No. 03-9877

In The Supreme Court of the United States

JON B. CUTTER, et al.,

Petitioners,

vs.

REGINALD WILKINSON, et al.,

Respondents.

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

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTRODUCTION

In apparent recognition of the fatal flaws in the ruling below, Respondents' brief attempts to radically recast this entire case. They recast its procedural posture, its record, and their principal Establishment Clause arguments. Respondents would have this Court believe that it is reviewing a ruling on a motion for summary judgment, when it is not. They assert that their pejorative characterizations of Petitioners and their religions are based on "uncontested evidence," when they are not. Resp. Br. 3. And, apparently uncomfortable with the Sixth Circuit's rationale, Respondents rely heavily on an unprecedented argument never presented to the courts below.

Notwithstanding Respondents' attempts to recast this case, it is, and has always been, an interlocutory appeal from the District Court's denial of Respondents' "Consolidated Partial Motions to Dismiss" arguing that the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) is unconstitutional on its face. J.A. 187. It is not the review of a ruling on a motion for summary judgment based on "uncontested evidence." Although Respondents urged the District Court and the Court of Appeals to treat their motion to dismiss attacking RLUIPA's validity as a motion for summary judgment, both courts declined to do so.[1]

Respondents recast the procedural posture of this case to justify the hyperbolic characterizations of Petitioners

[1] Respondents filed "Consolidated Partial Motions to Dismiss," and the District Court and Court of Appeals disposed of them as such. Because both courts addressed the constitutionality of RLUIPA on its face, the inclusion of documents and affidavits by the parties did not automatically convert Respondents' motion to dismiss into a motion for summary judgment. 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1366, at 182-86 (3d ed. 2004). The District Court ruled that the documents in the record were legislative, not adjudicative, facts. Pet. App. B4.

and their religious beliefs as "uncontested evidence." Resp. Br. 3.[2] There is, however, a substantial dispute of material facts unrelated to Respondents' facial attack on RLUIPA. Petitioners flatly deny that their religious beliefs and requests for religious accommodations are part of a huge conspiracy involving prison riots and ten murders. Resp. Br. 6. Petitioners also deny that their religious beliefs "preach violence" and that their religions are affiliated with violent gangs.[3] Resp. Br. 5. These and other of Respondents' assertions are based, in large part, on documents that they dumped into the record under seal – documents that Petitioners' counsel have never been permitted to show to their clients – or on statements from newspaper accounts, newsletters, trade books, and websites never introduced in any adversary proceedings. Resp. Br. 3-7, J.A. 127-84, 199-250.[4]

Petitioners urge this Court not to be distracted by Respondents' efforts to recast the proceedings and the record below. Rather, they urge this Court to uphold RLUIPA on its face because it is a legitimate accommodation of religion that does not violate the Establishment Clause.

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[2] FED. R. CIV. P. 12(b)(6) requires that a court ruling on a motion to dismiss for failure to state a claim must accept all of the factual allegations of complaint as true and view them in the light most favorable to the plaintiffs. *Berkovitz v. United States*, 486 U.S. 531, 540 (1988); 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 417 (3d ed. 2004).

[3] *See, e.g.*, Nahal Toosi, *A Wiccan Named Witch is Chaplain at Prison in Wisconsin*, MILWAUKEE J. SENTINEL, Dec. 8, 2001; *Royal Navy to Allow Devil Worship*, CNN.com, Oct. 24, 2004, *at* http://www.cnn.com/2004/WORLD/europe/10/24/uk.devilworship/index.html (British Royal Navy officially recognizes Satanism).

[4] Respondents' documents filed under seal were not redacted until designated for inclusion in the Joint Appendix filed in this Court.

ARGUMENT

I. NONE OF RESPONDENTS' SWEEPING AND UNPRECEDENTED ESTABLISHMENT CLAUSE CLAIMS JUSTIFIES INVALIDATING RLUIPA

A. Respondents' "Libertarian Aspect" Argument Is Unsupported By This Court's Cases And Would Prohibit All Accommodations Of Religion

Respondents argue that the "libertarian aspect" of the Establishment Clause renders RLUIPA unconstitutional because its provisions accommodate inmate religious practice beyond the requirements of the Free Exercise Clause, as interpreted in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). Resp. Br. 8-9.[5] Respondents' argument sweeps so broadly that it would invalidate every accommodation not required by the religion clauses, even those currently offered to mainstream faiths in their own prisons. Respondents try to limit the reach of their position by asserting it does not apply to accommodations outside the prison context. Resp. Br. 16, 17. However, every argument Respondents make is equally applicable to nonprison accommodations of religion, and Respondents rely heavily on nonprison cases: *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985); and *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994). It is presumably for this reason that one of Respondents' own amici disavows

[5] Although Respondents assert that their focus on the prison setting converts their so-far unsuccessful facial challenge into an "as applied" challenge, Resp. Br. 3, all of their arguments address the constitutionality of RLUIPA on its face.

Respondents' "libertarian" Establishment Clause attack on RLUIPA,[6] and another of Respondents' amici rejects the Sixth Circuit's Establishment Clause reasoning.[7]

1. RLUIPA Is A Neutral Accommodation

Respondents argue first that RLUIPA is not religiously neutral, favoring religion over non-religion. Resp. Br. 11-12, citing *Grumet*, 512 U.S. at 703, and Justice Stevens' concurring opinion in *City of Boerne v. Flores*, 521 U.S. 507, 536-37 (1997) (Stevens, J., concurring). Resp. Br. 11-12. However, *Grumet* addresses sect-based accommodations and holds that they are never constitutional. Moreover, a majority of the Justices in *Grumet* authored or joined opinions, indicating that an accommodation of religion is not unconstitutional favoritism even when it addresses burdens on religion that do not themselves violate the Constitution. *See* Pet. Br. 24. Further, Justice Stevens' position in *Boerne*, that constitutionally permissible religious accommodations must also cover secular activities, has never been adopted by this Court.

2. RLUIPA Does Not Impermissibly Slide Into Favoritism Toward Religion

Respondents argue RLUIPA is an accommodation that "slide[s] over . . . into favoritism." Resp. Br. 13, citing *Texas Monthly*, 489 U.S. at 40 (Scalia, J., dissenting). They say it is "a pro-religious rule about making accommodations." *Id*. However, RLUIPA accommodates religious exercise by articulating an evenhanded standard that states when government burdens are to be lifted. It does not, as Respondents' brief repeatedly suggests, create an automatic

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[6] Amicus brief of the Claremont Institute, 4.

[7] Amicus brief of the Commonwealth of Virginia et al., 3-4.

rule reflexively requiring the accommodation of all religious exercise. Resp. Br. 8, 13-14, 23. Rather, RLUIPA carefully preserves the right of prison officials to protect security and other important institutional interests whenever genuinely appropriate. 42 U.S.C. § 2000cc-3(e); RLUIPA § 5(e).

RLUIPA does not give Jews, atheists, or Unitarians, because of their religious status, "a powerful weapon to gain exemptions from whatever prison regulations they wish." Resp. Br. 13. This is twice wrong. First, RLUIPA does not make unpleasant prison rules vanish at the wave of a religious wand. Second, it is not a person's "status" as a believer that triggers RLUIPA, *id.*, it is the "imposition" of a "substantial burden" on sincerely held religious practice. 42 U.S.C. § 2000cc-1(a); RLUIPA § 3(a).

Further, it is unlikely that inmates adhering to "established religions" recognized by the Ohio Department of Rehabilitation and Correction (ODRC), J.A. 202, will have occasion to invoke RLUIPA, because the ODRC already accommodates mainstream religious practices. Resp. Br. 24. If RLUIPA "slide[s] over into favoritism," so do Respondents' current religious accommodations – at least those accommodations not required by the Free Exercise Clause and not matched by a secular equivalent.

Nor does RLUIPA impermissibly favor religious speech over political speech, as Respondents suggest. Resp. Br. 8. *Amos* permits the legislature to lift burdens from religious exercise that are not lifted from other rights. As observed in *Madison v. Riter*, 355 F.3d 310, 319 (4th Cir. 2003), "It was reasonable for Congress to seek to reduce the burdens on religious exercise without simultaneously enhancing, say, an inmate's First Amendment rights to access pornography." Even assuming *arguendo* that the First Amendment does not permit the lifting of burdens on religious literature that are not also lifted from political literature, RLUIPA is still valid. In that event,

avoiding content regulation that violates the First Amendment would be a compelling governmental interest, and RLUIPA would not apply. However, there are many aspects of religious exercise that are distinctive. They include kosher meals, private or group prayer, religious ceremonial items, and the like. Such matters should be addressed on a case-by-case basis on remand, not by invalidating RLUIPA on its face.

3. RLUIPA Does Not Create An Impermissible Perception Of Favoritism

Respondents argue that, due to "prisons' unique dynamics," RLUIPA creates an increased perception of "favoritism" not found outside of prison. Resp. Br. 14-15. However, Respondents' argument does not distinguish RLUIPA from their current religious accommodations. Moreover, religious exemptions outside of prison also generate concerns about favoritism. They have arisen recurrently with regard to the long-standing practice of conscientious exemption from military service. Amicus brief of the National Association of Evangelicals (NAE), 8-9. They have likewise arisen with regard to tax exemptions. *Texas Monthly*, 489 U.S. at 40 (Scalia, J., dissenting).

It is not necessary to decide here whether concerns about perceptions of favoritism play a role in delineating all of the outer boundaries of permissible accommodation. As Respondents themselves point out, "In prison's unique setting . . . State control of inmates' lives is pervasive. . . ." Resp. Br. 2. Therefore, in the prison context, a statute like RLUIPA, which sets a uniform standard for accommodation, is a much fairer and more effective way to avoid any perceptions of favoritism than piecemeal accommodations, that are inevitably haphazard and inconsistent.

Respondents also complain that the Act "elevat[es] the status of beneficiaries across the board." Resp. Br. 13. To

the extent that Respondents are suggesting that RLUIPA is a trump card under which inmates can defeat their keepers, Resp. Br. 14, they are, of course, wrong. The statute, on its face, does not require that all religious exercise be accommodated. 42 U.S.C. § 2000cc-1(a), 3(e); RLUIPA § 3(a), 5(e). It addresses "substantial burdens" that are unjustified by a "compelling governmental interest." *Id*. This standard, the equivalent of strict scrutiny, does not automatically invalidate administrative decisions to deny requests for religious accommodations. It provides the room that prison administrators need to deny requests for accommodation in the face of justified security and administrative concerns. As this Court recently said in *Johnson v. California*, No. 03-636, 2005 U.S. LEXIS 2007, at *28 (Feb. 23, 2005), "Strict scrutiny does not preclude the ability of prison officials to address the compelling interest in prison safety." The Ohio Supreme Court apparently agrees. It has held that the Ohio Constitution contains the same standard for measuring religious accommodations in the prison context. *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000) (state prison officials must accommodate the right of prison guards to have religiously-required long hair where there is no compelling government interest justifying prohibition).

4. Incidental Burdens On Third Parties Do Not Violate The Establishment Clause

Respondents posit an inflexible zero-sum game in prisons, such that every gain for one prisoner with regard to religious liberty is an inevitable burden on the religious liberty, or the nonreligious rights, of others. For this proposition, Respondents cite a single sentence from *Turner v. Safley*, 482 U.S. 78, 90 (1987), to the effect that some changes in "the necessarily closed environment of the correctional institution" will have "significant 'ripple

effect[s]' on fellow inmates [and] prison staff." Resp. Br. 19-20. This argument is profoundly flawed.

It is absurd to suggest that all, or even most, accommodations of religious exercise have intolerable "ripple effects."[8] Religious accommodation for one does not automatically mean less religious liberty or reduced safety for others. *See, e.g.*, *Kahane v. Carlson*, 527 F.2d 492 (2d Cir. 1975) (providing a kosher diet); *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003) (treating oils for religious use the same as secular oils). However, even assuming that some religious accommodations create undue incidental burdens, that does not justify invalidating RLUIPA on its face.

To the extent that Respondents argue that RLUIPA is invalid because a given accommodation endangers health or security, they are wrong. RLUIPA does not apply to cases in which those compelling government interests are present. To the extent that Respondents are arguing that RLUIPA is unconstitutional on its face because religious accommodations may be used as a cover for gang activity, they misinterpret the statute and improperly use religion as an indiscriminate proxy to address gang problems. *Cf. Johnson v. California*, No. 03-636, 2005 U.S. LEXIS 2007 (Feb. 23, 2005) (race may not be used as a proxy to address gang-related security needs).

Respondents also contend that because RLUIPA's accommodation of religion in the prison context, in their view, inevitably imposes some burdens on third parties,

[8] This Court made no such suggestion in *Turner*. The passage relied on by Respondents, without strategic ellipses and brackets, reads "*When* accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Turner*, 482 U.S. at 90 (emphasis added). That is, if a particular accommodation is especially onerous, then prison officials are entitled to more deference with respect to inmates' constitutional claims.

the mere presence of such burdens voids the statute. Resp. Br. 17-20, 24-25. However, if their reasoning were valid, it would also apply to the mainstream religious practices Respondents accommodate on their own. Just as a correction officer's time would be diverted from, say, cell blocks to supervise an Asatru congregation, it is similarly diverted when Respondents supervise a Protestant congregation.

5. RLUIPA Does Not Impermissibly Create Incentives For Religiosity

Respondents' extravagant claim that RLUIPA creates "powerful incentives for religiosity" is equally groundless. Resp. Br. 15. RLUIPA creates no more incentive than religious accommodations already in place. For example, kosher food has been available in federal prisons since *Kahane v. Carlson*, 527 F.2d 492, 495-96 (2d Cir. 1975), and there is no evidence of a mass rush of inmate conversions to Judaism. Likewise, Muslim inmates have had a right to pork-free diets since the late-1960s. *See, e.g.*, *Barnett v. Rodgers*, 410 F.2d 995, 1003 (D.C. Cir. 1969); *Ross v. Blackledge*, 477 F.2d 616, 617, 619 (4th Cir. 1973). And there is no evidence of a mass conversion to Islam either.[9]

If, as Respondents insist, the prison context inevitably creates pressure to adopt whatever religious practices are available "to gain privileges," Resp. Br. 16, this should have happened long ago under Respondents' existing

[9] As noted in Petitioners' and the United States principal briefs, there is also substantial evidence that the "powerful incentives" claim is factually false. RLUIPA has been the law for almost four years and there has not been a groundswell of litigation (let alone successful litigation). Pet. Br. 31, U.S. Br. 23-24. The same is true of federal prisoner claims under the Religious Freedom Restoration Act. *Id*.

religious policies – accommodating the traditional faiths they have selectively chosen to recognize. J.A. 202, 279-80.

6. RLUIPA Does Not Cause Excessive Government Entanglement

Respondents claim that RLUIPA causes entanglement to occur because prison officials must carefully assess the legitimacy and sincerity of each inmate request. Resp. Br. 20. However, legitimacy and sincerity are questions that must be answered for every accommodation request – even those already governed by the standard in *Turner* and *O'Lone*. RLUIPA does not change their consideration in any way.

If anything, RLUIPA reduces entanglement. Currently, some federal courts require inmates seeking an accommodation to show that their religious exercise is required by a basic or central tenet of their religion. *See, e.g.*, *Ford v. McGinnis*, 352 F.3d 582, 593-94 (2d Cir. 2003); *Abdullah v. Fard*, 974 F. Supp. 1112, 1118 (N.D. Ohio 1997), *aff'd*, 173 F.3d 854 (6th Cir. 1999) (unpublished opinion); *Ramsey v. Stewart*, 2000 U.S. App. LEXIS 18682 (9th Cir. 2000); *Beerhide v. Suthers*, 286 F.3d 1179 (10th Cir. 2002). RLUIPA has no central tenet requirement; therefore, it precludes any official need to interpret religious doctrines. 42 U.S.C. § 2000cc-5(7)(a); RLUIPA § 8(7)(A).

7. *Amos* Governs This Case

Respondents mount a series of unavailing arguments claiming that *Amos*, which approves accommodations lifting government burdens on religion, is not really dispositive of this case. Resp. Br. 14-17. Among other things, Respondents claim *Amos* is distinguishable because it only allows government entities to self-correct for burdens they have themselves imposed. Resp. Br. 23-24. In their view, Congress cannot remove an impediment to

religious exercise that it did not impose in the first place. That is not true. It does not matter for Establishment Clause purposes whether a local governmental unit is removing a self-imposed burden, if the state is telling a local government to remove a burden, or if Congress is creating an incentive for state officials to remove state-imposed burdens. In each situation, a government burden on religion is being removed. According to *Amos*, the constitutionality of an accommodation turns on the fact that a pre-existing government burden is being lifted.

Respondents also say that, to the extent an officially tolerated prison religious accommodation goes "beyond constitutional minimums, the State is indeed advancing religion." Resp. Br. 24. However, Respondents assume that there is no government burden on a prisoner's religious exercise unless a prison restriction violates the standard articulated in *Turner* and *O'Lone*. That assumption is wrong. At the moment a person enters prison, his or her individual rights, taken for granted before imprisonment, are lost or are very significantly limited. *Cf. Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 297-99 (1963) (Brennan, J., concurring). Prison officials then determine whether, and the degree to which, inmates will be permitted to engage in activities that approximate those they had prior to incarceration.

To the extent that prison officials choose to accommodate religious exercise, they lift burdens that were imposed at the instant of incarceration. The claim that such accommodations violate the Establishment Clause misunderstands the liberty lost at the time an inmate first walks through the jailhouse doors. It wrongly denies the authority of the legislature to restore some restricted liberty by accommodating religion. Prison officials have discretion, but no constitutional duty, to employ paid chaplains, as one can practice many faiths with and without clergy. And, it is no violation of the Establishment Clause to hire paid

chaplains or to similarly accommodate religious exercise more than *Turner* and *O'Lone* require.

In essence, Respondents claim that every religious accommodation that extends beyond the *Turner*/*O'Lone* minimum is an active endorsement of, or subsidy to, religion. However, to categorize every accommodation of inmate religious exercise as an active endorsement of religious activity – to insist that every religious exercise by inmates is one of the state – mischaracterizes this Court's accommodation rulings. Petitioners seek to buy religious books and ceremonial items with their own funds, over the opposition of public officials. *Cf. Polk County v. Dodson*, 454 U.S. 312, 317-19 (1981). The books are not written with state funds. The ceremonial items are not manufactured by the state. When purchased by Petitioners, neither the books nor the ceremonial items will be owned or endorsed by the state.

B. There Is No Support For Respondents' Federalist Reading Of The Establishment Clause That Would Create A New Constitutional Immunity For The States

Apparently concerned that the reasoning of the Sixth Circuit is not sustainable, Respondents now argue in this Court that there is a "federalism aspect" to the Establishment Clause which supposedly invalidates RLUIPA. According to Respondents, this "federalism aspect" creates a special, affirmative state immunity from federal legislation that encourages or requires state officials to accommodate religious exercise. Resp. Br. 25. Respondents contend that this "federalism aspect" immunizes states from all congressional legislation lifting religious burdens, although otherwise constitutional under Congress' enumerated powers, because it falls inside the "play in the joints" between the religion clauses. *Id*. at 25, 29.

Respondents make a largely originalist argument with little originalist support. They cite no cases, constitutional text, or history to justify the claim that the Establishment Clause immunizes them from RLUIPA. Respondents purport to find the immunity in *Locke v. Davey*, 540 U.S. 712 (2004), which upholds a state's authority to decline to subsidize a pastoral ministry degree, and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), which upholds the state issuance of vouchers to parents in order to pay for secular and religious elementary and secondary education. Resp. Br. 25-26. Neither of these cases even remotely supports Respondents' novel claim of immunity from federal legislation otherwise securely within Congress' power. Both address the constitutionality of state statutes, not Congress' own legislative authority.

Respondents' reliance on the text of the Establishment Clause is similarly misplaced. They claim that the words "Congress shall make no law respecting an establishment of religion" mean that Congress can make no laws addressing state burdens on religion. However, Respondents' textual argument turns on the meaning of "no law respecting an establishment of religion." A fair reading of these words is that Congress cannot establish, or perhaps disestablish, religion. There is no historical support for Respondents' Establishment Clause interpretation that would, in effect, create a state immunity from all federal legislation regarding religion. In fact, Rep. Samuel Livermore's proposal to have the Establishment Clause read "Congress shall make no law touching religion, or infringing rights of conscience," was never adopted. NAE Br. 28, citing 1 Annals of Cong. 759 (Aug. 15, 1789).

Nor do Respondents' citations to the historical record support their claim that the Establishment Clause was ratified to provide states a special immunity from federal legislation. Resp. Br. 26-27. Although Respondents quote Madison and Iredell to support their reading of the Establishment Clause, both of the quoted statements were made

during the Constitutional Convention in the midst of debates addressing the language of the unamended Constitution, Resp. Br. 27, not during subsequent debates over the ratification of the Bill of Rights. Madison and Iredell were defending the proposition that establishing or disestablishing religion was not an enumerated power. Neither was addressing Respondents' claim that the Establishment Clause immunizes states from otherwise permissible federal legislation accommodating religion.

Respondents' quotations of historians Curry and Levy are also out of context. Resp. Br. 27. Both quotations refer to the pre-Establishment Clause Constitutional Convention in 1789 and do not specifically address the language or intended purpose of the Establishment Clause at the time of its ratification in 1791. The only quotation in Respondents' brief that actually addresses the Establishment Clause is from JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 702 (Carolina Academic Press 1987) (1833). However, nothing in the quote or related text indicates Story had any hint of Respondents' "play in the joints" theory of "federalism."

What can be said confidently about the historical record is that, at the time of the ratification of the Bill of Rights, it was well understood that none of those rights, including the Establishment Clause, applied to the states. *Barron v. Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 247-48 (1833). It is also true that the Constitution created a government of enumerated powers. However, those historical facts provide no support for Respondents' claim that the Establishment Clause has an independent "federalism aspect" modifying Congress' enumerated powers by creating a state immunity from federal legislation falling in the "play in the joints" between the religion clauses.

Furthermore, there could have been no serious consideration of Congress' authority to condition subsidies in

light of the Establishment Clause at the time of the Bill of Rights' ratification. At that time, the federal government lacked sufficient taxing authority or enough money for there to be meaningful consideration of the appropriate scope of legislative conditions on federal subsidies to state and local governments. NAE Br. 23; DANIEL Q. POSIN & DONALD B. TOBIN, PRINCIPLES OF FEDERAL INCOME TAXATION 11-13 (6th ed. 2003). It was not until the 1930s, well after ratification of the Sixteenth Amendment, that the Court began to seriously address Congress' spending authority and its ability to impose conditions on subsidies. *See United States v. Butler*, 297 U.S. 1 (1936); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

There is similarly no support for Respondents' suggestion that the Establishment Clause uniquely limits Congress' commerce power. Resp. Br. 29. At the time of the ratification of the Bill of Rights, the future size and complexity of the nation's economy were unimagined. As a consequence, the drafters of the Establishment Clause had no reason to contemplate whether a federal law precluding states from imposing burdens on religious exercise genuinely affecting interstate commerce would violate the Establishment Clause.

In fact, Respondents' claim that the "federalist aspect" of the Establishment Clause limits Congress' spending and commerce authority really is an effort to rephrase Respondents' Spending and Commerce claims in Establishment Clause language. When Virginia made the same argument in *Madison*, 355 F.3d at 322, Judge Wilkinson remanded it for further consideration as a Spending or Commerce Clause claim. He said, "Although couched in religious terms, this is really a variant of the Commonwealth's many federalism based residual powers contentions. . . ." *Id*.

What in the end is most damaging to Respondents' "federalism aspect" argument, however, is their inability to

account for the transformation wrought by the Fourteenth Amendment. Respondents' argument, that their proposed Establishment Clause immunity survived the ratification of the Fourteenth Amendment, Resp. Br. 29-30, does not follow from their assertion. Assuming *arguendo* that the Establishment Clause originally created an immunity from federal legislation, any such immunity was lost when it was incorporated and applied to the states through the Fourteenth Amendment. *Everson v. Bd. of Educ. of the Township of Ewing*, 330 U.S. 1, 8 (1947). It follows from the concept of incorporation that the states lost any original discretion to establish religion or interfere with religious exercise without regard to Congress' constitutional powers.

If Respondent's claim for a new Establishment Clause immunity were to be upheld, it would indiscriminately invalidate federal statutes addressing important national issues when those statutes were inconsistent with state policies accommodating religion. For example, Congress could not require compliance with the Equal Access Act as a condition for public school subsidies. 20 U.S.C. § 4071(a). Similarly, if a deadly strain of influenza were to emerge, Congress might choose to grant money to the states to pay for administration of flu vaccine by state medical personnel. Yet, according to Respondents' argument, Congress would be prohibited from conditioning those subsidies on the recipient states' agreement to require all of their physically able residents to be vaccinated – even those exempted by state law on religious grounds.

II. RLUIPA IS A PROPER EXERCISE OF CONGRESS' SPENDING AUTHORITY

Respondents' Spending Clause argument assumes Congress lacks the authority to impose conditions on state corrections subsidies that discourage recipient correction

officials from burdening religious exercise. Respondents assert that RLUIPA's conditions on federal subsidies are impermissible because they are not "closely related," Resp. Br. 36, "closely connected," *id*. at 37, and lack a "functional nexus" to the subsidies, *id*. at 42. However, none of Respondents' formulations accurately state the constitutional test for a condition on a federal subsidy.

As Respondents concede, this case is governed by *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987), which holds that Congress can impose "conditions . . . *related* to the funding it is providing." Resp. Br. 36 (italics added). The relatedness requirement is further amplified by *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 203 (2003), a decision that Respondents do not mention, which reiterates the established rule that "Congress has wide latitude to attach conditions to the receipt of federal assistance to further its policy objectives."

Respondents cite *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947) as the source for their more restrictive standard. Resp. Br. 37. However, the case cuts against Respondents' position. It upheld an across-the-board funding condition requiring state recipients to prohibit employees working in federally funded programs from participating in the management of political campaigns. The condition even extended to political activities unrelated to work and occurring on employees' personal time. Moreover, this Court has also upheld across-the-board conditions on federal funds to public schools, requiring that recipients accommodate religious, noncurricular student groups. *Bd. of Educ. of the Westside Cmty Schs. v. Mergens*, 496 U.S. 226, 247, 253 (1990).

Respondents further argue that Congress has no interest in assuring that state corrections programs burdening religious exercise in violation of national policy do not use federal funds. They say that Congress' interest

under RLUIPA is "wholly unrelated" and "completely disconnected" to the burdens that Ohio places on religious exercise. Resp. Br. 38. However, Congress previously asserted its interest in lifting burdens on religious exercise when it enacted the Religious Freedom Restoration Act. Surely Congress has an interest in assuring that its funds are not used to support programs that needlessly burden religion. And, it also has an interest in discouraging burdens that limit inmate opportunities for rehabilitation. Pet. Br. 40.

Respondents contend that the relatedness standard previously employed by this Court should be narrowed because RLUIPA provides a judicial remedy. They claim that RLUIPA's judicial remedy makes the Spending Clause conditions approved in prior cases different because they only provide for a loss of federal funds. Resp. Br. 38-39. Respondents' argument would have this Court invalidate the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)(2). If Respondents do not wish to be covered by RLUIPA's judicial remedy, they need not accept federal corrections funds. In the absence of those funds, RLUIPA's Spending Clause conditions do not apply.

Virginia's amicus argues that RLUIPA is coercive because it applies to all federal subsidies and therefore "threaten[s] the loss of an entire block of federal funds. . . ." Virginia Br. 25, quoting *West Virginia v. United States Dep't of Health & Human Servs.*, 289 F.3d 281, 291 (4th Cir. 2002).[10] However, almost all courts that have considered the question of coercion have measured it by the percentage of a government unit's budget that is lost through noncompliance, and no court has ever held that the small fraction of Respondents' funds coming from

[10] Under Virginia's approach, because money is fungible, recipients can evade a spending condition by using the federal money to free up state funds for activities that violate congressional policies.

federal grants in this case is coercive. Pet. Br. 45 n.23. Even the West Virginia case cited by Virginia's amicus brief upheld the spending condition. In addition, this Court has approved an across-the-board requirement that public schools receiving federal money adhere to the Equal Access Act, even though the burden of loss of the federal funds might be so heavy that it would be "an unrealistic option." *Mergens*, 496 U.S. at 241.

III. THE CONSTITUTIONALITY OF RLUIPA UNDER THE COMMERCE POWER SHOULD BE ADDRESSED ON A CASE-BY-CASE BASIS

Respondents argue that RLUIPA is beyond Congress' commerce authority because Congress cannot regulate "non-economic activity [that] substantially affects interstate commerce." Resp. Br. 43. However, Petitioners' claims include interference with their efforts to purchase religious books and ceremonial items that are actually in interstate commerce. In addition, Petitioners also believe that other burdens imposed on their religious exercise substantially affect interstate commerce. Congress has plenary power to regulate all activities that genuinely affect interstate commerce regardless of whether the activities are economic or noneconomic. *See, e.g.*, *Lottery Case*, 188 U.S. 321 (1903); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). The degree to which an activity or policy of state correction officials affects interstate commerce, and whether that activity or policy can be regulated by Congress, are matters to be decided on a case-by-case basis by the District Court applying RLUIPA's jurisdictional element, 42 U.S.C. § 2000cc-1(b)(2); RLUIPA § 3(b)(2), not in an appeal addressing RLUIPA's facial validity.

CONCLUSION

RLUIPA is constitutional on its face and does not violate the Establishment Clause; therefore, the decision of the Court of Appeals to the contrary should be reversed. The additional issues raised by Respondents should be remanded for further proceedings.

Respectfully submitted,

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