funds otherwise available to the Department of Corrections under *all* federal grant programs, the Prison Provisions are plainly coercive. Thus, this case presents the Court with an excellent opportunity to define urgently needed limits on the exercise of federal power under the Spending Clause. Certiorari should be granted.

B. This Court Should Grant Review to Resolve an Important Question Concerning the Scope of Congress' Commerce Clause Power.

In passing the Prison Provisions, Congress also attempted to invoke its Commerce Clause power. The statute explicitly states that the Prison Provisions are applicable whenever the burden on religion or its removal affects "commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. § 2000cc-1(b)(2). Review is warranted to determine whether the regulation of interstate commerce includes regulating the religious accommodation policies inside a state prison. This is an important federal question that has not been, but ought to be, decided by this Court. This petition presents a timely and well-postured vehicle for deciding it.

Recent decisions of this Court compel the conclusion that the Commerce Clause power does not extend to mandating a particular religious accommodation policy for State prisons. First, a State's operation of its prisons does not implicate any of the three factors that this Court has said allow Congress to exercise its Commerce Clause power. That is to say, such policies do not involve a *channel* of interstate commerce, they do not involve an *instrumentality* of interstate commerce, and they do not *substantially affect* interstate commerce. *See Morrison*, 529 U.S. at 617-19; *Lopez*, 514 U.S. at 558-61. Indeed, few activities seem more completely removed from interstate commerce than policies governing inmates confined behind the walls of a prison. Thus, a State's operation of its prisons falls outside the scope of the Commerce Clause power.

Second, even if the State's operation of its prisons has a substantial effect on interstate commerce, the State is acting as a sovereign when it determines the terms and conditions of punishment. Congress may not regulate the States when they act as sovereign. *See Printz v. United States*, 521 U.S. 898, 924 (1997) ("Even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. . . . The Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."); *New York*, 505 U.S. at 166 ("The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.").

If this Court grants review to resolve the Establishment Clause issue, or to determine the Spending Clause questions, it should also take the opportunity to affirm and apply the Commerce Clause principles articulated in *Morrison* and *Lopez*. For this reason, too, certiorari should be granted.

III. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THE APPLICABILITY OF THE *EX PARTE YOUNG* DOCTRINE.

Review of this case is also warranted to resolve important questions regarding the application of *Ex Parte Young*, 209 U.S. 123 (1908) that have not been, but ought to be, decided by this Court. Specifically, this Court should grant review to determine if the *Ex Parte Young* doctrine is applicable to the Prison Provisions.[21] If *Ex Parte Young* is

[21] If this Court were to conclude that the Prison Provisions are unconstitutional, then this Court obviously would not reach the *Ex Parte Young* issue. Thus, in this part of the petition, it is assumed *arguendo* that the Prison Provisions are constitutional.

not applicable, then sovereign immunity bars Madison from seeking injunctive relief in the federal courts.

Although the *Ex Parte Young* doctrine generally allows federal courts to enjoin state officers from on-going violations of federal law, the doctrine is inapplicable where Congress has enacted a detailed remedial scheme, *Seminole Tribe v. Florida*, 517 U.S. 44, 74-76 (1996), or where special sovereignty interests are involved. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 281-82 (1997). While this Court has recognized these two exceptions to the doctrine, it is has never expounded upon their meaning in any other case. This petition presents an opportunity to do so.

A. This Court Should Determine Whether the Power to Withdraw All Federal Funds Constitutes a Detailed Remedial Scheme.

In *Seminole Tribe*, this Court held that the *Ex Parte Young* doctrine was inapplicable in those situations where Congress enacted a "detailed remedial scheme." *Seminole Tribe*, 517 U.S. at 71-75. Specifically, this Court explained:

> Where Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary. Here, of course, the question is not whether a remedy should be created, but instead is whether the Eleventh Amendment bar should be lifted, as it was in *Ex Parte Young*, in order to allow a suit against a state officer. Nevertheless, we think that the same general principle applies: therefore, where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex Parte Young*.

Id. at 74-75 (citations and footnote omitted). Where Congress has enacted a remedial structure to remedy violations of federal law, there is no need for the federal courts to use the *Young* doctrine to accomplish the same objective. Thus, the

inquiry necessarily becomes whether Congress has enacted a detailed remedial scheme for the Prison Provisions.

Congress has done so. As with any Spending Clause legislation, Congress has stated that if a State wishes to receive federal funds for various purposes, then it must agree to comply with the conditions that Congress has clearly and unambiguously mandated. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The federal government provides for the withdrawal of federal funds if a recipient of corrections grants fails to comply with civil rights requirements of federal statutes.[22] Department of Justice, Office of Justice Programs Financial Guide, Ch. 13 (2002) (available at www.ojp.usdoj.gov/FinGuide/part3-ch13.htm). This power to remedy any violation of the Prison Provisions by withdrawing federal funds is a detailed remedial scheme. There is no need for a federal court to provide additional remedies. Thus, this Court should grant certiorari to decide whether the *Ex Parte Young* doctrine is applicable to a suit brought pursuant to the Prison Provisions.

B. This Court Should Determine Whether the Commonwealth's Interest in Defining the Terms and Conditions of Punishment Constitutes a Special Sovereignty Interest.

Even in situations where there is an on-going violation of federal law, the *Ex Parte Young* doctrine is inapplicable if there are "special sovereignty interests" involved. *See Coeur d'Alene Tribe*, 521 U.S. at 270. In *Coeur d'Alene*, a tribe of Native Americans sued Idaho and various state officials in a dispute over the control of certain submerged lands. Although it was alleged that state officials were engaged in an on-going violation of federal law, this Court held that the *Ex Parte Young* doctrine was inapplicable. As this Court explained:

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[22] *See also Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287-88 (1998) (explaining process for withdrawal of federal funds for violation of Title IX).

> It is apparent, then, that if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these particular and special circumstances, we find the *Young* exception inapplicable. The dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case.

Coeur d'Alene Tribe, 521 U.S. at 287-88. Thus, in those situations where a special sovereignty interest is present, the *Ex Parte Young* doctrine does not apply. In such situations, the plaintiff's remedy must be found in state courts even though the basis of the claim is federal law.

There is a special sovereignty interest that precludes the application of the *Ex Parte Young* doctrine to claims based on the Prison Provisions. That special sovereignty interest is the authority of the Commonwealth to operate its prisons and define the terms and conditions of punishment. *New York*, 505 U.S. at 156-57 ("The Tenth Amendment thus directs us to determine, . . . whether an incident of state sovereignty is protected by a limitation on an Article I power."). *See Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973) ("It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with the state laws, regulations, and procedures, than the administration of its prisons."). The Commonwealth does not claim that such a special sovereignty interest is an exception to *Ex Parte Young* when the action is action brought to enforce *constitutional* obligations. However, under the Prison Provisions, the source of the alleged obligation is simply the Spending Clause – *i.e.*, a "contract" between the State and federal governments – and the Commonwealth's special sovereignty interest should bar any RLUIPA action brought by a State prisoner in federal court. In other words, while the federal courts, utilizing the *Ex Parte Young* doctrine, may direct the Commonwealth's correctional officials to comply with the Constitution, state officials should not be hauled into federal court to litigate whether

RLUIPA entitles the prisoner to a particular sort of meal or some other special treatment. The indignity of such a suit is at least as great as any indignity to Idaho in being brought into federal court to litigate the ownership of the land beneath its rivers and streams. In Virginia, as in Idaho, the state courts are "open to hear and determine the case." *Coeur d'Alene*, 521 U.S. at 288. If Madison wishes to litigate a claim alleging a violation of the Prison Provisions, he should be required to bring his claim there.

In sum, this petition provides the Court an opportunity to clarify the scope of the special sovereignty interest exception to *Ex Parte Young*. For this reason, too, certiorari should be granted.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 6, 2004

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

IRA W. MADISON,

Petitioner-Appellant,

v.

R. RITER, a/k/a R. Ruter, CCS Chairman; DUNCAN MILLS; D. J. ARMSTRONG; GARY BASS, Chief of Operations, CCS; Commonwealth of Virginia; LEWIS B. CEI, Special Programs Manager,

Respondents-Appellees.

ALEPH INSTITUTE; AMERICAN CIVIL LIBERTIES UNION; THE AMERICAN JEWISH COMMITTEE; THE AMERICAN JEWISH CONGRESS; THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS; THE BECKET FUND FOR RELIGIOUS LIBERTY; THE CHRISTIAN LEGAL SOCIETY; PEOPLE FOR THE AMERICAN WAY,

Amici Supporting Appellant.

No. 03-6362

UNITED STATES OF AMERICA,

Intervenor-Appellant,

v.

R. RITER, a/k/a R. Ruter, CCS Chairman; DUNCAN MILLS; D. J. ARMSTRONG; GARY BASS, Chief of Operations, CCS; Commonwealth of Virginia; LEWIS B. CEI, Special Programs Manager,

Respondents-Appellees.

ALEPH INSTITUTE; AMERICAN CIVIL LIBERTIES UNION; THE AMERICAN JEWISH COMMITTEE; THE AMERICAN JEWISH CONGRESS; THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS; THE BECKET FUND FOR RELIGIOUS LIBERTY; THE CHRISTIAN LEGAL SOCIETY; PEOPLE FOR THE AMERICAN WAY,

Amici Supporting Appellant.

No. 03-6363

Appeals from the United States District Court
for the Western District of Virginia, at Roanoke.
James C. Turk, Senior District Judge.
(CA-01-596-7)

Argued: October 28, 2003

Decided: December 8, 2003

Before WILKINSON, MICHAEL, and DUNCAN, Circuit Judges.

Reversed and remanded by published opinion. Judge Wilkinson wrote the opinion, in which Judge Michael and Judge Duncan Joined.

COUNSEL

ARGUED: Gene C. Schaerr, SIDLEY, AUSTIN, BROWN & WOOD, L.L.P., Washington, D.C.; Michael Scott Raab, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. William Eugene Thro, Deputy State Solicitor, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellees. **ON BRIEF:** Richard H. Menard, Jr., SIDLEY, AUSTIN, BROWN & WOOD, L.L.P., Washington, D.C.; Robert D. McCallum, Jr., Assistant Attorney General, Stuart E. Schiffer, Acting Assistant Attorney

General, John L. Brownlee, United States Attorney, Mark B. Stern, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Jerry W. Kilgore, Attorney General, William H. Hurd, State Solicitor, Maureen Riley Matsen, Deputy State Solicitor, Pamela A. Sargent, Senior Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellees. Kevin J. Hasson, Anthony R. Picarello, Jr., Roman P. Storzer, Derek L. Gaubatz, THE BECKET FUND FOR RELIGIOUS LIBERTY, Washington, D.C. for Amici Curiae.

OPINION

WILKINSON, Circuit Judge:

Appellant Ira W. Madison, a convict held in a Virginia Department of Corrections prison, was denied his requests for kosher meals that he claims his religious beliefs require. He sued the Commonwealth of Virginia and officials of the Virginia Department of Corrections, alleging among other claims a violation of section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). The district court ruled that the provision had an impermissible effect of advancing religion under the second prong of the *Lemon* test. *See Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971). Because we find that Congress can accommodate religion in section 3 of RLUIPA without violating the Establishment Clause, we reverse. To hold otherwise and find an Establishment Clause violation would severely undermine the ability of our society to accommodate the most basic rights of conscience and belief in neutral yet constructive ways.

I.

A.

From 2000 to the present, Madison has claimed to be a member of the Church of God and Saints of Christ, a congregation founded in 1896 and headquartered at Temple Beth El in Suffolk, Virginia. Church members are commonly known as Hebrew Israelites, and they claim to be "followers of the anointed God" who honor but do not worship Jesus Christ. Most importantly for purposes of this case, Madison's church requires its members to abide by the dietary laws laid out in the Hebrew Scriptures.

The parties dispute the timing of Madison's conversion and his affiliation with a wide range of other religious groups during his incarceration. What is clear is that in July 2000 and again in March 2001, Madison informed correctional officials that his religious beliefs required him to receive a kosher diet, defined as a "common fare diet" by the Virginia Department of Corrections. Both requests were approved by local prison officials, but denied by Department of Corrections administrators in Richmond. The Commonwealth rejected Madison's requests because it determined that Madison already had adequate alternatives from the regular, vegetarian, and no pork daily menus; because it doubted the sincerity of Madison's religious beliefs; and because it considered Madison's history of disciplinary problems.

In August 2001, Madison challenged the denial of his request in district court, relying in part on section 3 of RLUIPA. Section 3(a) of RLUIPA states that "no government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . 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 government interest; and (2) is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000cc-1(a) (2000). Section 3(b) of RLUIPA states that Section 3(a) applies whenever the substantial burden at issue "is imposed in a program or activity that receives Federal financial assistance." 42 U.S.C. § 2000cc-1(b)(1). In 2002 the Commonwealth Department of Corrections received $4.72 million – approximately 0.5% of its budget – from the federal government, thus triggering the statute's applicability. Madison's lawsuit relied on section 4(a) of RLUIPA, which creates a private right of action that allows any person to "assert a violation of this chapter as a claim or defense in a judicial proceeding" and to "obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a).

The district court denied Madison's motion for summary judgment concerning his constitutional claims on August 23, 2002, and it deferred ruling on his RLUIPA claim pending briefing and argument on the statute's constitutionality. The district court also granted the United States leave to intervene to defend the statute, pursuant to 28 U.S.C. § 2403(a).

On January 23, 2003, the district court found that section 3 of RLUIPA impermissibly advanced religion by offering greater legislative protection to the religious rights of prisoners than to other fundamental rights that were similarly burdened. *See Madison v. Riter,* 240 F. Supp. 2d 566, 577 (W.D. Va. 2003). The district court therefore rejected Madison's statutory claim, and simultaneously certified the question of RLUIPA's constitutionality for interlocutory appeal under 28 U.S.C. § 1292(b).

Madison and the United States filed timely petitions with this court to appeal the order, and their petitions were granted.

B.

The legislative and judicial background that led to RLUIPA's enactment are important for considering Madison's appeal. Congress crafted RLUIPA to conform to the Supreme Court's decisions in *Employment Division v. Smith,* 494 U.S. 872 (1990), and *City of Boerne v. Flores,* 521 U.S. 507 (1997). In *Smith,* the Court held that laws of general applicability that incidentally burden religious conduct do not offend the First Amendment. *See* 494 U.S. at 890. The neutrality principle in *Smith* largely complemented the traditional deference that courts afford to prison regulations that impose burdens on prisoners' rights. *See Turner v. Safley,* 482 U.S. 78, 89-90 (1987).[1] At

[1] *Turner v. Safley* laid out a four-factor "rational- relationship" test for analyzing the constitutionality of regulations that burden prisoners' fundamental rights. 482 U.S. at 89-90. Under *Turner,* courts must consider (1) whether a "valid, rational connection [exists] between the prison regulation and the legitimate governmental interest put forward to justify it," (2) whether "alternative means of exercising the right [exist] that remain open to prison inmates," (3) what "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally," and (4) whether there was an "absence of ready alternatives" to the regulation in question. *Id.* State and local prison regulations that burden prisoners' religious exercise have been subject to this rational-relationship test. *See O'Lone v. Estate of Shabazz,* 482 U.S. 342, 349-50 (1987); *see also In re Long Term Administrative Segregation of Inmates Designated as Five Percenters,* 174 F.3d 464, 468-69 (4th Cir. 1999); *Hines v. South Carolina Dept. of Corrections,* 148 F.3d 353, 357 (4th Cir. 1998). The deferential test that

(Continued on following page)

the same time, however, the *Smith* Court openly invited the political branches to provide greater protection to religious exercise through legislative action. *See* 494 U.S. at 890.

In 1993, Congress responded to *Smith* by enacting the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, which Congress claimed was premised on its remedial powers under section 5 of the Fourteenth Amendment. RFRA prohibited federal and state governments from "substantially burden[ing]" a person's exercise of religion, even as the result of a law of general applicability, unless the government could demonstrate that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)-(b).

The Supreme Court's decision in *City of Boerne v. Flores,* 521 U.S. 507 (1997), invalidated RFRA as it applied to states and localities. The Court held that the scope of the statute exceeded Congress's remedial powers under section 5 of the Fourteenth Amendment. *See* 521 U.S. at 532-36.

While RFRA continued to apply to the federal government, *see Guam v. Guerrero,* 290 F.3d 1210, 1221 (9th Cir. 2002); *O'Bryan v. Bureau of Prisons,* No. 02-4012, 2003 WL 22533454, at *2 (7th Cir. Nov. 10, 2003), in September 2000, Congress attempted to reinstate RFRA's protection against government burdens on religious exercise imposed by states and localities by enacting the

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courts customarily apply to prison regulations, however, does not operate to prevent legislative bodies from adopting a more searching standard.

Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq*. This statute mirrored the provisions of RFRA, but its scope was limited to laws and regulations concerning land use and institutionalized persons. *See* 42 U.S.C. § 2000cc-1(a). RLUIPA's enactment was premised on congressional findings similar to those made for RFRA, namely, that in the absence of federal legislation, prisoners, detainees, and institutionalized mental health patients faced substantial burdens in practicing their religious faiths. *See* Joint Statement of Senator Hatch and Senator Kennedy, 146 Cong. Rec. S7774-01 (daily ed. July 27, 2000).

In passing RLUIPA, Congress sought to avoid *Boerne*'s constitutional barrier by relying on its Spending and Commerce Clause powers, rather than on its remedial powers under section 5 of the Fourteenth Amendment as it had in RFRA. *See* 42 U.S.C. § 2000cc-1(b)(1) (establishing that Section 3 of RLUIPA applies whenever the burden at issue "is imposed in a program or activity that receives Federal financial assistance"); 42 U.S.C. § 2000cc-1(b)(2) (establishing that section 3 of RLUIPA applies in cases in which "the substantial burden [on religion] affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes").

II.

Among its numerous constitutional challenges to RLUIPA, the Commonwealth contends that the statute violates the Establishment Clause. The district court held that section 3 of RLUIPA violates the Establishment Clause because it singled out the religious exercise rights

of prisoners for special protection. The district court explained:

> Prison inmates exist in a society of universally limited rights, one that is required by the nature of the institution. When Congress acts to lift the limitations on one right while ignoring all others, it abandons a position of neutrality towards these rights, placing its power behind one system of belief.

Madison, 240 F. Supp. 2d at 577. The district court stated that "the practical effect of RLUIPA on the prison system in the United States is to grant religious and professed religious inmates a multitude of exceptions and benefits not available to non-believers." *Id.* at 580. It concluded that "RLUIPA extends far beyond regulations targeting religion, protecting religious inmates against even generally applicable and facially neutral prison regulations that have a substantial effect on a multitude of fundamental rights." *Id.* at 575-76.

Because Congress had failed to compile "demonstrable evidence that religious constitutional rights are at any greater risk of deprivation in the prison system than other fundamental rights," *id.* at 575, the district court found that protecting the religious exercise of prisoners violated the Establishment Clause. It concluded that this provision sends "non-religious inmates a message that they are outsiders of a privileged community," *id.* at 580, and it unconstitutionally advanced religion by providing an inmate with incentives to "claim religious rebirth and cloak himself in the protections of RLUIPA." *Id.*

The district court's decision is at odds with two other circuits that have examined this question and found that

section 3 of RLUIPA does not violate the Establishment Clause. *See*, *e.g.*, *Charles v. Verhagen*, No. 02-3572, 2003 WL 22455960, at *6-7 (7th Cir. Oct. 30, 2003); *Mayweathers v. Newland,* 314 F.3d 1062, 1068-69 (9th Cir. 2002), *cert. denied,* No. 02-1655, 2003 WL 21180348 (U.S. Oct. 6, 2003); *see also Williams v. Bitner,* No. CV-01-2271, 2003 WL 22272302, at *4-5 (M.D. Pa. Sept. 30, 2003). Courts have also rejected similar Establishment Clause challenges to the Religious Freedom Restoration Act, whose religious accommodation provisions are identical to section 3 of RLUIPA. *See*, *e.g.*, *In Re Young,* 141 F.3d 854, 862-63 (8th Cir. 1998); *Mockaitis v. Harcleroad,* 104 F.3d 1522, 1530 (9th Cir. 1997); *Sasnett v. Sullivan,* 91 F.3d 1018, 1022 (7th Cir. 1996); *EEOC v. Catholic. Univ. of Am.,* 83 F.3d 455, 470 (D.C. Cir. 1996); *Flores v. City of Boerne,* 73 F.3d 1352, 1364 (5th Cir. 1996), *rev'd on other grounds,* 521 U.S. 507 (1997). One circuit court, however, has relied extensively upon the district court's decision in this case to hold that section 3 of RLUIPA does violate the Establishment Clause. *See Cutter v. Wilkinson,* No. 02-3270, 2003 WL 22513973, at *4-9 (6th Cir. Nov. 7, 2003). It is this conclusion that we must address with care.

This court must review de novo the constitutionality of a federal law. *See United States v. Buculei,* 262 F.3d 322, 327 (4th Cir. 2001); *Farmer v. Employment Security Commission of North Carolina,* 4 F.3d 1274, 1279 (4th Cir. 1993). The basic framework for Establishment Clause challenges is well-settled: "first the [targeted] statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971) (internal and

quotations omitted). We address each of the three *Lemon* prongs in turn.

A.

We first consider whether section 3 of RLUIPA has a legitimate secular purpose. *Lemon,* 403 U.S. at 612-13. We are guided here by the Supreme Court's decision in *Corporation of the Presiding Bishop v. Amos,* which established that Congress may accommodate the exercise of faith by lifting government-imposed burdens on free exercise. 483 U.S. 327, 335 (1987). The *Amos* Court stated that the Establishment Clause seeks to prevent government decisionmakers "from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Id.* But in commanding neutrality, the Establishment Clause does not require the government to be oblivious to the burdens that state action may impose upon religious practice and belief. Rather, there is "ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'" *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet,* 512 U.S. 687, 705 (1994) (quoting *Amos,* 483 U.S. at 334). The Supreme Court therefore held in *Amos* that "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." *Amos,* 483 U.S. at 335.

This alleviation of government burdens on prisoners' religious exercise is precisely the legitimate secular purpose that RLUIPA seeks to advance. RLUIPA is not designed to advance a particular religious viewpoint or

even religion in general, but rather to facilitate opportunities for inmates to engage in the free exercise of religion. This secular goal of exempting religious exercise from regulatory burdens in a neutral fashion, as distinguished from advancing religion in any sense, is indeed permissible under the Establishment Clause. *See id.*

To be sure, Congress has no constitutional duty to remove or to mitigate the government-imposed burdens on prisoners' religious exercise. *See O'Lone v. Estate of Shabazz,* 482 U.S. 342, 349-50 (1987). But the Supreme Court has held that Congress may choose to reduce government-imposed burdens on specific fundamental rights when it deems it appropriate. The Supreme Court "has upheld a broad range of statutory religious accommodations against Establishment-Clause challenges." *Brown v. Gilmore,* 258 F.3d 265, 275 (4th Cir. 2001). These include statutes that allow public school students time off during the day solely for religious worship or instruction, *see Zorach v. Clauson,* 343 U.S. 306, 315 (1952), property tax exemptions for religious properties used solely for religious worship, *see Walz v. Tax Commission,* 397 U.S. 664, 680 (1970), and exemptions for religious organizations from statutory prohibitions against discrimination on the basis of religion, *see Amos,* 483 U.S. at 335. While RLUIPA's scope may in some ways be broader than the specific religious exceptions that the Supreme Court has previously upheld, the central principle – that Congress may legitimately minimize government burdens on religious exercise – remains the same. Congress here has acted properly in embracing this secular purpose.

B.

We next consider whether section 3 of RLUIPA has the impermissible effect of advancing religion. *See Lemon,* 403 U.S. at 612-13. The district court found that RLUIPA impermissibly advanced religion by according special protection only to prisoners' religious exercise. The district court stated:

> The singling out of religious belief as the one fundamental right of prisoners deserving of legislative protection rejects any notion of congressional neutrality in the passage of RLUIPA. In the absence of any proof that religious rights are more at risk in prison than other fundamental rights, and with the knowledge that strict scrutiny is not required to protect the religious belief of prisoners under the Free Exercise Clause, Congress acted only to protect religious rights. Such an action, while labeled a neutral "accommodation," is not in fact neutral at all, and the Court is not allowed to defer to the mere characterization of RLUIPA as such.

Madison, 240 F.Supp.2d at 576.

We disagree. "For a law to have forbidden 'effects' under *Lemon,* it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Amos,* 483 U.S. at 337 (emphasis in original). Evidence of the impermissible government advancement of religion includes "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz,* 397 U.S. at 668. Here, however, Congress has not sponsored religion or become actively involved in religious activity, and RLUIPA in no way is attempting to indoctrinate prisoners in any particular belief or to advance

religion in general in the prisons. Congress has simply lifted government burdens on religious exercise and thereby facilitated free exercise of religion for those who wish to practice their faiths.

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. *Madison,* 240 F. Supp. 2d at 577; *see also Cutter v. Wilkinson,* No. 02-3270, 2003 WL 22513973, at *7-8 (6th Cir. Nov. 7, 2003). There is no requirement that legislative protections for fundamental rights march in lockstep. The mere fact that RLUIPA seeks to lift government burdens on a prisoner's religious exercise does not mean that the statute must provide commensurate protections for other fundamental rights. *Amos* clearly established that "where, 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 secular entities." *Amos,* 483 U.S. at 338.

The district court attempted to distinguish *Amos* from the present case by stating that in *Amos,* Congress had found that Title VII's prohibitions on hiring or firing on the basis of religion had a much greater effect on religious groups than on secular organizations. *Madison,* 240 F. Supp. 2d at 577 n. 9. While congressional supporters of RLUIPA also emphasized the "egregious and unnecessary" burdens that prison regulations impose on religious exercise, the district court concluded that the restrictions inherent in prison life could not help but burden other fundamental rights as well. *Id.* at 575. The district court thus concluded that "when Congress acts to lift limitations

on one right while ignoring all others, it abandons neutrality towards these rights, placing its power behind one system of belief." *Id.* at 577.

The Establishment Clause's requirement of neutrality does not mandate that when Congress relieves the burdens of regulation on one fundamental right, that it must similarly reduce government burdens on all other rights. *Amos* stands, as we have noted, for the simple proposition that Congress can intervene to lift governmental burdens on religious exercise. The *Amos* decision does not at all indicate that Congress must examine how or if any other fundamental rights are similarly burdened. The *Amos* Court in no way made its ruling turn on a congressional finding that religious exercise was threatened more by the application of Title VII than were other rights. It is doubtful that such congressional findings – a compilation of evidence on how *all* fundamental rights would or would not be affected by Title VII – even existed. Regardless, such a heightened standard for congressional action was not part of the inquiry in *Amos*.[2]

Indeed, the context in which Congress was acting made it sensible for Congress to lift only state-imposed burdens on free exercise through RLUIPA. It was reasonable for Congress to seek to reduce the burdens on

[2] A concurrence in *City of Boerne v. Flores* admittedly states a view related to that of the district court. 521 U.S. at 536-37 (Stevens, J., concurring) (holding that the Religious Freedom Restoration Act provides religious groups "with a legal weapon that no atheist or agnostic can obtain" and thus constitutes a "governmental preference for religion, as opposed to irreligion"). This view, however, has not been adopted by the Supreme Court.

religious exercise for prisoners without simultaneously enhancing, say, an inmate's First Amendment rights to access pornography. Free exercise and other First Amendment rights may be equally burdened by prison regulations, but the Constitution itself provides religious exercise with special safeguards. And no provision of the Constitution even suggests that Congress cannot single out fundamental rights for additional protection. To attempt to read a requirement of symmetry of protection for fundamental liberties would not only conflict with all binding precedent, but it would also place prison administrators and other public officials in the untenable position of calibrating burdens and remedies with the specter of judicial second-guessing at every turn.

Apart from advancing religion, the district court further found that RLUIPA may create incentives for secular prisoners to cloak secular requests in religious garb and thus may increase the burden on state and local officials in processing RLUIPA claims. *See Madison,* 240 F. Supp. 2d at 580. This may be true, but it is simply not a concern under the Establishment Clause. Any additional burdens that RLUIPA may impose on states and localities speak more to the wisdom of the law and to the disincentives for states to assume their RLUIPA obligations than to RLUIPA's validity under the Establishment Clause. We therefore conclude that section 3 of RLUIPA has the effect of lifting burdens on prisoners' religious exercise, but does not impermissibly advance religion.

C.

We further conclude that section 3 of RLUIPA does not create excessive government entanglement with religion in

violation of the third prong of the *Lemon* test. *See Lemon,* 403 U.S. at 612-13; *see also Agostini v. Felton,* 521 U.S. 203, 232-35 (1997) (suggesting that the effects and entanglement prongs of *Lemon* focus on substantially the same factors). While the statute may require some state action in lifting state-imposed burdens on religious exercise, RLUIPA does not require "pervasive monitoring" by public authorities. *Agostini v. Felton,* 521 U.S. at 233-34; *see also Mayweathers v. Newland,* 314 F.3d 1062, 1069 (9th Cir. 2002). RLUIPA itself minimizes the likelihood of entanglement through its carefully crafted enforcement provisions. For example, the statute's broad definition of "religious exercise" to "include any exercise of religion, whether or not compelled by, or central to, a system of religious belief," 42 U.S.C. § 2000cc-5(7)(A), mitigates any dangers that entanglement may result from administrative review of good-faith religious belief.

D.

Section 3 of RLUIPA thus satisfies the three prongs of the *Lemon* test. The opposite conclusion, we believe, would work a profound change in the Supreme Court's Establishment Clause jurisprudence and in the ability of Congress to facilitate the free exercise of religion in this country. It would throw into question a wide variety of religious accommodation laws. It could upset exemptions from compulsory military service for ordained ministers and divinity students under federal law, since these exemptions are not paired with parallel secular allowances or provisions to protect other fundamental rights threatened by compulsory military service. *See* 50 U.S.C. App. § 456(g) (2000). It would similarly imperil Virginia's and other states' recognition of a "clergy-penitent privilege,"

which exempts from discovery an individual's statements to clergy when "seeking spiritual counsel and advice." *See*, *e.g.*, Va. Code Ann. §§ 8.01-400, 19.2-271.3 (2000). Other specific religious accommodation statutes, ranging from tax exemptions to exemptions from compulsory public school attendance, *see*, *e.g.*, Va. Code Ann. § 22.1-254(B) (2000), would also be threatened.

Perhaps more importantly, the principle of neutrality advanced by the district court would create a test that Congress could rarely, if ever, meet in attempting to lift regulatory burdens on religious entities or individuals. For example, if Congress sought to grant religious organizations an exemption from a particularly demanding legal requirement, then Congress might have to grant similar exemptions to radio and TV stations or secular advocacy groups, absent congressional findings that free exercise rights were somehow more endangered by the law than other rights. Congress would have to make determinations in every instance of what fundamental rights are at risk and to what degree they are at risk, and it would be able only to heighten protection for fundamental rights in a symmetric fashion according to these assessments. The byzantine complexities that such compliance would entail would likely cripple government at all levels from providing any fundamental rights with protection above the Constitution's minimum requirements.

III.

A.

The Commonwealth recognized at argument the problematic nature of the trial court's rationale, but pressed several alternative points in support of affirmance

which we feel obliged to address. It first contends that RLUIPA's mandate for the religious accommodation of prisoners violates the Establishment Clause because it subjects third parties to substantial burdens. The Commonwealth relies primarily on *Estate of Thornton v. Caldor, Inc.,* 472 U.S. 703, 710-11 (1985), for this contention. In *Caldor,* a Connecticut statute required employers to excuse employees from work on whatever day the employee designated as his Sabbath. *Id.* at 708. Importantly, that statute mandated the accommodation of the religious needs of not only state employees, but also private employees. The Supreme Court struck the statute down on Establishment Clause grounds because it imposed significant burdens on private employers by requiring them to lift privately-imposed burdens on religious exercise. *Id.* at 708-10.

It is true that section 3 of RLUIPA also seeks to have third parties – states accepting federal correctional funds – accommodate religious needs. But any comparison between RLUIPA and the statute in *Caldor* ends there. *Caldor* concerned an unfunded mandate imposed on private employers to lift *privately*-imposed burdens on the religious exercise of employees. Here the Commonwealth has voluntarily committed itself to lifting *government*-imposed burdens on the religious exercise of publicly institutionalized persons in exchange for federal correctional funds. These distinctions make the Commonwealth's reliance on *Caldor* unpersuasive.

B.

The Commonwealth also protests that RLUIPA's compelling interest test will bind its hands and make it

nearly impossible for the Commonwealth to prevail if prisoners challenge burdens on their religious exercise. The district court echoed this concern by proclaiming that "the change that RLUIPA imposes is revolutionary, switching from a scheme of deference to prison administrators to one of presumptive unconstitutionality." *Madison,* 240 F. Supp. 2d at 575.

We do not make light of this concern. RLUIPA may impose burdens on prison administrators as they act to accommodate an inmates' right to free exercise. But RLUIPA still affords prison administrators with flexibility to regulate prisoners' religious practices if the Commonwealth "demonstrates that imposition of the burden on that person – (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000cc-1(a).

Moreover, the 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. *See Developments in the Law – Religious Practice in Prison,* 115 Harv. L. Rev. 1891, 1894 (2002). This fact suggests that RLUIPA should not hamstring the ability of the Commonwealth's correctional officials to ensure order and safety in the Commonwealth's prisons.

Admittedly, prison administrators' litigation successes may obscure the extent to which RLUIPA provides incentives for administrators to accommodate religious needs

before litigation. But there is little empirical evidence from the federal government's experience under RFRA to suggest that the Commonwealth's compliance with RLUIPA will prove unworkable. And if it does, the Commonwealth at any time can decline the federal government's correctional funding. State legislators or administrators may weigh the burdens and benefits of RLUIPA and reject the federal funding if the tie-in of religious accommodation is not worth the financial benefits. In the final analysis, however, practical difficulties speak more to the wisdom of the legislation than to the precise Establishment Clause challenge under review in this appeal.

IV.

Our society has a long history of accommodation with respect to matters of belief and conscience. If Americans may not set their beliefs above the law, there must be room to accommodate belief and faith within the law. *See Smith,* 494 U.S. at 878-79. Regardless of the nature of their beliefs, people must pay taxes and observe other secular laws of general applicability. *See Minersville School Dist. v. Gobitis,* 310 U.S. 586, 594-95 (1940). However, legislative bodies have every right to accommodate free exercise, so long as government does not privilege any faith, belief, or religious viewpoint in particular. *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet,* 512 U.S. 687, 696-97 (1994). Section 3 of RLUIPA fits comfortably within this broad tradition.

We thus cannot find that section 3 of RLUIPA creates an Establishment Clause violation. We address here only the Establishment Clause challenge to RLUIPA. The Commonwealth has challenged the statute on a variety of

other grounds, namely that it exceeds Congress's authority under the Spending and Commerce Clauses and that it runs afoul of the Tenth and Eleventh Amendments. We do not address these issues in this interlocutory appeal because the district court has not yet had sufficient opportunity to consider them. The Commonwealth also argues that it retains the exclusive authority to regulate in a zone of discretion between what the Establishment Clause prohibits and what the Free Exercise Clause requires. Although couched in religious terms, this is really a variant of the Commonwealth's many federalism-based or residual power contentions, which we have left to the district court on remand.

The judgment is therefore reversed, and the case is remanded to the district court for further proceedings.

REVERSED AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

IRA W. MADISON	)	Civ. No. 7:01CV00596
Plaintiff,	)	MEMORANDUM OPINION
v.	)	By: James C. Turk
R. RITER, et al.	)	Senior United States District Judge
Defendants.	)	(Filed Jan. 23, 2003)

Plaintiff, Ira W. Madison, is an inmate under the supervision of the Virginia Department of Corrections seeking relief under the First Amendment and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc-1 (2002), for the alleged violation of his right to free exercise of religion. In an August 23, 2002 opinion, the Court denied summary judgment on the Plaintiff's First Amendment claim, holding that there was a material factual dispute concerning the sincerity of the Plaintiff's religious beliefs. The Court also denied qualified immunity to the Defendants, finding that the constitutional standards governing the Defendants' conduct were clearly established.

The Court took Plaintiff's RLUIPA claim under advisement until the constitutionality of the Act could be briefed and argued. The Court heard oral arguments from the parties and the United States Government as intervener, and the Defendants' Motion to Dismiss the Plaintiff's RLUIPA claim on the basis that the Act violates the United States Constitution is ripe for resolution.

I

The facts of the present case are explained in detail in the Court's August 23, 2002, opinion. For purposes of this motion, a short review of the facts is appropriate. The Plaintiff claims to be a member of a particular sect of the Hebrew Israelite faith, based out of the Beth El Temple in Norfolk [sic], Virginia. The Plaintiff argues that his faith requires him to consume a kosher diet, provided by the Department of Corrections in particular prison facilities under the name "Common Fare Diet."

The Plaintiff first requested the Common Fare Diet on July 27, 2000, while an inmate at Greenville Correctional Center. Local officials at the facility approved the request, but Central Classifications Services ("CCS"), a Richmond-based agency of the Virginia Department of Corrections which must review all such requests, overturned the approval upon the belief that Plaintiff had no compelling religious reason to participate in the diet, that he could satisfy his dietary needs from the regular food line, and that he had not shown a sincere belief in his religion. Plaintiff made a second request for the diet after his transfer to Bland Correction Center in March of 2001. Again, local officials approved the request but CCS reversed the decision and denied Plaintiff the diet. After his administrative appeals were denied within the prison system, the Plaintiff filed this suit on August 6, 2001.

II

The History of RLUIPA

On April 17, 1990, the Supreme Court of the United States decided *Employment Division, Dept. of Human Resources of Oregon v. Smith,* 494 U.S. 872, 110 S. Ct.

1595, 108 L. Ed. 2d 8576 (1990), holding that the right of free exercise did not "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879, 110 S. Ct. at 1600. The Court clarified existing free exercise precedent by rejecting the applicability of the test developed in *Sherbert v. Verner,* 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) and *Wisconsin v. Yoder,* 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972), which established a strict scrutiny level of review for governmental actions that "substantially burden a religious practice," in the context of generally applicable laws.[1] *Sherbert,* 374 U.S. at 402-03, 83 S. Ct. at 1792-94. The Court was not concerned about the possible discriminatory effect of its decision on religious belief, reasoning that narrow and constitutional exemptions would be provided by Congress and state legislatures when necessary to protect religion. *Smith,* 494 U.S. at 890, 110 S. Ct. at 1606.

The Court's prediction was fulfilled, and perhaps exceeded in degree, just three years later, when Congress passed the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb (2002). The stated purpose of the Act is to "restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of

[1] The Court was concerned about the dangerous effect that the application of strict scrutiny would have in invalidating generally applicable laws, as the power that the test would grant to a religious individual would allow the believer "to become a law unto himself," in contradiction of "both constitutional tradition and common sense." *Smith,* 494 U.S. at 885, 110 S. Ct. at 1603.

religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). The Act consequently forbids the government from substantially burdening a person's exercise of religion, even in the case of generally applicable laws, unless the government can demonstrate that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. *Id.* § 2000bb-1(b).

The back-and-forth between Congress and the Supreme Court on the applicability of the *Sherbert* strict scrutiny test to laws of general applicability continued in 1997 when a challenge to the constitutionality of RFRA reached the Supreme Court in *City of Boerne v. Flores,* 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997). Writing for a majority of the Court, Justice Kennedy held the Act unconstitutional as a violation of Congress's powers under § 5 of the Fourteenth Amendment. *Id.* Justice Stevens, concurring with the majority's opinion, wrote separately to voice his opinion that RFRA also violated the Establishment Clause of the First Amendment. *Id.* at 536-37, 117 S. Ct. at 2172. The reach of the Supreme Court's decision in *City of Boerne* has been the subject of much debate in the lower courts, as courts have disagreed as to whether *City of Boerne* invalidated RFRA as a whole or merely as it pertained to the states under § 5 of the Fourteenth Amendment. *Compare Young v. Crystal Evangelical Free Church,* 141 F.3d 854 (8th Cir. 1998) (concluding that RFRA was only declared unconstitutional as it applies to the states), *with United States v. Sandia,* 6 F. Supp.2d 1278 (D. N.M. 1997) (holding that the Court in *City of Boerne* held RFRA unconstitutional in its entirety). However, despite this confusion, it was clear in *City of Boerne* that the Court was continuing to resist the application of

the *Sherbert* strict scrutiny test to allow individuals to avoid burdens imposed on religious belief by generally applicable laws. After *City of Boerne,* it was once again up to Congress to try and fashion such an exemption in a constitutional manner.

The Religious Land Use and Institutionalized Persons Act of 2000 represents Congress's attempt to reestablish RFRA's strict scrutiny standard while avoiding the constitutional infirmities that led to the invalidation of RFRA. Congress narrowed the reach of the strict scrutiny test in RLUIPA to zoning ordinances and institutionalized persons and avoided § 5 of the Fourteenth Amendment as the source of its authority to act, opting instead to use the Spending Power and the Commerce Clause. 42 U.S.C. § 2000cc-1(b)(1) & (2). At the same time, Congress made no changes to RFRA's strict scrutiny test, merely adopting the test in RLUIPA. Section 2000cc-1(a) of the Act, the section covering the claims of prison inmates, reads as follows:

> 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.

RLUIPA requires the inmate to bear the burden of persuasion concerning the substantial burden imposed on his religious exercise, and then, as in any strict scrutiny case,

the government bears the burden of persuasion on the remaining elements of the test. *Id.* § 2000cc-2(b).[2]

The match between the judiciary and the legislature over the use of the *Sherbert* test continues to play out, as the question of the constitutionality of RLUIPA is presently before this Court. The answer to this question depends on the ability of Congress to cure the constitutional problems presented by RFRA in passing RLUIPA, despite the Supreme Court's strong suggestion in *City of Boerne* that the strict scrutiny test imposed by RFRA and RLUIPA has constitutional problems independent of Congress's power to enact such a statute.

III

The Constitutionality of RLUIPA

The Defendants claim that RLUIPA exceeds Congress's authority under the Spending and Commerce Clauses, and violates the Tenth Amendment, Establishment Clause, and the Separation of Powers. The Defendants' claims have been rejected by the few courts that have reviewed the constitutionality of RLUIPA. *See Mayweathers v. Newland,* 258 F.3d 930, 2002 WL 31875409

[2] The Plaintiff meets the substantial burden threshold under RLUIPA. The Plaintiff claims that a Kosher diet is mandated by his religion. In its August 23 opinion, the Court reserved for trial the issue of Plaintiff's sincerity of belief. Assuming that the Plaintiff's belief is sincere, prohibiting him from receiving the diet places a substantial burden on his religious exercise. As the Court's August 23 opinion explains, the Defendants have failed to prove as a matter of law that there is a rational reason for denying the diet, let alone a compelling one.

(9th Cir. 2002), *aff'g Mayweathers v. Terhune,* 2001 U.S. Dist. LEXIS 22300, 2001 WL 804140 (E.D. Cal.); *Johnson v. Martin,* 223 F. Supp.2d 820 (W.D. Mich. 2002); *Charles v. Verhagen,* 220 F. Supp.2d 955 (W.D. Wis. 2002); *Gerhardt v. Lazaroff,* 221 F. Supp.2d 827 (S.D. Ohio 2002). However, the backdrop of authority is not as unanimous in support of RLUIPA as it might seem. Several judges have come to the conclusion that the Supreme Court's invalidation of RFRA in *City of Boerne* extended beyond § 5 to condemn any use of the *Sherbert* strict scrutiny test as a violation of the Separation of Powers or the Establishment Clause. *See*, *e.g.*, *Sandia,* 6 F. Supp.2d 1278 ("*City of Boerne* stands . . . for the proposition that in setting out to replace the constitutional test of *Smith* with one demanding higher scrutiny, Congress impermissibly crossed into the judiciary's Article III territory."); *Warner v. City of Boca Raton,* 64 F. Supp.2d 1272 (S.D. Fla. 1999) (citing Justice Stevens' concurrence in *City of Boerne* for the proposition that RFRA "evidences a preference for religion which arguably runs afoul of the Establishment Clause of the First Amendment."); *Young v. Crystal Evangelical Free Church*, 141 F.3d 854 (8th Cir. 1998) (Bogue, S.J., dissenting) ("I would hold that RFRA is unconstitutional even as applied to federal law, and on that basis affirm the district court.").

The United States disagrees with the courts that have interpreted *City of Boerne* broadly to invalidate any application of strict scrutiny to laws of general applicability and argues that the narrower reach of RLUIPA and its passage under the Spending and Commerce Clause cured the infirmities that rendered RFRA unconstitutional. With due respect to the courts that have found RLUIPA constitutional, this Court is of the opinion that RLUIPA's application of the *Sherbert* strict scrutiny standard to the

free exercise claims of religious inmates is a clear violation of the Establishment Clause, having the primary effect of advancing religion above other fundamental rights and conscientious beliefs.[3]

A

The Establishment Clause

The First Amendment to the Constitution provides that "Congress shall make no law respecting an establishment of religion." This language has been interpreted by the Supreme Court to guard against laws that promote all religions equally, in addition to laws that attempt to promote one particular religion over all others. *See Bd. of Educ. of Kiryas Joel Village School Dist. v. Grumet,* 512 U.S. 687, 696, 114 S. Ct. 2481, 2487, 129 L. Ed. 2d 546 (1994); *Texas Monthly, Inc. v. Bullock,* 489 U.S. 1, 8, 109 S. Ct. 890, 896, 103 L. Ed. 2d 1 (1989); *Everson v. Bd. of Educ. of Ewing Township,* 330 U.S. 1, 15, 67 S. Ct. 504, 511, 91 L. Ed. 711 (1947) ("Neither a state nor a Federal government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another."). The Establishment Clause requires the courts to be vigilant against establishments, as "[a] law 'respecting' the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A

[3] In this opinion, the Court addresses 42 U.S.C. § 2000cc-1, the section of RLUIPA pertaining to institutionalized persons and not the portions of RLUIPA dealing with zoning laws.

given law might not establish a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment." *Lemon v. Kurtzman,* 403 U.S. 602, 612, 91 S. Ct. 2105, 2112, 29 L. Ed. 2d 745 (1971).

However, vigilance is not synonymous with antipathy. The so-called wall that separates church and state is anything but impenetrable, as total separation has been recognized by the Supreme Court and Fourth Circuit to be a mythical, and perhaps dangerous, objective. *See Lynch v. Donnelly,* 465 U.S. 668, 672, 104 S. Ct. 1355, 1359, 79 L. Ed. 2d 604 (1984); *Lemon,* 403 U.S. at 614, 91 S. Ct. at 2112; *Brown v. Gilmore,* 258 F.3d 265, 275 (4th Cir. 2001). Due to the counter-pressures asserted by the interplay of the Establishment and Free Exercise Clauses, it is permissible, and sometimes required, for Congress to legislate with respect to religion. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,* 483 U.S. 327, 335, 107 S. Ct. 2862, 2867, 97 L. Ed. 2d 273 (1987); *Texas Monthly,* 489 U.S. at 10, 109 S. Ct. at 897 (1989); *Lynch,* 465 U.S. at 673, 104 S. Ct. at 1359.

Congress is not without any guidelines to act in the area of religious belief, however, as the Supreme Court has established as a fundamental requirement of the Religion Clauses the necessity of legislative neutrality towards religious belief. *Agostini v. Felton,* 521 U.S. 203, 117 S. Ct. 1997, 2014, 138 L. Ed. 2d 391 (1997); *Rosenberger v. Rector and Visitors of the University of Va.,* 515 U.S. 819, 846, 115 S. Ct. 2510, 2525, 132 L. Ed. 2d 700 (1995) (O'Connor, J., concurring) ("Neutrality, in both form and effect, is one hallmark of the Establishment Clause."); *Kiryas Joel,* 512 U.S. at 705, 114 S. Ct. at 2492 (stating that the Religion

Clauses "command[ ] neutrality"); *Wallace v. Jaffree,* 472 U.S. 38, 50, 60, 105 S. Ct. 2479, 2486, 2491, 86 L. Ed. 2d 29 (1985); *Comm. for Public Educ. and Religious Liberty v. Nyquist,* 413 U.S. 756, 792-93, 93 S. Ct. 2955, 2975, 37 L. Ed. 2d 948 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion."). The concept of neutrality is often ill-defined in case law, but the Supreme Court has explained that, at the least, neutrality compels the state to act with equal regard to each fundamental freedom guaranteed by the First Amendment, placing no right above or below another. *See Wallace,* 472 U.S. at 50, 105 S. Ct. at 2486 ("'If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme.'" (*quoting Prince v. Mass.,* 321 U.S. 158, 164, 64 S. Ct. 438, 441, 88 L. Ed. 645 (1944)).

Neutrality is an effective guideline for constitutional state action, because it incorporates the concept of "benevolent neutrality," recognizing that government may provide benefits to religion with facially neutral exemptions and benefits. *See Kiryas Joel,* 512 U.S. at 705, 114 S. Ct. at 2492; *Amos,* 483 U.S. at 334, 107 S. Ct. at 2867-68. Therefore, a governmental accommodation of religious exercise, such as the one provided by RLUIPA, is not *per se* invalid as an establishment of religion despite granting protections going beyond what the Free Exercise Clause would otherwise require. *See Amos,* 483 U.S. at 334, 107 S. Ct. at 2867. The question for a court in analyzing the constitutionality of an accommodation of religion is

whether the accommodation goes too far in protecting religious belief and devolves into "an unlawful fostering of religion." *Id.* at 334-35, 2868.

The answer to this question, often an unclear and ambiguous inquiry, can be sharpened somewhat by the use of the three-part inquiry established in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S. Ct. 2105. In *Lemon,* the Supreme Court delineated three tests for a court to use in deciding whether a particular statute is constitutional under the Establishment Clause: (1) "The statute must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; (3) the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13, 2111. In *Agostini v. Felton,* the Court simplified the test, suggesting that a court's inquiry under the second and third prongs of the *Lemon* inquiry was substantially the same, and placing the search for excessive entanglement under the inquiry into impermissible effects. 521 U.S. 203, 232-33, 138 L. Ed. 2d 391, 117 S. Ct. 1997, 2015.

In evaluating the constitutionality of congressional action under the *Lemon* inquiry, the search for impermissible effects and excessive entanglement has often proved to be the most critical test. *See, e.g., Estate of Thornton, v. Caldor, Inc.,* 472 U.S. 703, 105 S. Ct. 2914, 86 L. Ed. 2d 557 (1985); *Nyquist,* 413 U.S. 756, 93 S. Ct. 2955; *Lemon,* 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745. It is this aspect of the inquiry that sheds light on the greatest Establishment Clause problems presented by RLUIPA,

and it will therefore be the focus of the Court's constitutional analysis.[4]

B

The Principal and Primary Effect of RLUIPA is to Advance Religion by Elevating Religious Rights Above All Other Fundamental Rights

In 1987, the Supreme Court, in two landmark decisions, developed a "rational-relationship" test to govern an inmate's claim that a prison regulation or action of a prison administrator burdens his constitutional rights. *See Turner v. Safley,* 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64, and *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 107 S. Ct. 2400, 96 L. Ed. 2d 282.[5] The test requires a court, in

[4] The search for a secular purpose is not a particularly strict inquiry, as the secular purpose prong can be satisfied even if legislation is motivated in part by a religious purpose. *See Wallace,* 472 U.S. at 56, 105 S. Ct. at 2489; *Brown,* 258 F.3d at 277. The Supreme Court has already held that the stated secular purpose of RLUIPA, to protect the free exercise of religion, is a permissible secular purpose, even if there is some question as to whether the purpose is in fact genuine. *See Amos,* 483 U.S. at 335, 107 S. Ct. at 2868. However, a valid secular purpose does not prevent the Act from going too far and having the primary effect of advancing religion. *See id.* at 334-35, 2868.

[5] The Fourth Circuit has recognized the possibility that the Supreme Court's decision in *Employment Division, Dept. of Human Resources of Oregon v. Smith* established a different standard of review for the constitutionality of generally applicable prison regulations. *See Hines v. South Carolina Dept. of Corrections,* 148 F.3d 353 (4th Cir. 1998). However, the Fourth Circuit has not yet ruled on this question, and it continues to apply the *Turner* test to such regulations. *See id.* The use of the *Smith* test in evaluating the constitutionality of a segment of prison regulations would not affect this Court's analysis of the constitutionality of RLUIPA, as the strict scrutiny standard imposed by RLUIPA would still represent a drastic increase in the level

(Continued on following page)

evaluating the merits of such a claim, to take into account four factors: (1) Whether there exists a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it;" (2) whether "there are alternative means of exercising the right that remain open to prison inmates;" (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally;" and (4) the "absence of ready alternatives" to the prison regulation.[6] *Turner,* 482 U.S. at 89-90, 107 S. Ct. at 2262.

The *Turner* rational relationship test represents a balance between the need to recognize the continuing vitality of the constitutional rights of inmates, and the fact that incarceration necessarily involves a retraction of some rights. *See O'Lone,* 482 U.S. at 348, 107 S. Ct. at 2404. However, the test is not a perfect balance, as, in establishing a reasonableness inquiry for the protection of constitutional rights, the test errs on the side of deference to the reasoned judgment of prison administrators. *See id.* at 349-50, 2404-05. This deference is a product of the experience of prison administrators combined with the limitations of the judiciary that make the courts "ill-suited" to control the administration of the prison system. *See id.; Turner,* 482 U.S. at 84-85, 107 S. Ct. at 2259. The

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of protection afforded religious rights relative to the protection afforded other fundamental rights under either the *Turner* or *Smith* analysis.

[6] While the absence of ready alternatives is evidence of reasonableness, this factor does not establish a least restrictive means requirement. The Court explained that "prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id.*

Supreme Court in *Turner* flatly rejected the application of a strict scrutiny analysis to prisoner constitutional claims, as "subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovate solutions to the intractable problems of prison administration." *Turner,* 482 U.S. at 89, 107 S. Ct. at 2262. The Court worried that strict scrutiny would force the judiciary to run the prison system, thereby eviscerating the necessary deference due prison officials. *Id.*

Before RLUIPA, the deference in *O'Lone* and *Turner* to the decisions of prison administrators applied equally to all claims based on the violation of fundamental rights,[7] including, among others, free speech claims, *Amatel v. Reno,* 156 F.3d 192 (D.C. Cir. 1998), claims concerning the right to marry, *Turner,* 482 U.S. 78, 107 S. Ct. 2254, the right to privacy, *Oliver v. Scott,* 276 F.3d 736 (5th Cir. 2002), the right of meaningful access to the courts, *Lewis v. Casey,* 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996), and discrimination on the basis of race, *Morrison v. Garraghty,* 239 F.3d 648 (4th Cir. 2002). In addition to

[7] The reach of *Turner* does not stop at the First Amendment, as the Supreme Court has made it clear that the *Turner* "rational relationship" standard applies to all cases in which "a prisoner asserts that a prison regulation violates the Constitution" and "all circumstances in which the needs of prison administration implicate constitutional rights." *Washington v. Harper,* 494 U.S. 210, 224, 110 S. Ct. 1028, 1038, 108 L. Ed. 2d 178 (1990); *see also Thompson v. Souza,* 111 F.3d 694 (9th Cir. 1997). However, the Supreme Court continues to apply highly deferential standards other than *Turner* to a limited class of inmate constitutional claims, including inmate claims under the Eighth Amendment. *See Farmer v. Brennan,* 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).

applying to such claims equally, the *Turner* test applied the same extraordinary amount of deference to prison officials' judgments, making each inmate's constitutional claim an uphill struggle in the courts. *See*, *e.g.*, *Giano v. Senkowski,* 54 F.3d 1050, 1055 (2d Cir. 1995) (defining content-neutral prison regulations as regulations whose "purpose is to maintain prison security and decrease violence" and upholding right of prison administrators to evaluate content on case-by-case basis); *see also Farmer v. Perrill,* 288 F.3d 1254, 1261 (10th Cir. 2002) (describing the manner in which courts have been "extremely deferential" to the views of prison administrators); *Nolley v. County of Erie,* 776 F. Supp. 715 (W.D. N.Y. 1991) (noting how prison officials are due "substantial deference" in deciding whether a prison regulation is rationally related to a legitimate penological interest). This level of deference makes many legitimate constitutional claims, which would otherwise be successful when brought outside the prison context under a strict scrutiny level of review, likely to fail when brought by inmates. *See In re Long Term Administrative Segregation of Inmates Designated as Five Percenters,* 174 F.3d 464, 468 (4th Cir. 1999) (noting how an unconstitutional law outside of a prison may be held constitutional when challenged by an inmate); *Fraise v. Terhune,* 283 F.3d 506, 515 n.5 (3d Cir. 2002) ("*Turner* discussed five prior Supreme Court cases involving inmate constitutional claims, and in all of those cases the challenged prison regulation would have been plainly unconstitutional outside the prison context."); *Giano v. Senkowski,* 54 F.3d at 1053 ("The *Turner* test has been routinely invoked to uphold prison policies restricting First Amendment rights that would not be permissible outside the prison context.").

The right to free exercise of religion did not escape the reach of *Turner.* In *O'Lone,* the Supreme Court upheld the rational relationship test as the appropriate standard for inmates' claims under the Free Exercise Clause, despite the unquestionably burdensome effect of the challenged prison regulation on the religious exercise of Muslim inmates. 482 U.S. 342, 107 S. Ct. 2400. Thus, like other fundamental rights that inmates retain in prison, the right of inmates to be free from burdens imposed on religious exercise by prison regulations was drastically circumscribed by the rational relationship test. *See id.*; *In re Five Percenters,* 174 F.3d 464 (upholding prison's classification of self-described religious group as a security threat group under *Turner*); *DeHart v. Horn,* 227 F.3d 47 (3d Cir. 2000) (denying religious diet under *Turner* on the speculative basis of inmate jealousy); *Salaam v. Collins,* 830 F. Supp. 853 (D. Md. 1993) (holding that cost concerns satisfy the *Turner* test).

While the judiciary saw fit to treat religious rights the same as other fundamental rights under *Turner,* Congress viewed these rights differently in passing RLUIPA. RLUIPA singles out religious rights from the fundamental rights encompassed within the *Turner* test and establishes a drastically increased level of protection for such rights. Under RLUIPA, prison regulations that substantially burden religious belief, including those that are generally applicable and facially neutral, are judged under a strict scrutiny standard, requiring prison officials, rather than the inmate, to bear the burden of proof that the regulation furthers a compelling penological interest and is the least restrictive means of satisfying this interest. 42 U.S.C. § 2000cc-1. As is well known from the history of constitutional law, the change that RLUIPA

imposes is revolutionary, switching from a scheme of deference to one of presumptive unconstitutionality. *See Smith,* 494 U.S. at 888, 110 S. Ct. at 1605. Instead of rational, the penological interest under RLUIPA must be of the highest order, *see Wisconsin v. Yoder,* 406 U.S. 205, 215, 92 S. Ct. 1526, 1533, 32 L. Ed. 2d 15 (1972); *Jenkins v. Angelone,* 948 F. Supp. 543, 546 (E.D. Va. 1996); instead of focusing on the prison inmate's ability to find other avenues to exercise his belief, a court is required to focus on the prison administrator's choice among regulatory options, *see* 42 U.S.C. § 2000cc-1(a)(2); instead of placing the burden of proof on an inmate, RLUIPA throws the burden on prison officials, *see id.* § 2000cc-1(a). It is hard to imagine a greater reversal of fortunes for the religious rights of inmates than the one involved in the passage of RLUIPA.

What makes this increased level of protection for religious rights, and religious rights only, constitutionally questionable is the fact that there is no demonstrable evidence that religious constitutional rights are at any greater risk of deprivation in the prison system than other fundamental rights. While the supporters of RLUIPA, in arguing for the passage of the Act, noted that "some institutions restrict religious liberty in egregious and unnecessary ways" as a result of either "indifference, ignorance, bigotry, or lack of resources," *see* Statements of Senators Hatch and Kennedy, 146 Cong. Rec. S7774-01, S7775 (2000), they never made the claim that other fundamental rights held by inmates are not similarly threatened by prison administrators. Indifference, bigotry, and cost concerns have the same restrictive effect on the freedom of speech, the ability to marry, the right to privacy, and countless other freedoms that RLUIPA proponents left to a

lesser level of protection under *Turner*. *See*, *e.g.*, *Cornell v. Woods,* 69 F.3d 1383 (8th Cir. 1995) (discussing retaliatory acts of prison officials in response to prisoner's exercise of his First Amendment rights); *Burton v. Livingston,* 791 F.2d 97 (8th Cir. 1986) (decrying bigoted death threats made by prison guard to inmate in retaliation for inmate's exercise of his due process and First Amendment rights); *Little v. Terhune,* 200 F. Supp.2d 445 (D. N.J. 2002) (analyzing a prison's inability to provide completely equal access to educational program due to cost concerns). RLUIPA supporters also ignore the fact that the Supreme Court has already considered the effect of bigotry and indifference on the exercise of religion in penal institutions and has held that strict scrutiny is not required by the Free Exercise Clause to protect religious belief from the burden imposed by prison regulations. *See O'Lone,* 482 U.S. 342, 107 S. Ct. 2400. The only standard that is *required* by the Constitution to protect the religious belief of inmates is the same as the standard used to protect other fundamental rights held by inmates: the rational relationship test. *See O'Lone,* 482 U.S. 342, 107 S. Ct. 2400.

If the reach of RLUIPA had been limited to prison regulations that specifically targeted and discriminated against religious belief, it would be much more difficult to decide the Act's constitutionality. However, RLUIPA extends far beyond regulations targeting religion, protecting religious inmates against even generally applicable and facially neutral prison regulations that have a substantial effect on a multitude of fundamental rights. *See* 42 U.S.C. § 2000cc-1(a). Such protections give religious rights a substantially greater level of protection than other fundamental rights held by inmates. Assume, for example,

that a prison official confiscates white supremacist literature held by two different inmates. One inmate is a member of the Aryan Nation solely because of his fanatical belief that a secret Jewish conspiracy exists to control the world. The second inmate holds the white supremacist literature because he is a member of the Church of Jesus Christ Christian, Aryan Nation ("CJCC"). The non-religious inmate may challenge the confiscation as a violation of his rights to free expression and free association. A court would evaluate these claims under the deferential rational relationship test in *Turner,* placing a high burden of proof on the inmate and leaving the inmate with correspondingly dim prospects of success. *See Haff v. Cooke,* 923 F. Supp. 1104 (E.D. Wis. 1996). However, the religious inmate, as a member of the CJCC, may assert a RLUIPA claim, arguing that the confiscation places a substantial burden on his religious exercise. The religious white supremacist now has a much better chance of success than the non-religious white supremacist, as prison officials bear the burden of proving that the prison policy satisfies a compelling interest and is the least restrictive means of satisfying the interest. *See id.* at 1115 ("If this court applied a RFRA test more stringent than the *Turner* test, this court would force prisons to favor prisoners' religious material over their secular material because prisons would need a better justification to confiscate religious material than political material.").[8] The difference in the level of

[8] The *Haff* court eventually found the actions of prison officials not to be a violation of RFRA, but only because the court felt constrained by the Establishment Clause to equate the strict scrutiny test under RFRA with the rational relationship test of *Turner.* This is not the normal approach followed by courts under RFRA and RLUIPA.

protection provided to each claim lies not in the relative merits of the claims, but lies instead in the basis of one claim in religious belief. *See id.* (holding that, applying a strict scrutiny standard under RFRA, the plaintiff "would possess the white supremacist material solely because of its relation to exercising his religious, as opposed to his political, rights.").

The singling out of religious belief as the one fundamental right of prisoners deserving of legislative protection rejects any notion of congressional neutrality in the passage of RLUIPA. In the absence of any proof that religious rights are more at risk in prison than other fundamental rights, and with the knowledge that strict scrutiny is not required to protect the religious belief of prisoners under the Free Exercise Clause, Congress acted only to protect religious rights. Such an action, while labeled a neutral "accommodation," is not in fact neutral at all, and the Court is not allowed to defer to the mere characterization of RLUIPA as such. *See Wallace,* 472 U.S. at 82, 105 S. Ct. at 2503 (O'Connor, J., concurring) ("Judicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause. Any statute pertaining to religion can be viewed as an accommodation of free exercise rights."). The burden placed on religious inmates in prisons is not, as in *Amos,* one that had been placed on them by an act of Congress specifically limiting free exercise rights.[9] 483 U.S. 327, 107 S. Ct. 2862. Instead,

[9] The courts that have upheld the constitutionality of RLUIPA have relied heavily on the Supreme Court's decision in *Amos,* arguing that RLUIPA is merely another example of benevolent governmental

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neutrality. However, *Amos* dealt with the lifting of an affirmative burden placed primarily on religious institutions, in that Title VII's prohibitions on hiring or firing on the basis of religion had a much greater negative impact on the purpose and mission of a religious organization in comparison to the effect of the prohibitions on a secular institution. When a religious organization cannot organize itself on the basis of religion, such a limitation runs counter to the requirements of the Free Exercise Clause. *See Amos,* 483 U.S. at 341-42, 107 S. Ct. at 2871 (Brennan, J., concurring) ("The authority to engage in this process of self-definition inevitably involves what we normally regard as infringement on free exercise rights, since a religious organization is able to condition employment in certain activities on subscription to particular religious tenets.").

The majority in *Amos* recognized the constitutional necessity of providing such an exemption, arguing that limiting the Title VII exemption solely to the religious activities of religious employers would still "affect the way an organization carried out what it understood to be its religious mission." *Id.* at 336, 2868. Thus, the purpose of the exemption in *Amos* was to "minimize government 'interference with the decision-making process in religions.' " *Id.* (alteration in original). When this interference is lifted, the church is the entity that discriminates on the basis of religious belief, not the government itself. *See id.* at 337, 2869.

Unlike the exemption held constitutional in *Amos,* RLUIPA requires the government *itself,* through the actions of prison administrators, to accommodate religious inmates to a greater degree than non-religious inmates. *See id.* at 337 n.15, 107 S. Ct. at 2869 n.15. In addition, while the Free Exercise Clause arguably required Congress to provide a religious exemption to Title VII in order to alleviate "governmental interference" with the decision-making process of a religious institution, the Supreme Court in *O'Lone* has specifically held that a strict scrutiny standard is not required by the Free Exercise Clause to protect inmates from regulations that have the effect of burdening their religious belief. *See* 482 U.S. 342, 107 S. Ct. 2400.

The difference between *Amos* and RLUIPA is, like all Establishment Clause cases, a question of degree. However, the difference in degree between the two is substantial, and congressional neutrality is the line that divides them. When Congress has acted to impose an affirmative burden on religion, it is necessary for Congress to remove that burden in order to retain a position of neutrality towards religious

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prison inmates exist in a society of universally limited rights, one that is required by the nature of the institution. When Congress acts to lift the limitations on one right while ignoring all others, it abandons a position of neutrality towards these rights, placing its power behind one system of belief. *See Wallace,* 472 U.S. at 50, 105 S. Ct. at 2486; *see also Haff,* 923 F. Supp. 1104, 1116 ("The Establishment Clause and the Free Speech Clause require [prison officials] to treat religious material no worse and no better than secular material."). When the one system of belief protected is religious belief, Congress has violated the basic requirement of neutrality embodied in the Establishment Clause.

While Congress could constitutionally legislate to raise the level of protection for all of the fundamental rights of prisoners, doing so only for the right to religious exercise when all fundamental rights are equally at risk in the prison system has the principal effect of raising religious rights to a position superior to that of all other rights held by prisoners. As a result, RLUIPA has the principal and primary effect of advancing religious belief.

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belief. However, when Congress acts to provide religious inmates, and only religious inmates, with a level of constitutional protection that the Supreme Court has deemed unnecessary to protect religious rights, it has gone beyond protecting religion to affirmatively advancing it.

C

The Impermissible Effect of RLUIPA in Promoting Religion Has a Direct Effect on the Status of Religious and Non-religious Inmates in Prison Society

The danger in privileging religious rights over all other fundamental rights can be seen in the way in which the greater protections offered by RLUIPA place religious individuals in a position of privilege relative to non-religious individuals in prison.

As discussed previously in this opinion, only interests of the highest order may satisfy the compelling interest standard of the strict scrutiny test.[10] If "'compelling

[10] The supporters of RLUIPA in Congress had no difficulty in asking courts to "'continue the tradition of giving 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.'" Statement of Senators Hatch and Kennedy, 146 Cong. Rec. at S7775. However, this suggestion rings hollow when one considers that the strict scrutiny standard under RLUIPA is no different from that applied in any other strict scrutiny context.

Some courts, in examining prison regulations under RFRA and RLUIPA, have softened the compelling interest test to allow speculative administrative judgments concerning security and cost to suffice to allow the regulation to survive strict scrutiny. *See*, *e.g.*, *U.S. v. Jefferson,* 175 F. Supp.2d 1123 (N.D. Ind. 2001); *Davie v. Wingard,* 958 F. Supp. 1244 (S.D. Ohio 1997); *Jones v. Roth,* 950 F. Supp. 254 (N.D. Ill. 1996); *Jenkins v. Angelone,* 948 F. Supp. 543 (E.D. Va. 1996); *Blanken v. Ohio Dept. of Rehabilitation and Correction,* 944 F. Supp. 1359 (S.D. Ohio 1996). Such an approach does restore the deference to the judgment of prison administrators valued so highly in *Turner* and *O'Lone,* but it leaves little of substance to the congressional vision of RLUIPA. It is also an approach that is dangerous for the protection of the constitutional rights of individuals outside of prison. Watering down

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interest' really means what it says . . . many laws will not meet the test." *Smith,* 494 U.S. at 888, 110 S. Ct. at 1605. Even if a prison regulation meets the standard of a compelling interest, the prison must still prove that the regulation is the least restrictive means of achieving the stated interest. Thus, as long as a prison inmate can establish that a regulation imposes a substantial burden on his religious exercise, the prison regulation comes into court with a strong presumption of invalidity.

Moreover, the substantial burden requirement leaves a court very little power to narrow the cases that come to court. Courts are severely limited in evaluating whether the inmate's stated religious practice is worthy of RLUIPA protections, as the courts cannot give close scrutiny to the importance or centrality of the religious practice in question to the believer's faith. *See* 42 U.S.C. § 2000cc-5(7)(A) ("The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."); *see also Thomas v. Review Bd. of Ind. Employment Sec. Division,* 450 U.S. 707, 715, 101 S. Ct. 1425, 1430, 67 L. Ed. 2d 624 (1981) ("Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and

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strict scrutiny in a result-oriented manner in the prison context could "subvert its rigor in other fields where it is applied." *Smith,* 494 U.S. at 888, 110 S. Ct. at 1605; *see also Haff,* 923 F. Supp. at 1118 ("If the courts interpret RFRA to apply a weaker compelling interest test, they risk the compelling interest test becoming a platitude. . . . As some courts weaken the RFRA test, other courts may import the RFRA test in areas where the traditional compelling interest test is needed. Then, laws deserving the strictest scrutiny will receive a more lenient review.").

precision that a more sophisticated person might employ."). As a result of the broad interpretation given to "religious exercise," a court must abide by the individual prisoner's subjective determination that a particular practice is a method of religious belief. *See Rouser v. White,* 944 F. Supp. 1447, 1454 (E.D. Cal. 1996) ("[T]he Supreme Court has explained that the relevant question is not what others regard as an important religious practice, but what the plaintiff believes.").

RLUIPA, in placing religious inmates in such a position of power, requires a prison to measure "the effects of . . . action on an objector's spiritual development," effectively making a religious inmate "a law unto himself." *See Smith,* 494 U.S. at 885, 110 S. Ct. at 1603. The "convenience or interests" of the prison system, an important element of the inquiry into an inmate's claim under the *Turner* test, has been eliminated in favor of a right to exemption closely resembling the "absolute and unqualified right" held by the employee in *Estate of Thornton v. Caldor*. *See* 472 U.S. 703, 105 S. Ct. 2914 (holding Connecticut law that prevented employers from requiring an employee to work on the employee's Sabbath unconstitutional as a violation of the Establishment Clause); *see also Smith* ("Precisely because 'we are a cosmopolitan nation made up of almost every conceivable religious preference,' and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."). While even strict scrutiny does not provide an "absolute" right of exemption to religious inmates, the tremendous level of protection

provided by RLUIPA is evident in the numerous exemptions and privileges courts have required prison officials to provide religious prisoners, and only religious prisoners, under the Act's strict scrutiny standard.

RLUIPA is just beginning to come into use by inmates bringing religious constitutional claims against prisons. However, federal courts have already found the following generally applicable and facially neutral prison regulations to be, or to have the potential to be, unconstitutional as applied to religious inmates under the RFRA[11] strict scrutiny test: (1) Grooming policies requiring hair to be worn short and beards to be cut, *Gartrell v. Ashcroft,* 191 F. Supp.2d 23 (D. D.C. 2002); *Lewis v. Scott,* 910 F. Supp. 282 (E.D. Texas 1995); (2) Regulations requiring inmates to eat the common meal provided to them, *Luckette v. Lewis,* 883 F. Supp. 471 (D. Ariz. 1995); (3) Regulations requiring inmates to submit to a Tuberculosis screen, *Jolly v. Coughlin,* 76 F.3d 468 (2d Cir. 1996); *Jihad v. Wright,* 929 F. Supp. 325 (N.D. Ind. 1996); (4) Regulations prohibiting the wearing of jewelry, *Sasnett v. Sullivan,* 908 F. Supp. 1429 (W.D. Wis. 1995); *Alameen v. Coughlin,* 892 F. Supp. 440 (E.D. N.Y. 1995); *Campos v. Coughlin,* 854 F. Supp. 194 (S.D. N.Y. 1994); (5) Regulations prohibiting the wearing of clothing not issued by the prison, *Muslim v. Frame,* 891 F. Supp. 226 (E.D. Pa. 1995); (6) Rules of solitary confinement limiting the clothes that may be worn, *Hall v. Griego,* 896 F. Supp. 1043 (D. Colo. 1995); *Luckette,* 883 F. Supp. 471; and (7) Rules prohibiting the possession

[11] As stated previously, the strict scrutiny tests of RFRA and RLUIPA are identical.

of metal objects which can be fashioned into weapons, *Ramirez v. Coughlin,* 919 F. Supp. 617 (N.D. N.Y. 1996).

Looking at the range of exceptions provided under the strict scrutiny test, it is not a logical stretch, in predicting the practical effects of RLUIPA, to imagine a prison in which religious prisoners are allowed to wear religious headgear and religious icons, have ungroomed hair and beards, receive extremist literature from outside the prison, refuse to submit to general medical tests and vaccinations, keep religious objects in their cells, and receive special diets. Meanwhile, non-religious inmates in the same prison must be clean shaven, wear prison issued clothing, submit to medical exams, and eat whatever is provided in the cafeteria. If the non-religious prisoner wants the same freedoms that the religious inmate possesses, he has two choices. First, if a prison regulation, such as a limitation on the inmate's ability to receive and keep photographs deemed obscene by prison officials, arguably burdens his First Amendment freedoms, the inmate may choose to challenge the regulation under the deferential *Turner* rational relationship test. Second, the inmate could claim religious rebirth and cloak himself in the protections of RLUIPA, a possibility that concerned courts under RFRA. *See Sasnett,* 908 F. Supp. at 1444 ("Proof of religiosity is especially important in the prison context because of the potential that prisoners might use religion as a pretext to achieve other goals.").[12] Whatever

[12] Even if courts interpret RLUIPA in a manner that weakens the strict scrutiny standard in order to continue to give great deference to prison administrators, the ease with which a prisoner is able to come to court under RLUIPA continues to give the religious prisoner a place in the prison community that is privileged relative to the non-believer.

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choice the inmate makes, the practical effect of RLUIPA on the prison system in the United States is to grant religious and professed religious inmates a multitude of exceptions and benefits not available to non-believers.

Whether or not non-religious inmates actually feel pressure under RLUIPA to conform their beliefs to coincide with the protections of the Act, prison administrators' compliance with the Act and the various exceptions provided for religious prisoners under the Act send non-religious inmates a message that they are outsiders of a privileged community. This effect is a clear violation of the Establishment Clause.

> The core notion animating the requirement that a statute possess "a secular legislative purpose" and that "its principal or primary effect . . . be one that neither advances nor inhibits religion," is not only that government may not be overtly hostile to religion but also that it may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling non-adherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community.

Texas Monthly, 489 U.S. at 9, 109 S. Ct. at 896 (*citing Wallace,* 472 U.S. at 69, 105 S. Ct. at 2496 (O'Connor, J., concurring) ("Direct government action endorsing religion

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The cost of litigating RLUIPA claims will lead prison administrators to give more weight to a regulation's effect on religious inmates than to the effect on non-religious inmates in promulgating a regulation.

or a particular religious practice is invalid . . . because it 'sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.' "); *see also Amos,* 483 U.S. at 348, 107 S. Ct. at 2875 (O'Connor, J., concurring).

The political community affected by RLUIPA in the present case is a unique one, as members of this community are already in a position in which conformity is a mandated norm. *See Amatel,* 156 F.3d at 198 ("Prisoners of course differ from the other examples of individuals entangled with the government in that they have no recourse to a private sphere. For them, there is no outside. Judges plainly must bear in mind the total occupation of prisoners' lives by the state."). Rules are dictated to inmates by prison administrators, and obedience is supported by the power of forcible retribution. In such a community of limited freedoms, exceptions to prison rules and regulations are fervently sought after by prisoners, and even the smallest exceptions, including religious exceptions, can lead to feelings of jealousy among fellow inmates. *See DeHart,* 227 F.3d at 52-53 (recognizing how the provision of special religious diets can lead to inmate jealousy); *Johnson v. Horn,* 150 F.3d 276, 282 (3d Cir. 1998) (holding that the request of a religious inmate for a special diet causes other inmates to think that the religious inmate is receiving special treatment, leading to harassment); *Garrett v. Gilmore,* 926 F. Supp. 554, 557 (W.D. Va. 1996) (recognizing that allowing exceptions to prison regulation "easily" engenders jealousy among inmates); *Udey v. Kastner,* 644 F. Supp. 1441, 1447 (E.D. Tex. 1986) (warning that the provision of exceptions leads

to numerous inmate claims), *aff'd,* 805 F.2d 1218 (5th Cir. 1986).

However, as seen by the exceptions made for prisoners under RFRA, this is not a question of small, single exceptions. RLUIPA forces prison administrators to focus specifically on the needs of religious prisoners, providing a number of exceptions to religious inmates from generally applicable prison regulations. While it is true that the exceptions religious inmates receive through RLUIPA do not provide them absolute, unqualified freedom, the level of power it provides them is not judged in a vacuum under the objective observer test. Rather, the power that a congressional act provides to a religious inmate must be analyzed in relation to the position of non-religious inmates in prison society. Under RLUIPA, whether the difference between religious and non-religious inmates exists in tangible privileges or the mere right to gain greater attention from prison administrators and the courts, religious inmates have far greater governmental support and power than non-religious inmates whose lives and rights are completely dominated by prison administrators. *O'Lone* and *Turner* give little comfort to those non-believers who must eat a common diet, undergo ordinary medical examinations, have their mail censored, and have their worldly possessions taken away from them, all the while witnessing religious inmates being exempted from the reach of these rules. An objective inmate, as opposed to an objective congressman or judge, would have no doubt that RLUIPA has established religious inmates as "favored members" of the prison community.

As all of the rights of inmates are burdened under the prison system, this is not an example of a law that an objective observer would see as merely lifting a burden

imposed only on religion. *See Amos,* 483 U.S. at 348, 107 S. Ct. at 2874-75 (O'Connor, J., concurring). Non-religious prisoners would continue to be limited in the manner in which they are able to exercise and protect their fundamental rights after the passage of RLUIPA. However, the privileged status of religion inmates, through the use of an elevated level of legal protection, will constantly be on display in the exceptions that prison administrators and courts will be forced to make for them under the Act's strict scrutiny level of review. The manner in which Congress has placed its power behind religious belief, privileging religious inmates in the prison community, is a clear violation of the *Lemon* test, adding support to the conclusion that section 2000cc-1 of RLUIPA violates the Establishment Clause.

Conclusion

It is often difficult to determine the lines of demarcation between free exercise and establishment, and accommodation and promotion, but RLUIPA does not appear to be a close case. The Act, as it relates to the constitutional claims of religious inmates, raises the level of protection of religious rights only, leaving other, equally fundamental rights languishing under the pressure of judicial deference to the decisions of prison officials. When applied to prison inmates, to whom privileges and exceptions to prison regulations are few, the different standards of review have the effect of establishing two tiers of inmates in the prison system: the favored believer and the disadvantaged non-believer. It is this precise result that the *Lemon* test and the Supreme Court's Establishment Clause jurisprudence seek to prevent, and it is therefore the obligation of this

Court to declare the section of RLUIPA that pertains to prison inmates, section 2000cc-1, UNCONSTITUTIONAL.

The Court recognizes that the issues addressed in this decision regarding the constitutionality of section 2000cc-1 of RLUIPA involve a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the Court's decision to the United States Court of Appeals for the Fourth Circuit, pursuant to 28 U.S.C. § 1292(b) (2002), may materially advance the ultimate termination of the litigation. Accordingly, the Court certifies the issue of the constitutionality of section 2000cc-1 of RLUIPA for interlocutory appeal to the Fourth Circuit.

ENTER: This 23rd day of January, 2003

/s/ James C. Turk
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

IRA W. MADISON Plaintiff, v. R. RITER, et al. Defendants.	)))))))	Civ. No. 7:01CV00596 **ORDER** (Filed Jan. 23, 2003) **By: James C. Turk** **Senior United States District Judge**

This matter is before the Court on the Defendants' Motion to Dismiss the Plaintiff's claim under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc-1 (2002), on the basis that the Act violates the United States Constitution. The Court heard oral arguments from the parties and the United States Government as intervener on November 26, 2002. As explained more fully in the accompanying memorandum opinion, it is hereby

ADJUDGED AND ORDERED

(1) that section 2000cc-1 of RLUIPA, the section of the Act governing the claims of prison inmates, is **UNCONSTITUTIONAL** as a violation of the Establishment Clause;

(2) that the Plaintiff's RLUIPA claim is hereby **DISMISSED**; and

(3) that the issue of the constitutionality of section 2000cc-1 is **CERTIFIED** for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

The Clerk is directed to send certified copies of this order to all counsel of record, including counsel for the United States.

ENTER: This 23rd day of January, 2003.

/s/ James C. Turk
Senior United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
March 4, 2003

No. 03-118
CA-01-596-7

IRA W. MADISON

Petitioner

v.

R. RITER, a/k/a R. Ruter, CCS Chairman;
DUNCAN MILLS; D. J. ARMSTRONG;
GARY BASS, Chief of Operations, CCS;
COMMONWEALTH OF VIRGINIA;
LEWIS B. CEI, Special Programs Manager

Respondents

No. 03-120
CA-01-596-7

UNITED STATES OF AMERICA

Petitioner

v.

R. RITER, a/k/a R. Ruter, CCS Chairman;
DUNCAN MILLS; D. J. ARMSTRONG;
GARY BASS, Chief of Operations, CCS;
COMMONWEALTH OF VIRGINIA;
LEWIS B. CEI, Special Programs Manager

Respondents

ORDER

Ira Madison and the government have filed petitions for permission to appeal an interlocutory order pursuant to 28 U.S.C. 1292(b).

The Court grants the petitions for permission to appeal. Petitioner Madison's case shall proceed under case number 03-6362(L), and the government's case shall proceed under case number 03-6363. The cases will remain consolidated for the purposes of appeal.

For the Court,

/s/ Patricia S. Connor
Patricia S. Connor
CLERK

UNITED STATES CODE SERVICE
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21C. RELIGIOUS LAND USE
AND INSTITUTIONALIZED PERSONS

§ 2000cc. Protection of land use as religious exercise

(a) Substantial burdens.

(1) General rule. No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution –

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

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

(2) Scope of application. This subsection applies in any case in which –

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has

in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion.

(1) Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits. No government shall impose or implement a land use regulation that –

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

§ 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 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.

§ 2000cc-2. 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 [*42 USCS § 2000cc],* 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 [*42 USCS § 2000cc]* 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 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.

§ 2000cc-3. 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.

§ 2000cc-4. 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.

§ 2000cc-5. 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 [*42 USCS §§ 2000cc-2*(b) and 2000cc-3], 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.