UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
Western Division

MICHAEL J. FEGANS, **Plaintiff,** **v.** **LARRY NORRIS et al,** **Defendants.**	**Case No: 4:03CV00172**

BRIEF OF *AMICUS CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF THE CONSTITUIONALITY OF RLUIPA

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INTEREST OF THE *AMICUS*

Amicus curiae The Becket Fund for Religious Liberty is an interfaith, nonpartisan public interest law firm dedicated to protecting the free expression of all religious traditions, and the freedom of religious people and institutions to participate fully in public life. The Becket Fund litigates in support of these principles in state and federal courts throughout the United States, both as primary counsel and as *amicus curiae*. Accordingly, the Becket Fund has been heavily involved in litigation on behalf of a wide variety of religious worshippers, ministers, and institutions under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA" or "the Act").

The Becket Fund's RLUIPA cases run the gamut as *amicus curiae* and as plaintiffs' counsel, in prisoner and land-use cases, from Florida to Hawaii. Specifically, the Becket Fund represents the plaintiffs in a host of RLUIPA prisoner and land use cases, including some that have resulted in published decisions,[1] and others that have concluded by favorable settlement.[2] In addition, we have filed a series of *amicus curiae*

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[1] *See, e.g., Castle Hills First Baptist Church v. City of Castle Hills*, No. SA-01-CA-1149, __ F. Supp. 2d __ 2004 WL 546792 (W.D. Tex. Mar. 17, 2004); *United States v. Maui County*, 298 F. Supp. 2d 1010 (D. Haw. 2003); *Hale O Kaula v. Maui Planning Comm'n*, 229 F. Supp. 2d 1056 (D. Haw. 2002); *Cottonwood Christian Center v. City of Cypress*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002); *Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002). *See also Benning v. Amideo*, Nos. 04-11044-C and 04-10979C (11th Cir.) RLUIPA constitutionality challenge pending); *Terrero v. Watts*, No. CV202-134 (S.D. Ga.) (same); *Redwood Christian Schs. v. County of Alameda*, Civ. No. 01-4282 (N.D. Cal. filed Nov. 16, 2001) (pending); *Missionaries of Charity, Brothers v. City of Los Angeles*, Civ. No. 01-08511 (C.D. Ca. filed Sept. 19, 2001) (pending); *Archdiocese of Denver v. Town of Foxfield*, Civ. No. 01-3299 (Colo. Dist. Ct., Arapahoe Cy., Div. 5) (pending); *Great Lakes Society v. Georgetown Charter Township*, No. 03-4599-AA (Mich. Cir. Ct., Ottowa Cy.) (pending).

[2] *See, e.g., Cotton v. Fla. Dept. of Corrections*, Civ. No. 02-22760 (S.D. Fla. filed Sept. 19, 2002) (settlement agreement signed Oct. 2003); *Temple B'nai Sholom v. City of Huntsville*, Civ. No. 01-1412 (N.D. Ala. removed June 1, 2001) (settlement agreement signed June 2003); *Greenwood Comm'y Church v. City of Greenwood Village*, Civ. No. 02-1426 (Colo. Dist. Ct.)

briefs in both prisoner and land-use cases involving RLUIPA.[3] We intend to continue filing lawsuits and *amicus curiae* briefs under RLUIPA until the jurisprudence under the law, as well as its constitutionality, is established beyond reasonable dispute.

(permit granted Dec. 2, 2002); *Living Waters Bible Church v. Town of Enfield*, Civ. No. 01-450 (D.N.H.) (agreement for entry of judgment signed Nov. 18, 2002); *Calvary Chapel O'Hare v. Village of Franklin Park*, Civ. No. 02-3338 (N.D. Ill.) (settlement agreement signed Sept. 3, 2002); *Refuge Temple Ministries v. City of Forest Park*, Civ. No. 01-0958 (N.D. Ga. filed Apr. 12, 2001) (consent order signed Mar. 2002); *Unitarian Universalist Church of Akron v. City of Fairlawn*, Civ. No. 00-3021 (N.D. Ohio) (settlement approved Oct. 1, 2001); *Haven Shores Comm'y Church v. City of Grand Haven,* No. 1:00-CV-175 (W.D. Mich.) (consent decree signed Dec. 20, 2000).

[3] *See, e.g., Murphy v. Town of New Milford*, No. 03-9329 (2d Cir.) (*amicus* brief filed June 28, 2004); *Westchester Day School v. Village of Mamaroneck*, No. 03-9042 (2nd Cir.) (*amicus* brief on behalf of a broad coalition filed January 20, 2004); *Midrash Sephardi v. Town of Surfside,* 366 F.3d 1214 (11th Cir. 2004) (*amicus* brief filed Nov. 21, 2003); *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003) (*amicus* brief filed on behalf of a broad coalition June 6, 2003); *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003) (*amicus* brief in support of rehearing *en banc* filed on behalf of a broad coalition Dec. 19, 2003); *Fifth Avenue Presbyterian Church v. City of New York,* 293 F.3d 570 (2d Cir. 2002) (*amicus* brief filed on behalf of broad coalition, Mar. 15, 2002); *San Jose Christian College v. City of Morgan Hill,* 360 F.3d 1024 (9th Cir. 2004) (*amicus* brief filed on behalf of a broad coalition Aug. 28, 2002); *C.L.U.B. v. City of Chicago,* 342 F.3d 752 (7th Cir. 2003) (*amicus* brief filed June 26, 2002); *Open Homes Fellowship v. Orange County*, No. 6:03-CV-943-ORL-31 (M.D. Fla.) (*amicus* brief filed Jan. 2, 2004); *Williams v. Bitner,* 285 F. Supp. 2d 593 (M.D. Pa. 2003) (*amicus* brief filed Apr. 16, 2002); *Benning v. Georgia*, No. CV-602-139 (S.D. Ga.) (*amicus* brief filed Oct. 31, 2003); *Johnson v. Martin,* 223 F. Supp. 2d 820, 822 (W.D. Mich. 2002) (noting Becket Fund intervention in defense of constitutionality of RLUIPA); *Primera Iglesia Bautista Hispana v. Broward County*, No. 01-6530-CIV (S.D. Fla.) (*amicus* brief filed Apr. 18, 2003); *Konikov v. Orange County*, No. 6:02-CV-376-ORL-28-JGG (M.D. Fla.) (*amicus* brief filed Apr. 11, 2003); *Murphy v. Town of New Milford*, 289 F. Supp. 2d 87 (D. Conn. 2003) (*amicus* brief filed Dec. 27, 2002); *Goodman v. Snyder*, Civ. No. 2000-948, 2003 WL 22765047 (N.D. Ill. Nov. 20, 2003) (*amicus* brief filed Mar. 17, 2003).

ARGUMENT

The Defendants, various Arkansas prison officials (hereinafter "Arkansas"), urge this Court to strike down an Act of Congress, RLUIPA Section 3, without even attempting to distinguish the weight of authority rejecting similar challenges.[4] Likewise, Arkansas ignores that courts have uniformly rejected its arguments as against Section 2 of RLUIPA, the analogous land-use provision.[5]

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[4] *See*, *e.g.*, *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003) (rejecting Establishment Clause challenge to RLUIPA Section 3); *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003) (rejecting Spending Clause, Establishment Clause, and Tenth Amendment challenges to RLUIPA Section 3); *Mayweathers v. Newland,* 314 F.3d 1062 (9th Cir. 2002) (rejecting Spending Clause, Establishment Clause, Tenth Amendment, Eleventh Amendment, and Separation-of-Powers challenges to RLUIPA Section 3), *cert. denied sub nom. Alameida v. Mayweathers,* 124 S.Ct. 66 (2003); *Williams v. Bitner,* 285 F.Supp.2d. 593 (M.D. Pa. 2003) (rejecting constitutional challenges to RLUIPA § 3); *Glick v. Norris*, No. 5:03CV00160 (E.D. Ark. Aug. 11, 2004) (attached as Ex. A); *Jones v. Toney*, No. 5:02CV00415 (E.D. Ark. Mar. 29, 2004) (same) (attached as Ex. B); *Sanabria v. Brown*, No. 99-4699 (D.N.J. June 5, 2003) (same) (attached as Ex. C); *Benning v. Georgia*, No. CV-602-139 (S.D. Ga. Jan. 8, 2004); *Gordon v. Pepe,* No. 00-10453, 2003 WL 1571712 (D. Mass. Mar. 6, 2003) (same); *Johnson v. Martin*, 223 F.Supp.2d 820 (W.D. Mich. 2002) (same), *overruled by, Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003); *Gerhardt v. Lazaroff*, 221 F.Supp.2d 827 (S.D. Ohio 2002) (same), *overruled by, Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003); *Taylor v. Cockrell*, No. H-00-2809 (S.D. Tex., Sept. 25, 2002) (rejecting constitutional challenge to RLUIPA Section 3), *vacated on other grounds, Taylor v. Groom,* No. 02-21316 (5th Cir. Aug. 26, 2003); *Love v. Evans,* No. 2:00-CV-91 (E.D. Ark., Aug. 8, 2001) (same); *Mayweathers v. Terhune*, 2001 WL 804140, at *6 (E.D. Cal. 2001) (same). *But see Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003) (holding RLUIPA § 3 violates the Establishment Clause, relying on *Al Ghashiyah v. Wis. Dept. of Corrections,* 250 F.Supp.2d 1016 (E.D. Wis. 2003), *overruled by Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003), and *Madison v. Riter,* 240 F.Supp.2d 566 (W.D. Va. 2003), *overruled by Madison v. Riter,* 355 F.3d 310 (4th Cir. 2003)).

[5] *See Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004) (rejecting Establishment Clause and Tenth Amendment challenges to RLUIPA Section 2); *Castle Hills First Baptist Church v. City of Castle Hills*, No. SA-01-CA-1149, __ F.Supp.2d __, 2004 WL 546792 (W.D.Tex., Mar. 17, 2004) (rejecting constitutional challenges to RLUIPA § 2); *United States v. Maui County*; 298 F.Supp.2d 1010 (D. Haw. 2003) (same); *Murphy v. New Milford*, 289 F.Supp.2d 87 (D. Conn. 2003) (same); *Westchester Day Sch. v. Mamaroneck*, 280 F.Supp.2d 230 (S.D.N.Y. 2003) (same); *Guru Nanak Sikh Society v. County of Sutter*, 326 F. Supp. 2d 1140 (E.D. Cal. 2003) (same); *Life Teen, Inc. v. Yavapai County*, No. Civ. 01-1490-PCT (D. Ariz. Mar. 26, 2003) (same); *Christ Universal Mission Church v. Chicago*, No. 01-C-1429, 2002 U.S. Dist. LEXIS 22917 (N.D. Ill. Sept. 11, 2002) (same) *vacated on other grounds* 2004 WL 595392 (7th Cir. Mar. 26, 2004); *Freedom Baptist Church v. Middletown*, 204 F.Supp.2d 857 (E.D. Pa. 2002) (same). *See also Hale O Kaula v. Maui Planning Comm'n*, 223 F.Supp.2d 1056, 1072 (D. Haw. 2002) (declining to address constitutionality of RLUIPA in detail, but concluding that "jurisdictional element" of § 2(a)(2)(B) precludes Commerce Clause challenge); *Cottonwood*

Courts routinely reject constitutional challenges to RLUIPA because Congress carefully drafted the Act to ensure that its provisions respect the bounds of Congress' enumerated powers. In particular, RLUIPA Section 3 meets all of the conditions that the Supreme Court has identified for Congress to exercise its ***Spending Power***. Congress' purposes of alleviating burdens on religious exercise and promoting rehabilitation are consistent with the general welfare; the condition Congress places on the receipt of federal funds—*i.e.,* that a state not substantially burden the religious exercise of prisoners unless the burden is the least restrictive means of advancing a compelling government interest—is unambiguously set forth in the text of RLUIPA; that condition is rationally related to Congress' purposes; and that condition does not offend any other constitutional provision.[6]

The Eighth Circuit's rejection of an ***Establishment Clause*** challenge to the Religious Freedom and Restoration Act ("RFRA"), *see In re Young*, 141 F.3d 854, 862-63 (8th Cir. 1998), forecloses Arkansas' identical challenge to RLUIPA. Indeed, the Establishment Clause is consistently interpreted to leave room for laws just like RLUIPA—accommodations that relieve substantial regulatory burdens on religious exercise—because they "follow[] the best of our traditions." *Zorach v. Clauson,* 343 U.S. 306, 314 (1952).

Christian Ctr. v. Cypress, 218 F.Supp.2d 1203, 1221 n.7 (C.D. Cal. 2002) (noting that "RLUIPA would appear to have avoided the flaws of its predecessor RFRA, and be within Congress's constitutional authority").

[6] Because RLUIPA is a valid exercise of Congress' Spending Clause power, this Court need not additionally consider whether the Act is also a constitutional exercise of Congress' Commerce power. In any event, Arkansas does not offer any argument that RLUIPA does exceed Congress' Commerce power. *See also Mayweathers v. Terhune*, 2001 WL 804140 (E.D. Cal. 2001) (rejecting Commerce Clause challenge to RLUIPA Section 3).

Finally, Arkansas' argument that RLUIPA violates ***Separation of Powers*** principles by establishing a strict scrutiny standard for substantial burdens on the religious exercise of prisoners is squarely foreclosed by the Eighth Circuit's decision in *In re Young*, 141 F.3d at 860-62, which rejected an identical challenge to RFRA's strict scrutiny standard.

I. RLUIPA Is a Valid Exercise of Congress' Spending Clause Power

Section 3(a) of RLUIPA provides that:

> No government shall impose a substantial burden on the religious exercise of a person . . . 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."

42 U.S.C. § 2000cc-1(a). RLUIPA Section 3(b)(1) specifically limits application of the substantial burden test of Section 3(a) to circumstances where the burden was "imposed in a program or activity that receives Federal financial assistance." RLUIPA § 3(b)(1).[7] Thus, RLUIPA invokes congressional authority under the Spending Clause, which empowers Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. "Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole,* 483 U.S. 203, 206 (1987) (internal quotations omitted). "When Congress acts pursuant to its

[7] Arkansas does not appear to dispute that its Department of Corrections receives Federal financial assistance. Thus, it appears similarly undisputed that, if the statute passes constitutional muster under the Spending Clause, Section 3(a) of the Act would apply in this case pursuant to Section 3(b)(1).

spending power, it generates legislation much in the nature of a contract: in return for federal funds, the state agrees to comply with federally imposed conditions." *Davis v. Monroe County Bd. of Educ.,* 526 U.S. 629, 640 (1999) (quotation omitted). In this way, Congress may achieve indirectly through the spending power what it could not achieve directly otherwise. *See Fullilove v. Klutznick,* 448 U.S. 448, 474 (1980).

Since *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), the Supreme Court has consistently respected the power of Congress to attach conditions to federal spending. Although Congress's power to attach such conditions is not unlimited, a party attacking them bears a heavy burden to show that they are invalid. *See, e.g.*, *Kansas v. United States,* 214 F.3d 1196, 1200 (10th Cir. 2000). Specifically, conditions on federal funds are permitted so long as they satisfy the four requirements set out in *South Dakota v. Dole,* 483 U.S. at 207.

First, the conditions must serve "the general welfare" rather than a purely private or local interest. *Dole*, 483 U.S. at 207 (internal citation omitted). ***Second***, they must be imposed "unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id*. (quotation omitted). ***Third***, grants "might be illegitimate" if they do not bear some reasonable or minimal relationship "to the federal interest in particular national projects or programs.'" *Id*. at 207-08 (internal quotations and citations omitted); *see New York v. United States,* 505 U.S. 144, 167 (1992) (conditions must "bear some relationship to the purpose of the federal spending"). ***Fourth***, the conditions must not violate any independent constitutional provisions. *Dole*, 483 U.S. at 208 (internal citations omitted).

Every court to address the issue, *see supra* n.4, including the Seventh and Ninth Circuits, has held that RLUIPA Section 3 readily meets all of these requirements and so is a legitimate exercise of the spending power.

A. RLUIPA Is in Pursuit of the General Welfare.

For the purposes of better "protect[ing] prisoners' religious rights and to promote the rehabilitation of prisoners," *Charles*, 348 F.3d at 607, RLUIPA imposes conditions on the use of federal funds received by state prisons.[8] These purposes "fall[] squarely within Congress' pursuit of the general welfare." *Charles*, 348 F.3d at 607; *Mayweathers,* 314 F.3d at 1066-67 ("protecting religious worship in institutions from substantial and illegitimate burdens ***does*** promote the general welfare. . . . [B]y fostering non-discrimination, RLUIPA follows a long tradition of federal legislation designed to guard against unfair bias and infringement on fundamental freedoms.") (emphasis in original). This congressional judgment is especially secure because "courts should defer substantially to the judgment of Congress" in this regard. *Dole*, 483 U.S. at 207 n.2.

B. RLUIPA Places Unambiguous Conditions on the Receipt of Federal Funds.

RLUIPA imposes its conditions "clearly and unambiguously," giving States notice of the regulatory burdens they undertake when accepting federal funds for their prison programs. *Charles*, 348 F.3d at 608; *Mayweathers*, 314 F.3d at 1067 ("RLUIPA

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[8] RLUIPA's legislative history confirms that all states receive federal money for prisons. *See* The Need for Federal Protection of Religion Freedom After Boerne v. Flores: Hearing Before the Subcomm on the Constitution of the House Comm. on the Judiciary, 105th Cong. (1998) (testimony of Isaac M. Jaroslawicz, Dir. of Legal Affairs, the Aleph Institute), available at http://www.house.gov/ judiciary/222356.html ("all state criminal justice systems obtain federal funding of one kind or another"). Additionally, state and local correctional facilities were budgeted $258 million by the Office of Justice Programs for fiscal year 2000, as well as $426 million for State prison drug treatment programs for that same year. See Table IV, Appendix A, U.S. Census Bureau. Federal Aid to States for Fiscal Year 2000 (2001), available at http://www.census.gov/prod/2001pubs/fas-00.pdf.

unequivocally states that it applies to any 'program or activity that receives Federal financial assistance.' 42 U.S.C. § 2000cc-1(b)(1).") Specifically, RLUIPA's plain language conditions a state's receipt of federal money upon that state's refraining from imposing substantial burdens on prisoners' religious exercise, unless the burdens represent the least restrictive means to advance a compelling government interest. Thus, by expressly conditioning "the receipt of federal money in such a way that each State is made aware of the condition and is simultaneously given the freedom to tailor compliance according to its particular penological interests and circumstances," *Charles*, 348 F.3d at 608, RLUIPA amply satisfies *Dole*'s "clear and unambiguous" requirement. Though Arkansas now complains about a court reviewing its decisions under the compelling interest and least restrictive means test, if it objected to this, "it certainly could have refused federal funding." *Id*.[9]

RLUIPA's plain language also serves to unambiguously apprise State Departments of Corrections that by accepting federal funds, they must comply with RLUIPA's conditions. *See, e.g., Mayweathers*, 314 F.3d at 1067 ("By its plain language, RLUIPA clearly communicates that any institution receiving federal funds must not substantially burden the exercise of religion absent a showing that the burden is the least restrictive means of serving a compelling government interest"); *accord Charles*, 348 F.3d at 608. Not only is the ***existence*** of RLUIPA's conditions unambiguous, but so are

[9] Arkansas additionally complains that the enforcement mechanism of RLUIPA "sweeps too widely." Defs. Br. at 6. This argument boils down to impermissible second-guessing of Congress' policy judgment. *Amicus* notes that the experience of federal correctional officials in complying with the identical strict scrutiny standard and enforcement mechanism found in least RFRA, does not suggest Arkansas will find this standard unworkable. As the Fourth Circuit recently observed, "[i]n the case litigated under RFRA, federal correctional officials have continued to prevail the overwhelming majority of the time." *Madison*, 355 F.3d at 321.

the ***contours*** of those conditions: the substantial burden standard is well-developed and familiar as the result of years of free exercise litigation, both before and after *Employment Div. v. Smith*, 494 U.S. 872 (1990).

Nor can a State claim that the compelling interest and least restrictive means standard is too ambiguous for a State to make an "informed choice" about what conditions are being attached to federal funds. The compelling interest / least restrictive means test is hardly a novel standard; instead, it is familiar to any first-year law student as the "strict scrutiny" test that applies to States under the Fourteenth Amendment in a wide variety of circumstances.[10]

The fact that application of RLUIPA's strict scrutiny standard may yield different outcomes under different factual circumstances does not somehow create a fatal ambiguity in RLUIPA's conditions. To the contrary, the "Supreme Court has held that conditions may be '***largely indeterminate***' so long as that statute 'provid[es] clear notice to States that they, by accepting funds under the Act, would indeed be obligated to comply with [the conditions].'" *Mayweathers*, 314 F.3d at 1067 (quoting *Pennhurst State School v. Halderman*, 451 U.S. 1, 24-25 (1981). (emphasis added).

Thus, this condition is indistinguishable from those upheld under the Spending Clause as a part of other civil rights legislation. *See, e.g.*, *Davis*, 526 U.S. at 650-51 (Title IX's general language proscribing school toleration of severe student-on-student sexual harassment satisfied *Pennhurst's* notice requirement, even though question of "whether gender-oriented conduct rises to level of actionable harassment . . . depends on

[10]*See, e.g., Smith*, 494 U.S. at 886 n.3 ("Just as we subject to the most exacting scrutiny laws that make classifications based on race, . . . or on the content of speech, . . . so too we strictly scrutinize governmental classifications based on religion.").

a constellation of surrounding circumstances, expectations, and relationships.") (internal citations and quotations omitted); *Lau v. Nichols,* 414 U.S. 563, 568-69 (1974) (upholding condition that public schools receiving federal funds comply with Title VI of Civil Rights Act of 1964), *overruled on other grounds*, *Regents v. Bakke*, 438 U.S. 2650 (1978).

C. RLUIPA's Conditions Relate to a Legitimate Federal Interest.

Arkansas broadly asserts that Spending Clause legislation is valid only if "the restriction bears a ***particularized, proportional relationship*** to the purpose of the individual federal spending program." Defs. Br. at 5 (emphasis added). However, the Supreme Court has repeatedly made clear that there is no such requirement of a highly particularized relationship between the conditions imposed and the purposes of the spending programs. Instead, the Supreme Court has said that "conditions on federal grants ***might*** be illegitimate if they are ***unrelated*** to the federal interest." *Dole*, 483 U.S. at 207 (emphasis added), and need only possess "***some*** relationship to the purpose of the federal spending." *New York,* 505 U.S. at 167 (emphasis added). The threshold of relatedness required by this test is a "low" one. *Mayweathers*, 314 F.3d at 1067. In other words, "[t]he required degree of . . . relationship is one of ***reasonableness or minimum rationality***." *Kansas*, 214 F.3d at 1199 (emphasis added).

RLUIPA more than satisfies this standard. Regardless of the particular federally funded program at issue, the conditions of RLUIPA always relate to the same federal purpose: that public funds "not be spent in any fashion which encourages, entrenches, subsidizes, or results," *Lau,* 414 U.S. at 569, in substantial burdens on, or discrimination against, religious exercise. As the Seventh Circuit held, "Congress has an interest in

allocating federal funds to institutions that do not engage in discriminatory behavior or in conduct that infringes impermissibly upon individual liberties." *Charles*, 348 F.3d at 608

Just as Congress has prohibited federal money from being used for race discrimination (Title VI), gender discrimination (Title IX), or disability discrimination (Section 504 of the Rehabilitation Act) even where such discrimination is not otherwise barred by the Constitution, RLUIPA's restrictions ensures that federal funds are not used for purposes Congress believes are contrary to the public welfare. In this regard, RLUIPA simply "follows in the footsteps of a long-standing tradition of federal legislation that seeks to eradicate discrimination and is 'designed to guard against unfair bias and infringement on fundamental freedoms.'" *Charles*, 348 F.3d at 607 (quoting *Mayweathers*, 314 F.3d at 1067).

Moreover, in light of the reasonable perception that religious exercise has rehabilitative qualities, *see infra* n.19, Congress "can rationally seek to insure that states receiving federal funds targeted at rehabilitating prisoners are not simultaneously using those funds or other federal money to impede prisoners' exercise of religion and its perceived rehabilitative effects." *Charles v. Verhagen*, 220 F.Supp.2d 955, 963 (W.D. Wis. 2002); *Charles*, 348 F.3d at 608-09; *Mayweathers*, 314 F.3d at 1067.[11] Here, there

[11] Other Spending Clause cases also demonstrate that there must be only a rational connection (rather than any particularized nexus) between the imposed conditions and the purpose of the funds. *See, e.g., Oklahoma v. Civil Service Comm'n,* 330 U.S. 127, 129,(1947) (upholding provision of Hatch Act prohibiting state employees "whose principal employment is in connection with any activity which is financed in whole or in part" by the United States from taking "any active part in political management or in political campaigns," even though this exercise of the Spending Power was not attached to any particular spending program); *Salinas v. United States*, 522 U.S. 52, 60-61 (1997) (upholding application of federal bribery statute covering entities receiving more than $10,000 in federal funds); *Jim C. v. United States*, 235 F.3d 1079, 1081-82 (8th Cir. 2000) (en banc) (upholding application of section 504 of Rehabilitation Act to state agency); *United States v. Dierckman*, 201 F.3d 915, 922-23 (7th Cir. 2000) (upholding Spending Clause legislation conditioning receipt of federal farm benefits on farmer's willingness

is an unmistakable relationship between federal funding of correctional institutes to assist in the rehabilitation of prisoners, and RLUIPA's conditions designed to protect prisoners' religious exercise, which may have rehabilitative benefits. *See, e.g., Charles*, 348 F.3d at 609 ("the goal of federal corrections funding and the conditions imposed by RLUIPA, with respect to the protection of prisoners' religious rights, share the goal of rehabilitation."); *Johnson*, 223 F.Supp.2d at 831 ("if Congress can restrict highway funds, used to build and repair roads, with a condition mandating a minimum drinking age, Congress can certainly restrict prison funds, used to support rehabilitation and education programs, with a condition mandating accommodation of religious activity.").

Nor does Arkansas' argument that RLUIPA's deregulation of prisoners' religious exercise is somehow out of "proportion" to the federal funding Arkansas receives find any support in its citation to *FCC v. League of Women Voters*, 468 U.S. 364 (1984). Arkansas neglects to mention that this case did not even involve the Spending Clause. Instead, it addressed whether the federal government's conditions violated the independent constitutional requirements of the Free Speech Clause.[12]

Besides, as one district court observed, a proportionality rule makes little sense in the context of quasi-contractual, conditional appropriations: "If the conditions imposed by the federal government are so out of proportion to the size of the funding stream on offer, a rational state will decline the funds and remain free of the onerous conditions." *Charles*, 220 F.Supp.2d at 964. In short, nothing within Spending Clause jurisprudence

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not to cultivate wetlands, even though benefits farmers lost for violating conditions were not limited to those relating to wetlands preservation).

[12] The holding of *League of Women Voters* had nothing to do with the "proportionality" of the conditions imposed by the statute that the Court invalidated. The holding was that the conditions themselves violated the Free Speech Clause of the First Amendment. *See* 468 U.S. at 398.

or RLUIPA provides a basis for Arkansas's novel proportionality rule; if Arkansas "wishes to receive any federal funding, it must accept the related, unambiguous conditions in their entirety." *Charles*, 348 F.3d at 609.

D. RLUIPA Does Not Violate Any Independent Constitutional Requirement.

Finally, RLUIPA does not violate any other constitutional provision, such as the Establishment Clause or Separation of Powers principles. *See infra*.[13]

In sum, if Arkansas would rather not comply with RLUIPA's unambiguous conditions imposed on the use of federal prison funds, it has been free since the passage of that Act—and remains free to this day—simply to decline that funding. Arkansas is ***not*** free, however, to have its cake and eat it too, to accept federal funds while disregarding the federal conditions associated with them. To allow Arkansas that additional latitude would be to allow a ***State*** to dictate to ***Congress*** how federal funds shall be used, which flies in the face of our constitutional structure of federalism. *See* U.S. CONST. art. VI ("[T]he laws of the United States … shall be the supreme law of the land"). Thus, in passing RLUIPA Section 3, Congress acted within its authority under the Spending Clause.

II. RLUIPA Section 3 Is Consistent with the Establishment Clause.

Arkansas' core Establishment Clause argument is that legislative accommodations of religious exercise are forbidden if they accommodate only religious exercise. But this

[13] Though Arkansas does not raise the argument, RLUIPA does not violate the Tenth Amendment either. The Tenth Amendment is implicated only when Congress acts outside the scope of its enumerated powers. *New York v. United States,* 505 U.S. 144, 156 (1992) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States."). Because RLUIPA Section 3 represents a proper exercise of Congress' Spending Power, any Tenth Amendment argument fails. *See Charles*, 348 F.3d at 609; *Mayweathers*, 314 F.3d at 1069.

argument is premised on an extreme view of the Establishment Clause held by only one sitting Justice of the Supreme Court. *See City of Boerne v. Flores*, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring); *Midrash Sephardi, Inc. v. Town of Surfide,* 366 F.3d 1214, 1242 n.20 (11th Cir. 2004) (describing rejection of Justice Stevens' Establishment Clause view by the majority of Justices in *Boerne*). And this argument was ***squarely rejected by the Eighth Circuit***, as well as every other to address the issue, when it was raised against RFRA—RLUIPA's broader predecessor—both before and after RFRA was struck down as applied to the states on other grounds in *Boerne*.[14]

And all but one court has rejected the argument in cases challenging the constitutionality of RLUIPA Section 3. *See supra* n.4. Likewise, every court to address the issue has rejected an Establishment Clause challenge to the analogous land-use provisions of RLUIPA Section 2. *See supra* n.5. Nowhere in its brief does Arkansas even attempt to discuss or distinguish any of these cases, which address ***the very question*** before the court.[15]

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[14] *See*, *e.g.*, *In re Young*, 141 F.3d 854, 863 (8th Cir.) ("RFRA fulfills each of the elements presented in the *Lemon* test, and we conclude that Congress did not violate the Establishment Clause in enacting RFRA."); *Mockaitis v. Harcleroad,* 104 F.3d 1522, 1530 (9th Cir.) (same), *vacated on other grounds*, 521 U.S. 507 (1997); *Sasnett v. Sullivan,* 91 F.3d 1018, 1022 (7th Cir. 1996) (same) *vacated on other grounds*, 521 U.S. 1114 (1997); *E.E.O.C. v. Catholic Univ. of America,* 83 F.3d 455, 470 (D.C. Cir. 1996) (same); *Flores v. City of Boerne*, 73 F.3d 1352, 1364 (5th Cir. 1996) (same), *rev'd on other grounds*, 521 U.S. 507 (1997).

[15] Arkansas also fails to cite, discuss, or attempt to distinguish three recent decisions of federal Courts of Appeals that are only one step removed, and so highly relevant. Specifically, those courts rejected Establishment Clause challenges to laws that have the purpose and effect of alleviating burdens on religious exercise, and ***only*** religious exercise. *See Ehlers-Renzi v. Connelly School of the Holy Child*, 224 F.3d 283, 291 (4th Cir. 2000) (upholding county zoning ordinance exempting from special exception requirement parochial schools located on land owned by religious organization); *Boyajian v. Gatzunis*, 212 F.3d 1 (1st Cir. 2000) (upholding state law and town by-law prohibiting municipal authorities from excluding religious uses of property from any zoning area); *Cohen v. Des Plaines,* 8 F.3d 484 (7th Cir. 1993) (upholding zoning ordinance that allowed churches to operate day-care centers in single-family residential districts, while requiring other operators of day-care centers to obtain special use permits).

The marginal character of Arkansas' Establishment Clause argument is further illustrated by the entities that have rejected it. For example, the argument that RLUIPA violates the Establishment Clause was rejected by a unanimous panel of the Ninth Circuit, *see Mayweathers*, 314 F.3d at 1068-69, the same court that read the Establishment Clause to prohibit voluntary recitation of the Pledge of Allegiance. Arkansas' position has not even been adopted by the ACLU—friend to Establishment Clause claimants, yet one of RLUIPA's strongest advocates. *See* American Civil Liberties Union, "Final Passage of Breakthrough Religious Freedom Bill Hailed By Religious and Civil Rights Groups" (available at <http://www.aclu.org/news/2000/n072800a.html>) (July 28, 2000). Nonetheless, Arkansas invites this Court to take a position even more separationist than these most separationist institutions. For the reasons set forth below, the Court should decline that invitation.

Courts so consistently uphold RLUIPA and similar laws because they satisfy all three requirements of the *Lemon* test: (1) RLUIPA has a secular purpose, to minimize government interference with religious exercise; (2) it does not have the primary effect of advancing religion, because alleviating substantial burdens on religious exercise—even exclusively, as religious accommodation laws do—does not involve the government ***itself*** advancing religion; (3) and the statute does not excessively entangle government with religion, because its purpose and effect is exactly the opposite—to ***diminish*** government interference with religious exercise. *See Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971).

In other words, RLUIPA does not entail "sponsorship, financial support, and active involvement of the sovereign in religious activity," *Walz*, 397 U.S. at 668, but instead "follows the best of our traditions" by relieving substantial regulatory burdens on religious exercise. *Zorach,* 343 U.S. at 314.

A. RLUIPA Has a Secular Purpose.

First, RLUIPA was passed for the secular government purpose of "protect[ing] the free exercise of religion from unnecessary government interference." 146 CONG. REC. E1234, E1235 (daily ed. July 14, 2000) (statement of Rep. Canady); *Madison*, 355 F.3d at 317; *Mayweathers*, 314 F.3d at 1068. As the Supreme Court has repeatedly made clear, it is a "***proper purpose*** [to] lift[] a regulation that burdens the exercise of religion." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987) (emphasis added); *id*. at 339 (noting the "permissible purpose of limiting governmental interference with the exercise of religion"). Indeed it has been a consistent refrain of the Court's Establishment Clause jurisprudence that it is a permissible government purpose to limit government interference with the exercise of religion.[16]

These cases simply emphasize the Supreme Court's admonition that the requirement of a secular purpose "does not mean that the law's purpose must be unrelated to religion—that would amount to a requirement that the government show a callous

[16] *See e.g., Gillette v. United States*, 401 U.S. 437 (1971) (exemption from military draft that lifts burden imposed on religious exercise of conscientious objectors does not violate the Establishment Clause); *Walz*, 397 U.S. at 680 (excepting religious organizations from neutral property tax laws does not violate Establishment Clause); *Zorach*, 343 U.S. at 314 (1952) (excepting religious students from mandatory public school attendance during certain hours of the day to obtain religious instruction does not violate Establishment Clause); *Larkin v. Grendel's Den*, 459 U.S. 116, 123-24 (1982) (finding secular purpose in regulating liquor sales in manner to protect disruption of church activities).

indifference to religious groups, and the Establishment Clause has never been so interpreted." *Amos*, 483 U.S. at 335. Thus, "the government may (and sometimes must) accommodate religious practice and . . . it may do so without violating the Establishment Clause." *Id.*, 483 U.S. at 334. *See also Zorach*, 343 U.S. at 314, (accommodating religious exercise "follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.").[17]

RLUIPA Section 3's purpose of alleviating government burdens on prisoners' religious exercise is a permissible secular purpose.[18] *See, e.g.*, *Madison*, 355 F.3d at 310

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[17] Indeed, legislation like RLUIPA that has the permissible purpose of lifting burdens on religious exercise is all the more common—and necessary—since the Supreme Court's decision in *Smith* made clear that people of faith should turn in the first instance to the legislative and executive branches, rather than the courts, for the protection of religious liberty:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also *a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation* as well.

Smith, 494 U.S. at 890 (emphasis added).

Thus, for example, while *Smith* rejected the claim that the Free Exercise Clause mandated an exemption to drug laws, the Court noted with approval that accommodations of peyote use for religious use (and only religious use) have been made by legislation. *Id*. (noting that "a number of States have made an exception to their drug laws for sacramental peyote use."). Such accommodations are constitutional, even though others wishing to use peyote for secular reasons are not offered the exemption. *See Lee v. Weisman*, 505 U.S. 577, 628–29 (1992) (Souter, J., concurring) ("[I]n freeing the Native American Church from federal laws forbidding peyote use, *see* . . . 21 C.F.R. § 1307.31 (1991), the government conveys no endorsement of peyote rituals, the Church, or religion as such; it simply respects the centrality of peyote to the lives of certain Americans."); *Peyote Way Church v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991) (exemptions from peyote laws for religious use do not violate Establishment Clause).

[18] As the Supreme Court emphasized in *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990), courts should "not lightly second-guess such legislative judgments" when reviewing the policy reasons for an accommodation. *Id.*, 496 U.S. at 251. Moreover, government action has failed the "secular purpose" test only when "there was *no question* that the statute or activity was motivated *wholly* by religious considerations." *Lynch*, 465 U.S. at 680 (emphasis added).

(Section 3 has secular purpose of alleviating burdens on religious exercise); *Charles*, 348 F.3d at 610; *Mayweathers*, 314 F.3d at 1068.

There is also at least one other secular purpose for RLUIPA's alleviating burdens on religion in the prison context—to promote rehabilitation. *See Charles*, 348 F.3d at 607 (identifying rehabilitation of prisoners as one of RLUIPA's purposes). *Cf. Kikumura,* 242 F.3d at 961 (discussing how RFRA's lifting of substantial burdens on the religious exercise of *federal* prisoners relates to Congressional purpose of rehabilitating prisoners).[19]

B. RLUIPA and Does Not Have the Primary Effect of Advancing Religion.

1. *RLUIPA does not cause the government to advance religious exercise itself, but rather to avoid interference with private religious actors as they advance religious exercise.*

RLUIPA satisfies the second *Lemon* factor, because alleviating burdens on religious exercise does not have the principal or primary effect of advancing religion. RLUIPA merely reduces intrusion and oversight by the government into how religious individuals carry out their missions. While this may better enable those ***individuals*** to advance ***their*** religious purposes, the Supreme Court has held this to be a permissible effect:

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[19] *See also generally* 139 Cong. Rec. S14,465 (daily ed. Oct. 27, 1993) (statement of Sen. Hatch) ("[E]xposure to religion is the best hope we have for rehabilitation of a prisoner. . . . We should accommodate efforts to bring religion to prisoners."); *id.* at S14,466 (statement of Sen. Dole) ("[I]f religion can help just a handful of prison inmates get back on track, then the inconvenience of accommodating their religious beliefs is a very small price to pay."); *id.* (statement of Sen. Hatfield) ("Mr. Colson's prison ministries group, which has successfully rehabilitated many prisoners, has been denied access to prisoners in Maryland ... who did not identify themselves as [P]rotestants.... [This is an] example[ ] of the need for us to pass this bill without this amendment [which would exclude prisons from RFRA].")

> A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. 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. As the Court observed in *Walz*, "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."

Amos, 483 U.S. at 337 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)) (emphasis in original).

Here, like the Title VII exemption approved in *Amos*, RLUIPA does not involve the *government itself* advancing religion.[20] Instead, RLUIPA simply permits prisoners some latitude to practice and define their own religious exercise by limiting government interference. Put another way, RLUIPA's lifting of any non-compelling, state-imposed regulations that substantially burden religious exercise is an example of "benevolent neutrality" that "permit[s] religious exercise to exist without sponsorship and without

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[20] *Amos* cannot be distinguished on the grounds that the Title VII accommodation at issue was somehow required by the Religion Clauses. *See Cutter*, 349 F.3d at 263 (suggesting that the accommodation in *Amos* was necessary to avoid violating First Amendment). With regard to the Free Exercise Clause, the Court in Amos expressly ***declined*** to rest its decision on the ground that Title VII's applicability to religious groups, prior to the enactment in 1972 of the legislative accommodation for religious organizations challenged in *Amos*, violated the Free Exercise Clause so that the 1972 amendment was constitutionally mandated. *Amos*, 483 U.S. at 336 ("We may assume for the sake of argument that the pre-1972 exemption was adequate in the sense that the Free Exercise Clause required no more"). Moreover, the Court took pains to point out that "[i]t is well established . . . that the limits of permissible state accommodation to religion are by no means co-extensive with noninterference mandated by the Free Exercise Clause." *Id*., 483 U.S. at 334, 107 S.Ct at 2867.

The argument that the accommodation in *Amos* was required in order to avoid an Establishment Clause violation is equally infirm. None of the opinions of the Justices in *Amos* make (or even suggest) such a holding, and courts have held that the government is not generally prohibited from regulating the hiring decisions of religious organizations. *See, e.g., E.E.O.C. v. Roman Catholic Diocese*, 213 F.3d 795 (4th Cir. 2000) ("ministerial exception" doctrine does not completely exempt hiring decisions of all employees (*e.g.*, building custodians) of a religious organization from anti-discrimination laws.). If the Establishment Clause permits the government to interfere with a religious organization's hiring of at least some employees, then the exemption approved in *Amos*—which involved the Title VII exemption's application to all employees of a religious organization—could not have been required by the Establishment Clause.

[government] interference." *Amos*, 483 U.S. at 334. *See Madison*, 355 F.3d at 318 ("Congress has simply lifted government burdens on religious exercise and thereby facilitated free exercise of religion for those who wish to practice their faiths.").

2. *None of the rationales suggested by Arkansas or the Sixth Circuit in Cutter v. Wilkinson distinguishes RLUIPA from the myriad accommodations of religious exercise by the political branches that "follow[ ] the best of our traditions.*"

In discussing the effects prong, Arkansas fails to distinguish the controlling analysis of *Amos,* or its application by the Eight Circuit in rejecting an Establishment Clause challenge to RFRA. *See In re Young*, 141 F.3d at 862-63. Although Arkansas and the Sixth Circuit's anomalous opinion in *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003), invoke three rationales in an effort to escape *Amos*, binding precedent forecloses all three.

a. The Establishment Clause does not prohibit laws passed solely to accommodate religious exercise.

Neither Arkansas nor *Cutter* even attempts to show that RLUIPA involves the "government itself" advancing religion. *Amos*, 483 U.S. at 337. Arkansas still faults RLUIPA, because it accommodates religious exercise without *also* accommodating other fundamental rights. *See* Defs. Br. at 11-12. But the Supreme Court has expressly rejected this rule, holding instead that where "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. Legion other courts have rejected arguments like Arkansas' over and over again in

upholding Sections 2 and 3 of RLUIPA.[21] And the Eight Circuit rejected this very argument in dismissing an Establishment Clause challenge to RFRA. *See In re Young*, 141 F.3d at 863 (rejecting reasoning of Justice Stevens' solitary concurrence in *Boerne* that RFRA is impermissible because it accommodates the religious without also providing a benefit for atheists as a viewpoint "in direct contradiction to the declaration of a majority of the Supreme Court in" *Amos*.). Nor could it be otherwise, as Arkansas' theory is fraught with problems on many levels.

First, there is a conceptual problem. The Establishment Clause certainly ***does*** require some form of "neutrality," but that neutrality is "between religion and religion, and between religion and nonreligion," *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968)—***not*** between religious exercise rights and all other fundamental rights, as Arkansas would have it. Certainly government cannot prefer the religious over the nonreligious: the state cannot imprison those who refuse to believe in a Creator, or withhold welfare checks from the atheist. But the government can—and often does—protect a ***singl****e* fundamental right in a particular piece of legislation or regulation, and the right to free religious exercise is no exception.[22] Such government actions do not "prefer" religion over

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[21] *See*, *e.g.*, *Madison*, 355 F.3d at 318-19 (holding that under *Amos* "[t]he 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."); *Mayweathers,* 314 F.3d at 1069 (holding that under *Amos*, RLUIPA "does not violate the Establishment Clause just because it seeks to lift burdens on religious worship in institutions without affording corresponding protection to secular activities or to non-religious prisoners."); *Charles*, 348 F.3d at 610 (same); *Sanabria*, slip op. at 35 (same); *Johnson*, 223 F.Supp.2d at 826 ("it does not follow, as Defendants argue, that merely because Congress has acted to provide religious activity with special protection and has not done the same for secular activity, that Congress has advanced religion."); *Gerhardt*, 221 F.Supp.2d at 847 ("Finally, the [*Amos*] Court rejected the notion that a law which singles out religions for the benefit it confers is *per se* unconstitutional.").

[22] *See, e.g.,* Privacy Protection Act of 1980, 42 U.S.C. §§ 2000aa *et seq*. (reacting to *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), and providing journalists with greater protection

irreligion; instead, they simply protect or reinforce the ***right*** to religious exercise, just as they would any other right.[23] As the Fourth Circuit recently held, "[i]t was reasonable for Congress to seek to reduce the burdens on religious exercise for prisoners without simultaneously enhancing, say, an inmate's First Amendment rights to access pornography." *Madison*, 355 F.3d at 319. This is because the Supreme Court has never held or even suggested "that legislative protections for fundamental rights march in lockstep." *Id.* at 318.[24]

Second, this reasoning defies logic. If the purpose of the Establishment Clause really were to preclude laws that ***single out*** religious exercise for protection from government interference, then the Establishment Clause would squarely contradict the Free Exercise Clause, which does precisely that. *See Lynch v. Donnelly,* 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state;

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against searches and seizures); Department of the Interior and Related Agencies Appropriations Bill, 1989, H.R. Rep. No. 713, 100th Cong., 2d Sess. 72 (1988) (reacting to statement in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 454 (1988), that "[t]he Government's rights to the use of its own land . . . *need not and should not discourage it from accommodating religious practices* like those engaged in by the Indian respondents" (emphasis added), and defunding the project at issue in *Lyng* that would have destroyed government land used by Indians for religious exercise); Exemption Act of 1988, 26 U.S.C. § 3127 (reacting to *United States v. Lee*, 455 U.S. 252 (1982), that declined to recognize Amish free exercise of religion claim, and providing a special Social Security tax exemption for employers and their employees who are members of "a recognized religious sect" whose "established tenets" oppose participation in Social Security); National Defense Authorization Act, 10 U.S.C. § 774 .

[23] Following Arkansas' logic to its conclusion leads to other absurdities. For example, if protecting religious exercise rights alone reflects impermissible ***favor*** for religion, then protecting any fundamental right alone ***other than*** religious exercise would reflect impermissible ***disfavor*** for religion.

[24] Moreover, not only would " a requirement of symmetry of protection for fundamental liberties" ignore Supreme Court 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." *Madison*, 355 F.3d at 319.

it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.").

Third, there are practical problems. Under Arkansas' view, the Establishment Clause would run amok, invalidating wholesale the legion acts of the political branches—legislative and executive, federal, state, and local—whose *sole* purpose and effect is to accommodate religious exercise. *See* Madison, 355 F.3d at 320 (holding that RLUIPA had an invalid purpose "would throw into question a wide variety of religious accommodation laws"). This includes, among many others, the ***federal statutory*** accommodations of religious peyote use and headwear in the military noted above; ***state constitutional*** provisions that provide stronger protections for religious exercise (and only religious exercise) than the federal Free Exercise Clause;[25] ***state statutes*** that

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[25] *See Arizona v. Evans,* 514 U.S. 1, 8 (1995) ("state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution"). Since the Supreme Court's *Smith* decision, the courts of at least ***eleven*** states have held that their state constitutions provide broader protection for religious exercise (and only religious exercise). *See, e.g., Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (*Sherbert* strict scrutiny test applies to free exercise claims under Alaska Constitution); *Rupert v. City of Portland*, 605 A.2d 63 (Me. 1992) (Maine constitution requires compelling interest/least restrictive means test); *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990) (test of "least restrictive alternative for protecting public safety" applies to Free Exercise claims under Minnesota constitution); *St. John's Lutheran v. State Comp. Ins. Fund*, 830 P.2d 1271 (Mont. 1992) (under Montana constitution "[T]he state may regulate affairs impacting religious activity when there is an overriding governmental interest in so doing."); *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000) (Ohio constitution requires compelling state interest/least restrictive means test); *First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992) (Under Washington constitution, "[a] facially neutral, even-handedly enforced statute that does not directly burden free exercise may, nonetheless, violate [the state constitution], if it indirectly burdens the exercise of religion."); *State v. Miller*, 549 N.W.2d 235 (Wis. 1996) (Wisconsin constitution requires compelling state interest/least restrictive alternative test when free exercise of religion burdened); *State v. Evans*, 796 P.2d 178, 14 Kan. App. 2d 591 (Kan.1990) (under Kansas constitution, "[o]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."); *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (although *Smith* "substantially altered" federal constitutional standard, Massachusetts constitution requires strict scrutiny when religious exercise burdened); *In re Browning*, 476 S.E.2d 465, (N.C. 1996) (requiring "compelling state interest in the regulation of a subject within the [North Carolina's] Constitutional power to regulate");

provide broader protection to religious exercise (and only religious exercise) than required by the federal or state constitution;[26] ***government chaplaincy programs*** in Congress, the armed forces, and in prisons that facilitate religious exercise (and only religious exercise);[27] and even ***particular prison regulations*** adopted by the Federal Bureau of Prisons that accommodate religious exercise (and only religious exercise).[28]

Another strange consequence of this reasoning is that, if legislative and executive officials would merely tack on to each protection of religious exercise the protection of another fundamental right, then the entire (allegedly grievous) constitutional problem would disappear. The Establishment Clause does not exist to require government actors to undertake such formalistic (and completely unprecedented) exercises. *See Madison*,

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Rourke v. N.Y. Dep't of Corr., 603 N.Y.S.2d 647 (N.Y. Sup. Ct. 1993) (New York constitution requires least restrictive means for serving compelling state interest when laws burden religious exercise), *aff'd*, 615 N.Y.S.2d 470 (N.Y. App. Div. 1994). *See also* Gary S. Gildin, *Coda to William Penn's Overture: Safeguarding Non-Mainstream Religious Liberty Under the Pennsylvania Constitution*, 4 U. PA. J. CONST. L. 81, 125-26 & nn.200-10 (2001).

[26] Since the Supreme Court's *Smith* decision, the political branches of at least ***twelve*** states have, either by statute or constitutional amendment, provided stronger protection for religious exercise (and only religious exercise). Those twelve states are Alabama, *see* ALA.CONST. amend. 622; Arizona, *see* ARIZ.REV.STAT.ANN. §§ 41-1493 *et seq*.(West 2003); Connecticut, *see* CONN. GEN.STAT.ANN. § 52-571b (West 2003); Florida, *see* FLA.STAT.ANN. §§ 761.01-761.04 (West 2003); Idaho, *see* IDAHO CODE §§ 73-401 *et seq.* (Supp. 2002); Illinois *see* 775 ILL.COMP.STAT. ANN. §§ 35/1 -35/99 (West 2002); New Mexico, *see* N.M.STAT.ANN. §§ 28-22-1 to 28-22-5 (Michie 2002); Oklahoma, *see* OKLA.STAT.ANN. tit. 51, §251 (West 2003); Pennsylvania, 71 PA. CONS.STAT.ANN. 2401 *et seq.*; Rhode Island, *see* R.I. GEN. LAWS §§ 42-80.1-1 to 42-80.1-4 (2001); South Carolina, *see* S.C.STAT.ANN. § 1-32-10 (Law. Co-op. 1999); and Texas, *see* TEX.CIV.PRAC. & REM. CODE ANN. §§ 110.001 *et seq.* (West 2003).

[27] *See, e.g., Mockaitis*, 104 F.3d at 1530 (holding that RFRA does not impermissibly promote religion anymore than "[t]he creation of chaplaincies in Congress and in the armed forces [which are] particularly striking promotions of religion.").

[28] *See, e.g.,* Federal Bureau of Prisons Policy Statement (attached as Ex. D) at 15 (providing religious prisoners accommodation for religious use of wine, an otherwise contraband substance in prison); *id.* at 10-11 (providing religious prisoners relief from generally applicable work duties in order to observe religious holidays); *id.* at 11-12 (providing religious prisoners accommodation to allow visits by outside religious advisors that do not count against the limit otherwise posed on social visits from outsiders).

355 F.3d at 320 (noting "[t]he byzantine complexities that such compliance would entail").

Indeed, the Supreme Court has squarely rejected that argument when it explained that it:

> has never indicated that statutes that give special consideration to religious groups are *per se* invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause. Where, as here, government acts with the purpose of lifting a regulation that burdens the exercise of religion, ***we see no reason to require that the exemption come packaged with benefits to secular entities.***

Amos, 483 U.S. at 338 (emphasis added).

Fourth, lacking ***any*** Supreme Court authority for its position, Arkansas relies on a hypothetical discussed in the now over-ruled district court decision in *Madison v. Riter*, 240 F. Supp. 2d 566, 576 (W.D.Va. 2003) *overruled Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003). Two white supremacist prisoners—one secular and the other a religious adherent to the Church of Jesus Christ Christian, Aryan Nation ("CJCC")—want to challenge a prison's decision not to let them possess white supremacist literature. According to the hypothetical, assuming the showing of a substantial burden on religious exercise, the religious prisoner would be able to challenge the prison's failure to accommodate his religious beliefs under RLUIPA's strict scrutiny standard, but the secular prisoner could bring free speech and association claims against the policy, but only under the more deferential standard of *Turner v. Safley*, 482 U.S. 78 (1987). Thus, Arkansas argues, "RLUIPA's effect is to single out religious belief as one fundamental right deserving of greater protection and negate[] the notion of congressional neutrality." Defs. Br. at 12.

But applying the reasoning of this hypothetical to factual circumstances ***actually addressed*** by the Supreme Court reveals starkly that the Court has ***already*** rejected that reasoning ***repeatedly***. For example, in *Zorach*, the Supreme Court rejected an Establishment Clause challenge to a "release-time" program that permitted students to leave public school grounds for religious—but not secular—instruction. *Zorach*, 343 U.S. at 308. Thus, under ***the very program*** already approved by the Court in *Zorach*, if there were two white supremacist students, the one seeking instruction from CJCC would be excused, but the one seeking instruction from a secular supremacist group would not. Similarly, in *Amos*, the Supreme Court approved a provision of Title VII that exempted religious organizations—and only religious organizations—from the statute's general prohibition of religious discrimination in employment. Thus, under ***the very exemption*** approved by the Court in *Amos*, if there were two white supremacist employers, a religious one such as CJCC could hire based on religion, but the secular one could not. *See also Madison*, 355 F.3d at 319 (*Amos* "does not at all indicate that Congress must examine how or if any other fundamental rights are similarly burdened.").

And why has the Supreme Court (and faithful lower courts) so consistently rejected Establishment Clause challenges to these laws? In short, government must be free to ***specially*** deregulate religious exercise, because it is a category of private activity in which government interference is ***uniquely*** misplaced. To quibble with that is to quibble with the Religion Clauses themselves. The same principle applies to RLUIPA—it lifts burdens only on religious exercise in order to ***minimize*** government interference with a human phenomenon that the Constitution itself recognizes to be uniquely sensitive

to government interference.[29] Thus, in accordance with the overwhelming weight of authority—and notwithstanding the superficial appeal of a single hypothetical—RLUIPA does not offend the Establishment Clause.

Fifth, there is an historical problem. Laws that exist solely to accommodate religious exercise are so numerous because they represent a time-honored American tradition.[30] And, as discussed *supra*, accommodations by the political branches are all the more imperative since *Employment Division v. Smith* narrowed the role of the judiciary in this area. In other words, if Arkansas' theory were accepted, then the *Smith* Court's invitation to enact religious accommodations, *see Smith,* 494 U.S. at 890, would appear to be an inducement to violate the Establishment Clause.[31]

Therefore, this Court should join the others that have heeded the Supreme Court's instruction in *Amos*, 483 U.S. at 338, and should reject the argument that accommodations of religious exercise alone impermissibly advance religion.

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[29] Of course, the First Amendment and laws like RLUIPA seek only to minimize government involvement in private religious conduct, not to eliminate it altogether. Even under these laws, whenever the specific religious practice of white supremacists (or any other prisoner) would create a demonstrable threat to the safety of other inmates or to prison security, prison administrators could still forbid the practice.

[30] *See, e.g., Kiryas Joel v. Grumet,* 512 U.S. 687, 705 (1994) ("Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice."); *Walz,* 397 U.S. at 676 ("Few concepts are more deeply embedded in the fabric of our national life … than for the government to exercise ***at the very least*** this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.") (emphasis added).

[31] Notably, the *Smith* Court, in encouraging the political branches to take responsibility for providing for accommodation of religious exercise, did not even ***suggest*** that those accommodations would be permissible only if packaged with other "secular" rights.

b. RLUIPA does not have any impermissible effects on the religious freedoms of others.

As an alternative argument under *Lemon*'s effect prong, the *Cutter* opinion asserts that RLUIPA has impermissible effects on other state prison officials. This argument is unsound as a matter of both law and fact. The *Cutter* opinion relies primarily on *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), for its assertion that RLUIPA will improperly burden state prison administrators. There, the Court struck down a statute imposing an ***absolute*** condition that employers retain employees who refused to work on the Sabbath. In contrast to the "unfettered right [given] to persons with certain religious practices [in *Caldor*] regardless of the countervailing interests of other entities," RLUIPA (like RFRA) "addresses the countervailing interests of prison administrators by allowing the government to burden inmates' religious freedom, provided this burden serves as the least restrictive means to achieve a compelling government interest." *Bitner*, 285 F.Supp.2d at 600 n.7; *see also Sanabria*, slip op. at 32 (RLUIPA is distinguishable from *Caldor* because it "invests prisoners with no absolute rights"). The statute in *Caldor* is also distinguishable from RLUIPA because, unlike the absolute mandate imposed on private employers in *Caldor*, Arkansas "has voluntarily committed itself to lifting government-imposed burdens on the religious exercise of publicly institutionalized persons in exchange for federal" funds. *Madison*, 355 F.3d at 322.[32]

[32] Nor is Arkansas helped by its citation to the plurality opinion in *Texas Monthly v. Bullock*, 489 U.S. 1 (1989). In *Texas Monthly,* a fractured Court struck down a statute that exempted certain religious publications from a state sales tax. Even if that plurality opinion were the law, it distinguished the case before it from one involving "remov[al of] a significant state-imposed deterrent to the free exercise of religion." *Id.* at 15 (plurality opinion). Here, of course, RLUIPA alleviates just such a deterrent to religious exercise, by generally relieving substantial burdens on prisoners' religious exercise. Moreover, unlike the absolute exemption for the religious publications in *Texas Monthly*, RLUIPA does not give an unfettered right to religious exercise, but accounts for countervailing interests.

Arkansas' policy judgment that RLUIPA will make it too difficult to balance prison concerns also fails to rise to the level of a cognizable Establishment Clause violation. First, far from removing a prison's ability to address important prison issues such as security, RLUIPA's provisions expressly grants prisons leeway to burden religious exercise where a compelling interest—like security—is actually implicated.

Moreover, no evidence supports Arkansas' sky is falling claim that it will face a "barrage of lawsuits." Defs. Br. at 12. In passing RLUIPA, Congress had before it a letter ***supporting*** RLUIPA's passage from the authorities overseeing federal prisons. The letter reported that, in the six years that the Bureau of Prisons had been required to apply RFRA—which also applies the same substantial burden standard—the BOP had not been overwhelmed by frivolous prisoner lawsuits. *See* 146 Cong. Rec. S7776 (daily ed. July 27, 2000) (July 19, 2000 letter of Robert Raben) ("Since enactment of RFRA in 1994, Federal inmates have filed approximately 65 RFRA lawsuits in Federal court naming the Bureau of Prisons (or its employees) as defendants. Most of these suits have been dismissed on motions by the defendants. . . . RFRA has not . . . significantly burdened the operation of Federal prisons."). *See also Developments in the Law—Religious Practice in Prison*, 115 Harv.L.Rev. 1891, 1894 (2000) (finding that federal officials overwhelmingly prevail in RFRA cases). Far from supporting Arkansas' second-guessing of Congress' policy judgment, the evidence only confirms "that RLUIPA should not hamstring [Arkansas'] ability" to maintain safety and order in its prisons. *Madison*, 355 F.3d at 321.

The *Cutter* opinion is equally unfounded in asserting that RLUIPA will improperly affect third parties by "induc[ing] prisoners to adopt or feign religious belief

in order to receive the statute's benefits." *Cutter,* 349 F.3d at 266. Even if RLUIPA would generate that effect, RLUIPA (like RFRA) does not prevent prison administrators from inquiring, as courts also may, into the sincerity of the religious beliefs of prisoners seeking relief from burdens on religious exercise. Just as sincerity of belief is a "threshold requirement" for a Free Exercise claimant, *see Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002), so too is it a threshold showing for a RLUIPA or RFRA claimant, *see, e.g., Kikumura*, 242 F.3d at 960. Thus, even assuming that RLUIPA causes a flood of religion-faking, claim-filing prisoners—and there is absolutely no evidence that it has—prison administrators retain the means to address the issue of feigned belief.

In addition, *Cutter* assumes that the religious exercise to be accommodated is typically desirable to the average prisoner. But this assumption has no basis in the record before Congress or elsewhere. Acts of religious faith, though deeply meaningful to an adherent, often appear irrational or baffling to a non-adherent, thus inviting derision rather than envy. Similarly, religious rituals and observances frequently demand rigorous attention to detail and form (*e.g.,* keeping a kosher diet) that only a true religious adherent would ever want to perform.[33]

Finally**,** even where the religious accommodation may be desirable outside a particular faith (*e.g.,* the ability to consume wine for communion), that fact alone would hardly render an accommodation unconstitutional. If that were true, then all sorts of accommodations for religious exercise in all sorts of contexts (even those required under

[33] The facts of the Seventh Circuit's decision in *O'Bryan* provide a good illustration. There, a Wiccan prisoner sued under RFRA for the right to cast spells. *O'Bryan v. Bureau of Prisons*, 349 F.3d 257 (7th Cir. 2003). It is unlikely that many non-Wiccans would find spell-casting so desirable that they would pretend to be Wiccan in order to obtain the "benefit" of the right to cast spells.

the more deferential *Turner v. Safley* test) would be at risk of violating the Establishment Clause by creating some incentive, no matter how minimal, to feign religious belief. For example, such an inducement to feign religious belief would presumably arise from a statute that provided a religious exemption from the general criminal prohibition against peyote use. Indeed, if peyote is indeed a desirable (yet dangerous) hallucinogenic substance, as those who have outlawed it believe, *see* 21 U.S.C. § 812 (listing peyote as a schedule 1 controlled substance), then the inducement to fake religious devotion in order to obtain the benefit of the religious accommodation would seem to be particularly strong. Nonetheless, in explaining that the legislature, rather than the courts, would be the appropriate place to provide an exemption for religious use of peyote, the Supreme Court in *Smith* did not suggest that any inducement to false piety created by the exemption would violate the Establishment Clause. *See Smith*, 494 U.S. at 890.

c. The mandates of the Free Exercise Clause are not a ceiling on permissible accommodation of religious exercise.

Arkansas last argues that RLUIPA impermissibly advances religion because its accommodation of religious exercise exceeds what the Supreme Court has required under the Free Exercise Clause in the prison setting under the deferential test of *Turner v. Safley*. But this argument proves too much. On this theory, ***any*** accommodation of prisoner religious exercise that is not mandated by the Free Exercise Clause would violate the Establishment Clause.

Once again, this argument ignores the nation's long history of specially accommodating religious exercise; would invalidate wholesale numerous federal and state laws that accommodate religion beyond what the Free Exercise Clause requires; and ignores *Smith*'s specific invitation to the political branches to provide that additional

measure of accommodation. But most importantly, this argument is foreclosed by *Amos*. *See Amos*, 483 U.S. at 334 ("It is well established that the limits of permissible accommodation of religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.") (quotation omitted).

C. RLUIPA Does Not Foster Excessive Entanglement with Religion.

Far from creating any entanglement problem, RLUIPA is designed precisely to ***minimize*** government entanglement in religious exercise; RLUIPA's deregulation of religion is the ***exact opposite*** of entanglement. As in *Amos*, "[i]t cannot be seriously contended that [the statutory accommodation of religious exercise] impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief" that the Constitution prohibits. *Id*., 483 U.S. at 339. Finding excessive entanglement here would contradict not only common sense, but the Supreme Court's emphasis that "[t]here is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'" *Amos*, 483 U.S. at 334.[34]

Although Arkansas criticizes RLUIPA's definition of religious exercise, this definition, far from increasing entanglement, actually tends to decrease it. The Act defines "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), precisely tracking Supreme Court precedent. RLUIPA thus entails no greater

[34] *See also Mockaitis*, 104 F.3d at 1530 ("Of course, application of RFRA, like the application of the First Amendment itself and any objection made under this amendment, requires a court to determine what is a religion and to define an exercise of it. There is no excessive entanglement.").

entanglement problem than the ordinary application of Free Exercise doctrine. That doctrine, moreover, is designed to minimize entanglement by precluding inquiry into the rationality of a belief or its centrality within a system. *See*, *e.g.*, *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *Thomas v. Review Bd. of Ind*., 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."). Like Free Exercise doctrine itself, RLUIPA's definition of religious exercise tends to avoid—not create—entanglements.[35]

In sum, because RLUIPA—like so many other religious accommodations—satisfies all three elements of the *Lemon* test, it does not violate the Establishment Clause.

III. RLUIPA Is Fully Consistent with Separation of Powers Principles.

Finally, Arkansas argues that RLUIPA violates Separation of Power principles by erroneously revising a ruling of the Supreme Court to apply strict scrutiny to burdens on prisoners' religious exercise instead of the rational basis scrutiny that would otherwise apply under *Turner v. Safley*. As an initial matter, it is noteworthy that the identical argument against application of RFRA to the ***federal*** government and its officials was rejected by the Eight Circuit and every other court to address the issue.[36]

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[35] Notably, even *Cutter* was unwilling to accept the argument that RLUIPA creates an entanglement problem. *Cutter*, 349 F.3d at 267 ("[W]e question whether RLUIPA requires any greater interaction between government officials and religion than exists under present law.").

[36] *In re Young,* 141 F.3d 854, 861 (8th Cir. 1998) (rejecting separation of powers challenge to RFRA and finding it applicable to prisoner's claim against the federal bureau of prisons); *O'Bryan v. Bureau of Prisons*, 349 F.3d 399 (7th Cir. 2003) (same); *Guam v. Guerrero*, 290 F.3d

The reasoning of the Eighth Circuit and those other courts applies equally to a separation of powers challenge to RLUIPA: it is well-established that Congress, so long as it acting pursuant to an enumerated power such as the Spending or Commerce power, can use its authority to provide stronger civil rights protections than the constitution would provide alone. *See In re Young*, 141 F.3d at 860 ("[C]ongressional disapproval of a Supreme Court decision does not impair the power of Congress to legislate a different result, as long as Congress had that power in the first place.") quoting *United States v. Marengo Cy. Comm'n*, 731 F.2d 1546, 1562 (11th Cir.), *cert. denied,* 469 U.S. 976 (1984). *See also Mayweathers*, 314 F.3d at 1070 ("RLUIPA does not erroneously review or revise a specific ruling of the Supreme Court. . . . Rather, RLUIPA provides additional protection for religious worship, respecting that *Smith* set only a constitutional floor—not a ceiling—for the protection of personal liberty.") Thus, Congress' decision to provide greater protection for the religious exercise rights of prisoners than the constitution requires merely accepts the Supreme Court's repeated invitations to adopt heightened legislative protection for religious exercise, *see*, *e.g.*, *Smith*, 494 U.S. at 890, and does not violate separation of powers principles.

CONCLUSION

For the foregoing reasons, this Court should uphold Section 3 of RLUIPA as a constitutional exercise of Congressional authority.

1210, 1220 (9th Cir. 2002) (rejecting separation of powers challenge to RFRA); *Kikumura v. Hurley*, 242 F.3d 950, 959-60 (10th Cir. 2001) (same).

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September, 2004, I served on all parties the above and foregoing Brief *Amicus Curiae* by depositing same in the United States mail, with proper first-class postage affixed thereto, addressed to counsel of record as follows:

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